2015

Intimate Partner Criminal Harassment Through a Lens of Responsibilization

Isabel Grant

Allard School of Law at the University of British Columbia, grant@allard.ubc.ca

Osgoode Legal Studies Research Paper No. 05
Vol. 11/ Issue. 01/ (2015)

Intimate Partner Criminal Harassment Through a Lens of Responsibilization

Grant, I. (2014). Intimate partner criminal harassment through a lens of responsibilization. *Osgoode Hall Law Journal*, 52(2), forthcoming.

Isabel Grant

Abstract:
Feminist scholars have demonstrated the gendered nature of intimate violence, and the tendency to put the responsibility on women to avoid both sexual and physical violence. The degree to which this responsibility is based on stereotypes about the "good victim" has been well documented in the context of sexual assault. This paper applies these insights to the context of intimate partner criminal harassment. All available statistics suggest that intimate partner criminal harassment is committed overwhelmingly by men against former female intimate partners. This crime affects thousands of women annually and can have devastating implications for their physical and mental health. Using criminal harassment decisions over the past decade, this paper argues that the elements of the offence – specifically the requirements that the accused cause the complainant to fear for her safety, that this fear be reasonable, and that he intend to harass her – feed into the tendency towards responsibilization. Women are disbelieved if they fail to report the harassment promptly to police, fail to obtain a restraining order, fail to demonstrate their fear in predictable ways, or fail to communicate to their harassers that the harassment is unwanted. The accused's behaviour, by contrast, is never subjected to a standard of reasonableness. After analyzing the case law on criminal harassment, and reviewing the approach taken in other jurisdictions, the paper concludes that legislative reform is a necessary step towards providing an adequate criminal justice response to this serious problem.

Keywords:
Criminal harassment, violence against women, intimate partner violence, responsibilization

Author(s):
Isabel Grant
Professor
University of British Columbia
E: grant@law.ubc.ca

Intimate Partner Criminal Harassment Through a Lens of Responsibilization *

Feminist scholars have demonstrated the gendered nature of intimate violence, and the tendency to put the responsibility on women to avoid both sexual and physical violence. The degree to which this responsibility is based on stereotypes about the "good victim" has been well documented in the context of sexual assault. This paper applies these insights to the context of intimate partner criminal harassment. All available statistics suggest that intimate partner criminal harassment is committed overwhelmingly by men against former female intimate partners. This crime affects thousands of women annually and can have devastating implications for their physical and mental health. Using criminal harassment decisions over the past decade, this paper argues that the elements of the offence – specifically the requirements that the accused cause the complainant to fear for her safety, that this fear be reasonable, and that he intend to harass her – feed into the tendency towards responsibilization. Women are disbelieved if they fail to report the harassment promptly to police, fail to obtain a restraining order, fail to demonstrate their fear in predictable ways, or fail to communicate to their harassers that the harassment is unwanted. The accused's behaviour, by contrast, is never subjected to a standard of reasonableness. After analyzing the case law on criminal harassment, and reviewing the approach taken in other jurisdictions, the paper concludes that legislative reform is a necessary step towards providing an adequate criminal justice response to this serious problem.

INTRODUCTION

One of the primary contributions of feminist scholarship to criminal law has been to establish the gendered nature of intimate partner violence.[1] Intimate partner violence and sexual assault, for example, are committed overwhelmingly by men against women. In this paper I explore how intimate partner criminal harassment is also a gendered crime and how judicial decisions reflect the same biases and assumptions that other gendered crimes reveal. Specifically,

*Faculty of Law, University of British Columbia. The author would like to thank Moira Aikenhead, Heather Burley, Rebecca Coad, David Ferguson and Kayla Strong for their research assistance with this paper. Special thanks to Laura DeVries for her tireless dedication to this project. Thank you also to Susan B Boyd and Joanna Birenbaum for their helpful comments. This research was supported in part by a grant from the Law Foundation of British Columbia.

[1] Lisa S Price, *Feminist Frameworks: Building Theory on Violence against Women* (Halifax, NS: Fernwood Publishing, 2005) at 11.

I will argue that, as with sexual assault, the law of criminal harassment has been influenced by assumptions about how women should respond to male violence and how they are responsible for changing their lives in order to avoid it.[2] This tendency to put responsibility on women to avoid gendered violence has hindered effective law enforcement of these crimes. In the context of criminal harassment, this tendency is facilitated both by the legislative requirements of criminal harassment and the judicial interpretation thereof.

The Supreme Court of Canada has had many opportunities to deal with gendered crimes in recent years and has fallen short.[3] Emma Cunliffe has demonstrated, for example, that equality is rarely given serious consideration in recent sexual assault cases in the Supreme Court.[4] With respect to sexual assault prosecutions more generally, women are often criticized for their inadequate expressions of non-consent or for other behaviours which may have

---

[2] I'm indebted to Lise Gotell whose groundbreaking work demonstrates how discourses of responsibilization and risk management are prevalent in Canadian sexual assault decisions. See Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 Akron L Rev 865 [Gotell, "Rethinking Affirmative Consent"] and Lise Gotell "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance and Neoliberal Sexual Citizenship" in Dorothy E Chunn, Susan B Boyd and Hester Lessard eds, *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) at 127-163 [Gotell, "The Discursive Disappearance"].

[3] In *R v JA*, 2011 SCC 28, [2011] 2 SCR 440, while the outcome is consistent with gender equality, the analysis takes a gender-neutral approach to sexual assault and fails to examine the context of intimate partner violence that was so central to the case. See e.g. Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?" (2013)18:2 Rev Const Stud 161 [Benedet, "Marital Rape"]. Similarly, in R *v Hutchinson*, 2014 SCC 19 the majority failed to consider the implications of its approach to statutory interpretation for complainants with mental disabilities or other forms of incapacity to consent such as intoxication (see *Criminal Code*, RSC 1985, c C-46, s 273.1(2)(b) and (c)). The majority's approach also fails to see sexual assault as a gendered phenomenon. For a discussion of how sexual assault has become degendered and detached from equality see Gotell, "The Discursive Disappearance", *supra* note 2. See also *R v DAI*, [2012] 1 SCR 149, 2012 SCC; *R v O'Brien,* 2013 SCC 2, [2013] 1 SCR 7*,* (involving uttering threats in the context of an intimate partner relationship); and *R v Ryan,* 2013 SCC 3, [2013] 1 SCR 14, (involving the defence of duress for a woman who had been repeatedly harassed by her ex-partner). In all of these decisions, the gendered nature of intimate partner violence and sexual assault is missing from the Court's analysis.

[4] Emma Cunliffe, "Sexual Assault Cases in the SCC: Losing Sight of Substantive Equality?" (2012) 57 Sup Ct L Rev 295. Cunliffe argues that while equality has underpinned the development of the substantive definition of consent as well as legislative reforms to improve trial procedure, individual complainants are still not fully protected from myths and stereotypes in situations where consent and credibility are in issue. This is not due to the absence of legal tools to address these problems but instead a result of the failure of judicial approaches to infuse equality reasoning in trial and appellate decisions.

"encouraged" the violence against them.[5] This paper demonstrates that the same phenomenon is seen in criminal harassment cases. The very definition of the crime requires that the Crown prove that the complainant, who, in intimate partner harassment, is almost always a woman, was afraid for her safety or that of others and that her fear was reasonable in the circumstances. The response of the victimized woman is scrutinized and may be found wanting, thus preventing successful prosecution. Her life may be significantly disrupted by the harassment, she may have to change much of her day-to-day routine, she may be unable to work because of the harassment, but if she was not afraid for her safety in a way that is judged by others to be reasonable, the law does not recognize the harassment. At no time is her harasser held to a standard of objectively reasonable behaviour.

Section 264 of the *Criminal Code* sets out the definition of criminal harassment in Canada:

> No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
>
> The conduct mentioned in subsection (1) consists of
>
> > repeatedly following from place to place the other person or anyone known to them;
> >
> > repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
> >
> > besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or

[5] In her article on the ethical responsibilities of defence counsel in sexual assault prosecutions, Elaine Craig demonstrates that defence counsel still make use of stereotypes about women's sexuality in defending sexual assault prosecutions. Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51:2 Osgoode Hall LJ 427.

engaging in threatening conduct directed at the other person or any member of their family.[6]

The offence is a hybrid offence punishable by a maximum 10 years on indictment and six months on summary conviction.[7] This section was enacted in 1993 in response to a number of murders of women by former intimate partners after a period of criminal harassment.[8] Section 231(6) was also added to the *Criminal Code* in 1997 providing that murders which take place in the course of criminal harassment are punished as first-degree.[9]

The first section of this paper presents a brief description of what we do know about intimate partner criminal harassment in terms of its incidence, its impact on the women harassed and the criminal justice response to this crime. This is followed by a summary of the theoretical literature on the concept of "responsibilization" as informed by the work of feminists in the areas of sexual assault and intimate partner violence. After setting out this context, the paper turns to an analysis of the case law on intimate partner harassment, focusing on three elements of the offence: the requirement that the complainant be afraid for her safety or the safety of others, the requirement that the fear be reasonable and the requirement that the accused know that his conduct is harassing. The focus of this paper is the judicial discourse around the elements of criminal harassment and how this discourse perpetuates problematic assumptions about gendered violence and women's responsibility to avoid it.

Close window no don't [6] *Criminal Code*, RSC 1985, c C-46, ss 264(1)-(2).
[7] *Criminal Code*, RSC 1985, c C-46, s 264(3).
[8] See Isabel Grant, Natasha Bone & Kathy Grant, "Canada's Criminal Harassment Provisions: A Review of the First Ten Years" (2003) 29 Queen's LJ 175.
[9] *Criminal Code*, RSC 1985, c C-46, s 231(6).

The Empirical Reality of Criminal Harassment

While a number of academic articles were written after s. 264 was enacted,[10] criminal harassment is under-studied and under-theorized in more recent legal and feminist literature in Canada. However, there is significant social science and medical literature exploring criminal harassment which reveals how dangerous and destructive former intimate partner harassment can be for women.[11]

The extent of criminal harassment and its threat to women's equality should not be underestimated. Women experience criminal harassment in Canada at an alarming rate. In the most recent Statistics Canada survey, for example, 3% of all women reported being harassed in 2009.[12] In 2011, uttering threats and criminal harassment accounted for 20% of the violent crime against women in Canada.[13] In 2011, there were approximately 11,700 female victims of police-

---

[10] Rosemary Cairns Way, "The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism" (1994) 39 McGill LJ 379; Grant, Bone & Grant, *supra* note 8; Bruce MacFarlane, "People Who Stalk People" (1997) 31 UBCL Rev 37; Diane Crocker, "Criminalizing Harassment in the Transformative Potential of Law" (2008) 20:1 CJWL 87.

[11] See, e.g. Kimberly N Fleming, et al, "Intimate Partner Stalking Victimization and Posttraumatic Stress Symptoms in Post-Abuse Women" (2012) 18:12 Violence Against Women 1368; Maria A Pico-Alfonso, et al, "The impact of physical, psychological, and sexual intimate male partner violence on women's mental health: depressive symptoms, posttraumatic stress disorder, state anxiety, and suicide" (2006) 15:5 Journal Of Women's Health 599; Canada, Department of Justice, Research and Statistics Division, Health Impacts of Violent Victimization on Women and their Children by Nadine Wathen (Ottawa: Department of Justice, 2012) at 10-11; World Health Organization, *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (Italy: World Health Organization, 2013) at 21-26; Laura E Watkins, et al, "The longitudinal impact of intimate partner aggression and relationship status on women's physical health and depression symptoms" (2014) 28:5 Journal of Family Psychology 655; Emily Finch, "Stalking: A Violent Crime or a Crime of Violence?" (2002) 41:5 Howard Journal of Criminal Justice 422 [Finch, "Stalking: A Violent Crime"]; Frank R Farnham, David V James &Paul Cantrell, "Association between violence, psychosis, and relationship to victim and stalkers" (2000) 355 The Lancet 199; David V James and Frank R Farnham, "Stalking and Serious Violence" (2004) 31 Journal of the American Academy of Psychiatry and the Law Online 432; Michele Pathé, Rachel Mackenzie & Paul Mullen, "Stalking by law: damaging victims and rewarding offenders" (2004) 12 JLM 103 at 106 [Pathé, Mackenzie & Mullen]; Leila Dutton and Barbara Winstead, "Types, Frequency, and Effectiveness of Responses to Unwanted Pursuit and Stalking" (2011) 26:6 Journal of Interpersonal Violence 1129 [Dutton & Winstead].

[12] Statistics Canada, *Juristat*, Measuring Violence against Women: Statistical Trends by Sinha Maire (Ottawa: StatCan, 2013) (Catalogue no 85-002-X) at 33 [Statistics Canada, 2013].

