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From Imprudence to Crime: Anti-Stalking Laws

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I. INTRODUCTION

On July 18, 1989, Rebecca Schaeffer, a star on the television show "My Sister Sam," was murdered at her Los Angeles apartment by an obsessed fan who had pursued her for two years.[1] In Connecticut, Margaret Ray repeatedly has appeared at David Letterman's home, sometimes claiming to be his wife.[2] Both of these high-profile cases have helped direct the attention of the media and of state legislatures to a problem that more often affects the ordinary citizen[3]—usually a woman—than a public figure: "stalking." Typically, states define stalking as wilfully,[4] maliciously, and repeatedly following and harassing another person.[5] Stalkers can be obsessed fans,[6] divorced or separated spouses,[7] ex-

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1 DARRELL DAWSEY & ERIC MALNIC, *ACTRESS REBECCA SCHAEFFER FATALLY SHOT AT APARTMENT*, L.A. TIMES, July 19, 1989, at 1; *see also* Marla Harper, *Personalities*, WASH. POST, Dec. 23, 1991, at B3 (for almost a year, her murderer, Robert Bardo, had sent Schaeffer gifts and telephoned her); Eric Malnic, *Man Who Killed T.V. Actress Gets Life Without Parole*, L.A. TIMES, Dec. 21, 1991, at 3B (Bardo followed Schaeffer for nearly two years, hired a detective to get her address, who obtained it through the California Department of Motor Vehicles, and repeatedly sent her letters); Rick Ratliff, *Computer Misuse Puts Snoopers into Private Lives*, DET. FREE PRESS, Aug. 30, 1992, at 9 (Bardo had gathered information about Schaeffer's personal life using an on-line database).

2 MARIA PUENTE, *LEGISLATORS TACKLING THE TERROR OF STALKING: BUT SOME EXPERTS SAY MEASURES ARE VAGUE*, USA TODAY, July 21, 1992, at 9A (also reporting that Johnny Carson, Olivia Newton-John, and Michael J. Fox have been stalked, as was John Lennon); *see also* Marvine Howe, *Chronicle*, N.Y. TIMES, Mar. 25, 1992, at B24 (Mr. Letterman's "stalker," Margaret Ray, went to his residence seven times and, on one occasion, broke into his house and stole his car.).

3 *COOPERATIVE AGREEMENT TO DEVELOP MODEL STATE ANTI-STALKING LAW*, U.S. NEWSWIRE, DEC. 23, 1992, *AVAILABLE IN* LEXIS, NEXIS LIBRARY, WIRES FILE [HEREINAFTER *COOPERATIVE AGREEMENT*] ("[T]HE VAST MAJORITY OF STALKERS PREY ON ORDINARY CITIZENS," STATED NATIONAL INSTITUTE OF JUSTICE SPOKESMAN CHARLES B. DEWITT.); *ANTI-STALKING LEGISLATION: HEARINGS ON S. 2922 BEFORE THE SENATE COMM. ON THE JUDICIARY*, 102D CONG., 2D SESS. (1992) (PREPARED STATEMENTS OF WITNESSES TESTIFYING AT THIS SEPT. 29, 1992 HEARING ARE AVAILABLE FOR EXAMINATION FROM THE SENATE JUDICIARY COMMITTEE'S DOCUMENTS CLERK) [HEREINAFTER *HEARINGS*] ("DOZENS OF WOMEN AND MEN TOLD US ABOUT THEIR ENCOUNTERS WITH STALKERS.") (STATEMENT OF REP. BULLARD).

4 THOUGH SEVERAL STATES UTLIZE "WILFULLY" TO DESIGNATE THE CUPABILITY REQUIREMENT OF STALKING BEHAVIOR, ITS USE CAN BE PROBLEMATIC. SEE MODEL PENAL CODE § 2.02, cmt. 10 n.47 (1985), for a discussion between Judge Learned Hand and Herbert Wechsler about the inadequacy of the word wilfully. ("It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, 'wilful' would lead all the rest in spite of its being at the end of the alphabet.").

5 *COOPERATIVE AGREEMENT*, SUPRA NOTE 3; *SEE ALSO INFRA* NOTE 28.

6 JOSH MEYER, *MAN HELD IN STALKING OF POP SINGER JANET JACKSON*, L.A. TIMES (Valley ed.), June 25, 1992, at 3B (man claiming to be Jackson's husband charged with stalking after making threats and attempting to gain entry to her home); *Milwaukee Man Charged with Threatening Johnny Carson*, L.A. TIMES, Dec. 8, 1989, at 1 (man who had

lovers,[8] rejected suitors,[9] neighbors,[10] co-workers,[11] classmates,[12] gang members,[13] former employees,[14] disgruntled

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threatened to kill Johnny Carson unless paid $5 million charged with making terrorist threats and with sending threatening letters).

7 *See, e.g.*, LINDA MAE CARISTONE, *Every Day May Be My Last*, CHI. TRIB., Sept. 13, 1992, at 3 (woman and her four-year-old son have been "followed, watched, phoned and threatened" by her ex-husband); James Hill, *First Stalking Charge Filed in Lake County*, CHI. TRIB., July 30, 1992, at 2 (husband arrested after he repeatedly threatened wife and visited house with video camera in hopes of gathering evidence for divorce proceeding); Janita Poe & Karen Brandon, *A Bloody Rampage in Zion*, CHI. TRIB., Mar. 8, 1993, at 1 (despite the imposition of a restraining order and 11 calls to police by the ex-wife during the year prior to the killings, a father/ex-husband murdered two of his children and wounded five other people, including his ex-wife).

8 MICHAEL CONNELLY, *Ex-Boyfriend Jailed Under 'Stalking Law,'* L.A. TIMES, June 10, 1991, at B1 (woman filed 13 reports with police about ex-boyfriend who had slashed her car tires, stolen her dog, and poured acid on her car, all while a restraining order was in effect); Ardy Friedberg, *"I'll Never Let You Go;" Elderly Man May Be First Charged Under Florida Stalking Law*, HOUSTON CHRON., July 12, 1992, at B16 (66-year-old man charged with stalking a 75-year-old widow, his girlfriend for 17 years, after he repeatedly showed up at her residence and called her numerous times each day); Brenda Camp Yarbrough, *Man Pleads Guilty in Stalking Georgia Woman: One of Tennessee's First Prosecutions*, ATLANTA CONST., Jan. 14, 1993, at C2 (man plead guilty to stalking ex-girlfriend).

9 N.R. KLEINFELD, *Ex-New York Judge Pleads Guilty and Details Plot*, N.Y. TIMES, Apr. 1, 1993, at A1. Though former-Chief Justice of the New York Court of Appeals, Sol Wachtler, was not indicted for stalking, he confessed to carrying out a 13 month long campaign of fear aimed at his former lover, Joy Silverman. Wachtler stated that his campaign was designed to "cause[] Ms. Silverman to seek my help and protection." *Id.* During his campaign, he made several threatening telephone calls using a voice-altering device, sent letters to Silverman under the forged name of David Samson, a friend of Silverman, and sent a letter containing a condom to Silverman's daughter, again forging Samson's signature. Wachtler even threatened to kidnap Silverman's daughter. Wachtler was diagnosed with bipolar disorder. *See also* Jennifer Lenhart, *Valentine Memory: Elmhurst Lights Candles to Young Couple Slain by Stalker*, CHI. TRIB. (Du Page ed.), Feb. 15, 1993, at 1 (couple slain by man who had dated the female victim a few times, had become obsessed with her, and then followed her).

10 DEE NORTON, *First Charge Filed Under New Anti-Stalking Law*, SEATTLE TIMES, Aug. 14, 1992, at B1 (man telephoned neighbors at work, sent them flowers, and shouted death threats).

