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# Stalking: Cultural, Clinical, and Legal Considerations

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## STALKING: CULTURAL, CLINICAL AND LEGAL CONSIDERATIONS

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### I. INTRODUCTION

Crimes of violence against women are unique in their treatment by our culture and our system of legal justice. Both culturally and statutorily, victims of crimes which have historically been perpetrated against women, such as rape, domestic violence and stalking, have received focus in a way no burglary,

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robbery or other crime victim has.<sup>1</sup> While this Article is intended to provide the legal community with a statutory and case law analysis of the crime of stalking, such a review cannot be undertaken without first considering this criminal behavior in light of its treatment by our culture.

Culturally, women who are rape and stalking victims have been portrayed in film and literature, sometimes as protagonists, sometimes as hesitant lovers who in the end are swayed by the amorous attentions of a persistent suitor and give in willingly to his ardent overtures. In the most dramatic cases found in literature, self-inflicted death was the only means by which a victim could communicate her total innocence in the perpetration of the crime. Cinema not only gives us very entertaining versions of stalkers and their crimes, but normalizes those crimes by the very nature of the cinematic art. While one could argue that "reel stalkers" can tell us relatively little about the real-life phenomenon, as their primary function is to entertain, the cultural consumption of stalkers and stalker narratives has much to tell us about our socially-constructed attitudes toward domestic violence. Stalkers occupy a very particular place in the American cultural imagination, being portrayed in film and literature as the most romantic of men, driven to extremes of following or haunting women by the overwhelming emotional experience of love. These cultural portrayals influence society's thinking about stalking and its victims, and are evidenced in statutory schemes where a "true victim" of rape or stalking must show certain reactions—fear, for example—in order for the offense to be considered criminal.

The complexities of the crimes of stalking and rape derive in part from the fact that the behavioral elements of these crimes, in a different context, are not criminal at all. Consensual sexual behavior or repeated telephone calls or flowers sent at the outset of a new romance are typically positive experiences for both individuals involved. When these same behaviors are unwanted by a woman or when they elicit fear in her, they enter the realm of the criminal code. Importantly, the focus of whether the behavior rises to the level of a crime, then, is not just on the offender's act, but decidedly on the reaction of his intended target. Further, the standard codified in many state laws, including Kentucky's, places a further burden on the victim, that her reaction be one which would be experienced by any "reasonable person."

<sup>1</sup> While statutorily the crime of stalking is gender-neutral, studies show that most stalking victims (four out of five) are women. See, e.g., PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 5 (1998).

Here is a circumstance where legal and clinical analyses of behavior are divergent. The clinical literature indicates that a person with a prior victimization experience may be more likely than someone never previously abused or victimized to feel threatened by stalking behavior. Does the special circumstance of prior abuse meet the reasonableness standard? What about a victim who is in denial regarding the degree of threat to which she or he is exposed? How does this scenario fit into the statutory scheme?

To further understand the complexities involved in stalking crimes, consider the following three scenarios:

*Scenario #1:* David and Diane were recently introduced to one another by mutual friends. After one evening together, David begins calling Diane daily and sending flowers to her workplace. David often leaves notes on her car with expressions of affection. Once or twice a week he surprises Diane by waiting outside her office in order to see her. Diane shares with friends how pleased she is with David's romantic attentions.

*Scenario #2:* After a year of dating, Diane ends the relationship with David due to several episodes of domestic violence. David, distressed by losing Diane, calls her daily in an effort to reestablish the relationship. He sends flowers to her workplace and occasionally waits outside her office to see if she leaves with another man. Diane shares with friends how frightened she is with David's persistent contact and pursuit of her.

*Scenario #3:* Barbara has never met Robert, but has seen him interviewed on television programs. Barbara develops a delusional pattern of thinking in which she is in a relationship with Robert. Unknown to him, she follows him and waits outside his office in order to see him depart. Robert never becomes aware of Barbara's pursuit or following behavior.

The behaviors described in each of the three scenarios is essentially the same: calling, following, waiting outside a workplace. In each case, however, they are experienced differently. In the first scenario, Diane experiences David's behaviors as romantic and positive. In the second scenario, in the context of prior violence in the relationship, these same behaviors have entirely different implications for Diane and she reacts with fear. In the third scenario, the target of the behavior is unaware of the stalker. When considering these scenarios from a statutory perspective, the complexity of the law becomes

clear. While scenarios one and two involve the same behavior, only the second is criminal conduct because the first does not elicit fear in the victim or target. Whether the third scenario constitutes criminal conduct is dependent upon the state in which the parties live, as will be discussed later.

## II. WHAT IS STALKING?

The criminal justice system's experience with the crime of stalking is less than a decade old. Stalking was first codified as criminal by California after the murder of a young actress who was shot to death by an obsessed fan. The death of Rebecca Schaeffer and murders, within a month and a half, of four other California women demonstrated the inadequacy of the existing criminal justice system in addressing the behaviors which comprise a pattern of stalking and the potential dangers they pose. In each of the California deaths, the women had sought restraining orders and each had communicated to others the fear that she would be killed. Within two years of the passage of the California statute, over half the states, including Kentucky, had passed laws to criminalize stalking; by 1998, all fifty states had stalking laws. National studies now show the prevalence rate of stalking to reach 12% for women and 4% for men.<sup>2</sup> For women, this prevalence rate means over 1.6 million women across this country are stalked every year.<sup>3</sup>

Nationally, approximately 12% of all stalking cases result in criminal prosecution.<sup>4</sup> Sufficient analysis of this data is not available to distinguish the type of stalking cases most often prosecuted, but if the pattern in rape and domestic violence cases is applicable, cases are less likely to be reported by victims when the perpetrator is known. In Kentucky during fiscal year 1999, there were 206 felony and 513 misdemeanor stalking charges processed by the court system.<sup>5</sup> Civil orders of protection are also used as a remedy to stalking, although national figures show that 25% or less of victims obtain protective or restraining orders, and when they are obtained, the majority are violated (69% of orders received by women are violated and 81% of orders given to men are violated).<sup>6</sup> The violation of protective orders by stalkers has also been found by other researchers.<sup>7</sup>

<sup>2</sup> See *id.* at 4.

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* at 2.

<sup>5</sup> See KENTUCKY ADMINISTRATIVE OFFICE OF THE COURTS, STALKING (1999).

<sup>6</sup> See TJADEN & THOENNES, *supra* note 1, at 12.

<sup>7</sup> See Ronnie B. Harmon et al., *Obsessional Harassment and Erotomania in a Criminal Court Population*, 40 J. OF FORENSIC SCI. 188, 194 (1995); Paul E. Mullen & Michelle Pathe,

Subsequent sections of this Article will provide a detailed statutory analysis of the elements of the crime of stalking. In general, clinical researchers agree that a comprehensive definition of stalking includes three elements: (1) a pattern of repeated conduct which (2) is unwanted and experienced as intrusive by the victim and which (3) includes an implicit or explicit threat which places the victim at some level of fear.<sup>8</sup> Research studies now document the wide range of behaviors found within this broad definition, including unwanted telephone calls, letters or other sent items, vandalized property, and other forms of harassing communications.<sup>9</sup> More recently the term cyberstalking has been applied to the use of electronic mail as a means of stalking a victim.<sup>10</sup> Notably, one study which looked at the type of stalking behavior committed by different types of offenders, found those stalkers with a prior relationship with the victim exhibited a greater incidence of face-to-face contact, a finding important to the level of risk posed by a stalker to a known victim.<sup>11</sup>

Approximately one-half of all stalking victims are threatened in the course of their victimization.<sup>12</sup> Meloy describes two types of threats exhibited by stalkers which reveal information regarding the offender's state of mind.<sup>13</sup> Instrumental threats are used to control or coerce the victim.<sup>14</sup> The primary intent is domination, with affective expressions on the part of the stalker being secondary to the desired gain.<sup>15</sup> Expressive threats are motivated less by a desire to control and more by a need on the part of the stalker to regulate his emotional state.<sup>16</sup> In these cases, threats are often used as a means of communicating anger or hatred.<sup>17</sup>

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*Stalking and the Pathologies of Love*, 28 AUSTL. & N.Z. J. OF PSYCHIATRY 469-77 (1994).

<sup>8</sup> See Darrah Westrup & William J. Fremouw, *Stalking Behavior: A Literature Review and Suggested Functional Analytic Assessment Technology*, 3 AGGRESSION AND VIOLENT BEHAVIOR, 255, 258 (1998).

<sup>9</sup> See *id.* at 256.

<sup>10</sup> J. Reid Meloy, *The Psychology of Stalking*, in THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES 2, 10-12 (J. Reid Meloy, ed., 1998).

<sup>11</sup> See Michael A. Zona et al., *A Comparative Study of Erotomanic and Obsessional Subjects in a Forensic Sample*, 38 J. OF FORENSIC SCI. 894, 902 (1993).

<sup>12</sup> See TJADEN & THOENNES, *supra* note 1, at 2.

<sup>13</sup> See Meloy, *supra* note 10, at 8-10.

<sup>14</sup> See *id.* at 8.

<sup>15</sup> See *id.* at 8-9.

<sup>16</sup> See *id.* at 9.

<sup>17</sup> See generally THE BIRTH OF HATRED (Salman Akhtar et al. eds., 1995).

An analysis of stalking based upon desired versus undesired behavior is insufficient; not all unwanted behaviors are experienced by the target as threatening or frightening. To address this oversimplification, the term "obsessive relational intrusion" (ORI) was created. It means the "repeated and unwanted pursuit and invasion of one's sense of physical or symbolic privacy by another person, either stranger or acquaintance, who desires and/or presumes an intimate relationship."<sup>18</sup> Stalking and ORI are related, although not interchangeable, as some stalkers have no desire to engage in a relationship with the person they stalk.<sup>19</sup> Additionally, in many of these cases the intrusive behaviors are an annoyance, but do not elicit fear.<sup>20</sup> Cupach and Spitzberg have organized the behaviors involved in ORI into what they describe as four factors of intrusion: pursuit (e.g., following, appearing at the target's workplace); violation (e.g., recording conversations); violence (e.g., slapping, hitting, threatening with physical harm); and hyperintimacy (e.g., making exaggerated claims of affection, describing acts of intimacy).<sup>21</sup>

#### A. The Cultural Context for Stalking

##### 1. Cinematic Portrayals

The relationship between popular cinema and stalking has long been an ambivalent one. Almost since the origin of the movies (usually dated to 1895), stalkers have populated the screen, often in the form of one-dimensional evil-doers (vampires, for example, make an early appearance), but often too as star-crossed lovers who pine in the bushes outside their darling's window, send love letters, and beg for reciprocal adoration. Many have been characters to be hated and feared, of course; yet the audience has found itself drawn to even the least palatable stalkers, from Peter Lorre's lugubrious serial killer in Lang's *M*<sup>22</sup> to the irresistible madman Hannibal Lecter in Demme's *Silence of the Lambs*.<sup>23</sup> Moviemakers have persistently toyed with their audiences by blurring the line between the acceptable and the unacceptable in their stalkers' actions, by creating characters that are as seductive as they are monstrous.

This ambivalence goes beyond the spectatorial identification with actants

<sup>18</sup> William R. Cupach & Brian H. Spitzberg, *Obsessive Relational Intrusion and Stalking*, in *THE DARK SIDE OF CLOSE RELATIONSHIPS* 233, 234-35 (Brian Spitzberg & William Cupach, eds., 1998).

<sup>19</sup> See *id.* at 236.

<sup>20</sup> See *id.* at 242-43.

<sup>21</sup> See *id.* at 241-44.

<sup>22</sup> *M* (Atlantic-Film, S.A. 1931).

<sup>23</sup> *THE SILENCE OF THE LAMBS* (Orion 1991).

on screen, however. Whether we sympathize with the activities of our protagonist or find them appalling, whether we see ourselves in the stalker or reject him, as spectators we are so often allied with his position in cinematic space (his gaze, movements, etc.) that we find ourselves bound to him and his desires, like it or not.<sup>24</sup> The spectator, in other words, does not merely identify with characters on screen, but is projected through the camera's eye into the cinematic world, sometimes as simple observer, but often as predator or victim.<sup>25</sup> He may wish to identify with a likable (and terrorized) character like Laurie Strode in Carpenter's *Halloween*,<sup>26</sup> despite his sympathy for her, however, he has no choice but to identify with the predator's gaze. So much depends upon this, especially in the case of a horror film like *Halloween*: to experience the film's horror, the victim's fear, and her ultimate relief when at last she defeats her assailant, requires that we see the world, at least in certain crucial moments, through the stalker's eyes.

Any discussion of the cinematic portrayal of stalkers and their victims should not neglect to observe the way cinema itself engages in (and thereby normalizes) the practice of stalking. The camera stalks (or at least spies on) characters even if it intends them no harm. Indeed, so much of the pleasure of watching movies is bound up in the privilege that cinema gives the spectator, i.e., the license to watch/spy with impunity. Movies are sanctioned voyeurism. And the spectator is a voyeur whose crime has been established, and sanctioned, by cinematic convention. Even if the desire to watch without being watched (fundamental to cinematic pleasure) does not necessarily entail the more transgressive (and illegal) desire to stalk, filmmakers forge this link both formally and thematically so as to obscure the boundaries between the licit and illicit.

Two excellent examples of this phenomenon are Hitchcock's *Rear Window*<sup>27</sup> and DePalma's *Body Double*,<sup>28</sup> where the protagonist's (and by

<sup>24</sup> The stalker is referred to here as a masculine figure, keeping in mind that the Hollywood stalker has been gendered feminine in many significant instances. Mention of the female stalker will appear later in this section.

<sup>25</sup> This distinction is made by Christian Metz in his seminal article "Identification, Mirror" to be found in *THE IMAGINARY SIGNIFIER: PSYCHOANALYSIS AND THE CINEMA* (1982). Identification with the camera, or more properly the camera's vanishing point (we can't see the camera, even if we know it is there), is what Metz deems primary identification. The spectator's relationship with on-screen characters is secondary identification. *Id.* at 56.

<sup>26</sup> *HALLOWEEN* (Compass International & Anchor Bay Entertainment 1978).

<sup>27</sup> *REAR WINDOW* (Paramount 1954).

<sup>28</sup> *BODY DOUBLE* (Columbia 1984).

extension the spectator's) initial desire to merely watch evolves into an unhealthy, and potentially criminal, obsession. Both Jefferies in *Rear Window* and Jake in *Body Double* justify their increasing willingness to break the law by insisting they are getting to the bottom of a mystery, an excuse that blinds Jake in particular to the fact that he stalks the object of his mysterious interest throughout much of the movie. These movies, and others such as *Sliver*<sup>29</sup> that explicitly thematize voyeurism/stalking, do not merely attempt to expose stalkers to our gaze; they expose our own desire to watch as potentially obsessive as well. The cameras of Hitchcock and DePalma show the stalker in action, and this captivates us to a large extent because their cameras become stalkers in the bargain.

This theoretical proviso is not intended to overextend the equation "cinema equals sanctioned stalking," but to remind us, as we enter into a discussion of contemporary stalker movies, that the stalker's activities are, in cinematic terms, fundamentally enjoyable to the spectator, even if he or she wishes to reject them. With this in mind we can turn to a more specific study of stalking films, focusing on recent American cinematic history, thus making these remarks more relevant to the larger issues raised by this Article.

Thus, the inevitable collusion between cinematic pleasure and stalking makes it virtually impossible to compile anything approaching a complete list of stalking movies. Even if one limits the field to actual on-screen stalkers and more recent vintages, the numbers are staggering. Innumerable films use elements of stalking, and some genres, horror for example, practically require them. Made-for-television movies traffic heavily in stalker narratives ("Lifetime" in particular seems intent on cornering the market), as do television drama series. The project here, then, is not to address the totality of stalker films, but to examine salient examples that might shed light on American cultural attitudes toward stalking and how they are informed, or reflected by, these films.<sup>30</sup> Even if it is impossible to establish a complete typology of stalker movies, we can examine some of the most common elements that make up most, if not all, stalking films.

First among these are the stalkers themselves and the targets of their crimes; it is here that we might well consider the gender politics of stalker films. A preliminary remark about American cinematic stalkers will surprise

<sup>29</sup> *SLIVER* (Paramount 1993).

<sup>30</sup> With this in mind the filmography that follows is at best indicative of the kinds of movies where stalking dominates the film's narrative.

almost no one who has watched *Fatal Attraction*,<sup>31</sup> *Cape Fear*,<sup>32</sup> or *Sleeping with the Enemy*.<sup>33</sup> These films rarely attempt to portray typical or average stalkers. Whereas the occasional example actually manages to resemble his real-life brethren, the overwhelming majority smack of Hollywood invention. In the interest of creating stark dramatic contrast, these films usually draw their stalkers in exaggerated, even caricatural strokes. Stalkers can (and indeed should) be exceedingly charming and attractive at the outset—they seduce their victim and the audience alike. But once they are prodded to stalk, usually by romantic rejection, they become singularly vindictive, morphing from charming to monstrous in the blink of an eye. They are very resourceful and usually intelligent, though this intelligence often masks deep emotional scars (witness Max Cady in *Cape Fear*).<sup>34</sup> They also appear willing to go to almost any lengths to destroy their victim in the end, such as David in *Fear*<sup>35</sup> who, rebuffed by his girlfriend Nicole, tries to kill her entire family and set fire to her house with the help of his hoodlum friends. Or Robert DeNiro's knife salesman in *The Fan*<sup>36</sup> whose career as a stalker finally ends on the pitcher's mound in San Francisco's Candlestick Park. Most spiral out of control (Travis Bickle in *Taxi Driver*,<sup>37</sup> Darian in *The Crush*<sup>38</sup>), and nearly all die at the hands of their victim.

It is hardly surprising that these characters are unrealistic—the need to entertain in Hollywood almost always trumps the desire to reflect reality (hence the strange maxim that stalkers die while their victims live—hardly a reflection of reality). These are meant to be spectacular movies. Yet some of them make the paradoxical claim to tell true stories. Bob Fosse's *Star 80*,<sup>39</sup> for example, changes no names to protect the innocent in its recounting of the Dorothy Stratton murder. The film painstakingly recreates the atmosphere of Hugh Hefner's California mansion, and further anchors itself in reality by presenting parts of Dorothy's story in the form of interviews with friends of the victim. Still, *Star 80* is no less spectacular and unreal in its treatment of the final tragedy than most other stalker films, despite its fidelity to actual

<sup>31</sup> *FATAL ATTRACTION* (Paramount 1987).

<sup>32</sup> *CAPE FEAR* (Universal 1991).

<sup>33</sup> *SLEEPING WITH THE ENEMY* (New Line 1991).

<sup>34</sup> See *CAPE FEAR*, *supra* note 32.

<sup>35</sup> *FEAR* (Universal 1996).

<sup>36</sup> *THE FAN* (Paramount 1981).

<sup>37</sup> *TAXI DRIVER* (Columbia 1976).

<sup>38</sup> *THE CRUSH* (Warner Bros. 1993).

<sup>39</sup> *STAR 80* (Warner Bros. 1983).

events.

Let us return, meanwhile, to the portrait of the stalker that began this section in order to fill in some of the missing blanks. Needless to say the "reel stalker" is most often male. He can hail from the monied classes, though he is not infrequently working class/poor, a detail that provides for class conflict (and anti-poor paranoia), since the female victim is invariably white middle/upper-middle class. Some begin to stalk out of romantic desperation (*Star 80*), though many seem to require little motive for their actions, such as the sociopathic husband in *Sleeping with the Enemy*, the serial killer in *Copycat*,<sup>40</sup> or Michael Myers in *Halloween* (*Fear and Through the Eyes of a Killer*<sup>41</sup> combine these possibilities). Either way the characters rarely show their true colors until it is too late, until they have already insinuated themselves into the lives of their future victims.

Indeed the stalker often appears too good to be true at the outset. *Through the Eyes of a Killer* is typical of this scenario, and can serve as a useful example. Laurie is a 30-something professional woman who breaks up with her two-timing lover/boss in the movie's opening frames. She moves out on him and (somewhat inexplicably) purchases an apartment in an old building that needs massive reconstruction. Enter Ray, a handsome stranger who offers his services as deluxe rebuild and, soon enough, lover. He excels in both roles early on. But whereas Ray never betrays Laurie as a contractor, he certainly does as a lover when he seduces Laurie's best friend. Devastated, she banishes him from her private life.