[13] *Ibid* at 8. According to this recent Statistics Canada report, "The five most common violent offences committed against women were common assault (49%), uttering threats (13%), serious assault (10%), sexual assault level I (7%), and criminal harassment (7%)" at 11.

reported criminal harassment, which constituted more than 75% of all criminal harassment complaints to police.[14] Eighty-five percent of the perpetrators in 2011 incidents against women were men. Intimate partners accounted for 58% of all criminal harassment of women. Strangers accounted for only 8% of criminal harassment.[15] Thirty-nine women have been murdered after being criminally harassed in the past decade, including three women who were killed in 2011.[16]

Studies also suggest that a large number of women who have been criminally harassed by a former partner have also been assaulted or sexually assaulted by him.[17] While criminal harassment does not necessarily involve further physical violence, intimate partner criminal harassment is more likely to escalate to assault or even femicide than other forms of criminal harassment.[18] Intimate partner criminal harassment is also likely to last up to twice as long on average as other forms of criminal harassment.[19] Intimate partner criminal harassers are less likely to have a serious mental illness than those who harass strangers.[20] When it comes to criminal harassment, women are at greatest risk of escalating violence from non-mentally ill, former intimate partners.[21]

Intimate partner criminal harassment is often only one component of a constellation of behaviours, such as assault and threatening, all of which together form part of the male partner's

---

[14] *Ibid* at 32.
[15] *Ibid.*
[16] *Ibid* at 33. In the United States, McFarlane et al. studied intimate partner femicides in 10 cities and found that 76% of victims had been "stalked" in the 12 months prior to the killing. J McFarlane, JC Campbell, S Wilt, CJ Sachs, Y Ulrich & X Xu, "Stalking in intimate partner femicide" (1999) 3:4 Homicide Studies 300.
[17] Carol Jordan, TK Logan, Robert Walker & Amy Nigoff, "Stalking: an Examination of the Criminal Justice Response" (2003) 18 J Interpersonal Violence 148 at 149.
[18] Farnham, James & Cantrell, *supra* note 11. This study found that 70% of the sample of intimate partner harassments involved serious physical violence whereas only 27% of the stranger/acquaintance sample did. James and Farnham, "Stalking and Serious Violence", *supra* note 11; Pathé, Mackenzie & Mullen, *supra* note 11.
[19] Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (UK: Oxford University Press, 2007) at 256 [Stark, "Coercive Control"]. See also: T Goldsworthy & M Raj, "Stopping the stalker: Victim responses to stalking" (2014) 2:1 Griffith Journal of Law & Human Dignity 171.
[20] Farnham, James & Cantrell, *supra* note 11 at 199.
[21] *Ibid.*

assertion of control over his (former) partner .[22] Evan Stark describes "stalking" as the most common behavioural component of coercive control next to assault.[23] As such, intimate partner criminal harassment can be seen as a variant of intimate partner violence which reflects the ongoing inequality of women in intimate relationships.[24] As Rosemary Cairns Way has pointed out:

> Stalking is one vicious manifestation of a broader spectrum of violence against women, one part of a multifaceted whole, intricately linked to the systemic social, economic and political inequalities experienced daily by Canadian women. The statistics detailing the extent of violence against women in Canada provide horrifying evidence of the "brutal face of inequality."[25]

Criminal harassment is an extremely traumatic experience that often continues for a significant period of time. Women respond in different ways to this kind of ongoing stress in their lives. For some women, the harm resulting from harassment "is severe and long-lasting; the adverse consequences caused by victimization frequently outlive the duration of the harassment".[26] Finch cites English studies that suggest that from 71%-94% of those subjected to harassment undergo major lifestyle and personality changes which often outlast the harassment.[27] Sleep and appetite disturbances are common.[28] Complainants are likely to become paranoid, anxious, introverted and less trustful generally, not just with respect to the harasser. Social isolation and a sense of powerlessness commonly ensue and there is a high risk of depressive

---

[22] Isabel Grant & Joanna Birenbaum, "Taking Threats Seriously: Section 264.1 and Threats as a form of Domestic Violence" (2012) 59 Crim LQ 206.
[23] Stark, "Coercive Control", *supra* note 19 at 256.
[24] See, for example, Jordan et al, *supra* note 17 at 149 stating that "stalking is but one variant of intimate violence". Feminist scholars have debated the meaning and definition of violence and whether it requires actual force before behaviour can be labelled violent. See Price, *supra* note 1 at 11-23. See also Grant & Birenbaum, *supra* note 22 for an argument that uttering threats is a form of intimate partner violence. Statistics Canada describes criminal harassment as a violent crime. See Statistics Canada, 2013, *supra* note 12.
[25] Cairns Way, *supra* note 10 at 382.
[26] Finch, "Stalking: A Violent Crime", *supra* note 11 at 424.
[27] *Ibid*.
[28] Dutton & Winstead, *supra* note 11 at 1131.

symptoms, including self-harm.[29] The General Social Survey found that female complainants were more likely than their male counterparts to stop going out alone and to socialize less after experiencing criminal harassment.[30]

Criminal justice responses to intimate partner harassment have been found to be wanting. In a majority of police complaints, charges are never laid. Many charges are dropped without proceeding, or dropped in exchange for the accused entering into a peace bond. In an early review of charges under s. 264, for example, it was found that 58% of charges were stayed or withdrawn before trial and, of those charges that proceeded, only about 35% were convicted.[31] In the large American National Violence against Women Survey in 2000, for every 100 female stalking victims identified "52 reported the crimes to the police, 13 men were prosecuted, 7 were convicted, and 4 went to jail." [32] It is no surprise that victims of criminal harassment demonstrate a lack of confidence in the criminal justice system which leads to even lower rates of reporting.[33] As with sexual assault, the complainant's credibility may be found to be lacking possibly because she has had ongoing contact with the accused or because she is distraught and upset when she reports the harassment to police.[34] In some cases the complainant actually returns to her former partner as a means of ending the harassment which undermines her credibility further

[29] Finch, "Stalking: A Violent Crime", *supra* note 11 at 425.
[30] Statistics Canada, *Juristat,* Family Violence in Canada: A Statistical Profile 2005 by Kathy Aucoin, ed (Ottawa: StatCan, 2005) (Catalogue no 85-224-XIE) [Statistics Canada, 2005].
[31] Department of Justice Canada, A Review of Section 264 (Criminal Harassment) of the *Criminal Code of Canada* by Richard Gill and Joan Brockman (Ottawa: DOJ, October 1996) at vii, online: Department of Justice < http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/wd96_7-dt96_7/wd96_7.pdf>.
In the United States context, more recently, Jordan et al, *supra* note 17 at 159, found that 54% of felony charges of criminal harassment and 62% of misdemeanour charges were dropped without proceeding to trial.
[32] Stark, "Coercive Control", *supra* note 19 at 256.
[33] Justice Unions' Parliamentary Group, *Independent Parliamentary Inquiry into Stalking Law Reform: Main Findings and Recommendations,* February 2012, www.protectionagainststalking.org/inquiryreportfinal.pdf, at 8 and 11. The inquiry cites a study presented to them in which 72% of complainants reported being unhappy with the criminal justice response to the harassment while 65% reported being unhappy with the police response. Complainants reported that their complaints to police were not investigated thoroughly even though reports were usually not made to police until after a significant number of incidents.
[34] Pathé, Mackenzie & Mullen, *supra* note 11 at 107.

with the police.[35] Police may see the matter as "merely" a domestic dispute that should be resolved privately, particularly where the isolated acts of the harasser are not in themselves individually threatening or physically violent.

Peace bonds and restraining orders are often resorted to in criminal harassment cases but they often fail to stop the harassment and can be counterproductive in some cases.[36]

> Protection orders provide dubious benefits for the victim but for stalkers unassailable opportunities to further their harassment. As noted earlier, stalkers may petition the court for a protection order against the victim, alleging that person is, in fact, stalking *them*. [Intimate partner] stalkers are more disposed than other groups to duplicitous behaviour of this type. Protection order hearings enforce contact between stalker and victim, imposing a relationship that is both gratifying to the stalker and distressing to the victim. They indulge the stalker's quest for personal information about the victim and endow the stalker with an audience to the litany of abuses he or she claims to have suffered.[37]

Potentially vexatious family law proceedings are another mechanism by which perpetrators can disrupt the lives of complainants.[38] Perpetrators become quite skilled at learning how to manipulate the limits of the criminal justice system by finding ways to harass which do not violate the terms of the legislation.[39]

---

[35] *Ibid*. For example, in a particularly tragic case *R v VanEindhoven* (2013) 9 CR (7th) 94 (Nun CJ), the victim left a violent relationship and only returned after repeated phone calls from the accused threatening to kill himself. On her return she was savagely beaten and stabbed to death.

[36] Concern has been raised in British Columbia recently regarding a number of killings of women by intimate partners who were under restraining orders. Andrea Woo & Justine Hunter, "Deaths show BC is failing victims of domestic violence, watchdog charges", *Globe and Mail* (13 May 2014) online: Globe and Mail < http://www.theglobeandmail.com/news/british-columbia/spate-of-deaths-revives-criticism-of-bcs-domestic-violence-program/article18631650/>.

[37] Pathé, Mackenzie & Mullen, *supra* note 11 at 108.

[38] Fiona Kelly, "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family" (2009) 21 Can J Women & L 315 at 333 described how courts continue to award access to fathers who are abusive to the mother. See also Marisa L Beeble, Deborah Bybee & Cris M Sullivan, "Abusive Men's Use of Children to Control Their Partners and Ex-Partners" (2007) 12:1 European Psychologist 54 which described how abusive men use their children as a means of controlling their intimate partners. See also the Justice Unions' Parliamentary Group*, supra* note 33 at 20 which recommended that the courts be given the authority to suspend the parental responsibilities of those who have been convicted of stalking who use vexatious applications for contact with children to get at the complainant (Recommendation 21) and the ability to impose civil orders preventing further applications in Family Court (Recommendation 23).

[39] Pathé, Mackenzie & Mullen, *supra* note 11 at 104.

Having demonstrated the seriousness of intimate partner criminal harassment, the paper now turns to a brief review of the theoretical literature on "responsibilization" and to how feminist insights in the context of sexual assault and intimate partner violence have informed our understanding of gendered violence. It is against this framework that the judicial discourse on intimate partner criminal harassment will be examined.

The Responsibilization of Gendered Violence against Women

As observed in the criminology literature, the shift towards neoliberal economies has had an impact on governmental approaches to crime.[40] In the context of crime prevention, "[n]eoliberalism valorizes the individual as the rational manager of his or her own risk portfolio".[41] According to David Garland, citizens in neoliberal societies have accepted "the premise that crime is a normal, commonplace, aspect of modern society" and that governments have limited ability to prevent or control it.[42] Crime becomes understood as a risk to be calculated, and crime prevention strategies turn to "the conduct of potential victims, to vulnerable situations, and to those routines of everyday life which create criminal opportunities".[43] These neoliberal strategies have served to transform our understanding of the model citizen, who is now deemed the responsible and self-reliant individual whose reduced

[40] David Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society" (1996) 36 Brit J Crim 445 [Garland, "Limits of the Sovereign State"]; David Garland, "'Governmentality' and the Problem of Crime: Foucault, criminology and sociology" (1997) 1 Theor Criminol 173 [Garland, "'Governmentality' and the Problem of Crime"]; Kevin Haggerty, "From Risk to Precaution: The Rationalities of Personal Crime Prevention" in Richard Ericson & Aaron Doyle, eds, Risk and Morality (Toronto: University of Toronto Press, 2003) 193; Susan Ilcan, "Privatizing Responsibility: Public Sector Reform under Neoliberal Government" (2009) Canadian Sociological Association 207; O'Malley, "Risk and Responsibility" in Andrew Barry, Thomas Osborne & Nikolas Rose, eds, *Foucault and Political Reason: liberalism, neoliberalism, and rationalities of government* (London: UCL Press, 1996) 189.
[41] Haggerty, *supra* note 40 at 193.
[42] Garland, "Limits of the Sovereign State", *supra* note 40 at 450.
[43] *Ibid* at 451.

expectations of the state mean he or she does not make claims on that state.[44] This idea that people are responsible for managing the risk they face on a day-to-day basis is referred to in this paper as "responsibilization".

While responsibilization is a relatively new discourse in criminology, blaming women for the violence that is perpetrated against them is hardly a recent phenomenon. Rather, it can be seen as a return to placing responsibility on women for their own safety. As Leslie Moran has aptly put it: "For women and non-heterosexuals who have long been denied State provision of safety and security, the rise of individual and private safety strategies is not so much a new development within the politics of crime control and thereby their social inclusion, but a long established feature of their social exclusion."[45] Elizabeth Stanko notes that, in terms of personal violence, this positioning in relation to danger is "socially embedded within wider structures of age, class, race/ethnicity, sexuality, masculinities and patriarchy…especially when negotiating physical and sexual safety with men."[46] Any understanding of responsibilization in the context of intimate violence against women must, therefore, also be informed by feminist insights into particular vulnerabilities to intimate violence that arise as a result of power imbalances based on gender. In that vein, feminist scholars have examined recent neoliberal value shifts and the rise

[44] Janine Brodie, *Politics on the Margins: Restructuring and the Canadian Women's Movement* (Halifax: Fernwood, 1995) quoted in J Koshan & W Wiegers, "Theorizing civil domestic violence legislation in the context of restructuring: A tale of two provinces" (2007) 19 CJWL 145 at 157. See also Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton: Princeton University Press, 2005) at 42, where she argues that neoliberalism equates moral responsibility with rational action and "in so doing, it carries responsibility for the self to new heights: the rationally calculating individual bears full responsibility for the consequences of his or her action no matter how severe the constraints on this action…"

[45] Leslie J Moran, "Affairs of the Heart: Hate Crime and the Politics of Crime Control" (2001) 12 Law and Critique 331 at 337.

[46] Elizabeth Stanko "Safety Talk: Conceptualizing Women's Risk Assessment As a 'Technology of the Soul'" (1997) 1 Theor Criminol 479 at 483.

of responsibilization as it relates to women in the context of sexual assault and intimate partner violence.[47]

In no context is the tendency towards responsibilization more pervasive than in dealing with sexual assault. Feminist scholars have documented the tendency in the sexual assault context both to blame women for the sexual violence they experience and to hold women responsible for avoiding sexual assault through proper avoidance activities.[48] Blaming women for sexual violence has a long history and manifests itself in numerous ways from how the complainant was dressed, [49] her past choices of sexual partners, [50] or her mental health history.[51] The responsibility for preventing sexual assault is only a slightly more subtle form of victim

[47] Outside of the criminal law context, US case law on sexual harassment under title VII of the *Civil Rights Act* (42 USC § 2000e-2 (1991)) shows a similar trend towards blaming the victim of harassment through its requirement of unwelcomeness whereby the plaintiff must show that the sexual harassment she experienced was not welcome. The US Supreme Court has indicated that the plaintiff's speech and how she dresses in the workplace are relevant in the assessment of unwelcomeness. See *Meritor Savings Bank v Vinson* 477 US 57 (1986). See Ann C Juliano, "Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases" (1991-192) 77 Cornell L Rev 1558 at 1586 "Dress is not the only element courts consider when deciding "welcomeness". The victim's personality must be pristine enough to demonstrate that she did not invite the harassment. When courts engage in this inquiry, the plaintiff's personality is put on trial." See also: Christina A Bull, "The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of *Meritor Savings Bank v Vinson*" (1994) 41 UCLA l Rev 117; Sandi Farrell, "Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence" (2003) 92 Ky LJ 483; Grace S Ho, "Note Quite Rights: How the Unwelcomeness Elements in Sexual Harassment Law Undermines Title VII's Transformative Potential" (2008) 20 Yale JL & Feminism 131; Wendy Pollack, "Sexual Harassment: Women's Experience vs. Legal Definitions" (1990) 13 Harvard Women's LJ 35.