11 DONNA HALVORSEN, *Senate Panel Will Debate Stalking Bill; But Crime is Difficult to Define, Backers Say*, STAR TRIB., Jan. 28, 1993, at 1B (woman killed by co-worker after he repeatedly came to her home uninvited and made threatening phone calls to her).

12 *Boy, 12, Accused as Stalker*, N.Y. TIMES, Dec. 17, 1992, at B21 (seventh grader charged with violating Florida's anti-stalking law after leaving threatening notes in a classmate's locker; the notes indicated that the boy had been following his victim).

13 *Two Women Charged Under Stalking Law*, CHI. TRIB. (North ed.), Jan. 22, 1993, at 3 (two women charged with aggravated stalking after following the victim and threatening to have her killed by fellow gang members); *see also* the discussion *infra* note 302 and accompanying text regarding tort actions for intentional infliction of emotional distress.

14 CONSTANCE SOMMER, *Senator, Wife Know Awful Lot About Stalkers*, L.A. TIMES, Mar. 19, 1993, at A5 (pilot who worked for senator during 1984 campaign harassed

defendants,[15] as well as complete strangers.[16] Two hundred thousand people in the United States are estimated to be stalking someone.[17]

In 1989, not only was Rebecca Schaeffer killed by a "stalker," but in Orange County, California, five women, all of whom obtained restraining orders against former spouses or boyfriends due to harassment, were also killed by their harassers.[18] Before 1990, protective orders were the main defense against stalking behavior, but these often prove ineffective.[19] This ineffectiveness, combined with the absence of adequate legal grounds permitting the police to intervene before a stalker causes serious bodily harm,[20]

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senator's family for eight years through obscene phone calls in the middle of the night, threatening letters in the mailbox, and incessant ringing of the doorbell); Marc Carey, *Police Say Tennis Pro Had Plans of Slavery*, TIMES UNION (Three Star ed.), Apr. 28, 1993, at B1, *available in* WESTLAW, Dialog, Papers File (Sixteen year old girl stalked by her former tennis instructor. The girl's parents had fired the instructor because he was obsessed with their daughter. The instructor shot himself after attempting to abduct the girl. Police say he also stalked other children. The police found surveillance equipment and pornographic materials on the instructor's premises.).

15 *THE JUDGE AS VICTIM: SHE TELLS HER STORY TO PUSH ANTI-STALKING BILL*, STAR TRIB., Feb. 20, 1993, at 1A (judge in Minnesota suspects that a man she sentenced in 1984 is guilty of slashing her tires eight times, spray-painting her house twice, and leaving mutilated animals on her porch); *see also Judge Wants Stalking Law*, NAT'L L.J., Mar. 8, 1993, at 6.

16 *HEARINGS*, *SUPRA* NOTE 3 (PREPARED STATEMENT OF M. JANE MCALLISTER WHO, AFTER A CHANCE ENCOUNTER WITH A MAN IN 1981, WAS STALKED BY THE SAME MAN FOR 18 MONTHS AFTER SHE ENCOUNTERED HIM AGAIN IN 1990); *SEE ALSO ID.* (PREPARED STATEMENT OF THE MOTHER OF KIMBERLY, A YOUNG WOMAN WHO HAS BEEN STALKED SINCE 1984 BY A MENTALLY DISTURBED MAN WHO HAD SEEN KIMBERLY'S PICTURE IN THE NEWSPAPER); SCOTT BOWLES, *"STALKED" BY STRANGERS, WOMEN SEEK PROTECTION*, DET. NEWS, Apr. 27, 1992, *available in* LEXIS, Nexis Library, Papers File (woman proprietor of a grocery store stalked by customer).

17 *HEARINGS*, *SUPRA* NOTE 3 (STATEMENT OF SEN. BIDEN, CHAIRMAN OF THE SENATE JUDICIARY COMMITTEE). THIS STATISTIC IS ALSO REPORTED IN PUENTE, *SUPRA* NOTE 2, AT 9A (CITING PARK DIETZ, A CLINICAL PSYCHIATRIST WHO CONDUCTED THE ONE MAJOR STALKING STUDY).

18 CONNELLY, *SUPRA* NOTE 8.

19 ALEXANDER REID, *WOMAN IS SLAIN AS CHILDREN WATCH*, BOSTON GLOBE, May 26, 1992, at 1 (despite an order to stay away from his wife, husband stabs wife to death in the couple's kitchen). Caristone, *supra* note 7, at 3 (35,346 order-of-protection violations reported in Illinois in a five-month period in 1992). According to the National Victims Center, "such orders penalize perpetrators *only* when the orders have been violated, or when the harm they are designed to protect against has already occurred. These restraining orders also may have jurisdictional boundaries which, when crossed, render them unenforceable." *Stalking Legislation*, NAT'L VICTIM CTR. (Nat'l Victim Center, Arlington, Va.), No. 63, 1992, at 1.

20 CONNELLY, *SUPRA* NOTE 8, AT B1 ("THE OLD ADAGE WAS 'ONCE HE ATTACKS YOU PHYSICALLY, THEN WE CAN ACT,' SAID EDWARD ROYCE (SPONSOR OF CALIFORNIA'S ANTI-STALKING LAW) [NOW] LAW ENFORCEMENT [HAS] THE ABILITY TO INTERVENE . . . BEFORE IT IS

prompted then State Senator Edward Royce of Fullerton to sponsor a bill that became the first "anti-stalking" law[21] in the nation.

Between 1990 and 1991, no other state adopted an anti-stalking law, but 1992 brought a torrent of legislation.[22] To date, thirty-six states[23] have anti-stalking laws. In twenty-six states, the first stalking offense is a misdemeanor;[24] in four states a felony;[25]

TOO LATE."); JAMES HILL, *FIRST STALKING CHARGE FILED IN LAKE COUNTY*, CHI. TRIB. (Lake ed.), July 30, 1992, at 2 ("Previously, you had to wait until there had been some kind of actual contact (battery) or confrontation between the two before we could really do anything," said state's attorney Michael Waller, commenting on Illinois' new stalker law.); Mark Langford, *Senate Unanimously Adopts Stalking Law*, UPI, Feb. 17, 1993, *available in* LEXIS, Nexis Library, UPI File (Regarding stalking victims seeking police protection, Texas State Senator Mike Moncrief stated, "The question has always been 'Has he hurt you yet? Until he does, our hands are tied.'"); *Bill Needed to Help Control Stalkers*, ATLANTA CONST., Jan. 2, 1992, at A10 ("[I]n many cases, a stalker may be breaking no existing laws . . . . [A] terrorist might stand on the street each morning in front of a woman's house and follow closely behind her anywhere she walks. As long as he stays on public streets and sidewalks, he isn't trespassing, so she can't make him stop."). Currently, for example, Georgia's anti-harassment statutes only cover telephonic harassment and fighting words. GA. CODE ANN. §§ 46-5-21, 16-11-39 (Michie 1992).

21 CAL. PENAL CODE § 646.9 (West 1991), *amended by* 1992 Cal. Stat. 627.

22 *SEE GENERALLY* MATTHEW J. GILLIGAN, NOTE, *STALKING THE STALKER: DEVELOPING NEW LAWS TO THWART THOSE WHO TERRORIZE OTHERS*, 27 GA. L. REV. 285 (1992).