As with most stalker films, Ray begins his stalking career positively, i.e. by begging for forgiveness, sending flowers, etc. But when Laurie resists him, the wolf sheds his sheep's clothing by murdering first the former lover, then the best friend. The twist in *Through the Eyes of a Killer*, its stab at originality, involves the apartment. Ray has secretly constructed a hiding place inside the apartment itself and is thus able to stalk/terrorize Laurie from within. He stalks her from his secret nest, and when all appears lost to him, attempts to kill her. This protracted, climactic scene features a dazed but tenaciously brave Laurie doing all she can to escape the apartment. When all else fails, she manages to outwit her attacker and brutally slay him before he does the same to her.<sup>42</sup>

<sup>40</sup> COPYCAT (Warner Bros. 1995).

<sup>41</sup> THROUGH THE EYES OF A KILLER (Malofilm Group 1995).

<sup>42</sup> She has taken on a role that will be familiar to connoisseurs of the slasher sub-genre, what

What is striking about *Through the Eyes of a Killer* and virtually all stalker films where a man stalks the lover who has jilted him, is that the figure of the stalker takes on decidedly less importance than that of the victim. The spectator takes little interest in the stalker's motives, and as in *Halloween*, *Copycat*, and many others, those motives are scarcely explained (there is ultimately one answer to all questions: the stalker is a lunatic). It is the victim, or more properly her fear, that fills the screen. And it is through the eyes of a killer that the spectator consumes that fear, through what Laura Mulvey, in a ground-breaking article for feminist film studies, has called the sadistic-voyeuristic gaze.<sup>43</sup> These movies portray a female protagonist experiencing excessive and orchestrated suffering, not to mention a hyper-sexualized violence—the threat of rape is always close at hand. Female vulnerability is foregrounded; in movies like *Hear No Evil*,<sup>44</sup> *Jennifer 8*,<sup>45</sup> and *Copycat*,<sup>46</sup> for example, the woman is given a physical handicap (blindness is the favorite). The spectator allows himself to enjoy her pain because he realizes that, according to the rules of the genre, the terrorized female will at the end triumph over her aggressor.<sup>47</sup>

Are movies that feature a female stalker and a male victim so very different? In a word, yes. Women stalkers tend to be hysterical shrews who use their sexuality as a weapon. They have dispensed with the natural desires for family and motherhood, typically in favor of a career. Their victims, on the other hand, are usually married men whose sexual indiscretion at the film's beginning is at the source of the trouble.<sup>48</sup> The victim, then, is more than an individual; it is the (bourgeois) family that the stalker puts at risk. The classic example of this scenario is the much-discussed *Fatal Attraction*, a movie that in its original written form proposed a study of a man's responsibility for his

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has been called the "final girl." See CAROL J. CLOVER, MEN, WOMEN, AND CHAIN SAWS: GENDER IN THE MODERN HORROR FILM 35-41 (1992).

<sup>43</sup> See Laura Mulvey, *Visual Pleasure and Narrative Cinema*, 16 SCREEN 6-18, 16 (1975).

<sup>44</sup> HEAR NO EVIL (Fox 1993).

<sup>45</sup> JENNIFER 8 (Paramount 1992).

<sup>46</sup> See COPYCAT, *supra* note 40.

<sup>47</sup> The issue of the (male) spectator's identification with the stalker and/or his victim is more complicated than the authors have room to develop here. Suffice to say that the spectator's identifications shift from victimizer to victim and back again in a complicated circuit of libidinal relocations. See CLOVER, *supra* note 42; see also Tania Modleski, *The Terror of Pleasure: The Contemporary Horror Film and Postmodern Theory*, reprinted in FILM THEORY AND CRITICISM 691-700 (Leo Braudy & Marshall Cohen, eds., 1999).

<sup>48</sup> A notable exception: Clint Eastwood's disc jockey in *Play Misty for Me* (Universal 1971). Still it is a sexual dalliance at the beginning that sets the film's stalking into motion.



(mis)deeds, but that in its final screen version presents a good, if flawed, family under siege from Alex, the half-witch, half-(professional) woman.<sup>49</sup>

Significantly, it is not the victim's fear of being stalked that the film puts on display, rather his fear of being found out by his wife. Moreover, he does not kill Alex, the good wife Beth does, just as the daughter (and not the philandering father) dispatches Ivy in the culminating scene of *Poison Ivy*.<sup>50</sup> Susan Faludi has perhaps best articulated what others have pointed out about *Fatal Attraction*; in its rush to punish Alex, the film suggests that the women's liberation movement has bred a legion of unhappy career women who, having abandoned the traditional home, are left to stalk it instead.<sup>51</sup> This is a message that reappears, explicitly or not, in many other films. It is part of what one would describe as the fundamental paranoia (here, specifically male) that marks the genre.

Paranoia is ultimately a constitutive element of stalking movies; these films play on a variety of contemporary paranoias that may ultimately have no more than a tangential relationship to real stalking. Two, in particular, appear:

1. "The law can't save us." The message is clear in stalking films: don't count on the law to protect you. The police are ineffective, the courts hopelessly bureaucratized. Restraining orders are a cruel joke. If a stalker is out to get you, you'll do best taking the law in your own hands. The private investigator in *Cape Fear* sums this attitude up well when he asserts that, "If some lone creep out there targets you for some obscure reason, the system is slow but skeptical, pathetic even."<sup>52</sup>
2. "You can't run, you can't hide." No place is safe from cinematic stalkers, least of all the home. Fear of violation runs rampant. It should be noted, of course, that the home in question is almost always a protected, upper-middle class home in the suburbs. Indeed, the paranoia so present in stalker movies is manifestly of a white, upper-middle class, usually suburban variety. As has been mentioned, several of the stalkers are themselves working class or self-proclaimed white trash (David in *Fear*, Max Cady in *Cape Fear*, Daryll Lee Cullum in *Copycat*, etc.), and it is typically their attack on the house that culminates the film.

<sup>49</sup> See *FATAL ATTRACTION*, *supra* note 31.

<sup>50</sup> *POISON IVY* (New Line 1992).

<sup>51</sup> Faludi cites *Fatal Attraction* as an excellent example of the late-80s backlash against feminism. See SUSAN FALUDI, *BACKLASH* 117-23 (1991).

<sup>52</sup> See *CAPE FEAR*, *supra* note 32.

## 2. Musical and Literary Potrayals

The cultural treatment of stalking as a phenomenon is found, not just cinematically, but also in music and literature. In the 1983 hit single, *Hungry Like the Wolf*, the lead singer of the briefly superstellar pop group Duran Duran croons to some desirable female "I'm on the hunt, I'm after you."<sup>53</sup> What is obvious in the lyrics, the music video (hailed as number eleven for the century in MTV's Millennial count-down) quite literally runs away with: a theme that likens male sexuality to animal predation. The British pop star—a kind of New Wave version of the young Elvis, sporting panama hat and perpetual pout—chases a lithe young black woman through the jungles of Sri Lanka. Hunter and prey—both in ritual war-paint and increasingly tattered dress—eventually wind up on all fours on the jungle floor, at which point she swipes his cheek with her nails, leaving four perfect claw-marks. In terms of gender and racial politics, this is no pretty sight, but the video itself is irresistibly gorgeous, the song's repetitive sexual threats irresistibly hummable, the 80s heart-throb singer every girl's dream of a night in the jungle. Indeed, to the swooning, teenaged "Duranees" packed by the tens of thousands into their concerts, being "stalked through the forest" by Simon LeBon was an enviable, not a frightening, prospect. That is why it is hard for any aging female fan to read the 80s video, even now, as having anything remotely to do with the grimmer subject of stalking laws. LeBon sings, "Woman you want me, give me a sign" and the mixed messages of the video-actress—who mostly runs, but in one frame lunges for an aggressive kiss—corresponds to the syntactical ambiguity of these lyrics, which can mean either "Woman *if* you want me, give me a sign," or "Woman *I know* you want me *so* give me a sign." But the video, which is designed to seduce the viewer as well, does not encourage us to ask what LeBon's sexual "prey" really wants.

Wittingly or not, the Duran Duran song draws upon an age-old literary motif: the male "hunt" for sexual quarry. And in the broader context of the history of the English language, the word "stalking" in fact has more to do with hunting than with gender relations or domestic violence. Stalking as a category of criminal behavior is a relatively recent notion; the term, included in only the most recent edition of *Black's Legal Dictionary*,<sup>54</sup> has yet to appear in its legal sense in the most authoritative historical dictionary of

<sup>53</sup> *HUNGRY LIKE THE WOLF* (1982).

<sup>54</sup> See *BLACK'S LAW DICTIONARY* 1412 (7th ed. 1999).

English, the *Oxford English Dictionary* (*OED*), published in a new edition in 1989.<sup>55</sup> Nonetheless, the *OED* can tell us something about the word's usage in the literary discourse upon which stalking archetypes are based. The earliest recorded usage of the verb "stalk" (dating to the year 1000) carries the definition, now obsolete, "to walk softly, cautiously, or stealthily"; a later, more pertinent definition is "to go stealthily to, towards (an animal) for the purpose of killing or capturing it"; finally, we have the current sense, "To pursue (game) by stealthy approach."<sup>56</sup>

The lexical invisibility of stalking can be read a number of ways. Certainly, this does not mean that stalking as threatening behavior perpetrated by humans (usually male) against other humans (usually female) constitutes a behavior unique to the 1990s, or even that the literary database for the *OED*—emphasizing "classic" works by authors such as Shakespeare—never mentions the kind of obsessive and invasive behavior that current stalking laws are designed to curtail. Quite the contrary, the most useful response to the *OED*'s seeming omission is the tentative observation that *stalking is a metaphor*, as in the Duran Duran video. After all, people don't hunt people.

Or do they? Dictionaries, after all, don't know everything: they do not "make" meaning so much as record it, particularly in regard to early English, where obsolete definitions must be extrapolated from usage. Under the list of "figurative" uses of the verb "stalk," lexicographers have failed to include a relevant quote from Shakespeare: "Into the chamber wickedly he stalks,/ And gazeth on her yet unstained bed."<sup>57</sup> The poem is *The Rape of Lucrece*, and the stalker is the rapist, Tarquin. Seemingly, both rape and seduction fall under the category of the sexual "hunt," which makes it easy to see how the trope lends itself to a blurring of these categories. Christopher Marlowe writes that "Love is not full of pittie (as men say)/ But deaffe and cruell, where he meanes to pray."<sup>58</sup>

And indeed, it is among literary rapists like Tarquin that one is most likely to find prototypes for the contemporary stalker. That Shakespeare's culture lacks a label like "stalker" says more about the relative safety of modern women than it does about behavioral patterns in the Seventeenth Century.

<sup>55</sup> See OXFORD ENGLISH DICTIONARY, VOL. XVI (2d ed. 1989).

<sup>56</sup> *Id.* at 469-70.

<sup>57</sup> William Shakespeare, *The Rape of Lucrece*, in SHAKESPEARE: THE COMPLETE WORKS 1091 (W.J. Craig ed., 1980 ed.) (1594).

<sup>58</sup> Christopher Marlowe, *Hero and Leander*, in THE COMPLETE WORKS OF CHRISTOPHER MARLOWE 784 (Roma Gill ed., Oxford Univ. Press, 1997) (1598).

Stalking in the works of Shakespeare and his contemporaries is almost always the first stage of a *process*, the culmination of which is an act of violence or violation, the fruits of a will to control. This pattern is especially evident in drama, where the suspense fostered by flight-and-capture narratives makes for good plot. In John Webster's *The Duchess of Malfi*, an insanelly possessive brother subjects his sister to sexual surveillance, harassment, and finally incarceration, before his incestuous urges find their outlet in murder.<sup>59</sup> Thomas Middleton's and William Rowley's *The Changeling* involves a disfigured servant who dogs the heels of his mistress: "I know she hates me/ Yet cannot choose but love her. No matter:/ If but to vex her, I'll haunt her still. . ."<sup>60</sup> The object of his obsession even demonstrates the type of fear many statutes require of the stalking victim: "I never see this fellow, but I think/ Of some harm towards me, danger's in my mind still;/ I scarce leave trembling of an hour after."<sup>61</sup> Unfortunately, the heroine does not heed her instincts. Mistaking the servant's abject obedience for trustworthiness, she enlists him in the bloody business required to free herself from the unwanted attentions of yet another male, the fiancé her father has chosen for her. He happily carries out the murder, but then uses their secret to blackmail her into sex. When the conspiracy is revealed, he kills her and commits suicide. In another Middleton play, *The Lady's Tragedy*,<sup>62</sup> the heroine sees the danger coming; to escape abduction by the soldiers of an obsessed Tyrant, she commits suicide—only to have him use her corpse as a prop for his necrophile fantasies.

This last example may seem particularly sensational and lurid, but in fact the Tyrant's pathology is also dramatized, albeit more subtly, in plays by a contemporary with whom we are more familiar: William Shakespeare. Othello soliloquizes over his sleeping wife's helpless, if beautiful form, "Be thus when thou art dead, and I will kill thee/ And love thee after . . ."<sup>63</sup> Romeo speaks some of his best love-poetry in the tomb alongside Juliet, characterizing "amorous" death as a rival suitor.<sup>64</sup> Hamlet dives into Ophelia's grave in a

<sup>59</sup> John Webster, *The Duchess of Malfi*, in THE COMPLETE WORKS OF JOHN WEBSTER (F.L. Lucas, ed., 1927) (c. 1613).

<sup>60</sup> THOMAS MIDDLETON & WILLIAM ROWLEY, *THE CHANGELING*, (Matthew Black, ed., 1966) (1623).

<sup>61</sup> *Id.* at 44.

<sup>62</sup> THOMAS MIDDLETON, *THE LADY'S TRAGEDY* (1611).

<sup>63</sup> William Shakespeare, *Othello* act 5 sc. 2 lines 18-19, in SHAKESPEARE: THE COMPLETE WORKS (W.J. Craig ed., 1980 ed.) (c. 1604).

<sup>64</sup> William Shakespeare, *Romeo and Juliet* act 5 sc. 3 line 103, in SHAKESPEARE: THE

contest of machismo with her over-protective brother.<sup>65</sup> When stripped of their poetry, these fantasies of union through death bear a disturbing resemblance to the fantasies which drive the stalker.

"Was Shakespeare a Stalker?" Glen Skoler poses this provocative question in an article applying the psychodynamics of delusional stalking to Shakespeare's so-called "Dark Lady Sonnets."<sup>66</sup> Skoler makes a convincing case not only for the sonnet speaker's psychosis, but also for the troubled "collective unconscious" revealed in the larger discourse of romantic love of which these sonnets are still a part.<sup>67</sup> Though Skoler is clearly compelled by autobiographical interpretations of the sonnets, he stops short of diagnosing the poet himself with "a complex of personality disorders," but rather views the poems as manifesting Shakespeare's "profound artistic ability to consciously articulate the human unconscious."<sup>68</sup> Skoler here makes an assumption that current literary theorists would resist, that literature simply records a priori and universal "human unconscious," rather than helping to construct and perpetuate these psychological formations, as they evolve across time.

He also may be giving Shakespeare a bit too much credit for originality. In fact the sonnet sequence was, by Shakespeare's time, a well-worn literary form stamped by certain conventions, among them the very qualities so central to the above-mentioned psychoanalytic reading. The formula is as follows: the love-smitten speaker (ostensibly, the biographical poet) adores a beautiful yet inaccessible lady, writing sonnets to her in the vain hope of winning her love. The sonnet lady is typically characterized as cold, impervious, disdainful, or downright cruel; though virtuous, she tends to be the "villain" of the story, and the one on whom the speaker heaps the blame for his allegedly uncontrollable passion. Shakespeare's sonnet sequence differs from those of his literary progenitors—for instance, Petrarch, Dante, Sidney, and Spenser—only in its fixation on the atypical "darkness" (that is, dark complexion and hair) of the beloved, and in the moral "darkness" or promiscuity he attributes to her.<sup>69</sup> Because the ambivalence of the speaker is more pronounced, being anchored

COMPLETE WORKS 792 (W.J. Craig ed., 1980 ed.) (c. 1593).

<sup>65</sup> William Shakespeare, *Hamlet* act 5 sc. 1, in SHAKESPEARE: THE COMPLETE WORKS 901-02 (W.J. Craig ed., 1980 ed.) (1594).

<sup>66</sup> Glen Skoler, *The Archetypes and the Psychodynamics of Stalking*, in THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES 85-102 (J.Reid Meloy ed., 1998).

<sup>67</sup> See *id.* at 85.

<sup>68</sup> *Id.* at 95.

<sup>69</sup> See *id.* at 89.

in descriptions of sexual defilement, it is easier to see the likeness to truly psychotic behavior in the "Dark Lady" sonnets, as opposed to other love poems. And yet Skoler himself points out that this kind of denigration is linked—by way of the "mother/whore splitting fantasy"—to the idealizing language which appears elsewhere in the sonnets, and in the sonnets of Shakespeare's predecessors.<sup>70</sup> For the stalker's "erotomania usually entails the fantasy of a pure, spiritual, asexual union with the beloved," such as that which, ultimately, Dante imagines with his Beatrice.<sup>71</sup> And herein lies the greatest danger to the victim of stalking. For this fantasy—driven, in part, "by a great deal of psychosexual anxiety, inadequacy, jealousy, preoccupation and confusion"—in itself "can actually lead to violence."<sup>72</sup>

Among the earlier authors who played a role in the formation of the courtly love tradition was a woman, Marie de France, writing in the late 1100s, who understood the danger a rejected suitor might pose. "It would be less dangerous for a man to court every lady in an entire land than for a lady to remove a single besotted lover from her skirts, for he will immediately attempt to strike back."<sup>73</sup>

Historically speaking, it is women who have had most to fear from intimate relations gone awry. The male sonneteers' pleas for "pity" in the form of sexual favors, their complaints against the "cruelty" of the lady's resistance, their accusations that her "eyes . . . wound" them to the quick, their repeated claims that they will "die" (a euphemism for orgasm, but also meant literally) if not granted relief—all these conventions appear highly ironic in light of the literal violence to which women were and are subjected by their lovers and husbands, or by men who aspire to such intimacy. Moreover, the language of courtly love, considered alongside its modern descendent, the romantic discourse of popular music, does not just ironically prefigure or foreground these sociological issues—arguably, it justifies and reinforces the psychology of the batterer, the stalker, or the rapist. The age-old conventions of western love poetry are not simply "perverted" in the fantasy-life of the modern domestic violence offender: in fact, those conventions underwrite these fantasies.

<sup>70</sup> See *id.* at 90-92.

<sup>71</sup> *Id.* at 97.

<sup>72</sup> *Id.*

<sup>73</sup> MARIE DE FRANCE, THE LAIS OF MARIE DE FRANCE 105 (Glyn S. Burgess & Keith Busby trans., 2d ed. 1999).

This is particularly true in regard to the "classic" literary works which live on in popular culture, most notably in film. Skoler justifies his focus on Shakespeare's sonnets by citing Harold Bloom, who places Shakespeare at the center of the western literary canon (more recently Bloom has inflated this claim, arguing that Shakespeare literally "invented" modern human psychology.)<sup>74</sup> However, the Shakespearean work of greatest impact to the modern outlook on sexual relations is not the sonnet sequence, and particularly not the "Dark Lady" sonnets, but the play *Romeo and Juliet*, revived as a blockbuster film in two distinct generations, by directors Franco Zeffirelli (1968) and Baz Luhrmann (1996).<sup>75</sup> That *Romeo and Juliet* works better as contemporary romance than the sonnets is no accident: the latter form, after all, was moribund in the poet's own time, to the point where Shakespeare himself could not resist parodying it ("My mistress' eyes are nothing like the sun").<sup>76</sup> And in fact, *Romeo and Juliet* is a play which revitalized the tired conventions of the sonnet by incorporating them into dialogue. The lovers speak in sonnets when they first meet at the Capulet ball. In the famous balcony scene, Romeo chirps the language of courtly love while Juliet more prosaically (though metrically) frets about the real danger he is in. When asked "How cam'st thou hither?" he answers, "With love's light wings did I o'erperch these walls, / For stony limits cannot hold love out . . ." <sup>77</sup> She warns him that he could be murdered at any moment, and he rhapsodizes, "Alack, there is more peril in thine eye / Than twenty of their swords"<sup>78</sup> and so on.