[48] See, e.g.: Melanie Randall, "Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming" (2010) 22 CJWL 397 [Randall, "Ideal Victims"]; Lise Gotell, "Third-Wave Anti-rape Activism on Neoliberal Terrain: the Garneau Sisterhood" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 243 [Gotell, "Third-Wave Anti-rape Activism"], online: University of Ottawa <http://www.ruor.uottawa.ca/fr/handle/10393/19876>; Gotell, "Rethinking Affirmative Consent", *supra* note 2; Stanko, *supra* note 46; Elizabeth Comack & Tracey Peter, "How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage between 'Responsibilization' and 'Blaming the Victim'" (2005) 17 CJWL 283; Janine Benedet, "The Sexual Assault of Intoxicated Women" (2010) 22:2 CJWL 435 [Benedet, "The Sexual Assault of Intoxicated Women"].

[49] For example, in *R v Ewanchuk*, 1998 ABCA 52 at para 4, the Alberta Court of Appeal acquitted an accused of sexual assault in part because the complainant was not dressed in "a bonnet and crinolines" and because she lived with her boyfriend. This decision was overruled by the Supreme Court of Canada: [1999] 1 SCR 30, 169 DLR (4th) 193 [*Ewanchuk*].

[50] See e.g.: Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43 Alta L Rev 743 [Gotell, "When Privacy Is Not Enough"].

[51] Katherine D Kelly, "'You must be crazy if you think you were raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997) 9 CJWL 178.

blaming: women are acknowledged as potential victims but are responsible for taking steps to avoid that victimization. As Lise Gotell has aptly explained, "within the neoliberal regime of responsibility, populations are divided on the basis of their capacity for self-management; those women who can be represented as failing to adhere to the rules of sexual safekeeping are in turn blamed for the violence they experience".[52] Victim blaming makes sexual assault an individualized phenomenon which depends largely on the behaviour of the complainant. Victim blaming, moves away from the notion of public responsibility for social issues such as violence against women and instead supports a "decontextualized, de-gendered focus on 'problematic' individuals."[53] This leads to what Randall refers to as "disappearing perpetrators" where, rather than focusing on the perpetrator himself and the social, political and economic contexts that perpetuate male violence against women, attention is focused on the individual victim.[54] Women are divided into good and bad victims: those deserving of a legal response to violence against them and those who are thus perceived as "unrapeable" such as women with mental disabilities [55] or women involved in prostitution.[56] Racialized and other marginalized women feel this burden disproportionately and are, in turn, deemed less valuable and less credible when their safety efforts fail; they are thus more likely to be stigmatized as "bad" or "undeserving" victims.[57]

Lise Gotell has described the tendency towards risk management and sexual safekeeping in response to sexual assault as the primary governmental technology for responding to sexual

[52] Gotell, "Third-wave Anti-rape Activism", *supra* note 48 at 257.
[53] Randall, "Ideal Victims", *supra* note 48 at 409.
[54] *Ibid* at 423. See also Benedet, "Marital Rape", *supra* note 3 at 164; Isabel Grant and Janine Benedet, "Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities" (2014) 22:2 Fem Legal Stud 131.
[55] Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52 McGill LJ 243.
[56] Randall, "Ideal Victims", *supra* note 48.
[57] *Ibid* at 410.

assault. Sexual assault becomes "something that individual women should try to avoid".[58] The ideal victim is constituted as "the rape-preventing subject who exercises appropriate caution (yet fails)."[59] As Gotell notes "(t)he new "ideal" and valorized victim is a responsible, security conscious, crime preventing subject who acts to minimize her own sexual risk."[60]

Women and girls from a young age are taught to negotiate their physical and sexual safety.[61] Avoiding victimization at the hands of men has become has become a regularized part of many women's daily routine.[62] Teaching girls and young women to avoid the ever-present risk of male violence has become so normalized that it is rarely questioned. Women and girls are expected to avoid alcohol, to vigorously guard their drinks to avoid being drugged, not to dress "provocatively", not to walk home at night alone and never to leave an event with a stranger.[63] Virtually all of these precautions, of course, falsely assume that women are more in danger from strangers than from people they know.

Historically, the tendency to view male violence against women in intimate relationships as a private matter between the partners has greatly hindered law enforcement approaches to intimate partner violence.[64] More recently, criminologists have documented the trend towards putting the responsibility for avoiding intimate partner violence on the victim and her family

---

[58] Gotell, "Third-wave Anti-rape Activism", *supra* note 48 at 245.
[59] Gotell, "Re-thinking Affirmative Consent", *supra* note 2 at 866.
[60] *Ibid* at 879.
[61] Stanko, *supra* note 46 at 485; "Truro mom fights school dress code after shorts deemed too short", *CBC News* (13 May 2014) online: < http://www.cbc.ca/news/canada/nova-scotia/truro-mom-fights-school-dress-code-after-shorts-deemed-too-short-1.2641525>.
[62] Stanko, *supra* note 46 at 488.
[63] Gotell, "Third-wave Anti-rape Activism", *supra* note 48 at 252.
[64] See Frances Olsen, "Constitutional law: Feminist critiques of the public/private distinction" (1993) 10 Const Comment 319 at 323 for a review of literature demonstrating that intimate partner violence has historically not been vigorously prosecuted because it was seen as a "private" family matter. See also Catherine Moore, "Women and Domestic Violence: The Public/Private Dichotomy in International Law" (2003) 7 International Journal of Human Rights 93; Jennifer Koshan, "Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women" in Susan Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) at 87.

members.[65] Silverstein and Spark explore how programs for battered women focus on having women "increasingly take full responsibility for their well-being even as governments take less and less responsibility for making social change affecting their situation."[66] As a result, they argue, some programs for battered women present ultimatums to powerless women about how they have to live their lives in the same way that batterers present ultimatums to their female victims.[67] Victims of intimate partner violence are expected to develop safety plans which give them strategies for avoiding or escaping from the abuser.[68] As Hoyle notes, "victims are made individually accountable – in part, at least – for minimizing the risk of future violence"[69] by developing and sticking with their safety plan. Such strategies may be useful in a context where there is no relationship between a perpetrator and victim but they become much more complex when dealing with women who have had an intimate relationship with the abuser, particularly where ongoing access to children is involved. [70]

These insights about responsibilization, as informed by a gendered analysis, are useful for examining criminal harassment prosecutions and specifically the requirements in s. 264 that the Crown prove the complainant was afraid for her safety or the safety of others, that her fear was reasonable and that the accused knew or was reckless with respect to the fact that she was harassed. While the treatment of female complainants in the criminal harassment context may

[65] See Martin Silverstein & Roberto Spark, "Social bridges falling down: Reconstructing a 'troublesome population' of battered women through individual responsibilization strategies" (2007) 15:4 Crit Criminol 327. The authors note, at 328, "Historically, the responsibility for domestic violence is shifted from the batterer to the community, from the community to the police, from the police to individual victims, to family members of victims, and to the community of the victim".
[66] *Ibid* at 331.
[67] *Ibid* at 337.
[68] Carolyn Hoyle "Will she be safe? A critical analysis of risk assessment in domestic violence cases" (2008) 30 Child Youth Serv Rev 323 at 331-332.
[69] *Ibid* at 332.
[70] *Ibid*. Hoyle points out that these kinds of measures may be useful when dealing with a crime like burglary were the assumption is that victims are rational actors, but that in the context of intimate partner violence (like with intimate partner criminal harassment) victims are often emotionally committed to the perpetrator and their choices are restricted by his controlling behaviours.

not be as dire a situation as we have seen in the context of sexual assault over the past several decades, there are worrisome similarities. For example, women are doubted if there is an absence of physical violence or threats thereof.[71] There is a tendency to attribute to women ulterior motives for bringing claims of criminal harassment, for example, to obtain an advantage in legal proceedings,[72] which reproduces the tendency in sexual assault law to believe that women bring claims falsely, contact police and assert fear where they in fact have none. As with sexual assault, a woman's motives are more likely to be doubted if she has a previous intimate relationship with her harasser.[73] Most notably, there is an expectation that women are responsible for avoiding criminal harassment and thus must respond to harassment in particular ways if they want the criminal justice system to acknowledge the crime. Police and other agencies often tell women complaining of harassment to change their lives to minimize risk.[74] A complainant is told not to frequent locations where the potential accused might be, to change her route to and from work or home, to change her phone number or not to take his calls, to install an alarm system and, in extreme cases, to leave the jurisdiction.[75] It is up to the responsible complainant to block attempts at harassment even if that requires that she seriously curtail her daily activities and mobility.[76] Sometimes women are faced with contradictory messages: on the one hand do not communicate with the accused under any circumstances. On the other hand, make sure you communicate to him that you are harassed. If she fails, or chooses not to take such steps, no

[71] See e.g.: *R v PJJE*, 2003 BCPC 511 [*PJJE*]; *R v Russo*, 2013 ONSC 2228 [*Russo*]; *R v Seaton*, 2012 ONSC 6070 [*Seaton*]; *R v MacLean*, 2008 ONCJ 30 [*MacLean*]; *R v Esau*, [1997] 2 SCR 777 at 789, 812.
[72] See, e.g.: *R v Chancellor*, 2012 BCSC 1993 [*Chancellor*] at para 67, where Dley J surmises that the complainants (the accused's ex-wife and her fiancé) had exaggerated their evidence, likely to gain an advantage in ongoing family litigation over assets and access to the children.
[73] Crocker, *supra* note 10 at 108.
[74] Canada, Department of Justice, *A Handbook for Police and Crown Prosecutors on Criminal Harassment* (Ottawa: Department of Justice, 2012) at 25.
[75] One study concluded that female college students who engage in drinking and drug use were at greater risk of being stalked than were women who abstain from these behaviours, suggesting that that behaviour on the part of the complainant is responsible for the harassment. Elizabeth Erhardt Mustaine & Richard Tewksbury, "A Routine Activities Theory Explanation for Women's Stalking Victimizations" (1999) 5 Violence Against Wom 43.
[76] Gotell, "Third-wave Anti-rape Activism", *supra* note 48 at 256.

matter what her reasons, the seriousness and the very legitimacy of the harassment allegation may be questioned.[77]

One of the problems with this responsibilization is that it creates the illusion that whether criminal harassment ceases or escalates depends upon the behaviour of the complainant and is not within the control of the accused. In fact, very little evidence supports the suggestion that the complainant's behaviour can have a significant impact on harassment. In some cases a particular intervention makes things better, in other cases the same intervention makes things worse, while in other cases it makes no difference whatsoever.[78] Responsibilization allows the role of the perpetrator, and the state, in stopping the harassment to be obscured.[79]

THE CASES:

An Overview

This study began with 348 trial and appellate decisions available on Quicklaw over the past 10 years dealing with liability for criminal harassment (often along with other offences) or sentencing for accused persons who pled guilty or were found guilty of criminal harassment at

---

[77] Cases in which the court used the complainant's contact with the accused to acquit include: *R v Moyse*, 2010 MBPC 21 [*Moyse*]; *R v Benoit*, 2009 ONCJ 441 [*Benoit*]; *Seaton*, *supra* note 72; *R v Gilmar*, 2010 ABPC 332 [*Gilmar*]; *R v JW*, 2010 ONCJ 194 [*JW*]. Cases in which the accused was acquitted because the complainant did not communicate that behaviour was harassing include: *R v Frohlich*, 2010 ABQB 260 [*Frohlich*]; *R v Ross*, 2006 PESCTD 11 [*Ross*]; *R v Benjamin*, 2010 ONSC 5799 [*Benjamin*].

[78] Social science studies substantiate the unpredictability of how a perpetrator will respond to different interventions. The results tend to show that different legal responses, for example seeking a restraining order, sometimes reduce the harassment for a victim of criminal harassment while other times they make it worse. It is plausible to suggest that the complainant may often be in the best position to know what kinds of responses will antagonize her abuser. See for example Dutton & Winstead, *supra* note 11 at 1135 who state "Thus, research indicates that some of the responses work some of the time, but no particular response is effective all (or most) of the time. Some research suggests that no responses are effective."

[79] A similar trend towards responsibilization can be seen in the social science literature. Social scientists have studied what types of behaviours women should engage in to minimize the impact of criminal harassment. See for example Goldsworthy & Raj, *supra* note 19 and Dutton & Winstead, *supra* note 11. For example, Goldsworthy & Raj, *supra* note 19 at 185, describe women as engaging in "reinforcing behaviours such as picking up the phone after the stalker has attempted to call 40 times in a row". Different victim typologies have been developed to categorize how women respond to criminal harassment with certain forms of responses being deemed as more appropriate than others even though overall there is no established response to criminal harassment that stops the harassment with even a majority of perpetrators (*Ibid* at 185-186; Dutton & Winstead, *supra* note 11 at 1132).

trial.[80] Because this paper is focused on intimate partner criminal harassment, the cases were separated into two groups. The first group includes all cases where a complainant had had an intimate relationship with the accused. This term is defined broadly to include spouses, common law and dating relationships. This group also includes cases in which the harassment arose out of an intimate relationship, even if other people were involved (for example, where the accused harassed both his former intimate partner and her new partner). 199 or 57% of the cases were classified as intimate partner cases, all but one of which involved heterosexual relationships. The second group of 101 cases (29%) were cases in which the relationship between the accused and complainant was not one of current or former intimate partnership. There were a further 48(14%) cases, where it was not possible to determine the relationship between the parties and these cases were eliminated.