23 ALA. CODE §§ 13A-6-90 to -94 (Supp. 1992); 1993 Ark. Acts 388; CAL. PENAL CODE § 646.9 (West 1991 & Supp. 1993); COLO. REV. STAT. ANN. § 18-9-111 (West Supp. 1992); 1992 Conn. Legis. Serv. 701 (West); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); FLA. STAT. ANN. § 784.048 (West Supp. 1993); 1993 Ga. Laws 560; HAW. REV. STAT. § 711-1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1992); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to -7.4 (Smith-Hurd 1993); Act of Apr. 29, 1993, S.B. 97 (Ind., not yet signed by the governor); 1992 Iowa Legis. Serv. 190 (West) (to be codified at IOWA CODE § 708.11); 1992 Kan. Sess. Laws 95; KY. REV. STAT. ANN. §508.130-.150 (Baldwin 1992); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); MASS. ANN. LAWS ch. 265, § 43 (Law. Co-op. Supp. 1993); 1992 Mich. Legis Serv. 1165 (West) (to be codified at MICH. COMP. LAWS § 750.411h); MISS. CODE ANN. § 97-3-107 (Supp. 1992); 1992 Neb. Laws 1098 (amending NEB. REV. STAT. §§ 28-101, 42-903, 42-924 (1988)); 1992 N.J. Sess. Law Serv. 720 (West) (to be codified at N.J. STAT. ANN. § 2C:12-10); 1993 N.M. Laws 86; N.Y. PENAL LAW §§ 120.13-.14, 240.25 (McKinney Supp. 1993); N.C. GEN. STAT. § 14-277.3 (Supp. 1992); 1993 N.D. Laws 120 (to be codified at N.D. CENT. CODE § 12.1-17); OHIO REV. CODE ANN. §§ 2903.211-.215 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993); R.I. GEN. LAWS §§ 11-59-1 to -3 (Supp. 1992); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 22-19A-1 to -6 (Supp. 1992); TENN. CODE ANN. § 39-17-315 (Supp. 1992); 1993 Tex. Gen. Laws 10 (amending TEX. PENAL CODE § 42.07); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993); W. VA. CODE § 61-2-9a (Supp. 1992); WIS. STAT. ANN. § 947.013(1), (1r), (1t) (Supp. 1992); Act of Feb. 25, 1993, ch. 92 (Wyoming) (to be codified at WYO. STAT. §§ 1-1-126, 6-2-506, 7-3-506 to -511).

24 CAL. PENAL CODE § 646.9(b) (up to one year imprisonment, $1000 fine, or both); COLO. REV. STAT ANN § 18-9-11(2) (class 3); HAW. REV. STAT. § 711-1106.5(2) (petty misdemeanor); IDAHO CODE § 18-7905(b) (up to one year imprisonment, $1000 fine, or both); IOWA CODE § 708.11(2)(c)-(d) (can be a simple or serious misdemeanor); 1992

and in six states, either a misdemeanor or a felony, depending on the nature of the offense.[26] Presently, legislators in another eleven states are considering anti-stalking bills,[27] and in Washington, Members of Congress are proposing several bills that provide federal penalties for stalking,[28] including one by freshman Congressman Royce, the sponsor of the California law.[29] Canada's anti-in-

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Kan. Sess. Laws 298 (class B or A); LA. REV. STAT. ANN. § 40.2(B) (up to six months, $1000 fine, or both); MASS. ANN. LAWS ch. 265, § 43(a) (up to two and a half years imprisonment, $1000, or both); 1992 Mich. Pub. Acts 261 (to be codified at MICH. COMP. LAWS §§ 750.411I) (misdemeanor); MISS. CODE ANN. § 97-3-107(1) (up to six months imprisonment, $1000 fine, or both); 1992 Neb. Laws 1098 (if protective or bail order violated, a class I misdemeanor); 1993 N.M. Laws 86 (misdemeanor); 1992 N.J. Sess. Law Serv. 720 (West) (fourth degree crime); N.Y PENAL LAW §§ 120.13-.14, 240.25 (class A or B); N.C. GEN. STAT. § 14-277.3(b) (up to six months, $1000 fine, or both); OHIO REV. CODE ANN. § 2903.211(b) (first degree misdemeanor); OKLA. STAT. ANN. tit. 21, § 1173(a) (up to one year imprisonment, $1000 fine, or both); R.I. GEN. LAWS ANN. § 11-59-2(a) (up to one year, $3000 fine, or both); S.C. CODE ANN. § 16-3-1070(B) (up to one year imprisonment, $1000 fine, or both); S.D. CODIFIED LAWS ANN. § 22-19A-1 (class 1); TENN. CODE ANN. § 39-17-315(b)(1) (class A); 1993 Tex. Gen. Laws 10 (class A); UTAH CODE ANN. 76-5-106.5(3) (class B); VA. CODE ANN. § 18.2-60.3(A) (class 1 or 2); W. VA. CODE § 61-2-9a(a) (up to one year, $1000 fine, or both); WIS. STAT. ANN. § 940.32(2) (class A).

25 ALA. CODE § 13A-6-90(1)(b) (class C felony); 1993 Ark. Acts 388 (class B or C felony); DEL. CODE ANN. tit. 11, § 1312A(f) (class F felony); ILL. ANN. STAT. ch. 720, para. 5/12-7.3(b) (class 4 felony).

26 1992 CONN. ACTS 92-237(1)(B) (FIRST DEGREE STALKING IS CLASS D FELONY AND A SECOND DEGREE STALKING IS A CLASS A MISDEMEANOR); FLA. STAT. ANN. § 784.048(c)(2)-(3) (stalking is a misdemeanor, while aggravated stalking is a felony of the third degree); KY. REV. STAT. ANN. §§ 508.140-.150 (first degree stalking is a class D felony, while second degree stalking is a misdemeanor); WASH REV. CODE ANN. § 9A.46.110(5) (gross misdemeanor or class C felony if person violates a court order protecting the person being stalked); 1993 N.D. Laws 120; Act of Feb. 25, 1993, ch. 92 (Wyoming) (to be codified at WYO. STAT. § 6-2-506(d)) (stalking may be a misdemeanor, but is a felony if the defendant caused serious bodily harm to the victim, committed the offense in violation of any condition of probation, parole or bail, or committed the offense in violation of a temporary or permanent protection order).

27 ALASKA (TWO BILLS), MAINE (ONE BILL), MARYLAND (FOUR), MINNESOTA (ELEVEN), MISSOURI (FIVE), MONTANA (TWO BILLS), NEVADA (THREE BILLS), NEW HAMPSHIRE (TWO BILLS), OREGON (SEVEN BILLS), PENNSYLVANIA (THREE BILLS), AND VERMONT (FIVE BILLS).

28 S. 470, 103D CONG., 1ST SESS. (1993) (SPONSORED BY SEN. BOXER AND SEN. KREUGER); H.R. 840, 103D CONG., 1ST SESS. (1993) (SPONSORED BY REP. KENNEDY).

29 H.R. 740, 103D CONG., 1ST SESS. (1993). THE TEXT OF THIS BILL IS REPRINTED HERE BECAUSE, WITH THE EXCEPTION OF ITS JURISDICTIONAL PROVISIONS, IT INCLUDES THE BASIC ELEMENTS OF ANTI-STALKING BILLS EITHER PASSED OR PENDING IN THE STATES. THE BILL READS:

§ 889. STALKING

(A) WHOEVER, IN A CIRCUMSTANCE DESCRIBED IN SUBSECTION (C) OF THIS SECTION WILLFULLY AND MALICIOUSLY—

(1) REPEATEDLY FOLLOWS OR HARASSES ANOTHER PERSON; AND

timidation law became effective in 1970,[30] but recently commen-

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(2) MAKES A CREDIBLE THREAT WITH THE INTENT TO PLACE THAT PERSON IN REASONABLE FEAR OF THE DEATH OR SERIOUS BODILY INJURY OF THAT PERSON OR A MEMBER OF THAT PERSON'S IMMEDIATE FAMILY;

SHALL BE PUNISHED AS PROVIDED IN SUBSECTION (B) OF THIS SECTION.