But what has *Romeo and Juliet* to do with stalking? Very little at first glance. But it doesn't take much distortion of the well-known plot to see how closely the impulsive hero resembles the jealous ex-boyfriends or erotomaniac strangers against whom women seek legal protection. In the above-mentioned balcony scene—arguably the most famous romantic moment in world drama, or even world literature—Romeo is *literally* stalking in the earliest *OED* sense. Juliet is—or thinks she is—alone at her window (in Zeffirelli's film she is in her nightgown), talking to herself. It is a supremely private moment, and Romeo unapologetically relishes his voyeurism before stepping forward and startling her. Juliet's first reaction, understandably, is shock: "What man art

<sup>74</sup> See HAROLD BLOOM, *SHAKESPEARE: INVENTION OF THE HUMAN* (1998).

<sup>75</sup> *ROMEO AND JULIET* (Paramount 1968); *ROMEO AND JULIET* (Warner Bros. 1996).

<sup>76</sup> William Shakespeare, *Sonnet CXXX*, in *SHAKESPEARE: THE COMPLETE WORKS* 1124 (W.J. Craig ed., 1980 ed.).

<sup>77</sup> William Shakespeare, *Romeo and Juliet*, *supra* note 64, at act 2 sc. 2 lines 62, 66-67, at 772.

<sup>78</sup> *Id.* at lines 71-72, at 773.

thou, that, thus bescreened in night, / So stumblest on my counsel?"<sup>79</sup> It is not until she learns that this Peeping Tom is no creep in a trenchcoat, but in fact the doe-eyed boy she just fell for, that the romantic dialogue can resume. But is that not the stalker's fantasy—that the victim really "wants" him, that she could be sighing his name as he approaches? One thing modern students of Shakespeare inevitably complain about is the play's lack of "realism." Yet the play's unreality—for reasons we as a culture don't seem to willing to interrogate—seems inextricably connected to what makes it "romantic." Romeo's disregard of his personal danger, coupled with his poetic flights of fancy, are both risible and endearing in a romantic literary protagonist, but this kind of delusional and reckless behavior is not fun to watch in the real world. Not even if you love the guy—or once loved him.

Shakespeare enthusiasts might balk at the suggestion that Romeo is stalking Juliet in the balcony scene. The play as written is not about one-sided sexual obsession, but a consensual, monogamous relationship. On the other hand, it is also a play about covert sex between minors which results in a joint-suicide. Romeo kills two people before dispatching himself over Juliet's apparent corpse (he also threatens to kill a third, the bumbling servant who accompanies him to the crypt—an ugly moment few readers remember, eclipsed as it is by the ensuing bloodbath). Although Juliet is not technically one of his victims, the scenario of the suicide over a wife's fresh corpse should give us pause for its resemblance to incidents of real-life domestic violence, themselves arguably prefigured if not glorified in Shakespeare's later tragedy, *Othello*, where the hero, delivering his own pre-suicide eulogy, justifies the wife-murder as proof that he "loved not wisely, but too well."<sup>80</sup> Interestingly, Skoler relates Shakespeare's literary stalkers—Othello among them—to contemporary domestic violence offenders, but he fails to see the connection to *Romeo and Juliet*.<sup>81</sup> The homicidal stalker, he argues, enacts "a perverse, forensic version of the Romeo and Juliet fantasy that death is a form of eternal marriage and possession"<sup>82</sup>—but to speak of the murder/suicide sequence as a perversion, rather than a gross literalization of Shakespeare's love story is to occlude the resemblances between the literary archetype and the criminal re-enactment. In fact, Romeo kills himself thinking Juliet has already died for him (as she might indeed have done when taking the dangerous, coma-inducing

<sup>79</sup> *Id.* at lines 51-52, at 772.

<sup>80</sup> William Shakespeare, *Othello*, *supra* note 63 act 5 sc. 2 line 353, at 976.

<sup>81</sup> See Skoler, *supra* note 66 at 105-08.

<sup>82</sup> *Id.* at 105.

drug), just as Othello dies having heard his victim, in her last breath, blame herself for her own murder ("Who has done this deed?"/ "Nobody; I myself; farewell."<sup>83</sup>). Most stalkers simply want a real-life Juliet: a woman willing to abandon all social ties for them, give up all other men (cousin, father, fiancé) for them, follow them into exile. Violent stalkers want, in short, a woman willing to die for them. If she isn't, this justifies her murder.

Sometimes people *do* hunt other people. That is why the term "stalking" has entered American legal discourse, and why the *OED* will eventually have to incorporate the legal usage of the term. One of the most arresting points made by Skoler is that "The more delusional stalking fantasies become, the more archetypal they become"<sup>84</sup>—that is, the more deluded stalkers become, the more they mimic old stories, the supposed "universals" of human experience which literature captures. On the issue of universality, however, the fields of psychoanalysis and literary critical theory are at odds. Many contemporary literary scholars—particularly those interested in the relationship between representations and social issues like domestic violence—do believe that stories change over time; we might gradually change social realities by changing the stories we tell ourselves.<sup>85</sup> And in fact, such changes have already started happening. The story of Lucrece—who is valorized for committing suicide to redeem her "honor" after rape—was retold again and again in the Middle Ages and Renaissance; Shakespeare's version was one of his most popular works, in his own time.<sup>86</sup> Yet this particular old story generally inspires repugnance in modern readers, who know that rape victims should be counseled out of their psychic scars, rather than complying in their own degradation. The story of Lucrece is retold in Samuel Richardson's Eighteenth Century novel *Clarissa Harlowe*.<sup>87</sup>

The lyrics of the Duran Duran song,<sup>88</sup> if not damning with faint praise, at least represent the contest between pursuer and pursued as somewhat equal. In fact, true to the modern concept of stalking, this "hunt" is left incomplete at the end of the video. All we know is that the seducer/stalker winds up with a scratched face. And if the characterization of a woman as something with claws (in one startling frame her eyes are superimposed over a tiger's) seems

<sup>83</sup> William Shakespeare, *Othello*, *supra* note 63 at act 5 sc. 2 lines 121-22, at 974.

<sup>84</sup> Skoler, *supra* note 66 at 109.

<sup>85</sup> See generally GARY TAYLOR, *CULTURAL SELECTION* (1996).

<sup>86</sup> See William Shakespeare, *The Rape of Lucrece*, *supra* note 57.

<sup>87</sup> SAMUEL RICHARDSON, *CLARISSA HARLOWE* (Rutledge & Sons ed., 1868) (1748).

<sup>88</sup> See HUNGRY LIKE THE WOLF, *supra* note 53.

to endorse misogynist notions of woman-as-animal, at least the male persona here recognizes his *own* behavior as animalistic. This is not typically the case with the man who stalks down his "bitch"—or, to cite the Shakespearean prototype, the husband who "tames" his "shrew." Feminists have rightly complained about the overuse of the term "bitch" in rap music—but if rappers have Shakespeare on their side, why should they listen?

#### B. *Who Are Stalkers and What Harm do They Inflict?*

No singular clinical profile exists for the person who stalks. The bulk of research on stalkers to date has focused on the types of mental disorders experienced by this population.<sup>89</sup> Stalkers include men and women and they include persons known to the victim and those the victim has never seen. Dziegielewski and Roberts have developed a typology which places stalkers into three primary categories: the erotomania or delusional stalker, the domestic violence stalker, and the nuisance stalker.<sup>90</sup> The first two types have received the greatest focus in the clinical literature. Erotomania has long been associated with stalking by both men and women and has the potential to lead to direct acts of violence against a targeted victim.<sup>91</sup> Early psychiatric literature frequently focused on the woman as the stalker of a more powerful man (the same dyad revealed in films like *Fatal Attraction*), and described a pattern of frustrated and unrealized love turning to anger and resentment toward the targeted victim.<sup>92</sup> More recent writers have also noted the pattern of a disintegration of delusional love into aggression against the object of desire in cases involving erotomania.<sup>93</sup> Domestic violence stalkers, on the other hand, use stalking behaviors as a means of trying to control the victim with whom they have or have had a relationship. The motivation for this subset of stalkers is the need to regain or continue the relationship with the victim.<sup>94</sup>

<sup>89</sup> See Cupach & Spitzberg, *supra* note 18, at 233-63; Michael A. Zona, et al., *Psychiatric Diagnosis and the Offender-Victim Typology of Stalking*, in *THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES* 70-87 (J. Reid Meloy, ed., 1998).

<sup>90</sup> Sophia F. Dziegielewski, & Albert R. Roberts, *Stalking Victims and Survivors: Identification, Legal Remedies, and Crisis Treatment*, in *CRISIS INTERVENTION AND TIME-LIMITED COGNITIVE TREATMENT* 73-90 (Albert R. Roberts ed. 1995).

<sup>91</sup> See Mullen & Pathe, *supra* note 7, at 469-77.

<sup>92</sup> See C.G. De Clerambaut, *Les Psychoses Passionnelles*, in *EUVRES PSYCHIATRIQUES* 315-22 (1942).

<sup>93</sup> See J. Reid Meloy, *Unrequited Love and the Wish to Kill*, 53 *BULL. MENN. CLIN.* 477-92 (1989).

<sup>94</sup> See Ann W. Burgess, et al., *Stalking Behaviors Within Domestic Violence*, 12 *J. OFFAM. VIOLENCE*, 389-403, 398 (1997).

A critical dimension in domestic violence is the batterer establishing or trying to re-establish dominance and control. When this occurs, there is usually isolation of the partner in which there are few social contacts, there is physical and sexual aggression, and threats and abuse to the welfare of the children.<sup>95</sup>

In a useful supplement to psychological profiles, a second classification of stalking behavior takes its scheme, not from the stalker's psychological profile, but rather from behavioral descriptors of the stalking itself. Under this scheme, stalking is classified based on the nature of the relationship (domestic or non-domestic); the content of the communication (delusional or non-delusional); the level of aggression (low, medium or high); the level of victim risk; the motive of the stalker; and the outcome of the pattern of behaviors.<sup>96</sup>

The experience of being stalked, by a known or unknown person, can have profound effects on the mental health of a victim. Studies show evidence of anxiety, depression, sleeplessness, anger, intense stress, and symptoms of trauma.<sup>97</sup> Some studies report victims comparing the experience of being stalked for long periods of time to psychological terrorism.<sup>98</sup> In one study of victims, 83% reported that their "personalities had changed" and that they experienced feelings as a consequence of stalking that they had not prior to the crime, including often feeling paranoid, being easily frightened, more aggressive, and less trusting.<sup>99</sup>

### III. STALKING IN THE CONTEXT OF DOMESTIC VIOLENCE

While the first stalking law in the country resulted from the death of a woman who did not know the man who stalked and ultimately killed her, studies show the bulk of stalking cases involve men known to the women they torment.<sup>100</sup> Similarly, both cultural renditions in film and literature and

<sup>95</sup> *Id.* at 398.

<sup>96</sup> See James A. Wright, et al., *A Typology of Interpersonal Stalking*, 11 J. OF INTERPERSONAL VIOLENCE 487-502, 489 (1996).

<sup>97</sup> See Doris M. Hall, *The Victims of Stalking*, in THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES 134 (J. Reid Meloy, ed., 1998); Michelle Pathe & Paul E. Mullen, *The Impact of Stalkers on Their Victims*, 170 BRIT. J. OF PSYCHIATRY 12-17 (1997); Brian H. Spitzberg et al., *Exploring the Interactional Phenomenon of Stalking and Obsessive Relational Intrusion*, 11 COMM. REP. 33-47 (1998); Brian H. Spitzberg & Jill Rhea, *Obsessive Relational Intrusion and Sexual Coercion Victimization*, 14 J. OF INTERPERSONAL VIOLENCE 1, 3-20 (1999).

<sup>98</sup> See Hall, *supra* note 97 at 133.

<sup>99</sup> See *id.* at 133-35.

<sup>100</sup> See TJADEN & THOENNES, *supra* note 1 at 2, 5.

psychiatric research have historically emphasized cases of erotomania in their analysis of stalking, again focusing on the delusional stalker whose relationship with the victim did not exist in fact but rather in the distorted thinking pattern of the offender.<sup>101</sup> The heavy emphasis on this subtype of stalker in the cultural lexicon and in criminal justice and psychiatric literature is, therefore, misleading. Found prominently within that subgroup are domestic violence cases in which stalking is one in a collection of violent or abusive behaviors directed at the victim.<sup>102</sup>

National studies find a definitive link between stalking and other forms of violence against a partner.<sup>103</sup> In the National Institute of Justice study on stalking, fully 81% of women who were stalked by a current or former partner were also physically assaulted by that individual, and 31% also experienced sexual violence.<sup>104</sup> This study supports the finding of other researchers that stalkers are more prone to violence in those instances where a prior intimate relationship existed.<sup>105</sup> In addition to a correlation between stalking and violent behaviors against a partner, the National Institute of Justice study documented a relationship between stalking and controlling and other emotionally abusive behavior on the part of the offender, specifically, ex-husbands who stalked were more likely to exhibit jealousy, possessiveness and to limit the victim's contact with other people than were domestic violence offenders who did not stalk.<sup>106</sup> Similarly, Coleman found stalking to be related to verbal and physical forms of abuse,<sup>107</sup> and Spitzberg & Rhea documented a significant correlation between stalking and sexual coercion.<sup>108</sup>

While stalking has been identified as a common form of abusive behavior exhibited by domestic violence offenders, research has not yet identified the exact relationship between stalking and risk of death or injury to the domestic violence victim. The information that is available, particularly when coupled with anecdotal experiences of victim advocates, tends to suggest that the lethality of domestic violence increases with the co-occurrence of stalking.

<sup>101</sup> See M.V. Seeman, *Delusional Loving*, 35 ARCHIVES OF GEN. PSYCHIATRY 1265-67 (1978).

<sup>102</sup> See TJADEN & THOENNES, *supra* note 1, at 6.

<sup>103</sup> See *id.* at 8.

<sup>104</sup> See *id.*

<sup>105</sup> See Frances L. Coleman, *Stalking Behavior and the Cycle of Domestic Violence*, 12 J. OF INTERPERSONAL VIOLENCE 420-32, 420 (1997).

<sup>106</sup> See TJADEN & THOENNES, *supra* note 1 at 8.

<sup>107</sup> See Coleman, *supra* note 105 at 430.

<sup>108</sup> See Spitzberg & Rhea, *supra* note 97 at 14.

Some of the most profound evidence of the danger of stalking to battered women comes from the femicide research. In one of these studies, researchers found that 23.4% of the women in the study who had been murdered by a current or former partner had been stalked prior to the fatal crime.<sup>109</sup> In a ten-state study of actual and attempted intimate partner femicide, McFarlane et al. found a majority of victims experienced at least one episode of stalking in the year proceeding their death (76% of femicide and 85% of attempted femicide victims).<sup>110</sup> Additionally, femicide victims in this study who were physically abused prior to the murder were also far more likely to be stalked than non-physically abused women, again documenting the pairing of stalking and violent behavior.<sup>111</sup> As reflected in the table below, an important finding of the McFarlane et al. study is not just the prevalence of stalking experienced by women later killed by their partners, but the wide range of behaviors evidenced by stalkers.<sup>112</sup>

#### Types of Stalking Behaviors Experienced by Femicide Victims

##### Within 12 Months of Their Death

Followed or spied	53%
Sent unwanted letters	10%
Unwanted phone calls	45%
Waited outside house/school/work	47%
Left threatening messages on phone	22%
Communicated in other ways against her will	33%
Destroyed/vandalized property	34%
Frightened with weapon	39%

<sup>109</sup> Kathryn Moracco, et al., *Femicide in North Carolina, 1991-1993: A Statewide Study of Patterns and Precursors*, HOMICIDE STUDIES 422-446, 435 (1998).

<sup>110</sup> Judith M. McFarlane, et al., *Stalking and Intimate Partner Femicide*, HOMICIDE STUDIES, 300-316, 311 (1999).

<sup>111</sup> *See id.* at 309.

<sup>112</sup> *Id.* at 310.

Threatened to harm kids if victim left	13%
Threatened to kill self if victim left	19%
Threatened to take kids if victim left	15%
Frightened victim's family	24%
Left threatening notes on victim's car	10%
Threatened to report drug use	4%
Threatened to report to authorities	4%
Threatened to leave victim	15%

A recent study of stalking as evidenced in cases of domestic violence identified three components to the pattern of stalking.<sup>113</sup> Early on, batterers are not discrete or quiet about the behavior, rather they engage in it openly. If the attempts to contact the victim are not successful, often the behavior extends to other people in the victim's life with the intent being to discredit her.<sup>114</sup> The second factor is a transition phase from love to hate; during this phase, behaviors become more secreted and clandestine, characterized by behaviors such as hang up phone calls and entering her residence without her permission.<sup>115</sup> Burgess and her colleagues describe a period of ambivalence between the love and hate felt by the stalker for the victim in the transition phase, the former emotion being evidenced by the sending of flowers or other remonstrances which are engaged in openly.<sup>116</sup> If the stalker is still unsuccessful at this point, they are likely to target the victim aggressively, by engaging in such acts as breaking into her home with the intent to commit harm.<sup>117</sup>

Domestic violence research has long shown that the time of separation of the relationship poses one of the most dangerous times for a domestic violence victim. In the femicide study cited above, it is notable that former intimate partners were more likely than current partners to stalk women who they later

<sup>113</sup> *See* Burgess, et al., *supra* note 94, at 399.

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*



killed or attempted to kill.<sup>118</sup> Similarly, there is evidence that separation or divorce increases a woman's risk of serious domestic abuse. For example, women separated from their spouses were three times as likely to be victimized than divorced women and twenty-five times more likely to be victimized than women still married to the abusive partner.<sup>119</sup> Given that stalking is often used by domestic violence offenders as a means to reestablish control of a woman who has left the relationship, victims escaping from violence are frequently in need of the legal remedies offered by stalking statutes.

#### A. The Statutory Scheme Presented by Stalking

In 1992, Kentucky passed its first anti-stalking legislation.<sup>120</sup> The statutes define stalking as engaging in "an intentional course of conduct," which is "directed at a specific person or persons."<sup>121</sup> The "course of conduct" must consist of a "pattern" of behavior, essentially being "two or more acts, evidencing a continuity of purpose."<sup>122</sup> The prohibited behavior includes both a subjective standard, i.e., it "seriously alarms, annoys, intimidates, or harasses" the actual victim,<sup>123</sup> as well as an objective standard, i.e., it "would cause a reasonable person to suffer substantial mental distress."<sup>124</sup> The conduct must serve "no legitimate purpose,"<sup>125</sup> an element which prevents the statute from encompassing constitutionally protected behavior.

For stalking to constitute a crime, the defendant not only must stalk the victim, but also must make either an "explicit or implicit threat" which places the victim in fear of "sexual contact, physical injury, or death."<sup>126</sup> Stalking escalates from a Class A misdemeanor<sup>127</sup> to a Class D felony<sup>128</sup> when the

<sup>118</sup> See McFarlane, et al., *supra* note 110 at 309.

<sup>119</sup> See R. BACHMAN & L. SALTZMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1 (1995).

<sup>120</sup> See KY. REV. STAT. ANN. §§ 508.130-508.150 (Michie 1998). From 1992 through the time this Article was written, Kentucky statutes specifically addressed stalking solely in the criminal context. However, the 2000 Legislature enacted a civil right of action for stalking victims, effective July 15, 2000. See SB 116.

<sup>121</sup> *Id.* § 508.130(1).

<sup>122</sup> *Id.* § 508.130(2).

<sup>123</sup> *Id.* § 508.130(1)(a)(2).

<sup>124</sup> *Id.* § 508.130(1)(b).

<sup>125</sup> *Id.* § 508.130(1)(a)(3).

<sup>126</sup> *Id.* § 508.150.

<sup>127</sup> The penalty for a Class A misdemeanor is up to twelve months in jail. See KY. REV. STAT. ANN. § 532.090(1) (Michie 1998).