While there is no way to determine whether these cases constitute a representative sample of criminal harassment cases, these findings are remarkably consistent with larger government studies on criminal harassment.[81] In the overall sample, 93% of accused were men and 81% of complainants were women. However the gender breakdown was more distinct in the intimate partner cases, 96% of the accused being men (as compared to 87% in the non-intimate partner group). Ninety-two percent of complainants in intimate partner cases were women as compared to 68% of complainants in the non-intimate partner cases. These findings support the suggestion

[80] The cases were found by searching the LexisNexis Quicklaw database for all cases with the search string "crim! /5 harass!" decided after May 2002.This date was chosen because it was the end date of the search conducted for Grant, Bone & Grant, *supra* note 8. In Quicklaw, this search string produces all cases in which any word beginning with "crim" is found within 5 words of any word beginning with "harass." This search string produced 1252 cases in late April 2013. Approximately two-thirds of the cases were eliminated from the sample, being either civil, family, or some other kind of case that simply happened to mention those words, or being a criminal case in which the words were mentioned for some reason other than a trial, appeal or sentencing proceeding. Four French-language decisions that turned up in the sample were also excluded, for reasons of consistency.

[81] See e.g.: Statistics Canada, *Juristat*, vol 1 no 1, Criminal Harassment in Canada, 2009 by Shelly Milligan (Ottawa: StatCan, 2011) (Catalogue no 85-005-X), online: Statistics Canada < http://www.statcan.gc.ca/pub/85-005-x/2011001/article/11407-eng.pdf> [Statistics Canada, 2011]; Statistics Canada, 2005, *supra* note 30.

that intimate partner criminal harassment, in particular, is a highly gendered crime which is predominantly committed by men against women.

The overall conviction rate across all cases was approximately 71%. The conviction rate was slightly higher in the non-intimate partner group (72.3 %) as compared to the intimate partner group (69.8%).[82] When the conviction rate was broken down by gender and relationship, male intimate partner accused were more likely to be convicted than female intimate partner accused (70.2% v. 62.5%). In the non-intimate partner group, the opposite trend was evident – women were more likely to be convicted (76.9% versus 71.6% for men). In both groups the number of female accused was so small that it is difficult to draw any conclusions from the differences in conviction rate by gender.

In almost 1/3 of the intimate partner cases, the accused was on a peace bond or a restraining order at the time the criminal harassment took place, highlighting the lack of effectiveness of such orders. In intimate partner cases where the accused had some sort of no contact order with respect to the complainant, the conviction rate of almost 86% was significantly higher. This pattern was even more striking for women accused where 100% of those under some form of no contact order were convicted, although again the numbers are very small, with only four women under pre-existing no contact orders.

In the vast majority of intimate partner cases the accused harasses someone of the opposite sex. One case involved a same-sex intimate partner criminal harassment, where the

[82] While this conviction rate appears significantly higher than that usually cited for sexual assault (most statistics suggest the conviction rate for sexual assault is below 50%), it is important to note that the figures presented in this paper only include cases where written judgments were issued. Thus it is impossible to compare these numbers with statistics based on charges laid or even all cases that have gone to trial. See Statistics Canada, Adult Criminal Court Statistics in Canada, 2010/2011 by Mia Dauvergne (Ottawa: StatCan, 28 May 2012) at 25.

accused harassed his former male partner.[83] In the other eight intimate partner cases involving accused and complainants of the same gender (six male accused and two female accused), the harassment is directed at the new partner of the former intimate partner who is being harassed. [84] In every case where harassment is directed at a new partner, the former intimate partner is also a complainant.

Looking at reported decisions, of course, does not give one a complete picture of criminal harassment cases in Canada. In a majority of cases, charges are probably never laid. Many charges are dropped, or dropped in exchange for the accused entering into a no contact order. Many charges of criminal harassment that do proceed are resolved by guilty pleas.[85] In some cases, behaviour that could be considered criminal harassment may be charged as assault, uttering threats or some other crime and thus will not have been identified as a criminal harassment case. Nonetheless, the present sample does give one an indication of how judges are dealing with the cases that do get to trial and the attitudes that inform those decisions. As such, the case analysis in this paper is more a study of judicial attitudes towards intimate partner criminal harassment than of the phenomenon of criminal harassment itself.

As Lise Gotell has demonstrated in the context of sexual assault, judicial discourses are an important site for the reconstruction of normative heterosexuality and sexual citizenship.[86]

---

[83] *R v Wenc*, 2009 ABCA 328 involved a man who criminally harassed his former male partner after their relationship ended. The accused was sentenced to 90 days intermittent imprisonment and the Court of Appeal indicated that 12 months imprisonment would have been an appropriate sentence but did not grant leave to appeal because the accused had served his sentence. It is unclear whether police are less likely to lay charges in same-sex intimate partner harassment or whether police are less likely to become involved initially. This would be a fruitful avenue of further research as part of the study of violence in same-sex intimate relationships.

[84] *R v Blohm,* [2011] NSJ No 440, 2011 NSPC 51 [*Blohm*]; *R v Prakash,* [2009] OJ No 1928, 2009 ONCJ 197 [*Prakash*]; *Chancellor*, *supra* note 73; *R v O'Reilly* [2006] NJ No 214 (QL); *R v Ibrahim*, 2011 ONSC 4252, [2011] OJ No 3331; *R v Zgraggen* [2011] OJ No 4556, 101 WC.B (2d) 648 (QL); *R v Katzenback,* 2011 ABCA 318, upheld 2012 ABCA 127; *R v Smysniuk,* 2007 SKQB 453.

[85] Gill & Brockman, *supra* note 31.

[86] Gotell, "The Discursive Disappearance", *supra* note 2 at 132-133.

Thus, "scrutinizing judicial discourses reveals both the shifting terms upon which the 'good victim' is defined and a changing set of justifications for disqualifying claims of sexual violence."[87] In the context of criminal harassment, these discourses both shape and reflect how the "responsible victim" of criminal harassment is constructed.[88] The power of judicial discourses can also act to silence the women who encounter the law.[89] This is especially true of those women who do not comply with the construction of the "responsible victim". Such decisions signal to men that they are not criminally responsible for instilling fear if, for example, there ex-partner occasionally agrees to see them or responds to their texts or communications. Such discourses may also affect women's choices, either in how they respond to the harassment or whether they report it, potentially exposing them to greater danger.

The central claim of this paper is that the elements of criminal harassment as defined in s. 264, specifically the requirements that the complainant be reasonably fearful and that the accused know that he is harassing her, lead judges to put the onus on women to prevent intimate partner criminal harassment and to behave like proper victims. Other aspects of criminal harassment under s. 264 may also create barriers to prosecution, such as the requirement that harassing behaviour take place repeatedly.[90] I focus, however, on the fear requirement and the *mens rea* requirement because it is in these elements that problematic assumptions about how women should respond to harassment arise most often. Because the focus is on the elements of the offence, trial and appellate decisions were generally more useful than sentencing decisions.

---

[87] *Ibid* at 135.
[88] *Ibid* at 133. See also Carissima Mathen, "Crowdsourcing Sexual Objectification" (2014) 3:3 Laws 529 at 542 where she discusses the expressive role that criminal law plays in society generally. In playing this expressive role, "it gives effect to broader intuitions about criminal wrongdoing, and it shapes and transmits crucial benchmarks by which citizens may guide their behaviour."
[89] Carol Smart, *Law, Crime and Sexuality: Essays in Feminism*, (London: Sage Publications, 1995) at 71.
[90] For example, only four types of behaviour are listed in section 264(2) and all of them, other than threatening, must be performed repeatedly before liability attaches.

An initial objective of this study was to compare the judicial responses to male accused and female accused in intimate partner criminal harassment cases. However, it is extremely difficult to draw any conclusions from the female accused cases. There are only eight women accused of intimate partner harassment in the database. Five of those eight decisions are sentencing decisions in which the elements of the offence, such as reasonable fear and *mens rea*, have already been established beyond a reasonable doubt.[91] The three trial decisions all resulted in acquittals.[92] In one of these cases, *R v Blohm,*[93] the charge appeared to be unsubstantiated. The trial judge found that none of the elements of the *actus reus* could be made out as the accused had not engaged in any of the enumerated harassing conduct or caused fear. The male complainant had locked the accused out of her home (and denied her access to her possessions) when she was away visiting her grandchildren, forcing her to stay in a shelter on her return. There was no evidence that she had harassed the female complainant (the new girlfriend) nor that she had come to the house knowing that the female complainant would be there.

The other two cases involved women seeking access to their children who were involved in custody disputes with their male partners. In *Harper*,[94] the accused was convicted of a number of charges relating to mischief and obstructing the police but acquitted of criminal harassment because the level of distress caused to her husband when she drove by his house and made obscene gestures was insufficient. There was no discussion of the details of the husband's response to the harassment, nor of whether he responded reasonably. In *KAM*,[95] the accused had been trying to establish contact with her children whom she had not seen for eight months. The

[91] *R v Hrabanek* [2005] AJ No 1941 [*Hrabanek*]; *R v Marsden* [2004] BCJ No 2112, 2004 BCPC 369; *Prakash, supra* note 84; *R v Shaw* [2012] AJ No 1024, 2012 ABPC 273; *R v Porter* [2002] BCJ No 3104, 2002 BCPC 641.
[92] *Blohm*, *supra* note 84; *R v Harper*, [2007] OJ No 1101, 2007 ONCJ 125, 76 WCB (2d) 440 [*Harper*]; *R v KAM*, [2002] SJ No 632, 2002 SKPC 105, 55 WCB (2d) 670 [*KAM*].
[93] *Blohm*, *supra* note 84.
[94] *Harper*, *supra* note 92.
[95] *KAM*, *supra* note 92.

trial judge believed that her only purpose in repeatedly leaving messages for the complainant was to contact her children through her former spouse. Overall, there were not enough cases from which to draw general conclusions. While there may be other stereotypes about men responding to female violence, I was unable to find evidence of the discourse of responsibilization in the cases dealing with the elements of the offence.[96] There is no equivalent conception of how a reasonable man responds to harassment by a female former partner.

In the sections that follow, therefore, I focus on male intimate partner harassment of women and examine the elements of criminal harassment that tend to put the onus on women to respond in particular ways and feed this tendency towards responsibilization. I turn first to the requirements that the woman be afraid and that her fear be reasonable, and then move on to examine the accused's *mens rea* with respect the fact that the complainant was harassed. In each of these elements, there are numerous examples of judges expecting women to behave in particular ways, which either illustrate societal expectations of a frightened woman or place the responsibility on her to make sure the accused knows that he is harassing her. Evidence of this trend is not found in every case, nor necessarily even in a majority of all cases but, as the following cases will demonstrate, it is present often enough to raise concerns about the elements of criminal harassment and the judicial interpretation thereof. One can only speculate about the number of charges that were not laid or which never proceeded to trial based on similar logic on the part of the police and prosecutors, and about the number of women who are deterred altogether from going to police because they know they will not be construed as an ideal victim.

[96] There was a suggestion in *Hrabanek, supra* note 91, that the complainant should not have continued contact with the accused (i.e. he met her for coffee on more than one occasion) but what is interesting is that the trial judge said it was nonetheless obvious that the male complainant was afraid and that anybody would have been afraid because of the complainant's persistence. Thus the ongoing contact did not negate his fear. Further, making this observation in sentencing has a very different impact given that the accused has already been convicted and the elements of criminal harassment already established.

An Analysis of the Intimate Partner Criminal Harassment Cases: the Judicial Discourse of Responsibilization

1. Reasonable Fear for One's Safety or the Safety of Others

Section 264(1) requires that the Crown prove that the accused caused the complainant "reasonably, in all the circumstances, to fear for [her] safety or the safety of anyone known to [her]."[97] This requirement has both a subjective component, which asks whether the complainant actually felt afraid for her safety, and an objective component, which asks whether that fear was reasonable "in all the circumstances". The requirement that the complainant be afraid means that women will have to testify about their fear and be subject to cross-examination regarding its honesty and its reasonableness. Where the accused is unrepresented by counsel, he will likely conduct that cross-examination himself.[98] The reasonable fear requirement may also open up the possibility for challenges to the complainant's character and mental health history, in turn creating the potential for further abuse by the accused.[99]

While most judges recognize, at least in theory, that the well-established judicial interpretation of "safety" includes psychological or emotional safety as well as physical safety,[100] the threshold for psychological safety established in the case law is extremely high and inevitably involves difficult line drawing.[101] For example, it is not uncommon for judges to state that it is insufficient if the complainant is "vexed, disquieted or annoyed"; rather she must be

---

[97] *Criminal Code*, RSC 1985, c C-46, s 264(1).

[98] Grant & Birenbaum, *supra* note 22. This problem has been acknowledged in the sexual assault context. Section 486.3(1) enables the Crown to apply to prevent an accused cross-examining a complainant under 18 years of age and sub (2) allows the judge to order that the accused shall not personally cross-examine any witness it would impede obtaining a full and candid account of her evidence. The judge should consider her age, whether she has a disability, the nature of the offence and the nature of the relationship between the witness and the accused (s. 486.1 (3)).

[99] Pathé, Mackenzie & Mullen, *supra* note 11 at 105. There were no cases in this sample where the record was clear that an application had been made for access to psychiatric records of the complainant.

[100] See, e.g.: *R v Goodwin*, (1997) 89 BCAC 269 (BCCA); *R v Vandoodeward*, [2009] OJ No 5099 (ONSC) (QL) at paras 72-73; *R v Korbut*, 2012 ONCJ 522 at para 25.

[101] In *PJJE*, *supra* note 71 at para 37, the judge explicitly recognized the fineness of the distinction: "It may be more accurate to say that the Accused's conduct caused her a great deal of stress and it may be splitting hairs to say that it was stress rather than fear that she was feeling."