(B) THE PUNISHMENT FOR AN OFFENSE UNDER SUBSECTION (A) OF THIS SECTION IS—

(1) A FINE UNDER THIS TITLE, OR IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH, IN THE CASE OF A FIRST CONVICTION UNDER SUCH SUBSECTION OR A SECOND OR SUBSEQUENT CONVICTION NOT DESCRIBED IN PARAGRAPH (2)(B); AND

(2) A FINE UNDER THIS TITLE OR IMPRISONMENT FOR NOT MORETHAN THREE YEARS, OR BOTH, IF THE OFFENSE—

(A) VIOLATED A RESTRAINING ORDER OR OTHER COURT ORDER IN EFFECT PROHIBITING THE BEHAVIOR; OR

(B) IS A SECOND OR SUBSEQUENT CONVICTION UNDER THIS SECTION AND IS AGAINST THE SAME VICTIM AS A PRIOR OFFENSE UNDER THIS SECTION.

(C) THE CIRCUMSTANCE REFERRED TO IN SUBSECTION (A) OF THIS SECTION IS—

(1) THAT THE OFFENDER CROSSED THE BORDER OF A STATE DURING OR FOR THE PURPOSES OF THE COMMISSION OF THE OFFENSE;

(2) THAT THE OFFENDER IN THE COURSE OF THE OFFENSE USED THE UNITED STATES MAIL OR A FACILITY IN OR INSTRUMENTALITY OF INTERSTATE COMMERCE, OR

(3) THE OFFENSE OCCURRED IN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES.

(D) FOR THE PURPOSES OF THIS SECTION—

(1) ONE HARASSES A PERSON IF—

(A) ONE KNOWINGLY ENGAGES IN A COURSE OF CONDUCT DIRECTED SPECIFICALLY AT THAT PERSON;

(B) THAT CONDUCT SERIOUSLY ALARMS, ANNOYS, OR HARASSES THAT PERSON BUT SERVES NO LEGITIMATE PURPOSE; AND

(C) THE COURSE OF CONDUCT IS SUCH AS WOULD CAUSE A REASONABLE PERSON TO SUFFER SUBSTANTIAL EMOTIONAL DISTRESS AND DOES IN FACT CAUSE SUBSTANTIAL EMOTIONAL DISTRESS TO THE PERSON AGAINST WHOM IT IS DIRECTED;

(2) THE TERM "COURSE OF CONDUCT" MEANS A PATTERN OR CONDUCT COMPOSED OF A SERIES OF ACTS OVER A PERIOD OF TIME, HOWEVER SHORT, EVIDENCING A CONTINUITY OF PURPOSE; AND

(3) THE TERM "CREDIBLE THREAT" MEANS A THREAT MADE WITH THE INTENT AND APPARENT ABILITY TO CARRY OUT THE THREAT SO AS TO CAUSE THE PERSON WHO IS THE TARGET OF THE THREAT A REASONABLE FEAR FOR THAT PERSON'S SAFETY.

(E) THIS SECTION DOES NOT PROHIBIT ACTIVITY PROTECTED BY THE CONSTITUTION.

Id.

30 R.S.C. c. C-34, s. 381 (1970), *reenacted and amended*, R.S.C. c. C-46, s. 423 (1985). In Canada, the offense of "stalking" is called "intimidation." The current Canadian anti-intimidation statute, R.S.C. c. C-46, s. 423, reads as follows:

(1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing,

(a) uses violence or threats of violence to that person or his spouse or children, or injures his property,

(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or a relative of his, or that the property of any

tators and Members of Parliament are calling for the law to be amended and its penalties toughened to more adequately protect stalking victims and their families.[31]

While law enforcement officials and advocates of battered women salute the legislation,[32] others are wary of the statutes' language and claim that the laws will ultimately be held unconstitutional.[33] Responding to this concern, Congress recently funded a project to draft a proto-type stalking law,[34] with the particular

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of them will be damaged,
(c) persistently follows that person about from place to place,
(d) hides any tools, clothes or other property owned or used by that person, or deprives him of them or hinders him in the use of them,
(e) with one or more other persons, follows that person, in a disorderly manner, on a highway,
(f) besets or watches the dwelling-house or place where that resides, works, carries on business or happens to be, or
(g) blocks or obstructs a highway,
is guilty of an offence punishable on summary conviction.
(2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

Id. For committing an offense punishable by summary conviction, the offender could be fined up to five hundred dollars, imprisoned for up to six months, or both. *Id.* s. 787.

31 *ANTI-STALKING LAW*, TORONTO STAR, Mar. 13, 1993, at D2 (The House of Commons justice committee has recommended changes to the Canadian intimidation law to make it more effective against stalking. MP Dawn Black has introduced an anti-stalking bill, and Justice Minister Pierre Blais is reported to be considering introducing an anti-stalking bill.).

32 DONNA HUNZEKER, *STALKING LAWS*, ST. LEGIS. REP., Oct. 1992, at 1 (National Conference of State Legislatures, Denver, Colo.).

33 *SEE* GERA-LIND KOLARIK, *STALKING LAWS PROLIFERATE*, A.B.A. J., Nov. 1992, at 35, 36.

34 PUB. L. NO. 102-568. S. 2922, 102D CONG., 2D SESS. (1992). THE TEXT OF THE BILL IN RELEVANT PART READS:

TO ASSIST THE STATES IN THE ENACTMENT OF LEGISLATION TO ADDRESS THE CRIMINAL ACT OF STALKING OTHER PEOPLE.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

§ 1. ANTI-STALKING LEGISLATION.

(A) FINDINGS AND DECLARATIONS—THE CONGRESS FINDS AND DECLARES THAT—

(1) THE CRIMINAL ACT OF STALKING OTHER PERSONS IS A PROBLEM OF DEEP CONCERN;

(2) PREVIOUSLY AVAILABLE LEGAL RECOURSE AGAINST STALKING, SUCH AS RESTRAINING ORDERS, HAVE PROVEN LARGELY INEFFECTIVE;

(3) ANTI-STALKING LEGISLATION HAS BEEN ENACTED OR PROPOSED BY SEVERAL OF THE STATES;

(4) THE CONSTITUTIONALITY OF SEVERAL OF THE STATES' ANTI-STALKING STATUTES MAY BE IN QUESTION; AND

goal of drafting one free of constitutional infirmities.[35] Because anti-stalking laws are a recent phenomenon, constitutional objections to the laws are as yet unaired in courts. Nonetheless, questions are raised about the laws' possible overbreadth,[36] vagueness,[37] and infringement of constitutional rights, including First Amendment rights,[38] the right to free association, and the right to travel.[39] Finally, still others criticize the legislation as redundant,[40] claiming that present laws can accomplish the same ends.[41]

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(5) THE CONGRESS HAS AN INTEREST IN ASSISTING THE STATES IN ENACTING ANTI-STALKING LEGISLATION THAT IS CONSTITUTIONAL AND ENFORCEABLE.

(B) EVALUATION—THE ATTORNEY GENERAL, ACTING THROUGH THE DIRECTOR OF THE NATIONAL INSTITUTE OF JUSTICE, SHALL—

(1) EVALUATE ANTI-STALKING LEGISLATION AND PROPOSED ANTI-STALKING LEGISLATION IN THE STATES;

(2) DEVELOP MODEL ANTI-STALKING LEGISLATION THAT IS CONSTITUTIONAL AND ENFORCEABLE;

(3) PREPARE AND DISSEMINATE TO STATE AUTHORITIES THE FINDINGS MADE AS A RESULT OF THE EVALUATION; AND

(4) NOT LATER THAN 1 YEAR AFTER THE DATE OF ENACTMENT OF THIS ACT, REPORT TO THE CONGRESS THE FINDINGS AND THE NEED OR APPROPRIATENESS OF FURTHER ACTION BY THE FEDERAL GOVERNMENT.

Id.

35 *COOPERATIVE AGREEMENT*, *supra* NOTE 3; Seth Schiesel, *Federal Measure Would Bar Stalking*, BOSTON GLOBE, July 2, 1992, at 5 (The bill's sponsor, Sen. William S. Cohen, said, "I am concerned that many of these statutes are so broad that they may not pass constitutional muster.").