<sup>128</sup> The penalty for a Class D felony is one to five years in the penitentiary. See KY. REV. STAT. ANN. § 532.060(2)(d) (Michie 1998).

defendant has, in some way, repeatedly offended against the victim: either a protective order has been issued to protect the victim, a criminal complaint is pending concerning the same victim,<sup>129</sup> or the defendant has previously been convicted of a felony or Class A misdemeanor against the same victim.<sup>130</sup> In addition, a defendant who stalks his victim while possessing a deadly weapon thereby elevates his offense from a misdemeanor to a felony.<sup>131</sup>

#### B. The Historical Framework for Stalking

Like the rest of the nation, Kentucky passed its anti-stalking legislation as a reaction to the murders of four women in California.<sup>132</sup> As such, the legislation created a crime which is perceived as preventative, convicting an offender of a lesser offense before he commits the greater offense of homicide. As stated by one California court, "The need for an anti-stalking criminal statute had been demonstrated. Restraining orders and requests for police help had not saved the lives of these four women. Existing criminal statutes were inadequate."<sup>133</sup> Anti-stalking legislation "serves significant and substantial state interests by providing law enforcement officials with a means of intervention in potentially dangerous situations before actual violence occurs, and it enables citizens to protect themselves from recurring intimidation, fear-provoking conduct and physical violence."<sup>134</sup>

Kentucky's 1992 anti-stalking legislation created a unique crime, designed to give victims greater protection than ever before. The statute's preventive goal of acting before actual physical injury occurred went beyond the criminal law's traditional preference for providing a remedy only when a victim had

<sup>129</sup> Both the protective order and the criminal complaint element require that the defendant either have been served or have received actual notice.

<sup>130</sup> See KY. REV. STAT. ANN. § 508.140 (Michie 1998). Also, the felony offense of stalking requires that the victim fear not only "physical injury" as in the misdemeanor offense, but "serious physical injury." KY. REV. STAT. ANN. 508.140(1)(a)(b) (Michie 1998). Until 2000, the prior offense against the same victim could not have been a prior stalking offense. SB 263, effective July 15, 2000, allows for the prior offense to be a stalking offense.

<sup>131</sup> See KY. REV. STAT. ANN. § 508.140(1)(b)(4) (Michie 1998).

<sup>132</sup> Not only do all fifty states currently have some form of stalking statutes on the books, but as part of the federal Violence Against Women Act, Congress passed legislation in 1994 which made stalking a federal offense as well. A defendant is guilty of the federal offense of stalking when he crosses a state line with the intent to injure or harass another person, and in the course of or as a result of such travel, he places the person in reasonable fear of the death of, or serious bodily injury to that person or a member of that person's immediate family. See 18 U.S.C. § 2261A (Supp. IV 1998).

<sup>133</sup> *People v. Carron*, 44 Cal. Rptr. 2d 328, 331 (Ct. App. 1995).

<sup>134</sup> *State v. Ruesch*, 571 N.W.2d 898, 903 (Wis. 1997).



actually sustained injury or when a defendant took the "substantial step" required to commit a criminal attempt to injure.<sup>135</sup> In this respect, the anti-stalking legislation most closely resembles the crime of menacing, the intentional placing of another in reasonable apprehension of imminent physical injury.<sup>136</sup> However, stalking surpasses menacing in not requiring that the danger of physical injury be "imminent," and in providing a greater penalty.<sup>137</sup>

The pre-physical injury focus of stalking also resembles the crime of terroristic threatening, where the making of a threat to kill, to seriously physically injure, or to substantially damage property, constitutes a Class A misdemeanor.<sup>138</sup> But stalking, in contrast, does not require an actual threat; it may occur by means of an implicit threat as well, which arguably includes threats implied by conduct. Stalking thus goes beyond mere terroristic threatening in making the underlying conduct itself actionable, even in the absence of an explicit threat.

Still another way in which stalking creates a unique crime is its insistence in targeting behavior which is, by definition, pattern-based. While harassment traditionally targeted the same actionable conduct—following or repeatedly engaging in acts to alarm or seriously annoy another<sup>139</sup>—the anti-stalking legislation recognized that it was precisely the offense's repetitive nature which caused the victim harm. As one court noted:

Each time a stalker commits an act, as part of an established course of conduct, under circumstances demonstrating an intent to place the victim in fear of bodily injury or to cause the victim substantial emotional distress, the fear and emotional distress increases. The repetitiveness of stalking acts is indicative of the defendant's unrelenting obsession with the victim and often reveals an escalation of violence.<sup>140</sup>

As a result, Kentucky's stalking statute provides for the more severe sentence

<sup>135</sup> See KY. REV. STAT. ANN. § 506.010 (Michie 1998) ("A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he . . . (1)(b) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.").

<sup>136</sup> See *id.* § 508.050.

<sup>137</sup> Stalking in the Second Degree is a Class A misdemeanor, carrying a penalty of up to twelve months in jail. See *id.* § 508.150. Menacing is a Class B misdemeanor, carrying a penalty of up to 90 days in jail. See *id.* § 508.050.

<sup>138</sup> See *id.* § 508.080.

<sup>139</sup> See *id.* § 525.070.

<sup>140</sup> Commonwealth v. Leach, 729 A.2d 608, 612-13 (Pa. Super. Ct. 1999).

of either a Class A misdemeanor or a Class D felony, rather than the Class B misdemeanor provided for in harassment.<sup>141</sup>

Yet, most significantly, although Kentucky's anti-stalking legislation does not contain gender-based language, it was enacted to protect female victims. It was the death of four women which led to the creation of this legislation, and, in this regard, the anti-stalking legislation surpassed other forms of criminal legislation enacted to protect women. In a discipline which depends upon such backward-looking doctrines as *stare decisis*, domestic violence and sexual assault laws were nothing short of radical in their goal of changing hundreds of years of statutes and legal decisions which had failed to criminalize crimes against women. Such change functions largely through two mechanisms: 1) an insistence on naming: not only is the defendant's conduct considered criminal, but it is given proper and accurate terminology for describing exactly what type of crime is committed and 2) the recognition that the victim's voice needed to be heard, freeing her from the silence to which the legal system had relegated her. These two themes combined to create a third, perhaps unexpected, outcome, one directly expressed by the anti-stalking legislation: a privacy interest for women.

### C. Domestic Violence as a Source of Stalking Laws

As a crime, stalking is closely interwoven with offenses criminalizing domestic violence. Not only, statistically, do most stalkers commit their stalking offenses in the domestic violence context,<sup>142</sup> but anti-stalking legislation also closely parallels domestic violence legislation, both in history and in terminology. Historically, domestic violence was not considered a crime. At most, a court would feel that domestic violence was something to limit within the constraints of the infamous Rule of Thumb, whereby the husband could not use a stick thicker than his thumb to beat his wife, or a sort of inconvenience in which the law refused to interfere due to the husband's power within the household and the veil of privacy which surrounded it.<sup>143</sup> As one court in North Carolina stated: "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."<sup>144</sup>

Slowly, however, activists succeeded in changing domestic violence laws.

<sup>141</sup> See KY. REV. STAT. ANN. § 525.070 (Michie 1998).

<sup>142</sup> See TRADEN & THOENNES, *supra* note 1 at 8.

<sup>143</sup> See generally *State v. Rhodes*, 61 N.C. 453 (1868).

<sup>144</sup> *Id.* at \*4.

Not only did injuring or killing one's wife become subject to criminal prosecution like any other homicide or assault, but the defense of extreme emotional disturbance (EED)<sup>145</sup>—historically used by defendants to justify their actions—became increasingly frowned upon by the courts. In *Henley v. Commonwealth*,<sup>146</sup> for example, the intoxicated appellant unsuccessfully attempted to get his wife to leave her mother's home with him. When she refused, the appellant blamed her refusal upon her mother, and vowed he would "solve the problem." The appellant's singular version of such problem solving consisted of beating down the door of the house, and then shooting his mother-in-law thirteen times with a .22 caliber rifle in front of his wife and three children. At the police station, the defendant freely admitted to the homicide, bragging that "if he had more bullets he would have shot her more."<sup>147</sup> At trial, he asserted the defense of extreme emotional disturbance, which requires not only an emotional disturbance, but "a reasonable explanation or excuse for such disturbance, which reasonableness is determined from the standpoint of a person in the defendant's situation as the defendant believed his situation to be."<sup>148</sup> The court soundly rejected appellant's assertion that he was entitled to assert an EED defense, refusing to accept that the "very nature of the homicide" merited the use of an EED defense.<sup>149</sup> "When the record shows no possible excuse or justification, there is nothing to submit [to the jury]."<sup>150</sup>

In addition to causing domestic violence to be recognized as a crime, advocates concurrently focused on creating civil mechanisms for victims to seek relief. The civil domestic violence protective order process, instituted in the 1980s, accorded victims both control and independence by establishing a process which they could initiate themselves and without a criminal prosecution. In contrast to earlier law which saw the door of the home as establishing a threshold over which the courts could not enter, the civil domestic violence process resulted in courts frequently ordering the offender

<sup>145</sup> See KY. REV. STAT. ANN. §§ 507.020 and 508.040 (Michie 1998).

<sup>146</sup> 621 S.W.2d 906 (Ky. 1981).

<sup>147</sup> *Id.* at 908.

<sup>148</sup> *Id.* at 909.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* See also *Thomas v. Commonwealth*, 587 S.W.2d 264 (Ky. App. 1979) (finding that EED did not apply in case where appellant attacked a man he saw driving his estranged wife to work: "The mere fact that a woman is driving down a public road in broad daylight with a man other than her husband could hardly constitute justification or excuse of a knife attack upon the man.").

out of the home which, until then, the law had considered his castle. Victims could secure a variety of remedies, including court orders for the offender to vacate the residence, to not contact the victim, to pay child support, and so forth.<sup>151</sup> In addition to the benefit of according the victim autonomy, the domestic violence protective order process recognized a privacy interest on behalf of the victim. A domestic violence order (DVO) provided a victim with far more than relief from having her body assaulted. In ordering the offender from the home and prohibiting contact with the victim, the protective order process thereby established a physical, safe space for the victim—a zone of privacy in which the offender could not legally intrude.

The criminal law, in turn, reaffirmed the victim's right to safety in the home, even when that safety was jeopardized by a spouse. In *Matthews v. Commonwealth*,<sup>152</sup> the appellant broke into the home he had formerly shared with his estranged wife, and, once inside, kidnapped her and murdered her mother. In defending himself against the burglary charge, Matthews argued he was entitled to a directed verdict, on the basis that the home was still his,

because he had formerly shared occupancy of the premises. His position is that the house was first rented as an abode for him and his wife, that he had occupied it with her during their marriage except for the periods when they were estranged, and that, therefore, he had a legal right to be on the premises, regardless of proof that on the night in question he forcibly broke into the house against the occupant's wishes.<sup>153</sup>

Noting that Matthews was under a court order to stay away from the premises, the court held:

We reject the position that there is any absolute right on the part of one spouse to be with the other against the other's wishes, giving a right to break into the home of the other with the intent to commit a crime . . . [B]urglary is an invasion of the possessory property right of another and extends to a spouse.<sup>154</sup>

While domestic violence legislation has succeeded in recognizing domestic violence as a crime and providing the victim with a privacy interest, victims' voices remain often unheard in prosecutions for domestic violence crimes. In contrast to California, for example, which has enacted a special hearsay exception for a victim's statements which "narrate, describe, or explain the

<sup>151</sup> See KY. REV. STAT. ANN. §§ 403.740 to 403.750 (Michie 1998).

<sup>152</sup> 709 S.W.2d 414 (Ky. 1985).

<sup>153</sup> *Id.* at 419.

<sup>154</sup> *Id.* at 420.

infliction or threat of physical injury" by the perpetrator.<sup>155</sup> Kentucky's courts exclude such evidence, in the absence of the availability of an established hearsay exception. Therefore, where a domestic violence victim is unavailable because she was murdered, any threats the perpetrator may have made to the victim will be inadmissible unless they meet an established hearsay exception or were overheard by a third party. In *Barnes v. Commonwealth*,<sup>156</sup> for example, the victim had obtained a restraining order against her husband before he murdered her. While the Commonwealth attempted to introduce her sworn statement as to the defendant's previous acts of abuse, his threats to shoot her, and her belief she would suffer irreparable harm, contained in an affidavit for a restraining order, the court held such statements inadmissible, as constituting hearsay not within any hearsay exception. In contrast, in *Partin v. Commonwealth*,<sup>157</sup> another domestic homicide, the court upheld the admission of evidence concerning the victim's fear of the defendant. The evidence was admissible, however, only because it was not admitted in the form of the victim's own statements, which would have been hearsay, but in the form of witness testimony concerning their observations of fear exhibited nonverbally by the victim. Thus, while fear exhibited by the victim is admissible, an unavailable victim's actual voice and her own version of events, even if submitted in an affidavit in a legal proceeding, still will not be admitted.

#### D. The Second Root of Stalking Laws: Sexual Assault

Sexual assault and rape laws provide the other historical root for Kentucky's current stalking legislation. Like laws concerning domestic assault, the initial challenge for activists in the area of sexual assault reform was to name the crime: that rape had to be recognized and criminalized, in all its forms. In Kentucky, much of that work focused upon the crimes of marital rape and foreign object rape. In *Smith v. Commonwealth*,<sup>158</sup> in 1978, Charles Smith assaulted his estranged wife with a gun, tied her up, and tore off her clothing. "He went into the kitchen and returned with a carrot. He forced the carrot into his wife's rectum and then into her vagina. She pleaded for this to stop and [a witness] testified that she heard Mrs. Smith scream, 'stop, please don't do it.'"<sup>159</sup>

<sup>155</sup> See CAL. EVID. CODE § 1370 (West 2000). Section 1370 requires that such statements be in writing, tape recorded, or made to a law enforcement officer, and that the victim be unavailable to testify.

<sup>156</sup> 794 S.W.2d 165 (Ky. 1990).

<sup>157</sup> 918 S.W.2d 219 (Ky. 1996).

<sup>158</sup> 610 S.W.2d 602 (Ky. 1980).

<sup>159</sup> *Id.* at 603.

Yet, in 1978, Mr. Smith could not be prosecuted for rape but merely for an assault. At that time, Kentucky specifically exempted the rape of a wife by a husband from the sexual assault statutes. Marital rape was a legal impossibility, since the definition of "sexual intercourse" was "limited to sexual intercourse between persons not married to each other."<sup>160</sup> In 1990 advocates succeeded in removing the marital rape prohibition.<sup>161</sup> Secondly, Mr. Smith could not be prosecuted for rape because he committed it with a "foreign object"—a carrot—rather than by penetrating the victim with his penis. In 1994, the legislature, acting again in response to sexual assault advocates, amended the statute to include rapes committed by the offender using a foreign object, defined as "anything used in commission of a sexual act other than the person of the actor."<sup>162</sup>

As with domestic violence cases, victims of rape often found their voices were not accorded sufficient weight in the courtroom. Due to the fear expressed long ago by Lord Hale in England, where he admonished that "it must be remembered that this [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent,"<sup>163</sup> many courts and legislatures had long required corroboration of a victim's testimony to sustain a conviction. Kentucky did not have a corroboration requirement for rape, provided that the victim's testimony and her behavior met certain requirements: "[I]f the story of the prosecutrix is intrinsically improbable or her actions before and after the time of the alleged offense are such as indicate (when considered in the light of ordinary rules of behavior) that the related event did not happen, then the uncorroborated testimony is not sufficient."<sup>164</sup> In other words, the courts permitted the

<sup>160</sup> KY. REV. STAT. ANN. § 510.010 (Michie 1988).

<sup>161</sup> However, until 2000, certain restrictions still existed upon the prosecutions of marital rape. Unlike any other felony, the victim was required to report the offense to law enforcement within one year, see KY. REV. STAT. ANN. 500.050(4) (Michie 1998), dismissal of marital rape charges were required to be expunged, see KY. REV. STAT. ANN. 510.300 (Michie 1998), and charges of marital rape could not be used as evidence in child custody proceedings, see KY. REV. STAT. ANN. § 510.310 (Michie 1998). With the 2000 changes, these limitations have been removed. See SB 263.

<sup>162</sup> KY. REV. STAT. ANN. § 510.010(9) (Michie 1998). Note: This definition does not extend to include cases of digital rape.

<sup>163</sup> *Carrier v. Commonwealth*, 356 S.W.2d 752, 754 (Ky. Ct. App. 1978) (quoting 1 MATTHEW HALE, PLEAS OF THE CROWN 636).

<sup>164</sup> *Id.* at 754 (emphasis added); see also *Commonwealth v. Cox*, 837 S.W.2d 898, 900 (Ky. 1992) (No need for corroborating evidence when the trial record "reveals no behavior of the prosecutrix that is inconsistent with the rules of 'ordinary behavior.'" (citing *Carrier*, 356

victim's testimony to be heard and to be the sole support for a rape conviction, but only if the court found that the victim's behavior was somehow "ordinary," i.e., the victim behaved in conformity with the court's definition of normal.

Rape victims also found that their verbal statements indicating nonconsent—saying "no" during the attack—were insufficient to prove a rape, largely because such testimony failed to meet the required element of forcible compulsion. In *Commonwealth v. Berkowitz*,<sup>165</sup> the victim testified that the appellant had raped her: he had held her down with his body and penetrated her, all while she sought to leave the room and continually said "no" throughout the assault. According to the Pennsylvania Supreme Court, however, the victim's statement of "no" did not prove relevant to the issue of force.<sup>166</sup>

In response to *Berkowitz*, Kentucky advocates conducted a statewide survey of prosecutors in an effort to answer the question of whether, under Kentucky statutes, "no means no?"<sup>167</sup> When the survey resulted in a finding that it was questionable whether "no" really meant "no" in Kentucky,<sup>168</sup> the legislature changed the definition of forcible compulsion in 1996, providing that, "Physical resistance on the part of the victim shall not be necessary to meet this definition."<sup>169</sup> Under current Kentucky law then, at least arguably, a victim's voice, her insistence of "no," would be accorded sufficient weight to prove that the rape occurred not only without her consent, but by forcible compulsion.

As with domestic violence legislation, sexual assault laws also began to create a privacy right for victims. In the case of rape, this privacy extended beyond the body to include the victim's past sexual history.<sup>170</sup> Historically, evidence of the victim's previous sexual history had been admitted for the "purpose of negating one of the essential elements of the crime of rape, i.e.,

S.W.2d at 752)).

<sup>165</sup> 641 A.2d 1161 (Pa. 1994).

<sup>166</sup> See *id.* at 1164.

<sup>167</sup> See GOVERNOR'S TASK FORCE ON SEXUAL ASSAULT, MINUTES OF SEPTEMBER 21, 1999 (Testimony of Carol Jordan); LOUISVILLE-JEFFERSON COUNTY CRIME COMM'N, RAPE LAW SURVEY AND RESULTS (1995).

<sup>168</sup> See RAPE LAW SURVEY, *supra* note 167 at 5 (indicating that 70.5% of those responding to the survey believed that a victim saying "no" did not meet the statutory definition of forcible compulsion in Kentucky).

<sup>169</sup> KY. REV. STAT. ANN. § 510.010(2) (Michie 1998).

<sup>170</sup> See KY. R. EVID. 412 (Michie 1998), originally codified as KY. REV. STAT. ANN. § 510.145 (Michie 1976).

nonconsent."<sup>171</sup> The logic, such as it was, consisted of the assertion that "if she consented to have relations with one or more persons then she consented to the relations with the defendant."<sup>172</sup> In 1976, recognizing that past sexual history was largely irrelevant, the Kentucky legislature enacted the Rape Shield Law which protected the victim's past sexual history by making it inadmissible except under limited circumstances.<sup>173</sup> Today the Rape Shield Law provides that in criminal cases of sexual assault, reputation or opinion evidence related to the victim's sexual behavior is never admissible, while particular instances of past sexual behavior may be admitted only to prove: 1) that the defendant was not the source of semen or injury; 2) if the previous sexual behavior was with the defendant, to prove that the victim consented; or 3) a general relevancy exception.<sup>174</sup> In interpreting the rule, courts have recognized that it "contains an obvious tilt toward exclusion over admission."<sup>175</sup> Even when the past sexual behavior at issue is that between the victim and the defendant, the court may still exclude the evidence as too remote for admission.<sup>176</sup>

While domestic violence and sexual assault legislation has made great advances in recent years, as demonstrated by the enactment of the Rape Shield Law, the issue of consent continues to play a large role in these particular crimes. To a certain extent, consent appears to be a valid issue here because, as noted earlier, much of the behavior, such as contact with the defendant or engaging in sexual intercourse, is often perceived by both parties as desirable. Instances of otherwise desired behavior certainly should require that the prosecution prove a lack of consent. However, even in situations where the behavior at issue would not typically appear desirable, the issue of consent still seems to play a role when the crime is committed against a woman. Most recently, this issue of consent has occurred in the context of burglary. Tellingly, these cases involved burglary in the context of domestic violence and sexual assault.