"tormented, troubled, worried continually or chronically, plagued, bedevilled and badgered".[102] In several cases, the complainant was found to be annoyed and stressed, but not sufficiently annoyed and stressed.[103] In one such example, the accused sent sexually explicit photographs of the complainant to her employer and several other people, while the complainant went on disability leave from work, took prescription medication and received counselling. The Court, relying on the test for psychological safety above, concluded that the impact on her was vexing and annoying, but not disturbing enough.[104] In other cases, the issue of psychological safety is not expressly considered and criminal harassment charges are rejected because there were no threats of violence or physical harm to the complainant.[105]

The burden of proof is of course on the Crown to establish, through the complainant, both the fear and its reasonableness. There is no inquiry into the reasonableness of the accused's harassing actions. Judges interrogate how the complainant responded to the harassment: did she take steps to avoid the accused,[106] did she alter her life so as to prevent the possibility of harassment,[107] did she avoid taking any actions that might be interpreted as inconsistent with fear;[108] did she communicate to him the fact that his conduct was harassing,[109] did she complain to the police promptly enough,[110] did she seek a restraining order,[111] and was the harassment

---

[102] See e.g.: *R v Greenberg*, 2010 ONSC 3584 at para 101 [*Greenberg*].
[103] See e.g.: *R v Hassan*, [2009 OJ] No 1378, 2009 CanLII 15447 (ONSC) [*Hassan*]; *R v Gibb*, [2005] OJ No 3057 (ONCJ) (QL) [*Gibb*]; *JW*, *supra* note 77.
[104] See e.g.: *Hassan*, *supra* note 103, where the trial judge applied this test and found that the threat to distribute sexually explicit photos of the complainant was vexing and annoying but did not meet the standard required by s. 264.
[105] See e.g.: *PJJE*, *supra* note 71; *Russo*, *supra* note 71; *Seaton*, *supra* note 71; *MacLean*, *supra* note 71.
[106] *Moyse*, *supra* note 77 at para 85; *Gilmar*, *supra* note 77 at para 42.
[107] *Moyse*, *supra* note 77 at para 87.
[108] *R v Monahan*, 2010 SKPC 46 at para 77 [*Monahan*].
[109] *Frohlich*, *supra* note 77 at para 56; *Moyse*, *supra* note 77 at paras 85, 91; *Benoit*, *supra* note 77 at para 11; *Seaton*, *supra* note 71 at para 87.
[110] *Chancellor*, *supra* note 72 at paras 77, 85. See also *R v Wease*, [2008] OJ no 1938 (ONSC) (QL) [*Wease*] where the complainant's fear was doubted because she did not seek a restraining order even though she did contact police. The fact that some women may not report criminal harassment immediately to police, and the tendency of courts to

objectively "bad enough" to allow us to label her fear as reasonable and the harassment as criminal?[112] As in sexual assault law, judges are assessing women's response to a highly traumatic series of events and determining whether that response is adequate for acknowledgement by the criminal justice system. Judges make assumptions about how one should respond to what may have been a persistent ongoing course of harassment by someone with whom the complainant may share children and a long history. For example, the fact that a woman does not contact police immediately may be used to discredit her allegations even though there may be numerous reasons for trying to resolve problems with a former intimate partner without immediate police involvement.[113] Some women expressed the concern, for example, that if they contacted the police the accused's behaviour would escalate.[114]

In the present study, there were 57 acquittals in the 193 intimate partner cases involving male accused. Of the 57 acquittals, more than half (33 cases) were based on some aspect of the

---

use that fact to cast doubt on her fear, can be analogized to the recent complaint doctrine that has plagued sexual assault complaints. While this doctrine was statutorily repealed in 1983, as Elaine Craig points out, the myths and stereotypes on which the doctrine is based are still prevalent in sexual assault prosecutions. See Elaine Craig "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Assault" (2011) 36 Queen's LJ 551. In sexual assault, a failure to report a sexual assault promptly is used to suggest that a woman is fabricating her allegations. In criminal harassment, the same kinds of problematic assumptions are used primarily to cast doubt on the alleged fear and distress experienced by the complainant. In both contexts, assumptions and stereotypes have developed about how women should respond to intimate partner violence. Failure to live up to those expectations, lead to women being disbelieved – *Ibid* at paras 6-12. As Sheehy notes in her work on battered women, if we only believe women who complain to police or friends about abuse, the most seriously abused women will be eliminated because these are the women who never go to police. See Elizabeth Sheehy, *Defending Battered Women on Trial*, (Vancouver: UBC Press, 2014) at 241 [Sheehy, *Defending Battered Women*].

[111] See e.g. *Wease*, *supra* note 110; *Ross*, *supra* note 77.

[112] *PJJE*, *supra* note 71 at paras 38, 41; *R v MDP*, 2005 BCPC 288 at para 34 [*MDP*]; *Frohlich*, *supra* note 77 at paras 50, 75.

[113] *Chancellor*, *supra* note 72 at paras 77, 85.

[114] See, for example *R v Mustaka*, 2006 BCPC 174 [*Mustaka*]. There is much social science evidence demonstrating that the decision for women to involve the police in issues of intimate partner violence or threats is complex. See, for example, Betty Jo Barrett, Melissa St. Pierre & Nadine Vaillancourt "Police Response to Intimate Partner Violence in Canada: Do Victim Characteristics Matter?" (2011) 21 Women & Criminal Justice 38; Caroline Akers & Catherine Kaukinen, "The Police Reporting Behavior of Intimate Partner Violence Victims" (2009) 24 J Fam Viol 159. It should be noted that section 264(4) makes it an aggravating factor in sentencing if the accused was in violation of a protective order at the time of the harassment. This demonstrates that a restraining order should not be seen as a requirement of establishing criminal harassment but rather as a factor that makes the harassment even more serious where it is present. Where the harassment exists in the context of a restraining order or protection order a lower threshold of *mens rea* and of fear on the part of the complainant should be required.

complainant's fear being inadequate: the complainant was not afraid, her fear was not reasonable or both.[115] In an earlier study of the criminal harassment provisions, Grant *et al.* found that courts were likely to conclude that a woman was subjectively afraid.[116] Thus in the current study I expected that, in most cases where repeated harassment was found, the subjective fear component would be found to be satisfied and the question would then be whether the fear was reasonable. To the contrary, the current study found that the subjective component of the fear creates more problems for complainants than the reasonableness requirement. In 21 intimate partner cases the court concluded that the complainant was not subjectively afraid for her safety,[117] and in 15 cases fear was labeled unreasonable,[118] the latter finding often made without analysis following a finding of no subjective fear.[119] Women asserted fear in these cases but were disbelieved.

[115] This reasonableness requirement attached to the fear was the subject of much early criticism. Grant, Bone & Grant, *supra* note 8 at 203-204; Cairns Way, *supra* note 10 at 396.
[116] Grant, Bone & Grant, *supra* note 8 at 196.
[117] *R v Carter,* [2004] OJ No 5167 (ONSC) (QL) [*Carter*]; *Gibb, supra* note 103; *R v Vanin,* 2006 SKPC 86 [*Vanin*]; *R v Lincoln*, 2008 ONCJ 14 [*Lincoln*]; *R v Lukaniuk*, 2009 ONCJ 21 [*Lukaniuk*]; *Hassan, supra* note 103; *Gilmar, supra* note 77; *JW, supra* note 77; *Moyse*, *supra* note 77; *Monahan, supra* note 108; *R v Greenberg,* 2009 ONCJ 500, 2010 ONSC 3584; *R v Barkho*, 2011 ONCJ 543 [*Barkho*]; *Blohm, supra* note 84; *Chancellor, supra* note 72; *Ross, supra* note 77; *Wease, supra* note 110; *R v Lenser,* [2003] ON No 3617 [*Lenser*]; *R v Wolfe,* 2008 BCPC 119 [*Wolfe*]; *Frohlich, supra* note 77; *R v Victoria-Penuela*, 2011 ONCJ 572 [*Victoria-Penuela*]; *Russo, supra* note 71.
[118] *PJJE, supra* note 71; *MDP, supra* note 112; *R v TV,* 2006 ONCJ 338 [*TV*]; *Benoit, supra* note 77; *R v Bachmaier,* 2010 ONCJ 11 [*Bachmaier*]; *R v Nkony,* 2010 BCPC 73 [*Nkony*]; *R v Benedict,* [2003] OJ No 4300 (ONCJ) (QL) [*Benedict*]; *Benjamin, supra* note 77; *R v Lenser,* [2003] OJ No 3617; *Wolfe, supra* note 117; *Frohlich, supra* note 77; *R v Victoria-Penuela*, *supra* note 117; *Russo*, *supra* note 71; *MacLean, supra* note 71 & *Seaton*, *supra* note 71.
[119] In 16 cases the court concluded only that the complainant was not subjectively afraid: *Carter, supra* note 117; *Gibb, supra* note 103; *Vanin, supra* note 117; *Lincoln, supra* note 117; *Lukaniuk, supra* note 117; *Hassan*, *supra* note 103; *Gilmar, supra* note 77*; JW, supra* note 77; *Moyse, supra* note 77*; Monahan, supra* note 108*; Greenberg, supra* note 102*; Barkho, supra* note 117*; Blohm, supra* note 84*; Chancellor, supra* note 72*; Ross, supra* note 77*; Wease, supra* note 110. In 10 cases any fear was found to be unreasonable: *PJJE, supra* note 71*; MDP, supra* note 112*; TV, supra* note 118*; Benoit, supra* note 77*; Bachmaier, supra* note 118*; Nkony, supra* note 118*; Benedict, supra* note 118*; Benjamin, supra* note 77*; MacLean, supra* note 71*; Seaton, supra* note 71. In five cases, the complainant was found not to have any fear, but if she did it was unreasonable: *Wolfe*, *supra* note 117; *Frohlich*, *supra* note 77; *Victoria-Penuela*, *supra* note 117; *Russo*, *supra* note 71; *Lenser, supra* note 117.

i) The Subjective Component: She Wasn't Afraid

The complainant's behaviour is a significant factor in the judicial analysis of whether she felt sufficiently fearful. In several cases, the judge's conclusion that the complainant had not subjectively feared was based, at least in part, on finding that her conduct was inconsistent with what was expected of a fearful woman. For example, in *R v Monahan*, the complainant testified as to her fear because the accused was following her.[120] She testified that she sometimes drove by the accused's house to look for his vehicle so that she would not have to check for his vehicle hiding somewhere on her way home. She indicated that she did this on the suggestion of the police.[121] The judge disbelieved her testimony about her fear, finding that "if she had truly feared for her safety it is difficult to imagine why she would follow [the accused] from time to time as she did. These actions are not consistent with someone experiencing fear".[122] Here the judge assumes that there is one standard fear response and departures from that standard will be fatal to successful prosecution, which ignores the sense of loss of control that women who are repeatedly harassed often experience. Knowing where his car was could help reestablish some sense of control over a situation which feels uncontrollable –what Stark refers to as "control in the context of no control"[123].

In *R v JW*, similar reasoning was used to find that the complainant did not subjectively fear the accused.[124] The complainant, only about 13 years old at the time of the offence, was the accused's ex-girlfriend. The accused, who was 16, could not accept the end of the relationship. She alleged that he threatened to kill her new boyfriend, continued to follow her home from school and to call her house, and attempted to put his hands down her pants. The accused was

[120] *Monahan*, *supra* note 108 at para 1.
[121] *Ibid* at para 24.
[122] *Ibid* at para 77.
[123] Stark, "Coercive Control", *supra* note 19 at page 17.
[124] *JW*, *supra* note 77.

convicted of assault and uttering death threats but acquitted of criminal harassment. Kenkel J. accepted that the accused repeatedly contacted the complainant and that, on one occasion, he refused to leave her home when asked.[125] However, much was made of the fact that the complainant met with the accused twice during the period when he continued to pursue her thus giving the judge a reasonable doubt about her fear.[126] The judge described the teenaged complainant as follows: "While she plainly found the accused annoying at times and was fearful as a result of some of his statements, she continued to seek him out, perhaps enjoying the intense attention even if it was the wrong kind of attention."[127] Reminiscent of the persistent mythology in sexual assault that women invite and secretly desire sexual violence,[128] the judge accepted that she was fearful but then negated that fear because of her behaviour. It is simply not possible to demonstrate how a 13-year-old girl "should" demonstrate fear as a result of harassment, death threats to her new boyfriend and other related behaviours from the accused.

In *R v Moyse*,[129] the judge found that the complainant was not afraid in part because she continued contact with the accused but also because the accused used getting his property back as an excuse to contact her. The judge reasoned that the complainant could have returned the property if she was fearful of him as a way to reduce legitimate contact.[130] The judge suggested

---

[125] *Ibid* at paras 6, 28.
[126] *Ibid* at paras 24-25.
[127] *Ibid* at para 30. See also *Gilmar*, *supra* note 77, where no fear was found because the complainant continued to have contact with the accused. See also *Russo*, *supra* note 71.
[128] See e.g.: Randall, "Ideal Victims", *supra* note 48 at 420.
[129] *Moyse*, *supra* note 77.
[130] *Ibid* at para 91. The complainant's reaction was also found wanting in *MacLean*, *supra* note 71. In that case, the accused repeatedly called his ex-wife, allegedly for the purpose of speaking to his sons, but often leaving hateful messages on her voicemail. The complainant testified that she was afraid for her safety, believing that "the defendant was unstable and that something would happen." She spent the night at a friend's home out of fear after she went to the police. The judge rejected her testimony as to her fear because "her sworn statement to vary the custody order, made only days before she went to the police, does not expressly assert this" and because the judge disagreed with her that one of the calls that she found disturbing contained a sexual innuendo. Although the judge was satisfied that the complainant was "psychologically disturbed" and "emotionally distress[ed]", he was not convinced that she feared for her physical safety.

that "[t]his is inconsistent and unexplained behaviour of someone who is fearful".[131] He also stated that if there had been genuine fear for her safety, she would have organized her life to ensure no contact with the accused.[132] The ongoing contact problem is a common theme in these cases. While many women do organize their lives around avoiding their harassers, this should not be a de facto element of the offence. Judges do not understand why a woman would have contact with someone she feared. There is no recognition that she might think she could resolve the situation through talking to the accused, that fear can coexist with other feelings towards the accused, or that fear of a former intimate partner may manifest itself differently than fear of a stranger.