36 CONSTANCE L. HAYS, *IF THAT MAN IS FOLLOWING HER, CONNECTICUT IS GOING TO FOLLOW HIM*, N.Y. TIMES, June 5, 1992, at B1; Laura E. Keeton, *Seven Proposed Bills Would Make Stalking a Crime*, HOUSTON CHRON., Jan. 17, 1993, at 1 (Texas ACLU director claims innocent behavior could be criminalized under overly broad anti-stalking law); Elizabeth Ross, *Problem of Men Stalking Women Spurs New Laws*, CHRISTIAN SCI. MONITOR, June 11, 1992, at 6 (Director of Public Education for the ACLU is concerned that an anti-stalking law "could restrict an investigative reporter's attempts to get an interview with a public figure").

37 *SEE* MARVIN GREENE, *PROSECUTORS UNHAPPY WITH THE TEST OF KENTUCKY STALKING LAW*, GANNETT NEWS SERVICE, Sept. 2, 1992, *available in* LEXIS, Nexis Library, Wires File.

38 KILEY ARMSTRONG, *HATE ABOUNDS IN THE NAME OF LOVE*, CHI. TRIB., Nov. 23, 1992, at 8 (Vice Dean of Columbia Law School concerned about the impact of anti-stalker laws on free speech).

39 *Id.* (VICE DEAN OF COLUMBIA LAW SCHOOL ALSO CONCERNED ABOUT THE EFFECT OF ANTI-STALKING LAWS ON THE FREEDOM OF TRAVEL); KAREN J. COHEN, *ROYCE INTRODUCES FEDERAL STALKING BILL*, STATES NEWS SERV., FEB. 3, 1993, *AVAILABLE IN* LEXIS, NEXIS LIBRARY, WIRES FILE (SOME GROUPS, INCLUDING ACLU, SAY THAT ANTI-STALKING LAWS COULD INTERFERE WITH THE RIGHT OF FREE ASSOCIATION AND FREEDOM OF TRAVEL).

40 JOSEPH V. COLLINA, *STALKING LAW IS BAD LEGISLATION, UNNEEDED AND UNCONSTITUTIONAL*, CHI. DAILY L. BULL., July 31, 1992, at 5 (criticizing Illinois' anti-stalking law as "unnecessary" because "[m]ost of the behavior it prohibits is already illegal"); Donna Halvorsen, *Senate Panel Will Debate Stalking Bill; But Crime is Difficult to Define, Backers Say*, STAR TRIB., Jan. 28, 1993, at 1B (Minnesota anti-stalking bill criticized because the state already criminalizes making harassing phone calls and terroristic threats; other "stalking"

In this Note we discuss stalking laws, their purpose, and their historical antecedents. We will also evaluate the laws' ability to provide continuing protection for the victim, and psychological evaluation and treatment, where necessary, for the individual offender. We do not discuss the effectiveness of anti-stalking legislation to control group activities that might violate anti-stalking laws.[42]

In an effort to provide insight into the risks that individual stalkers pose to their victims, Part II of this Note describes four discrete types of individuals who stalk others, and their behavioral patterns. Part II then describes the psychological etiology of stalking behavior, various factors known to correlate with violent behavior, and prospects for treating stalkers. Finally, Part II describes the psychological harm that stalking causes stalking victims. Because of the psychological factors that influence the stalker and the current inability of mental health professionals to predict violence with a high degree of certainty, we conclude that the penological goals of stalking laws should be to protect the victim and to provide psychological evaluation for all offenders and treatment where appropriate.[43]

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behavior is outlawed by Minnesota's "intrusion on privacy" law).

41 *FOX LETTER WRITER ARRESTED*, MIAMI HERALD, Feb. 10, 1989, at 21A (California woman who wrote Michael J. Fox 5000 threatening letters charged in 1988 with making terrorist threats).

42 BECAUSE GROUPS CAN ENGAGE IN ACTIVITIES THAT WOULD CAUSE REASONABLE PEOPLE TO FEAR FOR THEIR SAFETY OR THE SAFETY OF FAMILY MEMBERS, THE ENFORCEMENT OF ANTI-STALKING LAWS AGAINST GROUPS IS A TOPIC DESERVING A THOROUGH TREATMENT. GROUPS ENGAGING IN STALKING BEHAVIOR WILL DO SO IN A DIFFERENT POSTURE THAN INDIVIDUALS; DIFFERENT CONSTITUTIONAL RIGHTS, SUCH AS FREEDOM OF ASSOCIATION ARE IMPLICATED, OR ARE IMPLICATED IN A DIFFERENT WAY, WHEN GROUPS UNDERTAKE STALKING BEHAVIORS.

THE ANTI-ABORTION GROUP OPERATION RESCUE, FOR EXAMPLE, MAY BE VIOLATING ANTI-STALKING LAWS THROUGH ITS "NO PLACE TO HIDE CAMPAIGN," A CAMPAIGN DESIGNED TO UNCOVER ABORTION PROVIDERS' ACTIVITIES. AS PART OF THIS CAMPAIGN, OPERATION RESCUE PUBLICIZES THE NAMES AND FACES OF DOCTORS WHO PERFORM ABORTIONS ON "WANTED" POSTERS. DIANNE KLEIN, *THE END DOES NOT JUSTIFY THE FANATICAL MEANS OF TERRORISM*, L.A. TIMES, Mar. 16, 1993, at 3; *Slain Doctor Victim of Abortion Terrorism*, WALL ST. J., Apr. 9, 1993, at A9 (letter to the editor from Alexander C. Sanger, President and CEO, Planned Parenthood of New York City). The National Abortion Federation, which represents the nation's abortion providers, has recorded 29 instances of anti-abortion activists following and threatening doctors. *Id.* Also, anti-abortion activists are reported to have followed physicians' children to school or to after-school activities. *See* Judy Mann, *Terrorism at the Clinics*, WASH. POST, Mar. 12, 1993, at E3. Dr. David Gunn, a 47-year-old father of two who provided abortions at Pensacola Women's Medical Services, was shot in the back three times by an anti-abortion demonstrator in Pensacola on March 10, 1993. *Abortion Fight Resumes Over Florida Clinic*, L.A. TIMES, Mar. 19, 1993, at 25. Dr. Gunn's picture was on a "Wanted" poster distributed by Operation Rescue. Klein, *supra*.

43 THIS NOTE DOES NOT ADDRESS THE PSYCHOLOGICAL PROFILES OF INDIVIDUALS WHO

Part III discusses the history of Anglo-American criminal and civil law enforcement efforts to control stalking behaviors—including laws criminalizing threatening letters, attempt laws, "sureties of the peace," injunctions, and modern tort remedies. Unlike anti-stalking laws, these laws were not specifically designed to punish a series of behaviors that, though not always criminal when taken in isolation, collectively are the fit subjects of criminal sanctions. Stalking victims suffer substantial emotional harm or mental distress, and may develop as a result post-traumatic stress disorder. However, until 1990, Anglo-American law treated stalking behavior as antecedent to some other crime, such as assault, battery, or murder, and not as crime itself.[44]

Part IV examines criminal statutes used by United States law enforcement agencies to combat stalking behavior before the introduction of anti-stalking laws in 1990. We explain why these laws are ineffective against stalkers and why they should not be considered viable alternatives to anti-stalking legislation. Though criminal attempt laws could be helpful preventive tools against stalking behavior, present judicial interpretation of the laws render them ineffective against stalking behavior. The other criminal laws that we discuss are also inadequate against stalkers because their scope is too limited to encompass the breadth of possible stalking conduct.

Part IV also presents a textual analysis of the anti-stalking laws and evaluates them in light of the needs of the victims and offenders, especially where mental or emotional disturbance may be a cause of the offender's stalking behavior, and suggests the most appropriate penological goals for anti-stalking laws. We also discuss possible due process objections to anti-stalking statutes. We will

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ENGAGE IN GROUP-SANCTIONED STALKING BEHAVIORS.