<sup>171</sup> *Smith v. Commonwealth*, 566 S.W.2d 181 (Ky. Ct. App. 1978).

<sup>172</sup> *Id.* at 183.

<sup>173</sup> See KY. R. EVID. 412 (Michie 1998), originally codified as KY. REV. STAT. ANN. § 510.145 (Michie 1976).

<sup>174</sup> See KY. R. EVID. 412 (Michie 1998).

<sup>175</sup> *Dunn v. Commonwealth*, 899 S.W.2d 492, 494 (Ky. 1995), quoting ROBERT LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 2.30 (3d ed. 1993).

<sup>176</sup> See *id.* (excluding evidence of past sexual acts between defendant and rape victim seven years prior to charged offense).

In *Hedges v. Commonwealth*,<sup>177</sup> the appellant's estranged wife had a domestic violence protective order against the appellant, with the order providing that appellant was forbidden from committing acts of violence against the victim or damaging their property.<sup>178</sup> One night, appellant appeared at the victim's apartment, and she allowed him to come inside to use the telephone.<sup>179</sup> Once inside, appellant, "proceeded to break a fish tank, a microwave oven, and a vase—all of which was property owned jointly by Dana and appellant."<sup>180</sup> The victim ran to a neighbor to call the police, and when she returned, the appellant grabbed her by the neck. Appellant appealed his conviction for burglary in the second degree, which is committed when a person "with the intent to commit a crime, knowingly enters or remains unlawfully in a dwelling."<sup>181</sup> The supreme court reversed the conviction for burglary, partially because "violation of a DVO, without other evidence sufficient to show intent to commit a crime, may not be used to satisfy the elements of burglary."<sup>182</sup> Additionally, the court found that no burglary conviction could stand since, it asserted, the appellant did not know that his permission to remain in the apartment had been revoked:

While such a privilege could be revoked by conduct other than express words, no such conduct resulted in this case. Dana willingly allowed appellant to enter her apartment. While Dana did testify that she asked appellant what he was doing and asked him to stop damaging their property, this is not sufficient to constitute a revoking of the privilege she gave to appellant to be in the apartment.<sup>183</sup>

The court seems to be suggesting here that the victim somehow consented to the burglary, a consent granted when she permitted the appellant to enter the apartment to use the telephone and then failed to, in the court's eyes, revoke his privilege. The court did not indicate, however, what actions a victim must take to revoke a defendant's privilege. Under the facts of this case, neither asking the defendant to stop damaging their jointly-owned property, nor fleeing the residence to call the police was sufficient for revocation. "[I]f

<sup>177</sup> 937 S.W.2d 703 (Ky. 1996).

<sup>178</sup> *See id.* at 705. The order did not contain a provision forbidding appellant from contacting the victim.

<sup>179</sup> *See id.*

<sup>180</sup> *Id.*

<sup>181</sup> KY. REV. STAT. ANN. § 511.030(1) (Michie 1998) (emphasis added).

<sup>182</sup> *Hedges*, 937 S.W.2d at 706 (distinguishing *Matthews v. Commonwealth*, 709 S.W.2d 414 (Ky. 1985)).

<sup>183</sup> *Id.* at 706 (emphasis added).

Dana did revoke her permission, it was only after appellant had already destroyed their property.<sup>184</sup> And such belated revocation leaves the appellant beyond the scope of the burglary statute since, as the court notes, "[N]o intent to commit a crime existed at the time Dana revoked her permission to be in the apartment, if she revoked her permission at all."<sup>185</sup>

A similar issue of consent/permission arose in *Robey v. Commonwealth*.<sup>186</sup> In *Robey*, the victim awoke in the middle of the night to find a man whose voice she recognized as appellant's, wearing dark clothing and a ski mask, and holding a filet knife to her throat.<sup>187</sup> The appellant made her remove her clothing, and then raped her.<sup>188</sup> On appellate review, the supreme court reversed the burglary conviction finding, like the victim in *Hedges*, that the victim had given the appellant permission to enter and had failed to revoke that privilege:

The evidence presented at trial was that the victim gave Robey permission to come inside her apartment to sleep on the couch. Robey declined and said he would probably spend the night with a friend. However, the victim placed a pillow and blanket on the couch for Robey. She left the door to her apartment unlocked so he could let himself in should he decide to spend the night there. She testified that Robey, whom she identified by his voice, entered but made no effort to sleep on the couch. Instead, he entered her bedroom and forcibly raped her. Robey testified he had permission to enter her apartment and that the sex was consensual.<sup>189</sup>

The court framed the issue as whether a defendant can be convicted of burglary "when he lawfully enters the victim's premises to commit a crime against the victim (rape)."<sup>190</sup> The court then declared that a rape is not sufficient as the predicate crime for burglary, since "a crime against property is an essential element of burglary."<sup>191</sup>

Finally, just as in *Hedges*, the Court found the victim had failed to withdraw the privilege: "[T]here was no evidence to indicate that his privilege to be in the apartment had been withdrawn prior to the time he committed the

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> 943 S.W.2d 616 (Ky. 1997).

<sup>187</sup> *See id.* at 617.

<sup>188</sup> *See id.*

<sup>189</sup> *Id.* at 619.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

independent criminal act."<sup>192</sup> According to the dissenting opinion, however, "the victim did not give Robey permission to enter her bedroom or come inside the residence, concealing his identity with a mask, and rape her."<sup>193</sup> And, further, "even if [a]ppellant had entered the victim's apartment with her permission, his 'license ceased and the privilege to be upon the premises lapsed' when he formed the intention to rape his host."<sup>194</sup> However, taken together, *Hedges* and *Robey* leave one wondering exactly how a victim communicates that a privilege is revoked.

It is squarely within this context of domestic violence and sexual assault law where stalking legislation first arose. Like domestic violence, marital rape, or rape perpetrated with a foreign object, stalking consists of behavior which was often committed but which was not named as a crime. Further, stalking existed as a pattern of behavior for which there existed no name, in either the popular/literary context, or in the legal context. Even the 1990 edition of *Black's Legal Dictionary* failed to include "stalking" among its definitions.<sup>195</sup>

Again, as with domestic violence and rape, stalking creates something more than a right to be free from a physical assault—something more closely resembling a privacy interest. Stalking provides a victim with the right to not have contact with a defendant—regardless of whether or not the two have ever been involved in an intimate relationship. Therefore, stalking takes "no contact" one step further than would a domestic violence protective order. As a Connecticut court stated,

Providing protection from stalking conduct is at the heart of the state's social contract with its citizens, who should be able to go about their daily business free of the concern that the[y] may be the targets of systematic surveillance by predators who wish them ill. The freedom to go about one's daily business is hollow, indeed, if one's peace of mind is being destroyed, and safety endangered, by the threatening presence of an unwanted pursuer.<sup>196</sup>

Similarly, yet another court noted that a stalking statute "is a reasonable exercise of the police powers in protecting privacy interests of a segment of society from invasive oppressive behavior and harmful conduct. One person's freedom of movement gives way to another person's freedom not to be

<sup>192</sup> *Id.* at 620.

<sup>193</sup> *Id.* at 621 (Wintersheimer, J., dissenting).

<sup>194</sup> *Id.* at 620-621 (Cooper, J., dissenting) (citations omitted).

<sup>195</sup> See BLACK'S LAW DICTIONARY (6th ed. 1990).

<sup>196</sup> *State v. Culmo*, 642 A.2d 90, 102 (Conn. Super. Ct. 1993).

disturbed."<sup>197</sup>

While current law clearly labels stalking a crime, stalking victims—like domestic violence and sexual assault victims—nevertheless still find that their voices do not receive full weight in courts of law. As noted earlier, however, courts may still require a sexual assault victim's testimony to be corroborated in order to sustain a conviction if her behavior is considered improbable or out of the ordinary.<sup>198</sup> In stalking, most commonly, the offense is committed by conduct which seriously distresses the victim, and that conduct must be one which would cause a reasonable person to suffer distress.<sup>199</sup> Like rape, the stalking conviction can be secured only by a victim whose behavior the court deems "reasonable."

Despite the frequent assertion that the stalking statute is most similar to assault statutes,<sup>200</sup> stalking, technically speaking, "is not in essence a common law assault":

[A] person commits stalking when with a specific intent he "follows, places under surveillance, or contacts another." . . . Generally none of these actions would constitute an assault, which requires a demonstration of violence and a present ability to inflict injury. The intent element of the stalking statute requires proof of intentional conduct that "causes emotional distress by placing such person in reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family." This element differs from assault in two significant ways. The assault statute requires proof that the accused induced fear of an *immediate* violent injury. The stalking law contains no immediacy requirement. Secondly, assault requires proof that the victim perceived the threat of violent injury to himself, whereas stalking may be committed by inducing fear that the victim's family may be harmed.<sup>201</sup>

Rather, stalking is most closely related to sexual assault statutes. Like sexual assault, stalking is conduct whose illegality (generally) arises, not from the conduct performed, but from the fact that such conduct is not consented to by the victim. In sexual assault, lack of consent, if not due to incapacity, arises

<sup>197</sup> *State v. Lee*, 957 P.2d 741, 752-53 (Wash. 1998).

<sup>198</sup> See *Cox*, 837 S.W.2d 898; *Carrier*, 752 S.W.2d 752.

<sup>199</sup> See KY. REV. STAT. ANN. § 508.140 (Michie 1998).

<sup>200</sup> *Petersen v. State*, 903 P.2d 414, 431 (Alaska Ct. App. 1996) (finding "Alaska's stalking statutes are constitutional because, in essence, they outlaw assaultive conduct"); *People v. Zamudio*, 689 N.E.2d 254, 257 (Ill. App. 1997) ("Stripped of the name 'stalking,' the conduct described in the statute is nothing more than one example of an assault at common law or the offense of assault in our criminal code.")

<sup>201</sup> *State v. Rooks*, 468 S.E.2d 354, 355-356 (Ga. 1996) (emphasis in original).

from "forcible compulsion," which is defined as "physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any [sexual] offense under this chapter."<sup>202</sup> Here, use of either an express or implied threat, and the required fear of death, physical injury, or sexual contact, parallels stalking's requirement of an "explicit or implicit threat" which places the victim in fear of sexual contact, physical injury or death.<sup>203</sup>

Again, like sexual assault, stalking places great focus upon the victim, not merely upon the defendant. Such scrutiny of the victim contrasts sharply with other crimes, such as robbery, for example, where all the statute requires is that the defendant commits the predicate act (theft) with the use or threat of the immediate use of physical force.<sup>204</sup> Glaringly absent from robbery in the second degree, is that the prosecution demonstrate that the victim was placed in fear by the threat, and consequently relinquished the cash or whatever else was stolen.

One key means by which stalking differs from sexual assault, however, is that the definition of forcible compulsion for purposes of defining sexual assault offenses does not explicitly require that the victim's fears be "reasonable."<sup>205</sup> In contrast, under Kentucky's stalking laws, the victim is required to both individually/subjectively be placed in fear or intimidation, and have her fear be reasonable: "the course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress."<sup>206</sup>

Interestingly, it is not in any statute creating a crime, but in a statutory defense to a crime, in which we see this pairing of both a subjective and objective standard: extreme emotional disturbance.<sup>207</sup> As stated previously, extreme emotional disturbance, which may be asserted as a mitigating factor

<sup>202</sup> KY. REV. STAT. ANN. § 510.010(2) (Michie 1998).

<sup>203</sup> See *id.* § 508.150.

<sup>204</sup> See *id.* § 515.030.

<sup>205</sup> Although the courts, through the issue of corroboration, do appear to be demanding a reasonable victim, at least in cases where the evidence rests solely upon the victim's testimony. See *supra* text accompanying note 196.

<sup>206</sup> KY. REV. STAT. ANN. § 508.140(1)(b) (Michie 1998).

<sup>207</sup> See *id.* § 507.020(a) (providing that a defendant is not guilty of murder if he acted "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believes them to be").

by a defendant to either an assault or a homicide charge, requires both a subjective element—that the defendant is subjected to a disturbance—and that the disturbance is reasonable. Significantly, extreme emotional disturbance is commonly asserted as a defense by the batterer in domestic violence cases by the defendant. Like the stalking victim, the defendant's actions and fears must somehow be "reasonable."

Hence, while the stalking statute at first glance may appear to be progressive, it essentially moves full circle in a nearly regressive fashion: the stalking victim is treated in much the same way as the domestic violence defendant. We have moved from a crime where the defendant, usually a domestic violence offender, may assert a "reasonable emotional disturbance" as a mitigating factor, to a crime where the prosecution must establish such a reasonable emotional disturbance on the part of the victim before there will be any crime charged at all. Such proof inevitably mandates intense scrutiny of the victim, ironic in light of the fact that at least some courts have viewed anti-stalking legislation as part of a citizen's "right to be left alone."<sup>208</sup> After all, the whole purpose behind stalking legislation was to prevent a defendant from invading the life of the victim and subjecting her to intense surveillance and scrutiny.

As recounted by a prosecutor who handled a stalking case where the defendant had stalked the singer Madonna (who had been reluctant to testify at trial):

I asked Madonna on the stand how she felt about being in court with Hoskins across from her. She replied, "Sick to my stomach . . . I feel incredibly disturbed that the man who has repeatedly threatened my life is sitting across from me and we have somehow made his fantasies come true (in that) I am sitting in front of him and that is what he wants." (Reporter's Transcript on Appeal, Vol. I, p.p. 102-103). The look on her face said it all as she glanced at Hoskins. Hoskins just sat at the counsel table, humming a song to himself.<sup>209</sup>

In *Morton v. State*,<sup>210</sup> the court recognized that the very prosecution of stalking carries within it, not only scrutiny of the victim, but the possibility of this perverse gratification for the defendant. There, the defendant attempted

<sup>208</sup> *State v. Lee*, 957 P.2d 741, 752 (Wash. 1998) (citing *Whalen v. Roe*, 429 U.S. 589 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

<sup>209</sup> Rhonda Saunders, *The Legal Perspective on Stalking*, in *THE PSYCHOLOGY OF STALKING* 40-41 (J. Reid Meloy ed., 1998).

<sup>210</sup> 651 So. 2d 42 (Ala. Crim. App. 1994).



to introduce nude photographs of the victim, with the court finding such to be completely inadmissible, admonishing the defendant's attorney that "[I] think that it's highly unlikely that these pictures were taken at the times that your client has apparently told you. And I would have to regard his attempts to use these photographs as a furtherance of the very offense with which he's charged here; namely, to harass her."<sup>211</sup>

### E. Stalking Statutes Across the Country

Every state and the federal government have now enacted anti-stalking legislation. Yet, what, precisely, is the legal definition of stalking? According to *Black's Legal Dictionary*, stalking is defined as:

1. The act or an instance of following another by stealth. 2. The offense of following or loitering near another, often surreptitiously, with the purpose of annoying or harassing that person or committing a further crime such as assault or battery. Some statutory definitions include an element that the person being stalked must reasonably feel harassed, alarmed, or distressed about personal safety or the safety of one or more persons for whom that person is responsible. And some definitions stipulate that acts such as telephoning another and remaining silent during the call amount to stalking.<sup>212</sup>

*Black's*, then, places great emphasis upon the furtive nature of stalking—both elements of the definition provide that the stalker stalks secretly: "by stealth" or "often surreptitiously." Yet, in contrast to *Black's*, the majority, if not all, stalking statutes make no provision for such secretiveness.<sup>213</sup> Instead, the legislation proposed by the Model Anti-Stalking Code for the States (Model Code), and roughly followed in Kentucky and other states, targets the stalker who *wants* to be known, the stalker who knows (or should know) that his actions induce fear in the victim.

Like Kentucky, most states have passed some version of the Model Anti-Stalking Code developed by the National Institute of Justice in 1993.<sup>214</sup> According to the Model Code, stalking consists of:

1) A course of conduct which a) is directed at a particular person b) causes the victim to fear some sort of injury or death and c) would cause the

<sup>211</sup> *Id.* at 45.

<sup>212</sup> BLACK'S LEGAL DICTIONARY 1412 (7th ed. 1999).

<sup>213</sup> Of course, as a practical matter, a stalker who succeeded in such furtive stalking could not be prosecuted anyway, since the act of stalking would remain unknown to all.

<sup>214</sup> U.S. DEPT OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR STATES (1993).

"reasonable" person the same or similar type of fear, AND 2) The defendant must know, or should know, that his conduct will place the victim in fear.<sup>215</sup>

The Model Code, like the statutes of Kentucky and approximately twenty-six other states imposes both an objective and a subjective requirement upon the victim, in other words, the victim must be placed in a high level of fear, and her fear must be reasonable.<sup>216</sup>

Some states, however, distinguish between stalking committed by following and stalking committed by harassment. In these states, following does not require that the victim be placed in emotional distress, while definitions of harassment do impose such a requirement. For example, Florida provides that "any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking."<sup>217</sup> Florida defines "harass" as "to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose."<sup>218</sup> However, Florida imposes no such subjective requirement of emotional distress in the victim for stalking committed by following. Idaho, Louisiana, and Rhode Island take a similar approach, placing following in a unique category.<sup>219</sup> Under these statutes, following, when undertaken with willful and malicious intent, is in and of itself, criminal. Stalking by following consequently differs from stalking by harassment, where the conduct itself is

<sup>215</sup> *Id.* at 43.

<sup>216</sup> See ALA. CODE §§ 13A-6-90 to 13A-6-92 (1994); ARIZ. REV. STAT. § 13-2923 (West 1999); CAL. PENAL CODE ANN. § 646.9 (West 1999); COLO. REV. STAT. § 18-9-111 (1997); CONN. GEN. STAT. ANN. § 53a-181d (West 1999); DEL. CODE ANN. tit. 11, § 1312A (1998); GA. CODE ANN. § 16-5-90 (1999); IDAHO CODE § 18-7905 (1997); IND. CODE ANN. § 35-45-10-1 (Lexis 1998); IOWA CODE § 708.11 (West 2000); LA. REV. STAT. ANN. § 14:40.2 (West 2000); ME. REV. STAT. ANN. tit. 17-A, § 210-A (West 1999); MASS. ANN. LAWS ch. 265, § 43 (Lexis 1999); MICH. COMP. LAWS ANN. § 750.411h (West 1999); MO. ANN. STAT. § 565.225 (West 1999); NEV. REV. STAT. ANN. § 200.575 (Michie 1999); N.J. STAT. ANN. § 2C:12-10 (West 1999); N.D. CENT. CODE § 12.1-17-07.1 (1997); OKLA. STAT. ANN. tit. 21, § 1173 (West 2000); OR. REV. STAT. § 163.732 (1997); TEX. PENAL CODE ANN. § 42.072 (West 2000); UTAH CODE ANN. § 76-5-106.5 (1999); VT. STAT. ANN. tit. 13, §§ 1061-1062 (1998); WASH. REV. CODE ANN. § 9A.46.110 (West 2000); WIS. STAT. ANN. § 940.32 (West 1996); WYO. STAT. ANN. § 6-2-506 (Lexis 1999); MODEL CODE, *supra* note 214 at 43, 44-48.

<sup>217</sup> FLA. STAT. ANN. § 784.048(2) (West, 2000).

<sup>218</sup> *Id.* § 784.048(1)(a).

<sup>219</sup> See IDAHO CODE § 18-7905 (1997); LA. REV. STAT. ANN. § 41:40.2 (West 2000); R.I. GEN. LAWS § 11-59-2 (1999). New Hampshire takes a similar approach, distinguishing between stalking by following and stalking by "intimidation." N.H. REV. STAT. ANN. § 633:3-a (1999).



criminal only if it distresses the victim.

Other states, while distinguishing between stalking by harassment and stalking by following, nonetheless, in the end, require that the victim feel severely distressed by the following. Alabama, for example, provides that stalking may be committed either by following or by harassing.<sup>220</sup> Again, like Florida, Alabama defines harassment as conduct which "must actually cause substantial emotional distress," but imposes no such requirement upon the act of following.<sup>221</sup> However, in the overall structure of the crime of stalking, Alabama's statute provides that stalking can be committed only in the context of the defendant making a "credible threat."<sup>222</sup> "Credible threat" requires: "a threat . . . so as to cause the person who is the target of the threat to fear for his or her safety or the safety of a family member. . . ."<sup>223</sup> California and Missouri take similar approaches.<sup>224</sup>

In contrast to Kentucky and states which require that any form of stalking must demonstrate both subjective (emotional distress actually caused to the victim) and objective (acts which would cause distress to a reasonable person) components, and in those states which provide for a subjective-based (victim actually in emotional distress) and conduct-based (following) manner in which stalking may be committed, some states have chosen to create a solely objective crime of stalking. "Solely objective" means that the focus is not on the particular victim and a particular emotional distress she suffers, but rather, is solely on the defendant: his intent and how his conduct would effect a "reasonable" person. In this group of statutes, any requirement that the defendant's conduct actually result in the victim experiencing heightened fear or substantial emotional distress is completely absent. Maryland, for example, defines stalking as "a malicious course of conduct that includes approaching or pursuing another person with intent to place that person in reasonable fear (i) of serious bodily injury or death; or (ii) that a third person likely will suffer

<sup>220</sup> See ALA. CODE § 13A-6-90 (1994).