Sometimes trial judges rely on an absence of violence to reject the notion that the complainant was subjectively afraid for her safety even though courts have repeatedly acknowledged that fear for one's psychological safety is sufficient under s. 264. In *R v Russo*,[133] the accused had sexually groomed and sexually exploited the complainant beginning when she was about 14 years old and he was 59 years old. The complainant had a history of sexual abuse from a number of men and was living in poverty when she met the accused. The accused stayed in her life even after she married and had children. She eventually brought charges of criminal harassment when he refused to leave her family alone. The trial judge acquitted the accused of criminal harassment and a number of other charges, unconvinced that the complainant had feared for her safety. Although she had testified that she was afraid, the judge found that the accused had never behaved violently towards the complainant or her family. The judge used this

[131] *Moyse, supra* note 77 at para 55.
[132] *Ibid* at para 86. Even though contact was likely given the nature of their jobs, the complainant was a Crown counsel and the accused was a police officer.
[133] *Russo*, *supra* note 71.

conclusion, as well as the fact that the complainant felt some sympathy towards the accused, to reject the complainant's evidence that she was afraid of him.[134]

A complainant's failure to seek a restraining order is also considered in deciding whether she was truly afraid. In *R v Wease*,[135] a complainant's fear was doubted because she did not seek a restraining order against her husband even though she did go to police to complain about his behaviour. The accused and the complainant were involved in divorce proceedings. He was convicted of criminal harassment at trial after following her and taking pictures of her vehicle. The conviction was overturned on summary appeal, with the court stating that: "There is no explanation given as to why, if the complainant was fearful and concerned as to her own emotional or physical well-being, she did not pursue a restraining order in the Family Court proceedings".[136] In *Ross*,[137] the accused was acquitted of criminal harassment on the basis that evidence of her fear was equivocal. This conclusion was based, in part, on the fact that it took her a significant period of time before she sought a restraining order; roughly 2 weeks after the accused had assaulted her. The onus was clearly placed on the complainant in these cases to take the initiative to stop the harassment. The underlying (false) assumption is that restraining orders put an end to the accused's harassing behaviour.

As one might expect, where the complainant does take steps to act like the responsible victim, courts are more likely to find she was afraid. For example, in *R v Fader*,[138] the court explicitly acknowledged that the complainant took steps to secure her safety and communicate to

---

[134] *Ibid* at para 75. The court also found that any fear would be unreasonable. See also *Chancellor*, *supra* note 72, where the complainants were the accused's ex-wife and her fiancé. The judge concluded that there had been no overt threats of physical violence and that the fiancé's conduct was inconsistent with his alleged fear of the accused; for example, the complainants did not immediately go to the police.
[135] *Wease*, *supra* note 110.
[136] *Ibid* at para 23.
[137] *Ross*, *supra* note 77.
[138] *R v Fader*, 2009 BCPC 61.

the accused that the relationship was over.[139] In *R v Malakpour*,[140] the fact that the complainant avoided going out, avoided making friends and purchased a condominium because of its increased security all contributed to the finding of subjective fear.

In a number of cases the judge stated that the complainant was afraid but that the fear did not necessarily relate to her psychological or physical safety. In other words, she had the wrong type of fear. For example, in *R v Gibb*,[141] during the divorce proceedings of the accused and the complainant, the accused was repeatedly holding demonstrations with others about the state of family law in a park adjacent to the home of the complainant. On several occasions, anywhere from 6-10 protesters were dressed as judges, carrying signs and protesting. One of them carried a sign saying "judges kill families."[142] The accused also carried a sign with the names of his children on it and his assertion that he loved them. The complainant changed her route to and from home and avoided going to the park for walks or bike rides. Although the judge found that there was some evidence as to the complainant's fear, including her use of the words "scary" and "nervous", her installation of an alarm system in her home, and her being upset and crying when the police attended at her home, the judge concluded that she "never articulated expressly that she was in fear for her safety or the safety of her children".[143]

In a particularly problematic decision, *R v Lincoln*,[144] the accused left five insulting and threatening phone messages for his ex-girlfriend. He threatened to go to her workplace and

---

[139] *Ibid* at paras 8, 25.
[140] *R v Malakpour*, 2007 BCPC 127; appeal dismissed in 2008 BCCA 326 [*Malakpour*].
[141] *Gibb*, *supra* note 103.
[142] Susan Boyd has documented how the fathers' rights movement has downplayed the significance of intimate partner violence in its rhetoric about custody disputes. See Susan B Boyd "Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes" (2004) 6:1 Journal of the Association for Research on Mothering 52 at 61.
[143] *Gibb*, *supra* note 103 at para 61.
[144] *Lincoln*, *supra* note 117.

contact her family members because she had not returned a ring he had given her. His final message to her stated:

> I'm going to show you what kind of person I can be. You messed around with the wrong person… You have no idea what I am capable of doing. And you are going to start seeing slowly but surely I am going to affect you in every single way there is in life. You can run away but I can find you. You can move to Jerusalem but I can still find you. That's what I do as a living. And I will find you. So, I will give you the best advice. Give (sic) my ring. That's the only advice I have for you. And very shortly I will be finding your Mom, where they live. And nobody can stop me. Have a good day. Rest in peace.[145]

The complainant testified that "rest in peace" in her mind referred to death.[146] Despite these not-so-subtle threats of serious harm, the trial judge concluded that the complainant was not subjectively fearful. The judge held that if the complainant had feared, her fear would have been reasonable, and found that the complainant "felt threatened by the messages" and that they "made her feel sick"[147], but concluded that she had not explicitly said that the "threat was to her safety, as opposed to her financial well-being" and therefore dismissed the charges.[148] It is not clear how this last threat quoted above could be interpreted as a financial threat particularly with the ominous "rest in peace" closing the message.

ii) The Objective Component: Her Fear Wasn't Reasonable

As outlined earlier, even where the accused repeatedly harassed the complainant, causing her fear, and knowing that he is harassing her, he will still be acquitted if the judge decides her fear was not reasonable. As mentioned above, in the present sample, more acquittals resulted from the judge finding that the complainant did not fear for her safety than from findings that her

[145] *Ibid* at para 14.
[146] *Ibid* at para 25.
[147] *Ibid.*
[148] *Ibid* at para 25. See also *Lukaniuk*, *supra* note 117, where the court concluded that her fear was financial because the accused had threatened to disrupt her job as a home stay host.

fear was not reasonable. The reasonableness requirement receives less scrutiny in the cases than was expected. However, there is significant overlap between the assessment of whether the complainant was afraid (which will be influenced by whether fear would be reasonable in the circumstances) and whether that fear is assessed as reasonable.

For example, in *R v PJJE*,[149] after the divorce of the accused and the complainant, the accused entered their formerly shared home, which at the time was by court order exclusively possessed by the complainant, to recover some property to which he felt he was entitled. As a result, he was placed under a s. 810 peace bond, which forbade any contact, except through a third party for the purpose of arranging access to the children. He continued to contact the complainant, having numerous letters delivered to her house or taped on her door. In other incidents, he followed her or showed up at places she was attending to seek access to the children. The trial judge characterized the accused's repeated harassment as merely the "zealous pursuit of what is perceived to be his parental rights", and found that his conduct could "fairly be classified as threatening only in the sense of someone threatening to enforce a legal right".[150] The trial judge characterized the accused's conduct as merely the accused's attempt to "check up on the complainant from time to time"[151] despite the fact that he was under a court order not to contact her. The accused had never threatened violence although there were allegations of violence before the marriage broke down.[152] "His threats [were] of prospective outcomes in court rather than physical harm."[153] Skilnick J. accepted that the complainant felt harassed and afraid and that the accused knew or ought to have known that his constant communication was

[149] *PJJE*, *supra* note 71.
[150] *Ibid* at para 33.
[151] *Ibid* at para 32.
[152] *Ibid* at para 34.
[153] *Ibid* at para 33.

harassment or at least that he was wilfully blind about whether the complainant was harassed.[154] However, the judge was left in doubt as to whether her fear for her safety or that of her children was reasonable, commenting:

> In saying this, I do not minimize the feelings of frustration that the Complainant has as a result of the bitterness and bad feelings from her matrimonial court battles with the Accused. The difficulty I have in finding criminal liability in these circumstances stems from the fact that all of the harassing behaviour is rooted in the matrimonial issues. The "threats" are of legal consequences, not of expressed or implied threats of violence or other affronts to the safety of the Complainant or of her children.[155]

Skilnick J. noted that while some matrimonial disputes may escalate into criminal harassment, "the conduct of the Accused in this case leaves me in doubt as to whether that stage has been reached", given that he never threatened the complainant, even in a veiled manner. Her fear was unreasonable because it was based on past not future violence:

> His behaviour may have generated fear in the Complainant. However that fear seems to be based on a concern that past behaviour might repeat itself. The communications in and of themselves can not reasonably be construed as threatening of anything other than legal action. I can not find beyond a reasonable doubt that his conduct is such as to reasonably cause the complainant to fear for her safety.[156]

The trial judge was dismissive of the fear he found the complainant had, indicating that while the accused was not "a living example of the prayer of St. Francis", her fear was unreasonable.[157]

In *R v Benedict*,[158] the accused had courted the complainant in anticipation of an arranged marriage according to their culture. She exercised her right to refuse the marriage according to

---

[154] *Ibid* at paras 36-37.
[155] *Ibid* at para 38.
[156] *Ibid* at para 41. See also *Benoit*, *supra* note 77, where the complainant's fear was not reasonable because she did not cut off contact with the accused (via email) or instruct him to contact her only through counsel. This was another case in which access to children was an issue.
[157] Scholars have documented how men can manipulate their "zealous pursuit of parental rights" to continue access and control over the women involved, particularly in the context of violent relationships. Beeble, Bybee & Sullivan, *supra* note 38.
[158] *Benedict*, *supra* note 118.

custom and told him she did not want to see him anymore, but agreed to meet him on one further occasion after breaking off the relationship. He frequently phoned her and waited in his car outside her workplace. The accused was cautioned more than once by the police and was subject to a restraining order with respect to the complainant. He had also apparently spent time in custody for prior harassing conduct against the complainant although it appears that no charges were ever proceeded with at the time. [159] The trial judge accepted all of the complainant's evidence as credible and rejected the evidence of the accused as incredible and unreliable.[160] Nonetheless he concluded, without any real explanation, that the complainant's fear was not reasonable:

> I accept that [the complainant] was made nervous and upset by Mr. Benedict's appearance outside her home. Her privacy and sense of peace had been disturbed once again by the accused's pitiable conduct. However, given the chronology and context of events since May 2001, while I consider it probable and while I accept that the experience for her was quite unsettling, I am not satisfied on all the evidence to the requisite standard that the complainant feared for her safety on an objective standard of reasonableness. In this regard, the prosecution has failed to prove one of the essential elements of criminal harassment.[161]

Yet the judge clearly had some concern for the safety of the complainant given that he ordered the accused not to have any contact or communication with the complainant or any member of her family.

In three of the four cases where acquittals were based entirely on the grounds of unreasonableness (i.e.: where subjective fear was not doubted), the accused was subject to a restraining order to stay away from the complainant.[162] This finding is difficult to explain because one would expect that the presence of a restraining order would give judges more

[159] It is unclear from the judgment how long he spent in custody and what the basis of the previous harassing conduct was.
[160] *Benedict*, *supra* note 118 at para 18.
[161] *Ibid* at para 25.
[162] *PJJE*, *supra* note 71; *Benoit*, *supra* note 77; *Benedict*, *supra* note 118.

support for the complainant's fear and the reasonableness thereof. The restraining order was presumably obtained for a reason and, the fact that an accused is willing to ignore a court order demonstrates his willingness to step outside the bounds of the law to engage in harassment. One would expect resultant fear would be considered reasonable. In the overall sample, the presence of a restraining order made conviction more likely, as one would expect. It is possible that police are more likely to lay charges of criminal harassment sooner where there is a restraining order and thus the behaviour may not have escalated as far, although the ongoing harassment in *Benedict*, in particular, was quite significant. The high conviction rate overall, where restraining orders are in place, belies this possibility.[163] These three cases represent such a small number that no real conclusions can be drawn from the fact that fear was found to be unreasonable in the face of a restraining order. However the fact that women's fear is considered unreasonable when the harassment takes place in the context of a restraining order creates a bind for women: if she does not get a restraining order she was not sufficiently afraid, yet if she does her fear may still be labelled as unreasonable. Why should women seek restraining orders if their violation does not render the fear they experience reasonable?

---

[163] In *MDP*, *supra* note 112, the accused and his wife had separated after a relationship of several years and were involved in a custody dispute over their child. The complainant had secured a restraining order against the accused that only permitted him to contact the child via telephone. In the past, the accused had received a conditional discharge for making harassing telephone calls, after he made 100 to 150 telephone calls to his wife in two hours. The criminal harassment charges resulted from the accused's alleged suspicion (based on noises he heard over the phone) that his wife was abusing their child. He repeatedly telephoned the police, resulting in police attendance at his wife's home on four occasions within 16 days.

With respect to the criminal harassment charge, Warren J found that his phone calls resulted from his genuine belief that his child was at risk. Further, Warren J found that it was not objectively reasonable that the wife was ever in fear for her safety as a result of the telephone calls. The complainant had testified (at para 30):

> I was worried just taking my garbage out. I felt uncomfortable getting in and out of my car. I would always be, you know, double-checking my shoulders during grocery shopping. It was not – it was like walking on eggshells all of the time.

Warren J found that the phone messages that the accused left were <u>not</u> angry and threatening, but instead were tearful, pleading, and rambling. Although Warren J hesitantly accepted (at para 18) that "it may be that she subjectively feared for her safety," there was no objectively threatening language.