44 WILLIAM BLACKSTONE BELIEVED THAT THREATENING BEHAVIORS COULD BE DIRECTED *TOWARD* THE COMMISSION OF A CRIME BUT WERE NOT CRIME ITSELF. PREVENTIVE JUSTICE, HOWEVER, REQUIRED THE STATE TO INTERVENE TO PROTECT CITIZENS FROM THESE BEHAVIORS. REQUIRING A CITIZEN WHO HARASSED ANOTHER TO GIVE "SURETIES OF THE PEACE" WAS ONE WAY TO EMBODY PREVENTIVE JUSTICE IN A "STALKING" SITUATION.

> *[P]reventive* justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice . . . . But the caution we speak of at present [requiring sureties to keep the peace] is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless, perhaps, for a man's imprudence in giving just ground of apprehension.

4 WILLIAM BLACKSTONE, COMMENTARIES *248-49; *see infra* Part III.

not discuss possible state or federal constitutional objections based on free speech, freedom of association, freedom of travel objections, or the constitutionality of the no-bail provisions included in some anti-stalking statutes.[45]

In Part V we conclude that anti-stalking laws are a needed extension of the criminal law. Most current statutes, though, could be improved to better address the phenomenon and the harm suffered by stalking victims and their families.

II. "STALKERS:" PERSONALITY PROFILES, CORRELATES OF VIOLENCE, PROSPECTS FOR TREATMENT, AND THE IMPACT OF STALKING ON THE VICTIM

A review of current psychological, psychiatric, and forensic literature suggests that at least four different categories of stalkers exist, that stalker motives and behaviors may differ, and that the potential for aggressive behavior may differ between individuals within categories.[46] The characteristics of these "stalkers" and their typical behaviors will be described in terms of their motives, associated mental illnesses or emotional disturbances, the etiology of their conduct, and the prevalence of their stalking behavior.

In order to provide insight into the risks that these individuals may pose to society, we then turn to the correlates of violence currently under investigation by forensic, medical, psychiatric, and psychological investigators. In light of current understanding of "stalking" behaviors and factors that appear to be related to violent behavior, we offer general recommendations regarding the evaluation and treatment of individuals who are prosecuted or convicted under "stalking" statutes.

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45 BECAUSE STALKERS OFTEN ARE NOT EASILY DETERRED, ESPECIALLY IF EMOTIONALLY DISTURBED OR MENTALLY ILL, SOME STATES AUTHORIZE COURTS, WHEN APPROPRIATE, TO DENY BAIL TO STALKING ARRESTEES. THIS PROVIDES VICTIMS WITH MUCH NEEDED SAFETY AND PEACE OF MIND BEFORE TRIAL. WHILE "NO BAIL" PROVISIONS DO NOT VIOLATE THE UNITED STATES CONSTITUTION, THESE PROVISIONS MAY BE HELD TO VIOLATE STATE CONSTITUTIONS. IN ILLINOIS, COOK COUNTY CIRCUIT COURT ASSOCIATE JUDGE NICHOLAS S. ZAGONE, HAS RULED THAT THE "NO BAIL" PROVISION OF THE ILLINOIS ANTI-STALKING STATUTE IS UNCONSTITUTIONAL UNDER THE ILLINOIS CONSTITUTION. *SEE* SUSAN KUCZKA, *CLAUSE IN STALKING LAW RULED UNCONSTITUTIONAL*, CHI. TRIB. (Northwest ed.), Feb. 5, 1993, at 3 (The court agreed with the public defender's position that, under the Illinois Constitution, only persons charged with an offense for which probation is not available, murder for example, can be denied bail. Probation is available for those convicted of stalking.).

46 *SEE* J. REID MELOY, *UNREQUITED LOVE AND THE WISH TO KILL*, 53 BULL. MENNINGER CLINIC 477, 480 (1989); *see also* Puente, *supra* note 2, at 9A (citing Dr. Park Dietz, clinical professor of psychiatry and biobehavioral sciences, UCLA School of Medicine).

Finally, as discussed in Part IV of this Note, some states require that "stalking" victims experience "substantial"[47] or "actual" emotional distress,[48] or both, before an individual can be prosecuted for "stalking." Because of this requirement, we review the emotional impact that "stalking" behavior may have on its victims.

A. "Stalker" Profiles

1. Erotomania and de Clérambault's Syndrome

The *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-III-R") of the American Psychiatric Association defines Erotomania as the presence of a persistent "erotic delusion that one is loved by another."[49] This disorder is frequently referred to in psychiatric and psychological literature as de Clérambault's syndrome.[50] In actuality, however, the two disorders are distinct. The DSM-III-R nosology[51] does *not*, for example, require that the erotomanic believe that his fantasized object of affection *initiated* the relationship. In contrast, de Clérambault's syndrome requires such a belief. Hence, Erotomania and de Clérambault's syndrome should not be equated.

Erotomania is a delusional disorder in which the individual truly believes himself to be loved by an individual who may not even know of his existence. The erotomanic individual often fantasizes the existence of an idyllic romantic or spiritual love with someone who is typically of a higher social status or in a position of authority relative to the erotomanic individual.[52] Sexual attrac-

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47 *SEE INFRA* PART IV-B(1)(E).

48 *SEE INFRA ID.*

49 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 199 (3d ed. 1987) (This manual defines the criteria for all mental disorders recognized by the American Psychiatric Association and classifies them according to type.).

50 MELOY, *SUPRA* NOTE 46, AT 478 (CITING O. FENICHEL, THE PSYCHOANALYTIC THEORY OF NEUROSIS (1945)).

51 "A BRANCH OF MEDICAL SCIENCE THAT DEALS WITH ORDERLY RELATING OR CLASSIFICATION OF DISEASES . . . ." WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY 1542 (1986). Here, nosology refers to the classification of mental and emotional disorders currently recognized and defined by the American Psychiatric Association.

52 AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 199; *see* M. Ghaziuddin & L. Tsai, *Depression-Dependent Erotomanic Delusions in a Mentally Handicapped Woman*, 158 BRIT. J. PSYCHIATRY 127, 128 (1991); *see also* Park E. Dietz et al., *Threatening and Otherwise Inappropriate Letters to Hollywood Celebrities*, 36 J. FORENSIC SCI. 185, 186 (1991) (In this study, Dietz *et al.* examined communications sent to celebrities of "national or international stature." These renowned celebrities fit the criteria for "higher social status" as described by the DSM-III-R criteria for Erotomania.).

tion to the fantasized lover is not required for the diagnosis of Erotomania to be made, though the erotomanic typically seeks to establish an intimate, even permanent, relationship with the object of his fantasy.[53] One of the most publicized forensic cases of male Erotomania is the murder of Tatiana Tarasoff by a male acquaintance, Prosenjit Poddar. Poddar initially interpreted a New Year's Eve kiss by Tarasoff as an indication that she loved him. After repeated, but failed, attempts to gain Tarasoff's attention and affection, Poddar attempted to orchestrate a dangerous situation from which he could rescue Tarasoff; he assumed that his heroism would reveal to her the depth of *her* feelings for him. His plan went awry, and Poddar fatally stabbed Tarasoff.[54]

Park Elliot Dietz *et al.* observed the delusional nature of Erotomania in an empirical study of 1800 inappropriate communications sent to celebrities by 214 subjects.[55] They report that twenty-seven percent of the subjects misperceived the celebrity to be their spouse, potential spouse, or suitor. An additional twenty-six percent of the subjects projected the celebrity into the role of lover, potential lover, or "would-be" lover. These subjects then placed themselves in the complementary role, *i.e.*, as the one being pursued or loved rather than as the pursuer.[56] Some subjects *believed* that the celebrity sufficiently reciprocated affection so that their role as suitor or "would-be" lover was warranted. The flagrant misperception of reciprocity indicates the presence of erotomanic delusions. When the reported behavioral overtures made by these subjects is analyzed, Erotomania appears to be the appropriate diagnosis for these individuals.