<sup>221</sup> ALA. CODE § 13A-6-92(c) (1994).

<sup>222</sup> ALA. CODE § 13A-6-90 (1994).

<sup>223</sup> ALA. CODE § 1A-6-92(b) (1994).

<sup>224</sup> See CAL. PENAL CODE ANN. § 646.9 (West 1999); MO. ANN. STAT. § 565.225 (West 1999). Colorado does not distinguish between stalking by following and stalking by harassment, but instead distinguishes between stalking committed in the context of the defendant making a "credible threat" and stalking without such a threat. Stalking committed with a credible threat made is solely objective, while stalking without a credible threat must actually cause demonstrated "serious emotional distress" to the victim before it can be actionable. COLO. REV. STAT. § 18-9-111(4)(b) & (c) (1997).

serious bodily injury or death."<sup>225</sup> Notably, while "approaching" and "pursuing" are not defined, they sound a great deal like following.

Pennsylvania provides that "a person commits the crime of stalking when he engages in a course of conduct or repeatedly commits acts toward another person, including following the person without proper authority, under circumstances which demonstrate either of the following: (1) an intent to place the person in reasonable fear of bodily injury; or (2) an intent to cause substantial emotional distress to the person."<sup>226</sup> Tennessee, while adhering to the following/harassment forms of stalking, defines harassment objectively and includes no requirement that the victim's actual emotional distress be demonstrated. "A person commits the offense of stalking who intentionally and repeatedly follows or harasses another person in such a manner as would cause that person to be in reasonable fear of being assaulted, suffering bodily injury or death."<sup>227</sup> Tennessee defines "harasses" as "a course of conduct directed at a specific person which would cause a reasonable person to fear an assault, bodily injury, or death, including, but not limited to, verbal threats, written threats, vandalism, or unconsented-to physical contact. . . ."<sup>228</sup>

In these states, the stalking statutes do not subject the victim to such minute scrutiny, nor require that the prosecution demonstrate the severe distress in which the defendant has succeeded in placing her. Rather, these statutes adhere more to the structure of other criminal statutes—ones not particularly targeted for female victims—such as robbery, for example, where all the prosecution must show is that the defendant committed the prohibited act with the designated intent.<sup>229</sup> Notably, such prosecutions fail to require that the state demonstrate that the victim was reduced to hysterics from the criminal actions of the defendant.<sup>230</sup>

Still other states simply define stalking as involving conduct which the defendant commits without the consent of the victim. Georgia defines stalking in this manner: "A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of

<sup>225</sup> MD. ANN. CODE art. 27, § 124 (1999).

<sup>226</sup> 18 PA. CONS. STAT. ANN. § 2709 (West 1999).

<sup>227</sup> TENN. CODE ANN. § 39-17-315 (1997).

<sup>228</sup> TENN. CODE ANN. § 39-17-315 (a)(1) & (a)(2)(B) (1997).

<sup>229</sup> See KY. REV. STAT. ANN. § 515.020 (Michie 1998).

<sup>230</sup> See *id.*

harassing and intimidating the other person."<sup>231</sup> "Harassing and intimidating" is defined as "a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person's safety or the safety of a member of his or her immediate family. . . ." <sup>232</sup> Notably, Georgia still requires a demonstration of the victim's emotional distress. Oregon takes a similar approach, defining stalking as "engaging in repeated and unwanted contact," but, similar to Georgia, still requires that the state demonstrate that the defendant caused the victim to be placed in reasonable apprehension.<sup>233</sup>

As noted above, many stalking statutes require that the defendant elicit fear from the victim, or intend to place the victim in such fear. Many states require that this fear be that of physical injury or death.<sup>234</sup> However, some states, like Kentucky, go beyond physical injury to also include sexual assault or contact.<sup>235</sup> While the Model Code does not explicitly include fear of sexual assault, its Commentary suggests such an inclusion would be desirable:

Many victims who fear the defendant may sexually assault them probably also fear physical injury. Nevertheless, due to the nature of stalking offenses, states may want to consider expanding the language of their felony stalking statutes to include explicit behavior that would cause a reasonable person to fear sexual assault in addition to behavior that would cause a reasonable person to fear bodily injury or death.<sup>236</sup>

Some states do not particularize what type of injury the victim must fear, and instead provide for a more generalized fear for "safety."<sup>237</sup> Vermont and Texas extend stalking beyond fear of bodily injury to include fear that an offense will be committed against the victim's property as well.<sup>238</sup>

<sup>231</sup> GA. CODE ANN. § 16-5-90 (1999).

<sup>232</sup> *Id.*

<sup>233</sup> See OR. REV. STAT. § 163.732 (1997).

<sup>234</sup> See ALA. CODE § 13A-6-90(a) (1994); ALASKA STAT. § 11.41.270(a) (Lexis 1998); ARK. CODE ANN. § 5-71-229(a)(1) (Michie 1997); LA. REV. STAT. ANN. § 40.2.A (West 2000); MD. ANN. CODE art. 27, § 124(a)(3)(i) (1999); N.J. STAT. ANN. § 2C:12-10b(1) & (2) (West 1999); N.C. GEN. STAT. § 14-277.3(a) (1999); TENN. CODE ANN. § 39-17-315(a)(1) (1997); WIS. STAT. ANN. § 940.32(2) (West 1996).

<sup>235</sup> See 720 ILL. COMP. STAT. ANN. 5/12-7.3(a)(2) (West 1999); VA. CODE ANN. § 18.2-60.3A (Michie 1999).

<sup>236</sup> See MODEL CODE, *supra* note 214 at 47.

<sup>237</sup> See CAL. PENAL CODE ANN. § 646.9(a) (West 1999); CONN. GEN. STAT. ANN. § 53a-181d(a) (West 1999); GA. CODE ANN. § 16-5-90(a) (1999).

<sup>238</sup> TEXAS PENAL CODE ANN. § 42.072(a)(C) (West 2000); VT. STAT. ANN. tit. 13, § 1061(4) (1998) (limiting fear of property damage, i.e., "vandalism", to the harassment form of

Of significance here, in terms of the type of fear at issue in stalking, is that many states now provide that stalking extends to cover instances where the victim fears the defendant will harm not only her, but a member of her household or family as well.<sup>239</sup> Finally, in addition to the required element of fear, many states also agree that stalking is a crime where the defendant either intends to cause the victim some form of mental or emotional distress, or that such mental distress actually occurs.<sup>240</sup>

stalking).

<sup>239</sup> See ALA. CODE § 13A-6-92(b) (1994); ALASKA STAT. § 11.41.270(a) (Lexis 1998); ARIZ. REV. STAT. ANN. § 13-2923A(1) & (2) (West 1999); ARK. CODE ANN. § 5-71-229(a)(1) (Michie 1997); CAL. PENAL CODE ANN. § 646.9(a) (West 1999); COLO. REV. STAT. § 18-9-111(4)(b) (1997); DEL. CODE ANN. tit. 11, § 1312A(a) (1998); GA. CODE ANN. § 16-5-90(a) (1999); IDAHO CODE § 18-7905(a) (1997); ME. REV. STAT. ANN. 17-A, § 210-A(1) (West 1999); N.J. STAT. ANN. § 2C:12-10b (West 1999); N.M. STAT. ANN. § 30-3A-3(A) (Michie 1999); N.D. CENT. CODE § 12.1-17.07.1(1)(c) (1997); OKLA. STAT. ANN. tit. 21, § 1173(A)(1) (West 2000); OR. REV. STAT. § T. 16, 163.732(1)(a) (1997); TEXAS PENAL CODE ANN. § 42.072(a) (West 2000); UTAH CODE ANN. § 76-5-106.5(2) (1999); VA. CODE ANN. § 18.2-60.3(A) (Michie 1999).

<sup>240</sup> See ALA. CODE § 13A-6-92 (1994) (harassment must cause substantial emotional distress and credible threat must cause reasonable mental anxiety, anguish or fear); CAL. PENAL CODE ANN. § 646.9(e) (West 1999) (actual substantial emotional distress required for harassment component); COLO. REV. STAT. § 18-9-111(4)(b)(III) (1997) ("serious emotional distress" does not require a showing of receiving professional counseling or treatment); FLA. STAT. ANN. § 784.048(a) (West 2000) (for harassment form of stalking (versus following), victim must be placed in substantial emotional distress); GA. CODE ANN. § 16-5-90(a) (1999) (predicate conduct must be done with intention to cause harassment and intimidation, which must cause "emotional distress"); IDAHO CODE § 18-7905(d)(1) (1997) (harassment must cause substantial emotional distress to reasonable person (and annoy, alarm or harass actual victim)); LA. REV. STAT. ANN. § 40.2(C)(1) (West 2000) (harassment must cause "substantial emotional distress"); ME. REV. STAT. ANN. tit. 17-A, § 210-A(1) (West 1999) (defendant's conduct must cause victim to suffer from intimidation or serious inconvenience, annoyance or alarm); MASS. ANN. LAWS ch. 265, § 43(a) (Lexis 1999) (defendant's conduct seriously alarms or annoys the victim or would cause the reasonable person to suffer substantial emotional distress); MICH. COMP. LAWS ANN. § 750.411h (West 1999) (defendant's conduct would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested); MO. ANN. STAT. § 565.225(3) (West 1999) (harassment must cause substantial emotional distress); NEB. REV. STAT. § 28-311.03 (1995) (requires terrified, threatened, or intimidated victim); NEV. REV. STAT. § 200.575 (Michie 1999) (victim must actually feel terrorized, frightened, intimidated or harassed); N.H. REV. STAT. ANN. § 633:3-a (1999) (stalking by intimidation requires resulting emotional distress in victim); N.C. GEN. STAT. § 14-277.3 (1999) (defendant must intend to cause emotional distress); OHIO REV. CODE ANN. § 2903.21.1 (West 1997) (mental distress is any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment); OKLA. STAT. ANN. tit. 21, § 1173 (West 2000) (requires that a reasonable person would feel frightened, intimidated,

Most states now provide for some form of aggravated stalking.<sup>241</sup> Like Kentucky, states frequently elevate stalking from a misdemeanor to a felony when the defendant is, in essence, a repeat offender: when he has violated a protective order issued to protect the victim or the defendant previously has been convicted of stalking.<sup>242</sup> Additionally, many states have joined Kentucky in elevating the penalty for stalking when the defendant commits the stalking while in possession of a deadly weapon, or when the defendant has previously committed a crime against the victim.<sup>243</sup> Besides elevating stalking when the

threatened, harmed, or molested; if defendant stalks by harassment, his conduct must cause the victim actual emotional distress, defined as "significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling"; 18 PA. CONS. STAT. ANN. § 2709 (West 1999) (One way to commit stalking involves causing "substantial emotional distress," a "temporary or permanent state of great physical or mental strain."); UTAH CODE ANN. § 76-5-106.5 (1999) (requires victim to experience emotional distress or fear of bodily injury); VT. STAT. ANN. tit. 13, § 1061(1) (1998) (substantial emotional distress or fear for physical safety).

<sup>241</sup> Maryland, for example, still has no aggravated form of the stalking offense.

<sup>242</sup> See ALASKA STAT. § 11.41.260(a)(1) (Lexis 1998) (violation of a protective order or prior stalking conviction); ARK. CODE ANN. § 5-71-229(a)(1)(A)(B)(i) (Michie 1997) (violation of protective order or previous stalking conviction); CAL. PENAL CODE ANN. § 646.9(b)(c) (West 2000) (violation of protective order or previous stalking conviction); COLO. REV. STAT. § 18-9-111(5) (1997) (repeated stalking offense or violation of protective order); CONN. GEN. STAT. ANN. § 53a-181c(a)(1) & (2) (West 1999) (protective order or previous stalking conviction); FLA. STAT. ANN. § 784.048(4) (West 2000) (violation of protective order); GA. CODE ANN. § 16-5-90(c) (1999) (second stalking conviction); IDAHO CODE § 18-7905(b) (1997) (violation of protective order or subsequent stalking conviction); 720 ILL. COMP. STAT. 5/12-7.3(b) (West 1999) (second stalking conviction); LA. REV. STAT. ANN. § 40.2(B)(3)-(5) (West 2000) (repeated stalking offenses or protective order in place); ME. REV. STAT. ANN. tit. 17-A, § 21-A(3) (West 1999) (violation of protective order or previous stalking, unless previous stalking was within three days of the second stalking); MASS. ANN. LAWS ch. 265, § 43(b) & (c) (Michie 1999) (violation of a protective order or previous stalking offense); N.H. REV. STAT. ANN. § 633:3-a(VI)(a) (1999) (subsequent stalking); N.M. STAT. ANN. §§ 30-3A-3(C) & 30-3A-3.a(A)(1) (Lexis 1999) (subsequent stalking or violation of a protective order); OKLA. STAT. ANN. tit. 21, § 1173(B)(1) & (C) (West 2000) (violation of protective order or prior stalking conviction); OR. REV. STAT. § 16 163.732(2)(b) (1997) (previous stalking offense or violation of a protective order); 18 PA. CONS. STAT. ANN. § 2709(c)(2)(ii) (West 1999) (subsequent stalking); R.I. GEN. LAWS § 11-59-2.(b) (1999) (second or subsequent stalking conviction); TENN. CODE ANN. § 39-17-315(b)(2) (1997) (tiered sentencing scheme for subsequent stalking convictions); TEXAS PENAL CODE ANN. § 42.072(b) (West 2000) (subsequent stalking conviction); VA. CODE ANN. § 18.2-60.3(B) (Michie 1999) (third or subsequent stalking conviction); WASH. REV. CODE ANN. § 9A.46.110(5)(b) & (c) (West 2000) (violation of protective order or previous stalking offense); WYO. STAT. ANN. § 6-2-506(e)(i) & (iv) (Lexis 1999) (previous stalking conviction or violation of protective order).

<sup>243</sup> See ALASKA STAT. § 11.41.260(a)(4) & (6) (Lexis 1998) (possession of deadly weapon

defendant has violated a protective order, some states elevate it when the defendant has violated conditions of probation, pretrial release, or bond.<sup>244</sup> Illinois and Wyoming elevate the offense when the defendant has actually physically harmed the victim, or if he has confined or restrained her.<sup>245</sup>

While one would expect to see these aggravating factors in stalking offenses, some states have added provisions which appear to go beyond the intent of the Model Code. Many elevate stalking to a felony when the stalker stalks a child victim.<sup>246</sup> Washington has passed a stalking statute which provides additional protection to "professional" victims: the offense increases from a gross misdemeanor to a Class C felony when "the stalker's victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, legislator, or community correction's officer, and the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties . . . or the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony."<sup>247</sup>

or commission of crime against same victim); ARK. CODE ANN. § 5-71-229(a)(1)(C) (Michie 1997) (armed with a deadly weapon); DEL. CODE ANN. tit. 11, § 1312A(e) (1998) (possession of deadly weapon); LA. REV. STAT. ANN. § 14:40.2(B)(2) (West 2000) (possession of deadly weapon); NEB. REV. STAT. § 28-311.04 (1995) (prior conviction within last seven years involving same victim); N.M. STAT. ANN. § 30-3A.3.a(A)(3) (Michie 1999) (possession of a deadly weapon); OKLA. STAT. ANN. tit. 21, § 1173(B)(3) (West 2000) (previous conviction involving violence toward stalking victim); 18 PA. CONS. STAT. ANN. § 2709(c)(2) (West 1999) (previous commission of other enumerated crimes of violence against victim); UTAH CODE ANN. § 76-5-106.5(5)(c) & (6)(a) (1999) (dangerous weapon or conviction of other felonies involving same victim); VT. STAT. ANN. tit. 13, § 1063(a)(3) (1998) (previous criminal offense involving violence against victim or victim's immediate family); WASH. REV. CODE ANN. § 9A.46.110(5)(d) (West 2000) (armed with a deadly weapon).

<sup>244</sup> See ALASKA STAT. § 11.41.260(a)(2) (Lexis 1998); COLO. REV. STAT. § 18-9-111(5)(b) (1997); DEL. CODE ANN. tit. 11, § 1312(A)(f) (1998); HAW. REV. STAT. § 711-1106.4(1)(b) (1998); N.J. STAT. ANN. § 2C:12-10(e) (West 1999); N.M. STAT. ANN. § 30-3A-3.1(A)(2) (Michie 1999); OKLA. STAT. ANN. tit. 21, § 1173(B)(2) (West 2000); WYO. STAT. ANN. § 6-2-506(e)(iii) (Lexis 1999).

<sup>245</sup> See 720 ILL. COMP. STAT. 5/12-7.4(a) (West 1999); WYO. STAT. ANN. § 6-2-506(e)(ii) (Lexis 1999).

<sup>246</sup> See ALASKA STAT. § 11.41.260(a)(3) (Lexis 1998); CONN. GEN. STAT. ANN. § 53a-181c(a)(3) (West 1999); FLA. STAT. ANN. § 784.048(5) (West 2000); LA. REV. STAT. ANN. § 14:40.2(B)(6) (West 2000); MICH. COMP. LAWS ANN. § 750.411h(2)(b) (West 1999); N.M. STAT. ANN. § 30-3A-3.1(A)(4) (Michie 1999); VT. STAT. ANN. tit. 13, § 1063(a)(4) (1998).

<sup>247</sup> WASH. REV. CODE ANN. § 9A.46.110(5)(e) & (f) (West 2000).

Some states have taken a particularly intriguing approach to the crime of stalking. Some provide that if the victim requests the defendant to stop contacting her, such a request functions either as a rebuttable presumption that the contact is unwanted or as prima facie evidence that the stalker intended to intimidate or harass the victim.<sup>248</sup> Some states have begun to examine the new crime of electronic stalking. While many stalking statutes, like that of Kentucky, appear broad enough to cover this particular form of stalking, some states have expanded their statutes to specifically cover electronic communications.<sup>249</sup> Maine provides that the underlying "course of conduct" includes "gaining unauthorized access to personal, medical, financial or other identifying information, including access by computer network. . . ."<sup>250</sup> Finally, Wisconsin has addressed the unique privacy problems posed by the modern technological age by elevating the offense when the defendant "gains access to a record in electronic format that contains personally identifiable information regarding the victim in order to facilitate the violation."<sup>251</sup>

Some states have supplemented criminal stalking statutes with other mechanisms to provide relief for stalking victims. Paralleling domestic violence laws, many states now permit stalking victims to obtain an anti-stalking protective order against the defendant, whether or not that defendant would meet the eligibility requirements for a domestic violence protective order. California provides that the sentencing court "shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years. . . ." <sup>252</sup> In addition, it provides for the issuance of emergency protective orders for stalking victims "if the judicial officer finds . . . that reasonable grounds have been asserted to believe that an immediate and present danger of stalking . . . exists . . . [and] that an emergency protective order is necessary to prevent the occurrence or reoccurrence of the stalking activity."<sup>253</sup> Similarly, in Utah a stalking conviction automatically

<sup>248</sup> See MICH. COMP. LAWS ANN. § 750.411i.(5) (West 1999); N.D. CENT. CODE § 12.1-17.1.(3) (1997); OKLA. STAT. ANN. tit. 21, § 1173(E) (West 2000); WASH. REV. CODE ANN. § 9A.46.110(4) (West 2000).

<sup>249</sup> See ALASKA STAT. § 11.41.270(b)(3)(F) (Lexis 1998), CAL. PENAL CODE ANN. § 646.9(g) (West 1999); MASS. ANN. LAWS ch. 265, § 43(a) (Lexis 1999), MICH. COMP. LAWS ANN. § 750.411h(1)(e)(vi) (West 1999); WYO. STAT. ANN. § 6-2-506(b)(i) (Lexis 1999) (all specifically providing that stalking includes electronic communications—such as e-mail—sent to the victim).