A finding that a woman's fear is unreasonable, where the other elements of the offence are established, is highly problematic in light of the evidence that women are particularly attuned to the cues of abusive intimate male partners. This has been widely recognized in the context of intimate partner violence[164] and there is no reason to suspect otherwise in the context of criminal harassment. It is very likely that the complainant is in a better position to assess whether to take seriously the harassing activities of her former intimate partner than are judges and juries.

As with the cases on subjective fear, the complainant who has taken steps to avoid the harassment is more likely to have her fear labelled as reasonable.[165] In *R v Lauzon*,[166] for example, in deciding whether the complainant's fear was reasonable, the judge noted that she had had to change her phone number to avoid the accused, she limited the places she went to in town to avoid him, and that she knew he would be waiting for her when she left work. "It seems to me clearly in that context it was reasonable for her to feel as she did that she was fearful of Mr. Lauzon".[167]

As mentioned, there is a significant overlap between a finding that a woman was not afraid and that her fear was unreasonable. The former finding implies that a woman was not believed in her assertions of fear, usually because she failed to take adequate steps to avoid the harassment or because her fear was not manifest in the manner we expect women to demonstrate fear. Finding that her fear was not reasonable implies that, while we may believe she was afraid, that fear was exaggerated or illegitimate (or even hysterical). Both findings are premised on assumptions driven by how we expect women to respond to and express fear. It is important not

[164] *R v Lavallee*, [1990] 1 SCR 852 at 880-881, 55 CCC (3d) 97; Julie Blackman, "Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill" (1986), 9 *Women's Rights Law Reporter* 227. See also Sheehy, *Defending Battered Women, supra* note 110 at 52.
[165] See e.g.: *Malakpour*, *supra* note 140.
[166] *R v Lauzon*, 2009 ONCJ 666, appeal dismissed 2010 ONSC 3592.
[167] *Ibid* at para 37.

to overstate the differences between an acquittal based on no fear and an acquittal based on unreasonable fear. In the actual cases, the reasonableness requirement often plays a role in the subjective determination of fear. In other words, courts may disbelieve her actual fear precisely because it is not consistent with expectations of how a reasonable woman would behave in the circumstances. For example, if the complainant fails to make clear that she wants the harassment to stop that may be "taken to be acting inconsistently with her assertion of fear" or taken as "condoning his continued attentions", which can in turn be taken to "remove the objective basis for fear".[168] In other words, both subjective fear and its reasonableness can be negated by evidence that the complainant failed to behave like the "responsible victim".

I am not suggesting that none of the acquittals in the above decisions were justified. Nor am I suggesting that women should not take steps to avoid criminal harassment by former intimate partners as most of them choose to do. Rather, I would argue that taking such steps should not be a necessary prerequisite to criminal prosecution of their harassers. Clearly, fear is not the only response to harassment, yet it is the only response that section 264 acknowledges as legitimate. Judging women for continuing to have contact with their harassers fails to acknowledge the complex emotions that can result from being victimized by one's former intimate partner. Requiring the complainant to radically change her life or to take steps to make sure the harassment was minimized shifts the focus onto her behaviour and away from the behaviour of the accused in a way that is reminiscent of the sexual assault context.[169] Such responsibilization also shifts attention away from the failure of the legal system to enforce no contact orders, and away from the state's obligation to protect women from harassing behaviour.

[168] *Mustaka*, *supra* note 114 at para 47.
[169] Benedet, "The Sexual Assault of Intoxicated Women", *supra* note 48.

The problem lies both in the legislation, which requires reasonable fear, and in the judicial interpretation thereof.

2. *Mens rea*: Did the Accused Know That His Conduct Was Harassing

The fault requirement for criminal harassment has been described as "one of the most controversial elements of the crime" and has been dealt with differently in different jurisdictions.[170] The *mens rea* for criminal harassment in s. 264 is whether the accused knew or was reckless with respect to the fact that the complainant was harassed. This requirement has been criticized for allowing the man who sees harassment as "romantic pursuit" of the complainant to avoid conviction.[171] Similarly, the man who calls or texts his former partner 200 times under the guise of resolving access to children will be acquitted if he does not even consider whether that behaviour is harassing.[172] In some cases the *mens rea* requirement has been interpreted as a responsibility on women to communicate to the potential accused that she is afraid or harassed.

This interpretation can be analogized to the early interpretation of non-consent in the sexual assault context. Early case law put the responsibility on women to communicate a "no" on the issue of consent and only more recently have the courts come to an understanding of affirmative consent that requires a communication of consent (not of non-consent).[173] In criminal harassment, the wording of section 264 and its judicial interpretation creates an ongoing

---

[170] Troy McEwen, Pall Mullen, Rachel McKenzie, "Anti-Stalking Legislation and Practice: Are We Meeting Community Needs?" (2007) 14:2 Psychiatry, Psychology and Law 207 at 209.
[171] One study found that 58% of stalkers were motivated by their unwillingness to accept that the relationship was over. Doris Hall, "Outside looking in: stalkers and their victims" (doctoral dissertation, Claremont Graduate School, 1997) cited in Goldsworthy & Raj, *supra* note 19 at 179.
[172] Three leading psychologists studying "stalking" suggest that many perpetrators will not have the high level of subjective fault that is demanded by some legislation such as Canada's: "The upshot of this lack of intent is that offenders who have caused great damage to their victims over extended periods of time have been found not guilty and released (McEwen, Mullen, & McKenzie, *supra* note 170 at 209).
[173] *Ewanchuk*, *supra* note 49.

requirement that a woman communicate to the accused that she is being harassed. In other words, harassing male pursuit of women which causes fear is acceptable unless she communicates otherwise to him. Sometimes contacting the police or seeking a restraining order will be sufficient to demonstrate one's harassment,[174] but as the data in the sample demonstrates, the existence of a no contact order does not make conviction inevitable. The sample did not contain many intimate partner cases where the male accused was acquitted because he lacked the *mens rea* for criminal harassment. This is in part because *mens rea* is usually the last element considered: the trial judge does not even consider *mens rea* if there is a reasonable doubt about the complainant's lack of fear or its reasonableness, both of which are part of the *actus reus*.

There is also an overlap between *mens rea* and reasonable fear such that a finding of *mens rea* is less likely where the judge has concluded there is no reasonable fear. The steps the complainant takes to avoid the accused, and what she communicates to him, will be critical for both elements. The following is taken from *R v Mustaka* and demonstrates the overlap between the elements of criminal harassment:

> These cases appear to often boil down to a question of degree. In *Ryback*, above, Finch J.A. looked to whether the complainant had made her rejection of the accused known to him, such that he must have been taken to be reckless as to the effect of his attention on her. *It seems the issue of communication may be relevant to both mens rea and the reasonableness of the complainant's assertion of fear*. Arguably, some level of persistent behaviour may occur in a dating context or in the course of a relationship breakup and not be either objectively frightening or indicative of recklessness. However, one would also expect that there is an onus on the accused to ensure that a complainant welcomes his attentions, rather than adopting a course of *wilful* blindness where there is no active encouragement. See: *R. v. Ewanchuk,* [1999] 1 S.C.R. 330.
>
> *… [A] complainant who fails to rebuff unwanted entreaties may in some circumstances be taken to be acting inconsistently with her assertion of fear.* That is essentially the argument here, that the complainant had not made it plain enough to Mr. Mustaka that the relationship was over, essentially that she was allowing or condoning his continued

[174] *R v PMB*, 2011 BCPC 370.

> attentions, which can either be taken to remove the objective basis for fear on the part of the complainant or, presumably, to negate recklessness on the part of the accused.[175]

As we have seen so often with sexual assault, the onus is put on the complainant to demonstrate that his harassing behaviour was unwanted. The judge went on to hold that there is a higher onus on the Crown when dealing with former intimate partners to establish that the accused's behaviour in pursuing a reconciliation crossed the line into criminal conduct unless the accused's conduct is "inherently offensive or obviously uninvited".[176] In other words, after being in an intimate relationship, you are expected to tolerate a certain amount of harassment. This is particularly problematic for women leaving abusive relationships.

In the six cases where the accused was acquitted on this basis,[177] it was common to see the rationale being that the complainant had failed in her efforts to inform the accused that his behaviour was harassing; the accused was not expected to figure that out for himself. In *R v Benjamin*,[178] the accused was convicted at trial but that conviction was overturned on summary conviction appeal. The judgment is a bit unclear as to which element of the offence led to the acquittal. However, the court made a number of relevant statements regarding *mens rea* and regarding the complainant's failure to communicate that she was harassed. For example, the Court stated:

---

[175] *Mustaka*, *supra* note 114 at paras 46-47.
[176] *Ibid* at para 48. This additional burden in the context of intimate partners is reminiscent of all the challenges around prosecuting spousal sexual assaults. See for example the work done on marital rape: Melanie Randall, "Sexual Assault and Spousal Relationships, 'Continuous Consent', and the Law: Honest but Mistaken Judicial Beliefs" (2008) 32:1 U Man LJ [Randall, "Sexual Assault and Spousal Relationship"] and Jennifer Koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience" *The Equality Effect* (September 2010), online: The Equality Effect <http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf> [Koshan, "The Legal Treatment of Marital Rape"].
[177] *Benjamin, supra* note 77; *Wease, supra* note 110; *Ross, supra* note 77; *Frohlich, supra* note 77; *Seaton, supra* note 71; *R v Menkarios*, 2010 ONSC 5478 [*Menkarios*]. In *Menkarios* the acquittal was quashed on appeal and a new trial ordered but I have been unable to find any record of whether the accused was retried.
[178] *Benjamin*, *supra* note 77.

> In her telephone conversation, Ms. D did not say that he frightened her or that he intimidated her or that she was threatened by him. She did not warn him that there would be consequences should they encounter each other again.[179]

The fact that complainant had initiated a phone call with the accused, even though the purpose of the call was to make clear that she did not want to see him again, was held against her even though the accused knew that the complainant wanted nothing to do with him:

> That Mr. Benjamin was obsessed and knew that Ms. D did not want to have anything to do with him does not mean that he knew that she was afraid or intimidated by his presence. It does not mean his conduct was designed to invoke the fear of an invasion of Ms. D's privacy. She never told him that he frightened her in their three-hour telephone phone call, which was their last direct contact before May 27, 2008. Her conduct in that telephone call, which she initiated, if anything, revealed her strength and her resolve not to be overborne by his desire to reconcile.[180]

In *R v Wease*,[181] the accused was initially convicted of criminal harassment on the basis of *wilful* blindness. The accused had admitted he didn't care what impact his actions had on the complainant and the trial judge found this was adequate to constitute wilful blindness. On appeal, however, the judicial focus was on the fact that the complainant had not sought a restraining order against the accused nor communicated the fact that she was afraid.

> I cannot agree that the accused engaged in such conduct that he knew harassed the complainant nor was he reckless or wilfully blind as to whether the complainant was harassed. In this case, the appellant received no warning that his conduct was considered harassment by the complainant; nor was this communicated to the appellant through the complainant's lawyer or through the police. There was no outstanding restraining order…There is no explanation given as to why, if the complainant was fearful and concerned as to her own emotional or physical well-being, she did not pursue a restraining order in the Family Court proceedings. [182]

---

[179] *Ibid* at para 30.
[180] *Ibid*.
[181] *Wease*, *supra* note 110.
[182] *Ibid* at paras 21-23.

Similarly in *R v Ross*,[183] a summary conviction appeal was allowed on the basis that the accused did not have the requisite *mens rea*. The accused suffered from mental health issues following an accident and had become aggressive and was behaving unpredictably towards his wife. Although the complainant considered herself to be separated from the accused, the appellate court found that she may not have effectively communicated the separation to him even though they were living in separate homes and she had started discussing divorce with him. She testified that she did not tell him that his behaviour was harassing because she was afraid it would escalate his conduct. The trial judge had clearly found that the accused knew his behaviour was harassing, given that the accused made repeated angry telephone calls to the complainant and made regular disruptive visits to the complainant's home and workplace. The summary conviction appeal court disagreed finding that she should have told him that she was afraid and that he should stop communicating with her. The Court also noted that there was never any police intervention telling the accused to stay away from the complainant even though the complainant had in fact called the police. The Court indicated that she had never followed up with an application for a restraining order nor was it clear that the police had actually spoken with the accused and warned him not to contact the complainant.[184] There may be a number of reasons why a woman would not want to communicate her fear to her former intimate partner. For example, a communication of fear could make the complainant feel more vulnerable to the accused and could encourage the accused to persist in his behaviour. In essence, a communication of fear could demonstrate that the accused has been successful in his attempts to harass the complainant thus giving the accused even more power over her. The complainant may

[183] *Ross*, *supra* note 77.
[184] *Ibid* at para 33.

feel she needs to retain some sense of control of the situation and not to reveal to the accused just how fearful she is.[185]

The *mens rea* cases also demonstrate similar concerns to those of the subjective fear cases – if the complainant initiates contact, for example, it is more likely that the accused will be found not to have the *mens rea*. Paradoxically, she is expected to communicate the fact that she is harassed and yet not to communicate with the accused. In *R v Frohlich*, the Court found that the complainant was "equivocal" because she had contacted the accused twice during the relevant time period, even though one of those contacts was to insist that he have no further contact with her.[186] Similarly, in *R v Seaton*, the Court held that the complainant's failure to inform the accused that she had a new boyfriend and to tell him to stop calling her suggested that he did not know he was harassing her by continuing to attempt to reestablish their relationship.[187]

In *R v Menkarios*,[188] the accused was convicted at trial of assaulting his former girlfriend twice, however he was acquitted of criminal harassment because the complainant apparently unconsciously invited the harassment. The summary conviction appeal court summed up the trial judge's reasons for acquitting the accused of criminal harassment as follows:

> The trial judge stated that he acquitted the accused on the harassment charge because he was left wondering "whether in some unconscious sort of way [the complainant] may not have inadvertently invited that or in an attitude of appeasement just to let it pass and there may have been a note of encouragement".[189]

It is not entirely clear from the trial decision to what element of criminal harassment this "unconscious" invitation to be harassed relates although the appellate judgment seems to suggest

[185] See Goldsworthy & Raj, *supra* note 19 at 187 where the authors note that communicating distress to the harasser can be counterproductive because such behaviours tell him his harassment is having an effect.
[186] *Frohlich*, *supra* note 77 at para 54.
[187] *Seaton*, *supra* note 71.
[188] *Menkarios*, *supra* note 177.
[189] *Ibid* at para 3.

it relates to both the complainant's fear and the accused's intent. The appellate court noted that the trial judge's observation was purely speculative and that nothing in the evidence supported this conclusion. The trial judge had also indicated that the complainant had a tendency to look back at the history of their relationship and "to attribute great importance to minor hurts and peccadilloes,"[190] a puzzling finding given that that history included two assaults prior to the course of harassment in question. There was strong evidence of ongoing harassment and it was clear the accused had been warned by the police to stop contacting the complainant. This type of judicial pronouncement – that a woman unconsciously invited male violence against her – would no longer be considered acceptable in the sexual assault context and should not be acceptable in criminal harassment. These *mens rea* cases demonstrate the problem with putting the responsibility on the complainant to alert the accused to the fact that his behaviour is harassing. A subjective *mens rea* standard may be particularly inappropriate for criminal harassment given that the accused men in these cases seem able to detach themselves from the reality of their actions and to retain the belief that they are engaged in legitimate pursuit of their former partner or of access to children or property. The accused essentially gets a free pass with his harassing behaviour until the complainant has communicated her distress to him. As such, the accused who believes he is entitled to ongoing access to the complainant, or the accused who never bothers to think about how the complainant is perceiving his behaviour, is entitled to be acquitted.