The DSM-III-R description of Erotomania includes the stalking behaviors typically observed in the delustional erotomanic. They include repeated efforts to contact the fantasized individual by telephone, letter, gifts, attempted visits, and "even surveillance and

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53 *See* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 199.

54 TARASOFF V. REGENTS, 551 P.2D 334 (CAL. 1976). FOR ANOTHER EXAMPLE OF EROTOMANIC BEHAVIOR, SEE MELOY, *SUPRA* NOTE 46, AT 482 (MELOY DESCRIBES THE "TWINSHIP ALLIANCE" WHICH JOHN HINCKLEY ATTEMPTED TO ESTABLISH WITH ACTRESS JODIE FOSTER. BY ATTEMPTING TO ASSASSINATE PRESIDENT RONALD REAGAN, HINCKLEY HOPED TO UNITE HIMSELF WITH FOSTER IN HISTORY.).

55 *See* DIETZ ET AL., *SUPRA* NOTE 52. DIETZ DEFINES COMMUNICATION AS "THE DELIVERY OF ANY WRITTEN INFORMATION OR ITEM TO AN AGENT OF THE CELEBRITY." *ID.* AT 187.

56 THE ACTUAL SAMPLE OF SUBJECTS WHO BELIEVED THEY *WERE* THE SPOUSE OR LOVER AND WERE IN A *RECIPROCAL* RELATIONSHIP WITH THE TARGET COULD BE DETERMINED ONLY IF THEY WERE SEPARATED FROM THOSE WHO BELIEVED A CELEBRITY *COULD BE* A *POTENTIAL* SPOUSE OR LOVER.

stalking are common."[57] Although the statistical prevalence of these behaviors is not empirically verified, case examples of such behavior in the psychiatric, psychological, and forensic literature abound.[58] The purpose, or goal, of the erotomanic's behavior is to advance a relationship with the object of fantasy. Dietz *et al.* observe that the predominant emotion that their subjects attempted to evoke from their target was love, and the majority of subjects sought some type of verbal, written, or physical contact.[59] Stepping into the psyche of the erotomanic, this goal is not unfounded, since by definition, the erotomanic delusional believes his target reciprocates an intensity of emotion and desire for union—despite *the absence of any actual relationship or emotional reciprocity.*

The criteria for Erotomania set forth by the DSM-III-R indicates that this disorder is diagnostically distinct from Schizophrenia and the Mood Disorders.[60] While the etiology of Delusional Disorders are unknown, the DSM-III-R suggests that severe socio-emotional stresses may predispose an individual to the development of a Delusional Disorder, as might a low socioeconomic level or the presence of a clinical Paranoid, Schizoid, or Avoidant Personality Disorder.[61] Kohut and Wolf describe a well-formulated object-relations understanding of the intrapsychic processes involved in the development of this delusional disorder.[62]

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57 AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 199; *see also* Cheryl Laird, *Stalking; Laws Confront Obsession that Turns Fear into Terror and Brings Nightmares to Life*, HOUS. CHRONICLE, May 17, 1992, *available in* LEXIS, Nexis Library, Papers File.

58 *SEE* GHAZIUDDIN & TSAI, *SUPRA* NOTE 52 (GHAZIUDDIN DESCRIBES A MENTALLY HANDICAPPED WOMAN WHO DEVELOPS AN EROTOMANIC DELUSION TOWARDS HER SCHOOL'S HEAD TEACHER. CONVINCED THAT HE LOVED HER AND WANTED TO HAVE SEX WITH HER, SHE WROTE HIM NUMEROUS LOVE LETTERS AND OFTEN INSISTED ON SEEING HIM. HER DELUSION APPEARS TO BE RELATED TO HER DEPRESSIVE SYMPTOMS.). *SEE GENERALLY* JOYCE L. DUNLOP, *DOES EROTOMANIA EXIST BETWEEN WOMEN?*, 153 BRIT. J. PSYCHIATRY 830, 830-32 (1988) (describing the behaviors of two women with erotomanic delusions toward older women).

59 DIETZ ET AL., *SUPRA* NOTE 52, AT 202.

60 *SEE* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 201 (Certain symptoms necessary to make the diagnosis of schizophrenia are not present in Delusional Disorders. In addition, if mood disorder symptoms precede psychotic features such as hallucinations, the diagnosis of Mood Disorder with Psychotic Features cannot be ruled out.).

61 *SEE ID.* at 339 (diagnostic criteria for Paranoid Personality Disorder); *see also id.* at 340 (diagnostic criteria for Schizoid Personality Disorder); *id.* at 353 (diagnostic criteria for Avoidant Personality Disorder).

62 *SEE* HEINZ KOHUT & ERNEST S. WOLF, *THE DISORDERS OF THE SELF AND THEIR TREATMENT: AN OUTLINE, IN* ESSENTIAL PAPERS ON NARCISSISM 175, 192 (Andrew P. Morrison ed., 1986) (Kohut describes "[m]erger-hungry personalities" who, because of their "pathological" need to merge with another individual, lose their ability to "discriminate their own thoughts, wishes and intentions from those of the selfobject.").

Sufficient demographic data to estimate the prevalence of this disorder does not exist.[63] The prevalence of all delusional disorders is estimated at 0.03 percent of the United States population. Erotomania, however, is one of the six subtypes of delusional disorders included in this estimate. This estimate is conservative because "delusional patients rarely seek psychiatric help unless forced to do so by their families or the courts."[64] Clinical and forensic data indicates that both males and females are affected by this disorder, though "in clinical samples most of the cases are female, in forensic samples most are male."[65] Some researchers conclude that male erotomanics may predominate in forensic cases because they are more prone to aggressive acting-out of their frustrations when their affections are not reciprocated.[66]

2. "Borderline Erotomania"

Several features of "Borderline Erotomania" differentiate this disorder from Delusional Erotomania. Meloy uses the term "Borderline Erotomania" to describe individuals who developed intense emotional feelings towards other individuals *who they know do not reciprocate* their feelings,[67] as opposed to delusional erotomanics who *do* believe their feelings are reciprocated. Borderline Erotomania is not a delusional disorder because these individuals do not exhibit delusional features. The difference between Erotomania and Borderline Erotomania implicates both clinical and legal con-

63 MELOY, *SUPRA* NOTE 46, AT 479; *SEE ALSO ID.* (CITING PARK DIETZ, THREATS AND ATTACKS AGAINST PUBLIC FIGURES (1988) (A PAPER PRESENTED AT THE MEETING OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW)).

64 HAROLD I. KAPLAN & BENJAMIN J. SADOCK, SYNOPSIS OF PSYCHIATRY 343 (6th ed. 1991).

65 AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 199; *see* Meloy, *supra* note 46, at 478 ("male erotomania is more likely to result in violent acting out").

66 MELOY, *SUPRA* NOTE 46, AT 478 (CITING R.L. GOLDSTEIN, *EROTOMANIA IN MEN*, 143 AM. J. PSYCHIATRY 802 (1986); R.L. Goldstein, *More Forensic Romances: De Clérambault's Syndrome in Men*, 15 BULL. AM. ACAD. PSYCHIATRY & L. 267-74 (1987); Taylor et al., *Erotomania in Males*, 13 PSYCHOLOGICAL MED. (1983)); *see id.* at 489 (The risk of violence increases as the paranoid and psychopathic traits become more obvious, especially if alcohol or psychostimulants are used by the erotomanic.).