<sup>250</sup> ME. REV. STAT. ANN. tit. 17-A, § 210-A(2)(A) (West 1999).

<sup>251</sup> WIS. STAT. ANN. § 940.32(2)(2m) (West 1996).

<sup>252</sup> CAL. PENAL CODE ANN. § 646.9(k) (West 1999).

<sup>253</sup> CAL. PENAL CODE ANN. § 646.91(d)(1) & (2) (West 2000).

operates as an application for a stalking protective order<sup>254</sup> and in Georgia the sentencing judge is authorized to issue a permanent restraining order.<sup>255</sup> Georgia also permits a victim to independently file to seek a protective order, as do Ohio and New Hampshire.<sup>256</sup> In keeping with expanding the civil law to address stalking, some states have created a stalking tort to provide the victim with real and punitive damages from the offender.<sup>257</sup>

Finally, some states provide for the judge to order the offender into counseling.<sup>258</sup> New Hampshire has expanded law enforcement's arrest powers to provide that they may arrest for a stalking offense, without a warrant, provided they have probable cause.<sup>259</sup> And Minnesota bans defendants convicted of stalking from gun possession for a three year period.<sup>260</sup>

#### F. Case Law and Constitutional Questions

Since their passage in the early 1990s, courts have upheld the great majority of stalking statutes against constitutional challenges. Most commonly, defendants have asserted that the stalking statutes fail as being void for vagueness, or that they are overly broad, in violation of the First Amendment. When challenging the statutes as being vague, defendants argue that the various terms employed in the statutes cannot be understood by an ordinary person:

[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.<sup>261</sup>

In 1997, the Kentucky Court of Appeals sustained the stalking statute against a void for vagueness challenge in *Monhollen v. Commonwealth*.<sup>262</sup>

<sup>254</sup> See UTAH CODE ANN. § 76-5-106.5(7) (1999).

<sup>255</sup> See GA. CODE ANN. § 16-5-90(d) (1999).

<sup>256</sup> See GA. CODE ANN. § 16-5-94 (1999); OHIO REV. CODE ANN. § 2903.213 (West 1997); N.H. REV. STAT. ANN. § 633:3-a(III-a) (1999).

<sup>257</sup> See CAL. CIVIL CODE ANN. § 1708.7 (West 2000); KY. SB 263 (2000); MICH. COMP. LAWS ANN. § 600.2954 (West 1999); WYO. STAT. ANN. § 1-1-126 (Lexis 1999).

<sup>258</sup> See GA. CODE ANN. § 16-5-90(D) (Lexis 1999); HAW. REV. STAT. § 711-1106.5(3) (1993); N.M. STAT. ANN. § 30-3A-3(D) (Michie 1999).

<sup>259</sup> See N.H. REV. STAT. ANN. § 633:3-a(V) (1999).

<sup>260</sup> See MINN. STAT. § 609.749(Subd. 8) (West 2000) (applies when the defendant uses a firearm during commission of the stalking offense).

<sup>261</sup> Kolender v. Lawson, 461 U.S. 352, 357 (1983).

<sup>262</sup> 947 S.W.2d 61 (Ky. Ct. App. 1997).

The appellant had argued that because there was no statutory definition for either "legitimate purpose" or for "seriously alarms, annoys, intimidates or harasses," the statute failed for vagueness.<sup>263</sup> The court of appeals rejected the argument, finding that the stalking statutes defined the offense of stalking "with sufficient definiteness that ordinary people can determine what conduct is prohibited."<sup>264</sup> The objective requirement of the statute—that the course of conduct be such that would cause a reasonable person to suffer substantial mental distress—proved a key element in upholding the statute's constitutionality, since "the meaning of 'seriously alarms, annoys, intimidates or harasses' is not determined by the victim's subjective feelings."<sup>265</sup>

The majority of other courts have taken an approach identical to that of *Monhollen*, finding that the objective/reasonable person element of the stalking statute protects it from being void for vagueness.<sup>266</sup> Other courts have found that the specific intent element of some stalking statutes saves them from any vagueness problem.<sup>267</sup> In contrast, the courts which have found a stalking statute to be unconstitutionally vague have clearly been in the

<sup>263</sup> *Id.* at 62.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 63.

<sup>266</sup> See *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (because credible threat element contains an objective reasonable person standard, it avoids the risk of reaching otherwise innocuous statements merely because they are directed at an unusually sensitive listener); *Bouters v. State*, 659 So. 2d 235 (Fla. 1995) (finding stalking statute's definition of "harasses" not void since it is based on a reasonable person standard); *Johnson v. State*, 648 N.E.2d 666, 670 (Ind. 1995) ("The reasonableness standards contained in the statutes provide a constraining and intelligible enforcement standard for those charged with enforcing the statutes."); *State v. Rucker*, 987 P.2d 1080 (Kan. 1999) (In contrast to previous stalking statute, current stalking statute not unconstitutionally vague, since it included an objective standard in which to measure the prohibited conduct); *Parker v. Commonwealth*, 485 S.E.2d 150, 153-54 (Va. Ct. App. 1997) ("Both the 'reasonable fear' element and the requirement of specific intent make the statute sufficiently clear to inform both citizens and law enforcement officers of what acts constitute stalking. . . . [T]he conduct proscribed . . . 'does not vary with the particular psychological makeup of the victim.'");

<sup>267</sup> See *People v. Halgren*, 61 Cal. Rptr. 2d 176, 179 (Ct. App. 1996) ("It is clear that it is the perpetrator's intent, rather than the definition of the conduct engaged in, which triggers the applicability of the statute."); *State v. Culmo*, 642 A.2d 90, 98 (Conn. Super. Ct. 1993) (finding "[t]he fact that the statute creates a specific intent requirement significantly vitiates any claim that its purported vagueness could mislead a person of common intelligence into misunderstanding what is prohibited."); *State v. Dario*, 665 N.E.2d 759, 763 (Ohio Ct. App. 1995) ("The scienter requirement vitiates any claim that the statute's purported vagueness could mislead a person of ordinary intelligence into misunderstanding what is prohibited"); *Parker*, 485 S.E.2d at 153.

minority.<sup>268</sup>

As with the challenge for vagueness, the majority of courts have similarly upheld stalking statutes against challenges of overbreadth. According to the overbreadth doctrine:

A law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected expressive or associational rights . . . . A plausible challenge to a law void for overbreadth can be made only when 1) the protected activity is a significant part of the law's target, and 2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional application so as to excise the latter clearly in a single step from the law's reach.<sup>269</sup>

Most courts appear to have taken an approach similar to that of the Ohio Court of Appeals in *State v. Bilder*,<sup>270</sup> which in rejecting the overbreadth challenge, stated:

Despite the United States Supreme Court's broad statements concerning the application of the overbreadth doctrine, it has pursued a more limited analysis when considering challenged laws that regulate conduct that "falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct . . . . Section 135.09 [stalking statute] is a criminal law aimed at prohibiting harmful conduct. The statute undoubtedly reflects a

<sup>268</sup> See, e.g., *Commonwealth v. Kwiatkowski*, 637 N.E.2d 854 (Mass. 1994) (finding the term "repeatedly" was vague when used to modify the term "harasses"); *State v. Norris-Romine*, 894 P.2d 1221 (Or. Ct. App. 1995) (finding that "legitimate purpose" was unconstitutionally vague); *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996) (holding that terms "annoy" and "alarm" are unconstitutionally vague). Some other cases which have upheld stalking statutes against vagueness challenges are as follows: *Culbreath v. State*, 667 So. 2d 156 (Ala. Crim. App. 1995); *State v. Randall*, 669 So. 2d 223 (Ala. Crim. App. 1995); *Petersen v. State*, 930 P.2d 414 (Alaska Ct. App. 1996); *People v. Falck*, 60 Cal. Rptr. 2d 624 (Ct. App. 1997); *State v. Cummings*, 701 A.2d 663 (Conn. App. Ct. 1997); *McDade v. State*, 693 A.2d 1062 (Del. 1997); *People v. Bailey*, 657 N.E.2d 953 (Ill. 1995); *People v. Holt*, 649 N.E.2d 571 (Ill. App. Ct. 1995); *State v. Fonseca*, 670 A.2d 1237 (R.I. 1996); *State v. McGill*, 536 N.W.2d 89 (S.D. 1995); *Salt Lake City v. Lopez*, 935 P.2d 1259 (Utah Ct. App. 1997); *Woolfolk v. Commonwealth*, 447 S.E.2d 530 (Va. Ct. App. 1994); *State v. Lee*, 957 P.2d 741 (Wash. 1998); *State v. Ruesch*, 571 N.W.2d 898 (Wis. Ct. App. 1997); *Brock v. State*, 981 P.2d 465 (Wyo. 1999).

<sup>269</sup> LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 12-27 at 1022 (2d ed. 1988), citing *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); see also *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

<sup>270</sup> 651 N.E.2d 502 (Ohio Ct. App. 1994).

legitimate state interest.<sup>271</sup>

While a few defendants have challenged stalking statutes as violative of their right to travel, such attacks have proven uniformly unsuccessful. In rejecting this contention, one court grounded its decision in the victim's right to privacy:

The United States Supreme Court has recognized the "right of privacy" . . . This provision focuses on the protection of a citizen's private affairs. Personal rights found in the guaranty of privacy are fundamental to or implicit in the concept of ordered liberty. If the right of privacy offers any protection, that protection must include the right to be left alone. . . . In the case of stalking, . . . the State has a legitimate interest in restraining harmful conduct. It may do so under the police powers. Individuals have a constitutional right to move about as long as they are not committing a crime. The stalking statute . . . does not interfere with one's legitimate freedom of movement or right to travel, but applies to conduct between two or more persons when one wishes to be left alone and to be free of interference by the other. The statute is a reasonable exercise of the police powers in protecting privacy interests of a segment of society from invasive oppressive behavior and harmful conduct. One person's freedom of movement gives way to another person's freedom not to be disturbed.<sup>272</sup>

In another case, the court dismissed the defendant's argument, holding that the

state's interest in criminalizing stalking behavior . . . is compelling. . . . Providing protection from stalking conduct is at the heart of the state's social

<sup>271</sup> *Id.* at 509; see also *Culbreath*, 667 So. 2d 156; *Falek*, 60 Cal. Rptr. 2d 624 (finding stalking statute not overbroad since it was limited in application only to such threats as pose a danger to society and thus are unprotected by the First Amendment); *Baer*, 973 P.2d 1225; *State v. Marsala*, 688 A.2d 336 (Conn. App. Ct. 1997) (finding the stalking statute does not, on its face, implicate recognized First Amendment rights); *Culmo*, 642 A.2d at 104 ("Just as 'a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment[.]' neither is 'stalking' behavior"); *Bouters*, 659 So. 2d at 237 (finding stalking statute not overbroad since it is "clearly criminal and is unprotected by the First Amendment. . . . [T]he First Amendment gives the [citizen] no boon to jeopardize the health, safety, and rights of others"); *Bailey*, 657 N.E.2d 953; *Holt*, 649 N.E.2d 571; *State v. Rangel*, 977 P.2d 379, 384-85 (Or. 1999) (finding it necessary, to save the stalking statute from an overbreadth problem, that it required a threat or something threat-like); *Lopez*, 935 P.2d 1259; *Woolfolk*, 447 S.E.2d 530 (stalking statute was designed to prohibit conduct and not speech, and conduct engaged in with intent to place the victim in reasonable fear of death or bodily injury); *Lee*, 957 P.2d 741; *Brock*, 981 P.2d 465.

<sup>272</sup> *Lee*, 957 P.2d at 752-53.

contract with its citizens, who should be able to go about their daily business free of the concern that they may be the targets of systematic surveillance by predators who wish them ill. The freedom to go about one's daily business is hollow, indeed, if one's peace of mind is being destroyed, and safety endangered, by the threatening presence of an unwanted pursuer.<sup>273</sup>

Defendants fared slightly better when arguing that convictions for stalking, in combination with other convictions, violate double jeopardy. "Double jeopardy does not occur when a defendant is charged with two crimes arising from the same conduct as long as each statute requires proof of an additional fact which the other does not."<sup>274</sup> Pursuant to the *Blockburger* analysis, courts agree that a defendant may be convicted of stalking, even when he has earlier been charged with contempt for violating a protective order for the same conduct, since each offense contains an element which is not contained in the other:

Johnson committed one criminal offense when, in contravention of a court injunction, he contacted Green and entered her place of residence. The only elements necessary to prove the contempt offense were knowledge of the injunction and a willful violation of that injunction. He was also charged with a second offense—aggravated stalking. The statutory elements of aggravated stalking . . . are knowledge of an injunction and knowingly, willfully, maliciously, and repeatedly following or harassing the beneficiary of the injunction. Each of the two offenses contains an element not contained in the other. Criminal contempt requires proof of entering the residential premises, which the aggravated stalking offense does not; aggravated stalking requires proof of maliciousness which the contempt offense does not.<sup>275</sup>

Some courts exempt the issue from a double jeopardy analysis altogether. "The provisions relating to the violation of a restraining order do not define a crime. They merely create a punishment enhancement. As such, they're not to be considered in the double jeopardy analysis."<sup>276</sup> However, in some instances, a double jeopardy violation will be found to have occurred. When

<sup>273</sup> *Culmo*, 642 A.2d at 102; see also *McDade*, 693 A.2d 1062; *Ruesch*, 571 N.W.2d 898 (holding that the legislature carefully crafted the stalking law in such a content-neutral way that is a reasonable time, place and manner restriction on the right to intrastate travel).

<sup>274</sup> *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1997) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

<sup>275</sup> *State v. Johnson*, 676 So. 2d 408, 411 (Fla. 1996); see also *Ex parte Ivey*, 698 So. 2d 187 (Ala. 1997); *State v. Gonzales*, 940 P.2d 185 (N.M. Ct. App. 1997).

<sup>276</sup> *People v. Kelley*, 60 Cal. Rptr. 2d 653, 658 (Ct. App. 1997).

a defendant was convicted of both stalking and harassment, based on the same course of conduct, the court found that double jeopardy had been violated. "We do not believe that the policies underlying the enactment of the offenses of harassment and stalking can be said to materially differ. . . . While it is clear that stalking may be committed in several alternative ways, where both harassment and stalking are charged against the same defendant and the two offenses arise out of the same unitary conduct, the offense of harassment is subsumed into the offense of stalking."<sup>277</sup> Also, two misdemeanor stalking convictions, based on one course of conduct, but targeting two different victims, were also found to violate double jeopardy principles.<sup>278</sup>

Finally, a few states have enacted certain rebuttable presumptions in their stalking statutes, generally providing that if the victim requests that the defendant cease contacting her, then the victim's intimidation will be presumed.<sup>279</sup> The one court which examined the constitutionality of such a provision upheld it, since a rational connection existed between the fact proved and the fact presumed:

We find a rational connection does exist between the facts proved (which are: (1) a course of conduct by the perpetrator; (2) a request by the victim for the perpetrator to cease this conduct; and (3) a continuation of the course of conduct); and the fact presumed (that the victim actually felt terrorized, frightened, intimidated, threatened, harassed, or molested). . . . The fact presumed is not the guilt of the perpetrator, but rather the feeling of the victim.<sup>280</sup>

In issues of statutory interpretation, courts have generally taken the position that "stalking statutes must be interpreted as broadly as possible so as to afford the victim maximum protection."<sup>281</sup> When examining stalking statutes, courts consistently interpret them in a manner consistent with the legislative intent of victim protection, even when the literal wording of the

<sup>277</sup> *State v. Duran*, 966 P.2d 768, 774 (N.M. Ct. App. 1998), cert. denied, 972 P.2d 352 (N.M. 1998).

<sup>278</sup> See *Marinelli v. State*, 706 So. 2d 1374 (Fla. Dist. Ct. Ap. 1998); see also *Burton v. State*, 665 N.E.2d 924 (Ind. Ct. App. 1996) (holding that while stalking and invasion of privacy were separate offenses, when factual basis for defendant convictions for both was the same, double jeopardy barred convicting for both).

<sup>279</sup> See MICH. COMP. LAWS ANN. § 750.411i(5) (West 1999); N.D. CENT. CODE § 12.1-17.1.(3) (1997); OKLA. STAT. ANN. tit. 21, § 1173(E) (West 2000); WASH. REV. CODE ANN. § 9A.46.110(4) (West 2000).

<sup>280</sup> *State v. Saunders*, 886 P.2d 496, 497-498 (Okla. Crim. App. 1994).

<sup>281</sup> *Hayes v. State*, 717 So. 2d 30, 35 (Ala. Crim. App. 1997).

statute may suggest a very different reading. In *People v. Carron*,<sup>282</sup> for example, the court determined that the required element of "credible threat" did not mandate that the defendant had an intent to carry out the threat. "In ascertaining legislative intent, not only the statutory language should be considered; we should also take into account the object of the legislation, the evils to be remedied, the legislative history, public policy, and other matters helpful in discerning the intended meaning of the words used."<sup>283</sup> The court reached its conclusion despite the literal wording of the statute as providing that a "credible threat" means a threat made with the intent and the apparent ability to carry out the threat.<sup>284</sup> The court made such a finding since "to construe into the statute an 'intent to carry out the threat' element would largely thwart the statute's purpose. Stalkers could terrorize victims with impunity by merely threatening 'I might kill you; I haven't decided yet.'"<sup>285</sup>

The most persistent issue of statutory interpretation has arisen over the meaning of "repeatedly" in those statutes which employ a "repeatedly follows or harasses" definition of stalking. In an effort to limit the reach of the statute, defendants have frequently argued that "repeatedly" modifies both follows and harasses. The majority of courts have rejected this argument as being "illogical to read the statute to require repeated harassing when harassing itself is defined as consisting of repetitive acts."<sup>286</sup>

Courts in Illinois and in South Carolina have most broadly expanded their stalking statutes beyond their literal language. When confronted with statutory wording which prohibited surveillance "by remaining present outside the other place occupied by the person," an Illinois court nonetheless, in a semantic somersault, found that "[f]or the purposes of the stalking statute, a defendant may be found to have remained present outside for conduct that occurs

<sup>282</sup> 44 Cal. Rptr. 2d 328 (Ct. App. 1995).

<sup>283</sup> *Id.* at 331.

<sup>284</sup> *Id.* at 330.

<sup>285</sup> *Id.* at 333. See also *Hayes*, 717 So. 2d at 34-35 (finding that stalking statute does not contain requirement that the defendant actually intend to carry out this threat in order for the treat to be deemed credible); *Commonwealth v. Matsos*, 657 N.E.2d 467, 470 (Mass. 1995) (finding same standard of intent for defendant in stalking as in assault: "In a case of simple criminal assault, the Commonwealth need not prove that the defendant actually intended to harm the victim . . . it need only prove that the defendant's threats were reasonably calculated to place the victim in imminent fear of bodily injury.")

<sup>286</sup> *Snowden v. State*, 677 A.2d 33, 37 (Del. 1996); see also *People v. McCray*, 67 Cal. Rptr. 2d 872 (Cal. 1997); *Fonseca*, 670 A.2d 1237. But see *Kwiatkowski*, 637 N.E.2d 854.



inside.<sup>287</sup> The language of the stalking statute, noted the court,

does not require that [the] defendant remain physically outside the building occupied by the victim, and the insertion of such a requirement would unduly restrict the scope of the statute, contrary to the legislative intent. Common sense dictates that a victim may be subjected to as much, or more, harassment by being placed under surveillance from within a separate portion of a large structure, such as a shopping mall or ice skating facility, as from outside such a structure.<sup>288</sup>

A South Carolina court expanded the offense of aggravated stalking to include stalking committed by property damage.<sup>289</sup> The stalking statute defined aggravated stalking as requiring an "act of violence," but failed to define that phrase. The court declared that "if simple stalking can consist of fear of property damage, it logically follows that aggravated stalking can consist of actual property damage."<sup>290</sup>

The drafters of the Model Code urged that the crime of stalking be one of general intent, since many stalkers labor under the delusion that the victim is in love with him and consequently may argue that they had no wish to harm but only a desire to establish a relationship.<sup>291</sup> In keeping with such a goal, the Iowa court found a requirement of general, not specific, intent in its stalking statute:

Commentators have interpreted the [M]odel [C]ode to contain a general-intent provision. . . . Stalkers may suffer from a mental disorder that causes them to believe that their victim will begin to return their feelings of love or affection. . . . The drafters of the Model Code believed that the stalker's behavior, rather than his motivation, should be the most significant factor in determining whether to press charges. The Model Code's general intent requirement holds the accused stalker responsible for his intentional behavior if, at the very least, he should have known that his actions would cause the victim to be afraid. . . . By placing the focus on the stalker's behavior, the Model Code effectively eliminates the possibility that a stalker could assert a successful defense by claiming that he did not intend to cause the victim to be afraid, but was instead expressing his feelings and opinions.<sup>292</sup>

<sup>287</sup> *People v. Daniel*, 670 N.E.2d 861, 864 (Ill. App. Ct. 1996).