Canada is not unique in struggling to find an appropriate balance between the need to recognize the harm to women from criminal harassment and the need to avoid over criminalization. Even though criminal harassment is a relatively new crime in most jurisdictions,

[190] *Ibid* at para 66.

several countries have reassessed their new legislation in light of the types of frailties identified in this paper. The following section presents a brief summary of how other jurisdictions have responded to the challenges in drafting criminal harassment legislation with a view to identifying options for reform in the Canadian context.

LESSONS FROM ABROAD

The 1990s saw a flurry of legislative action in the area of criminal harassment. In many jurisdictions, like Canada, the legislation was triggered by outrage over cases where women had been murdered after being criminally harassed, usually by a former intimate partner.[191] California passed the first anti-stalking law in the United States in 1990 and every other state followed suit.[192] Every Australian jurisdiction enacted legislation between 1993 and 1996 with several jurisdictions undergoing major revisions of this legislation only a few years after its enactment in response to criticism concerning gaps in the initial legislation.[193] New Zealand passed criminal harassment laws in 1997.[194] Very few of these jurisdictions require both a high level of intention and a particular response on the part of the complainant (as in Canada); most focus on one element or the other.[195]

---

[191] Grant, Bone & Grant, *supra* note 8; McEwan, Mullen, & MacKenzie, *supra* note 170 at 208.
[192] *Cal Penal Code,* § 646.9 (West 2014); Stark, "Coercive Control", *supra* note 19 at 256.
[193] Western Australia amended its anti-stalking legislation in 1998 in *Criminal Law Amendment Act (No 1) 1998* (WA), cl 4 & 5 (see Karen Whitney, "Western Australia's New Stalking Legislation: Will it Fill the Gap?" Western Australia L R 28 (1999) 293); Queensland significantly amended its anti-stalking law in 1999 in the *Criminal Code (Stalking) Amendments Act 1999* (Qld) (see Sally Kift, "Stalking in Queensland: From the Nineties to Y2K" (1999) 11:1 Bond Law Review 144); the Northern Territory added provisions to its anti-stalking legislation in 2002 in the *Criminal Code Amendments Act 2002* (NT); Victoria has also undertaken a number of amendments (see e.g. *Crimes (Stalking) Act 2003* (Vic)).
[194] *Harassment Act 1997* (NZ), 1997/92, s. 8.
[195] Out of all the Australian jurisdictions only South Australia has both a strict requirement that the perpetrator cause "serious harm" or "serious apprehension or fear" and that the victim actually fear harm as in Canada. (McEwan, Mullen & McKenzie, *supra* note 170 at 211). Subjective intention to cause fear on the part of the perpetrator was an essential *mens rea* element of almost all of the initial Australian anti-stalking provisions. However, some Australian jurisdictions have since amended their legislation to incorporate a less stringent intent requirement with Western Australia and the Northern Territory adopting an objective standard of *mens rea* based on reasonableness. The amended Queensland provision simply requires that the accused intend to direct their conduct at the complainant.

England has recently moved away from a rigid focus on fear of violence. In 1997, England enacted two provisions in the *Protection from Harassment Act 1997*. These provisions were reportedly enacted hastily without a lot of thought by a government wanting to appear to be responding to crime before an election.[196] Section 2 of the Act is the equivalent of a summary conviction offence which involves harassment leading to alarm or distress and is punishable by a maximum six months. Section 4A creates a more serious offence where the conduct leads to a fear of violence on the part of the complainant and is subject to a maximum punishment of five years. More recently, in 2012, England enacted a new provision through amendments to the *Protection from Harassment Act 1997*.[197] The 2012 amendments were in response to a government report demonstrating that existing laws against harassment were inadequate in many respects.[198] Concerns were raised that many cases were too serious for the lesser offence but could not meet the threshold of fear of violence required by the more serious offence. The fear of violence provision set too high a threshold and one which failed to recognize the impact of harassment even where there is no explicit fear of violence.[199] The new s. 4A(1)(b)(ii) adds a third offence where the accused engages in a course of conduct which causes the victim "serious

---

There is no requirement that he intend to cause her fear. The approach to the complainant's response is an objective test only with no subjective test of what the complainant was actually experiencing. The question is whether "reasonably in the circumstances" a person would apprehend or fear violence to themselves, others or to property or whether they would experience a "detriment". Detriment is defined broadly and includes serious mental, psychological or emotional harm and also includes an impact on the person's day-to-day behaviours such as changing one's route or form of transport to work or other places (see *Criminal Code (Stalking) Amendments Act 1999* (Qld)). Each jurisdiction in Australia has a different combination of elements with some focusing more on the intention of the perpetrator and others focusing on whether the behaviour in question could be reasonably expected to cause fear. Western Australia has fused these approaches by creating two stalking offences. "Stalking with intent to intimidate" requires a subjective intention in the perpetrator to intimidate the victim, but makes no mention of a required victim response. The second less serious summary offence requires that the perpetrator's actions could be reasonably expected to intimidate and did in fact intimidate the victim, but no subjective intent on the part of the perpetrator is necessary (see *Criminal Code Compliation Act 1913* (WA), s. 338E).

[196] See Judith Gowland, "Comment: Protection from Harassment Act 1997: the 'New' Stalking Offences" (2013) 77 JCL 387.
[197] *Protection of Freedoms Act 2012* (UK), c 9, ss 111, 112.
[198] Justice Unions' Parliamentary Group*, supra* note 33.
[199] Gowland, *supra* note 196 at 393; see also *R v Ireland*; *R v Burstow*, [1998] 1 Cr App R 177 at 180, 182, [1998] AC 147 (UKHL) where Lord Steyn raises this problem.

alarm or distress which has a substantial adverse effect on the victim's usual day-to-day activities" and where the defendant "knew, or ought to have known" that his conduct would have this effect. This offence is punishable by a maximum five years imprisonment.

While this English provision could be criticized for focusing on the reaction of the complainant, it has several advantages over s. 264. First, it recognizes that harassment can have a profound negative impact on a person's day-to-day life without necessarily causing them fear. Never knowing when the harasser is going to appear, incessant contact through social media, changing one's day-to-day life to avoid contact with the accused, the lack of control over one's life that results from ongoing harassment could all be recognized under this provision. The Home Office guidelines on the new law suggest that indicators of substantial adverse effect on the usual day-to-day activities could include:

- the victim changing their routes to work, work patterns, or employment;
- the victim arranging for friends or family to pick up children from school (to avoid contact with the stalker);
- the victim putting in place additional security measures in their home;
- the victim moving home;
- physical or mental ill health;
- the victim's deterioration in performance at work due to stress;
- the victim stopping/or changing the way they socialize.[200]

Thus, the English approach does not define one reaction that alone is sufficient. A broad range of possible reactions is acknowledged and the legislation does not purport to present an exhaustive list of the types of harms acknowledged. Under Canadian legislation, in contrast, a

[200] UK, Home Office Crime and Policing Group, *A change to the Protection from Harassment Act 1997* (Circular 018/2012) (Home Office Circulars, 2012).

deteriorating work performance or a change in socialization patterns would not pass the threshold of reasonable fear.

Second, the complainant's reaction is not subjected to a standard of reasonableness. There does have to be a substantial adverse effect on her daily activities but that affect is assessed subjectively. The English structure prioritizes the complainant's actual response rather than the response that is expected of her. English law holds the harasser to a standard of reasonableness while Canadian law subjects the complainant's reaction to a reasonableness requirement. While there is no requirement that the complainant's response be reasonable in the English legislation, there is a defence for an accused whose course of conduct was reasonable for his own protection or the protection of property.[201]

Third, the accused does not have to intend to harass the complainant. It is sufficient if a reasonable person would know that his behaviour is harassing. The man who thinks he is engaged in merely pursuing his former partner to win her affections or the man who believes he is entitled to harass his former spouse in his "zealous pursuit" of access to his children would not have a defence as he does under the Canadian legislation. While the judicial interpretation of this provision remains to be seen, and specifically whether courts are assessing the adequacy of the women's response, the legislation is an example of a law reform effort that tries to address the wide range of harms caused by criminal harassment in a manner that is responsive to the impact of such behaviour on complainants.

CONCLUSION

This case law study demonstrates that, too often, the Canadian law on criminal harassment puts women in the position where they must take responsibility for avoiding criminal

[201] *Protection from Harassment Act 1997* (UK), c 40, s 4(c).

harassment and for ensuring that the accused knows that his behaviour is harassing, rather than putting the responsibility on the accused to assess his own behaviour and determine that repeated phone calls or texts, watching, following, sending pictures to her workplace, etc. are harassing behaviours.

Criminal harassment may emerge from a previously violent relationship, it may escalate into physical violence, and in extreme cases, it can lead to femicide.[202] However, it is important to recognize that the potential for physical violence is not the only harm of criminal harassment. The cumulative impact of a number of behaviours which, when considered in isolation, might not individually warrant criminal liability, can have a devastating impact on a woman's life. These behaviours leave complainants with a sense of dread, loss of control and trauma which builds over time and can have a significant impact on their mental and physical health. Researchers have demonstrated in the context of intimate partner violence that it is not always the actual physical violence that causes the most harm to women but rather the psychological impact of the other controlling behaviours of the male partner.[203] Focusing on individual components of the harassment fails to acknowledge the totality of the ordeal experienced by the victim of criminal harassment.[204]

Canadian legislation accordingly needs to be rethought with a view to removing the obligation on women to establish that they have behaved like proper victims. Our experience

---

[202] MacFarlane, *supra* note 11.
[203] Evan Stark, "Commentary on Johnson's "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence" (2006) 12 Violence against Women 1019 [Stark, "Commentary on Johnson's"] at 1020 . See also Sheehy, *Defending Battered Women*, *supra* note 110 at 3, 234 where she demonstrates that the psychological abuse and fear involved in intimate partner violence can be more devastating than the physical violence.
[204] Emily Finch, *The Criminalisation of Stalking: Constructing the problem and evaluating the solution* (London: Cavendish Publishing Limited, 2001) at 172. See also Stark, "Coercive Control", *supra* note 19 at 257 where he describes "the cumulative effects when these acts occur as part of a single pattern and are directed at a single victim [which] completely misses the elements of subordination and entrapment, the most dramatic consequence when these acts are combined."

with sexual assault teaches that there is no ideal victim, and no "correct" response to criminal harassment. Putting requirements on women to respond in a particular way perpetuates stereotypes about female victimization by intimate partners.[205] In this respect, the recent English legislation provides a useful example. Removing the focus on fear and removing the requirement that that fear be reasonable would be a significant start. While it is impossible to remove the impact on the complainant altogether from the definition of the offence (because, in some cases, the behaviours of the accused are not otherwise criminal), it is important that no one response be privileged over others. Women should not be told that there is only one appropriate response to criminal harassment and that all others will be disregarded. The English legislation is instructive in this regard; it requires a substantial adverse effect on the usual day-to-day activities of the complainant thus acknowledging a range of responses to ongoing harassment. Canadian law could integrate some form of a substantial adverse effect on day-to-day activities. Her response to the harassment should not be subjected to a reasonableness inquiry as women are in a better position to understand the cues of the harasser and the seriousness of the harassment. People respond to trauma and abuse in different ways and the reasonableness requirement shifts the responsibility onto women to be "responsible victims". With respect to *mens rea*, an objective standard of liability, such as that adopted in the new English provision, would require the accused's behaviour to be subjected to a standard of reasonableness. The accused who *reasonably* believed that his behaviour was not harassing would still be acquitted but the accused who *unreasonably* believed he was romantically pursuing the complainant or asserting rights over property or children would no longer have a defence. In other words, we should shift the risk that the accused's harassing behaviour is unwanted onto him, not the complainant. More

[205] See for example the work done on marital rape: Randall, "Sexual Assault & Spousal Relationship", *supra* note 176; and Koshan, "The Legal Treatment of Marital Rape", *supra* note 176.

importantly, the requirement that the complainant communicate her fear to the accused could no longer be imposed by judges if a standard of reasonableness were used to assess the accused's mental state. It should be sufficient if the harassing conduct takes place repeatedly, has a significant adverse effect on the complainant, and the accused knows or ought to know that fact. These changes would make a significant contribution to ensuring that the criminal justice system recognizes the harm done to women from criminal harassment. Other jurisdictions, most notably England, have taken steps to amend their legislation to address the seriousness of criminal harassment. It is time for Canada to follow suit.