<sup>288</sup> *People v. Holt*, 649 N.E.2d 571, 577 (Ill. App. Ct. 1995).

<sup>289</sup> *See State v. Prince*, 517 S.E.2d 229 (S.C. Ct. App. 1999).

<sup>290</sup> *Id.* at 234.

<sup>291</sup> *See MODEL CODE*, *supra* note 214 at 47-48.

<sup>292</sup> *State v. Neuzil*, 589 N.W.2d 708, 711-12 (Iowa 1999) (finding that reading a specific intent into the stalking statute would essentially negate its purpose).

However, in those states which have enacted a stalking statute requiring a specific intent, such an intent appears to present no obstacle to upholding the defendant's conviction. Whenever defendants in such cases assert the benevolence of their intentions and the purported love for the victim, courts routinely reject their assertions by finding that "specific intent may, like any other fact, be shown by circumstances."<sup>293</sup> While an appellant may attempt to argue that he "loved the victim, would never harm her and had no desire to make her afraid,"<sup>294</sup> circumstantial evidence generally proves otherwise:

Here, it can be inferred that appellant intended to cause fear in the victim from the fact that he insisted on maintaining contact with her although she clearly was attempting to avoid him, and although he had been warned away by the police, the court and the victim's husband. In addition, appellant's letters were peppered with his desire to engage in sexual acts with the victim, acts which often included elements of bondage or violence. Appellant sent the victim black roses, symbolic of death. He referred to being together with her for eternity. He referred to his prowess with a rifle. All this evidence not only supports the conclusion that the victim feared appellant and had reason to fear him, but that he acted with the intention of inducing that fear.<sup>295</sup>

Even when the statute requires that the offense be committed with malice, which typically requires a higher degree of proof, the courts find no problem in the variance between the appellant's stated allegedly innocent intentions and the circumstantial evidence suggesting otherwise.<sup>296</sup>

Like domestic violence perpetrators who find little success in asserting the defense of extreme emotional disturbance, stalkers who argue that they had a "legitimate purpose" for their conduct see such arguments soundly rejected by the courts. In *People v. Tran*,<sup>297</sup> the appellant claimed that he had such a

<sup>293</sup> *Woolfolk*, 447 S.E.2d at 532 (While appellant argued that his acts of following the victim, maintaining surveillance on her residence, and threatening the man the victim was dating, were that of a "father who was worried and concerned about his children," court found the jury had a right to reject his assertion.)

<sup>294</sup> *Falck*, 60 Cal. Rptr. 2d at 631.

<sup>295</sup> *Id.*; *see also Kelley*, 60 Cal. Rptr. 2d 653 (finding that despite appellant's asserted affection and concern for the victim, the jury could find he acted with the requisite intent since he had molested victim as a child, punched a hole in her door, and run her bicycle off the road).

<sup>296</sup> *See McKinnon*, 712 So. 2d 1259 (finding that malice could be inferred from the appellant's twice disregarding the injunction); *McGill*, 536 N.W.2d 89 (finding evidence supported that appellant acted with malice when he admitted his obsession, called the victim incessantly, threatened her and her family, had to be removed from her office, followed her and her children, and sent her three letters on the same day).

<sup>297</sup> 54 Cal. Rptr. 2d 650 (1996).



legitimate purpose, which he defined as convincing the victim to leave her husband and pursue a romantic relationship with him. The court granted no credence to his argument: "Defendant cannot genuinely question that his acts of threatening [victim] with a knife or hammer and chasing her husband and baby while wielding a long knife are prohibited, even if he somehow hopes the acts will persuade [victim] to leave her husband."<sup>298</sup> Occasionally, the court will react in indignation to such an assertion. In *State v. Knight*,<sup>299</sup> an unpublished opinion which involves particularly egregious facts, the defendant had become fixated on a counselor at the community college where he was receiving training. His obsession with the victim resulted in the college banning him from the campus, at which point he then stalked the victim at her home. His endless calls and notes to her, reflecting a desire to make love to her and insisting that it was God's will that they be together, caused her to move from her townhouse. The defendant located her at her new residence within weeks, culminating in a harassment charge and a no contact order, which the defendant promptly violated. Over a period of months, the defendant then sent the victim hundreds of love letters, a subscription to *Bride* magazine and catalogs for wedding invitations. The court harshly rejected the defendant's argument, stating:

There was no personal relationship between the defendant and the victim except for what may have existed in the fantasy world of the defendant. To attempt to legitimize his actions by arguing the need to seek some sort of psychological "closure" for himself of a nonexistent relationship is outrageous. A defendant cannot attempt to justify his illegal actions by arguing that "closure" of a relationship is a legitimate purpose of harassment activity.<sup>300</sup>

Evidence of previous bad acts by criminal defendants are not generally admissible at trial unless they fall within certain designated exceptions, such as proof of motive, intent, plan, or absence of mistake.<sup>301</sup> In cases of stalking, however, courts consistently hold that a defendant's prior bad acts are admissible to show the defendant's intent and the course of conduct. "Other acts evidence can be particularly useful in prosecutions for menacing by stalking because it can assist the jury in understanding that a defendant's otherwise innocent appearing acts, when put into the content of previous contacts he has had with the victim, may be knowing attempts to cause mental

<sup>298</sup> *Id.* at 653.

<sup>299</sup> 1994 WL 19938 (Del. Super. 1994).

<sup>300</sup> *Id.* at \*3.

<sup>301</sup> See, e.g., KY. R. EVID. 404(b) (Michie 1998).

distress."<sup>302</sup> Admission of prior bad acts evidence is relevant in those jurisdictions which make stalking a specific intent crime.<sup>303</sup> In those jurisdictions which provide that a victim's request that the defendant cease his conduct creates a rebuttable presumption that the contact is unwelcome, the defendant's prior bad acts may be admitted to show the context in which the victim's request was made.<sup>304</sup>

Moreover, some courts have admitted prior bad acts the defendant had previously committed against other victims.<sup>305</sup> In *Morton v. State*,<sup>306</sup> the prosecution presented evidence concerning the defendant's acts toward another victim three years earlier. The witness was allowed to testify about the appellant's violent conduct towards her, the foul names he called her, his theft of her rings, his violent physical assaults, his breaking and entering of her residence, his wrecking her car, his assaulting her date, and his taking her dog. In *Morton*, as well as in other stalking cases dealing with prior bad acts, courts have not found that remoteness of the previous bad acts prevents their admission into evidence.<sup>307</sup> Again and again, courts find that the prosecution is entitled to present the totality of the evidence against the defendant, even if such evidence is repetitive.<sup>308</sup>

Courts permit the introduction of the prior bad acts not only because they demonstrate the defendant's intent, but also because they demonstrate the victim's fear (and the reasonableness of such fear) of the defendant.<sup>309</sup> Prior bad acts become particularly relevant in stalking which arises in the domestic

<sup>302</sup> *Bilder*, 651 N.E.2d at 505; see also *People v. Ranstrom*, 710 N.E.2d 61 (Ill. App. Ct. 1999); *Commonwealth v. Urrutia*, 653 A.2d 706 (Pa. Super. Ct. 1995); *McGill*, 536 N.W.2d 89.

<sup>303</sup> *Culbreath*, 667 So. 2d at 163 (noting the "rule is based upon the theory that, because the unintentional doing of an act is abnormal and unusual, the more a person does other acts similar to the act in question, the greater the likelihood that the act in question was not done inadvertently.").

<sup>304</sup> See *State v. Ferebee*, 499 S.E.2d 459 (N.C. Ct. App. 1998).

<sup>305</sup> See *Crenshaw v. State*, 515 S.E.2d 642 (Ga. Ct. App. 1999) (admitting testimony from two other women the defendant had harassed).

<sup>306</sup> 651 So. 2d 42 (Ala. Crim. App. 1994).

<sup>307</sup> See *Hayes*, 717 So. 2d at 37 (admitting evidence of a prior assault made by defendant upon stalking victim seven years earlier).

<sup>308</sup> See *Matsos*, 657 N.E.2d 467 (finding that trial court wrongly limited evidence of the number of letters sent by defendant to the victim); *Commonwealth v. Martinez*, 683 N.E.2d 699 (Mass. App. Ct. 1997) (admitting prior acts of violence against victim and minor child).

<sup>309</sup> See, e.g., *Petersen v. State*, 930 P.2d 414 (Alaska Ct. App. 1996).

violence context, where the defendant has assaulted the victim in the past.<sup>310</sup>

As seen in the courts' analyses of prior bad acts of the defendant, the crime of stalking places scrutiny not only upon the defendant, but upon the victim as well. Many states require that the defendant's conduct actually result in the victim being placed in a high state of fear. Such fear need not necessarily be contemporaneous with the act of stalking,<sup>311</sup> nor must the prosecution prove such fear through expert testimony,<sup>312</sup> but unless the stalking statute provides that the victim's fear will be judged by an objective standard,<sup>313</sup> then her actual fear must be demonstrated. The result of such statutes is that stalking victims must take the stand and painfully testify before the court and before the defendant to their state of fear and/or how emotionally disturbed they have become by the defendant. As one victim stated:

It makes you feel like you don't have a life, like you're violated, like you have to go . . . hurry and lock your doors, look around, scan the parking lot. It's like you can't go through a normal routine. You can't even go to work. It's frustrating. It's a violation and makes you fearful about what the intent is.<sup>314</sup>

Ironically, such statements indicate that while states have created a stalking offense to punish those who invade the privacy of others, a victim must relinquish that privacy in order to secure a conviction. While stalking statutes were passed to protect the physical safety and lives of victims, a victim must testify to her fear and emotional distress before she will be capable of securing such safety. While stalking statutes provide the victim with the ability to control her life by working within the criminal system to remove a dangerous offender from her life, she gains such control only by testifying to her helplessness in the face of the defendant. Here the law eerily parallels films on "reel" stalkers: like film it highlights the female protagonist experiencing planned, excessive suffering; female vulnerability is emphasized." Tellingly,

<sup>310</sup> See *McCray*, 67 Cal. Rptr. 2d at 881; see also *Bilder*, 651 N.E.2d 502; *Parker*, 485 S.E.2d 150.

<sup>311</sup> See *People v. Norman*, 89 Cal. Rptr. 2d 806 (Ct. App. 1999).

<sup>312</sup> *State v. Tichon*, 658 N.E.2d 16 (Ohio Ct. App. 1995).

<sup>313</sup> In *People v. Nakajima*, 691 N.E.2d 153 (Ill. App. Ct. 1998), the court rejected the defendant's assertion that the victim was required to testify about how each act he committed resulted in her fearing him: "[T]he determination of whether the victim was placed in reasonable apprehension of 'bodily harm, sexual assault, confinement or restraint' will be judged by an objective standard. The victim, therefore, need not testify explicitly about his or her apprehension. Rather, the trier of fact may reasonably infer such apprehension from the facts and circumstances of the case." *Id.* at 160.

<sup>314</sup> *Waldon v. State*, 684 N.E.2d 206, 207-08 (Ind. Ct. App. 1997).

these real life victims do triumph over their stalkers, but only by playing the role of the "terrorized female."

Notably, stalking cases which arise in the context of domestic violence continue to prove the most difficult for prosecution. While many courts recognize that prior acts of domestic violence are particularly relevant in a stalking prosecution, other courts exhibit far less understanding of the problems and complexities of domestic violence cases. In *Butler v. State*,<sup>315</sup> the court reversed the defendant's conviction for aggravated stalking of his wife, a woman characterized in the opinion as "somewhat immature."<sup>316</sup> The court found that there had been merely "vague testimony about a few unpleasant incidents."<sup>317</sup> Such "unpleasant incidents" consisted of the appellant arguing with the victim, refusing to leave the porch area when he had been escorted out of the house by the victim's brother, striking the victim, and throwing a chair through the window. On another occasion, the victim had a visible knot on her head, and on still another occasion, the appellant followed the victim to the school where she volunteered, where he became violent and was arrested by the police. Due to that incident, the appellant entered a guilty plea to charges of battery, trespassing and disorderly conduct. The court reversed the conviction not only because the victim failed to testify about any emotional distress she sustained as a result of defendant's conduct, but also because the state failed to prove that the defendant "repeatedly" harassed the victim.<sup>318</sup> Given that domestic violence relationships are often somewhat "on and off" as victims attempt to end the relationship, *Butler* appears to make prosecution of most stalking offenses arising in the domestic violence context extremely problematic.

While *People v. Gams*<sup>319</sup> ultimately upheld the defendant's conviction for stalking the victim in violation of a domestic violence protective order, it did so only by finding the victim so "helpless" that, according to the court, she belongs to a class of "people who often need the most protection from their own impotency."<sup>320</sup> In this court's analysis, the victim needed rescuing, not from the defendant, but from herself. In *Gams*, the victim attempted to end the relationship with the defendant, but he would not leave her alone. She obtained

<sup>315</sup> 715 So.2d 339 (Fla. Dist. Ct. App. 1998).

<sup>316</sup> *Id.* at 339.

<sup>317</sup> *Id.* at 340.

<sup>318</sup> *Id.* at 341.

<sup>319</sup> 60 Cal. Rptr. 2d 423 (Ct. App. 1997).

<sup>320</sup> *Id.* at 426.

a restraining order against him, an order which he then violated. When the victim called the police, not once but three times, they told her they were "too busy and if appellant was not hurting her they could not respond."<sup>321</sup> The victim permanently ended the relationship with the appellant, who then began to stalk her—all in violation of the restraining order.

On appeal, appellant claimed his conviction was invalid because the victim had entrapped him into committing a criminal violation. The court characterized the victim—who had ended the relationship, who had taken out a restraining order against the appellant, whose testimony at court was "reasonable and credible," whose calls to the police for help had resulted in their three times saying that they were "too busy"—as "passive, submissive, and helpless."<sup>322</sup> In the face of such efforts by the victim to get police protection and get the defendant removed from her life, the court still focused on "the participation of victims like Salcedo in abusive relationships."<sup>323</sup> Finally, citing to studies discussing the principle of "learned helplessness," the court rejected the appellant's entrapment argument, finding it inapplicable to "statutes which have as their *raison d'être* the protection of victims from participation or complicity in their own predicament . . . to hold otherwise would place compliance with lawful court orders in the hands of the very people who often need the most protection from their own impotency."<sup>324</sup>

#### G. What is the Model Stalking Law?

The composite analysis of the cultural, clinical, and legal perspectives on stalking can inform, to a significant degree, the most effective statutory scheme for this crime. Above all, it is imperative that the camera lens of the law be focused on the perpetrator of the crime of stalking rather than on the intended target. Statutes which emphasize the emotional reaction of a victim rather than the behavior and intent of the stalker inadvertently further the offender's aim of scrutinizing the victim. The following elements are those which the authors believe would comprise a model stalking law:

1. An objective standard of a course of conduct by the offender which is intended to inflict emotional distress or would cause a victim to reasonably fear for her or his safety. This standard removes the current subjective requirement of many stalking statutes that the conduct actually result in

<sup>321</sup> *Id.* at 424.

<sup>322</sup> *Id.* at 426.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

demonstrated (acute) distress to the victim. The effect of this solely objective standard is to focus the law on the behavior of the offender and away from the victim. Under this standard, there is no longer a need to demonstrate that the victim actually experienced fear or other harm. A standard based not on actual, but rather on a reasonable fear means that "[t]he victim, therefore, need not testify explicitly about his or her apprehension. Rather, the trier of fact may reasonably infer such apprehension from the facts and circumstances of the case."<sup>325</sup> By adhering to a reasonableness standard, such a statute avoids constitutional challenges of vagueness since it provides the ordinary person with sufficient definitiveness to understand what conduct is prohibited.<sup>326</sup>

2. Further, by including a general intent standard (i.e., that the defendant intended to engage in the proscribed conduct but did not necessarily intend the specific results of such conduct) as one way in which stalking can be committed, the statute still targets a delusional offender who believes his overtures would be welcomed by the victim. It was precisely to include this type of offender which lead the drafters of the Model Code to make stalking a crime of general intent. While appellate courts seemed to have held, even in states which require specific intent, that the intent of the offender can be surmised from the circumstances (i.e., negating the defendant's argument that he acted only out of love or a legitimate purpose), it may be wise to specify the general intent language as a security measure. Further, appellate opinions provide only limited guidance on this point, since, by definition, they include only the appeals of convicted defendants. It cannot be known how many defendants, in jurisdictions which make stalking solely a specific intent crime, escape conviction by arguing that their stalking was committed out of a feeling of love, not from a motive to harm.
3. A measure used by some states to strengthen the intent language is to provide that if the victim requests the defendant stop contacting her, such a request shall function either as a rebuttable presumption that the contact is unwanted or as prima facie evidence that the stalker intended to intimidate or harass the victim. This may function as a constructive supplement to the statute, since it provides for a mechanism by which the victim's voice can be heard, in contrast to much of the law on sexual assault and domestic violence, which far too often negates the victim's

<sup>325</sup> *Nakajima*, 691 N.E.2d at 160.

<sup>326</sup> *See supra* section III F.

voice. Notably, it could provide a way in which "no means no." Care should be taken, however, not to encourage victims to contact dangerous stalkers who would interpret the contact as evidence that his intentions are desired.

4. In general, stalking is a crime because of the victim's lack of consent to the defendant's behavior. However, consent plays out differently depending upon the stalking behavior at issue. Following would appear to be non-consensual *per se*, since a defendant could be following the victim only because she did not or would not want the defendant to be present with her. Harassing conduct, in contrast, may or not be nonconsensual (and hence harassing), depending upon the context for the behavior. States like Florida and Idaho which distinguish between stalking as following and stalking as harassment have made a valid distinction, one which should be recognized in more stalking statutes.
5. The harm which the offender inflicts upon the victim should be as broadly worded as possible. By limiting actionable criminal stalking conduct to that which elicits fear from the victim, the Model Code and many states fail to include those victims who may be distressed or angry by being stalked, but not fearful. As noted earlier, the clinical literature gives evidence that survivors of a prior trauma or abuse may be less likely than other persons to identify danger signals in their environment or may be in denial about the degree of danger to which they are exposed. Yet, those offenders present as great a danger to the victim and to society as offenders who elicit fear. As a result, statutory language should include not only fear, but also emotional distress and serious annoyance. Note, however, that a stalking statute which used a "reasonable" fear standard would avoid the current problem by removing the focus on the particular victim at issue.
6. Statutes should also broadly define what a victim might fear, including physical injury, sexual contact or death, as well as general safety, as specified by California, Connecticut, and Georgia statutes, and property damage, as provided in Texas and Vermont. The category of persons to whom the victim's fear may extend should also be expanded to include a victim's fear of injury to a family or household member.
7. Statutes should provide for an aggravated level of stalking. When a protective order has already been issued in the case; when the stalker has possession of a weapon at the time of the stalking; when the stalker has been convicted or when a criminal complaint has previously been filed by the victim against the stalker, the criminal conduct should rise to a felony

level. States should also consider defining "protective order" in broad terms to include any order of the court issued for the specific purpose of providing protection to a victim (e.g., pre-trial release conditions, domestic violence orders of protection issued by any state, conditions of bond or parole, etc.).

8. As a supplement to the criminal stalking law, statutes should afford stalking victims, like domestic violence victims, access to protective orders. This is particularly important for those victims who would not fall under the state's existing statutory definition for eligibility for a domestic violence protective order.
9. On a related note, states should consider providing victims a civil right of action which would allow them to sue the person who stalked them.<sup>327</sup>

#### IV. CONCLUSION

The complexities of stalking are manifested in the contradictory ways the behavior is treated by our legal and clinical systems and in the provocative film and literary portrayals of those involved in this crime. No consideration of stalking can be undertaken without understanding how our professional response is intertwined with our cultural imagery about crimes of violence directed at women. The elements of a model statute offered within this article are intended to accommodate the complexities of the law, psychology and culture, all to the benefit of those harmed by this crime.

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<sup>327</sup> See SB 116.