67 MELOY, *SUPRA* NOTE 46, AT 480; *SEE ALSO* MAREVA BROWN, *STATE ANTI-STALKING LAW SHADOWS LOVERS WHO WON'T LET GO*, SACRAMENTO BEE, Nov. 29, 1992, at A1 (One of the difficulties that researchers, clinicians, and law enforcement agencies encounter when discussing the issue of stalking is the discrepancy in language and categorization of "stalkers." *See infra* text accompanying note 81.).

siderations, particularly as regards pleas of insanity[68] or determinations of incompetence.[69]

Several other features of Borderline Erotomania help to explain these individuals' stalking behavior. Meloy proposes that, unlike delusional erotomanics, borderline erotomanics usually have "some history of actual emotional engagement with the object [of fantasy]."[70] He allows for the possibility that such engagement may be extremely trivial; a friendly, but innocuous glance is often a sufficient catalyst for the development of Borderline Erotomania.[71] These individuals are profoundly vulnerable to other's trivial expressions of warmth and openness. From a theoretical perspective, Borderline Erotomania is symptomatic of a "gross disturbance of attachment or bonding."[72] The disturbance of attachment that borderline erotomanics exhibit is essential to understanding their behavior and predicting their behavioral responses in the face of rejection by their object of desire. If disturbances of bonding or attachment to a trusted and loving caregiver occur in early childhood, without a corrective bonding experience during later childhood or adolescence, such disturbances may lead to difficulties with, or disturbances of, adjustment in adulthood.[73] The borderline erotomanic experiences rejection in adulthood as a "reliving" of emotional or physical abandonment that he or she likely experienced as a child.[74] The individual's fragile ego, or sense of self, hangs in the balance between his or her ability to "win" or "lose" the others' affection. The needy, clingy desperation that such individuals experience is remarkably similar to the terror a young child feels when faced with imminent parental abandon-

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68 MELOY, *SUPRA* NOTE 46, AT 480.

69 *SEE GENERALLY* ALAN M. GOLDSTEIN & MARC BURD, *ROLE OF DELUSIONS IN TRIAL COMPETENCY EVALUATIONS: CASE LAW AND IMPLICATIONS FOR FORENSIC PRACTICE*, 3 FORENSIC REP. 361, 362 (1990); *see id.* at 367 (relationship between delusions and the competency standards set forth in Dusky v. United States, 362 U.S. 402 (1960)).

70 MELOY, *SUPRA* NOTE 46, AT 481.

71 *ID.*

72 *ID.* AT 480.

73 DANIEL K. LAPSLEY & KENNETH RICE, *THE "NEW LOOK" AT THE IMAGINARY AUDIENCE AND PERSONAL FABLE: TOWARD A GENERAL MODEL OF ADOLESCENT EGO DEVELOPMENT*, *IN* SELF, EGO, AND IDENTITY, INTEGRATIVE APPROACHES 109, 123 (Daniel K. Lapsley & F. Clark Power eds., 1988); *see id.* at 118 (stating that DSM-III-R Narcissistic and Borderline Personality disorders "result from the failure of the environment to provide empathic responsiveness to the adolescent's [normal] narcissistic strivings and pursuit of ideals"); *see also id.* at 124 (stating that impaired ego development in adolescence can lead to disturbances in interpersonal relationships, "e.g., entitlement, [and] exploitativeness").

74 MELOY, *SUPRA* NOTE 46, AT 481.

ment.[75] When faced with the inevitability of abandonment in adulthood, the borderline erotomanic may experience intense fury, known in psychological literature as "Narcissistic Rage"[76] or "abandonment rage."[77] We will explain this type of rage in greater detail when the correlates of violence are discussed, but such rage responses are not limited to expression by borderline erotomanics, and they may also be observed in delusional erotomanics.

Another critical characteristic of the borderline erotomanic is the propensity to vacillate between attitudes of love and hate towards the object of attention. This is a clinically recognized ego-defense process by which the individual alternately idealizes and devalues another.[78] As Klein describes it, "The love object is initially idealized, but then ragefully devalued; intense love and intense hatred exist concurrently, but are experienced only in alternate split-off affect states; and the narcissism and grandiosity of the violent act betray the defensive projection of devalued parts of the self *into* the victim."[79] This "splitting" of affect is present in more than one DSM-III-R diagnosis, but it is characteristic of borderline erotomanics.[80]

The actual behavioral activities of the borderline erotomanic may not differ significantly from those of the delusional erotomanic, *i.e.*, they may both repeatedly write letters, send gifts, make phone calls, and follow their targets. The borderline

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75 *See* BEN BURSTEN, *SOME NARCISSISTIC PERSONALITY TYPES, IN* ESSENTIAL PAPERS ON NARCISSISM, *supra* note 62, at 387-88 (describing "pouting," "sulking," and the desperate clinging of the "craving personality").

76 OTTO F. KERNBERG, *FURTHER CONTRIBUTIONS TO THE TREATMENT OF NARCISSISTIC PERSONALITIES, IN* ESSENTIAL PAPERS ON NARCISSISM, *supra* note 62, at 248; *see also id.* at 272, 274, 290 (describing clients who are enraged at their analyst for his "abandonment" of them).

77 MELOY, *SUPRA* NOTE 46, AT 481; *SEE ALSO ID.* AT 485 (DESCRIBING THE HYSTERICAL PERSONALITY TRAITS OF THE BORDERLINE EROTOMANIC—IN PARTICULAR, THE RAPIDLY SHIFTING EXPRESSIONS OF "BOUNDLESS AFFECTION OR UNBRIDLED RAGE").

78 AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 347 (The DSM-III-R Diagnostic Criteria for Borderline Personality Disorder—a disorder whose features are not unlike many of those manifested by borderline erotomanics—includes a "pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of overidealization and devaluation.").

79 MELOY, *SUPRA* NOTE 46, AT 482 (QUOTING M.K KLEIN, *ENVY AND GRATITUDE, IN* ENVY AND GRATITUDE AND OTHER WORKS, 1946-1963, at 176-235 (1975); M.K. Klein, *Notes on Some Schizoid Mechanisms, in* ENVY AND GRATITUDE AND OTHER WORKS, 1946-1963, *supra*, at 1-24).

80 *See* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 377; *see also supra* text accompanying note 76.

erotomanic, however, does not presume the target reciprocates his or her feelings of affection, and may demonstrate affective splitting. The individual may also express significant Narcissistic or abandonment rage when his or her target does not develop reciprocal feelings of affection. Meloy, in his clinical experience with delusional and borderline erotomanics, observes that borderline erotomanics "invariably" manifest symptoms characteristic of one or more DSM-III-R personality disorders.[81] Specifically, he identifies Narcissistic, Histrionic, Antisocial, Borderline, and Paranoid personality disorders as diagnostic categories into which borderline erotomanics may fall. Not all individuals presenting with these personality disorders are at risk of becoming borderline erotomanics.

Demographic data on the prevalence of Borderline Erotomania is not available. The Los Angeles Police Department ("LAPD") estimates that forty-three percent of its stalking cases are "love obsessional," a group similar to borderline erotomanics.[82] This may provide a rough figure, but further study and more refined tracking of stalkers is necessary before a high degree of confidence in these estimates is warranted.

3. "Former Intimate" Stalkers

The FBI's 1990 Supplemental Homicide Report reveals that while four percent of the male homicide victims in 1990 were killed by their wives or girlfriends, a staggering thirty percent of female homicide victims were killed by husbands or boyfriends.[83] Perpetrators falling into the "domestic violence" category include both *current* and *former* wives, girlfriends, husbands, and boyfriends. Accordingly, it is difficult to distinguish from these data the actual prevalence of homicide by individuals who are no longer intimately involved with their victim. Ruth Micklem, codirector of Virginians Against Domestic Violence, estimates that as many as ninety percent of the women killed by (former) husbands or boyfriends were stalked before a murder occurred.[84] This category of stalkers warrants closer scrutiny.

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81 MELOY, *SUPRA* NOTE 46, AT 481.

82 BROWN, *SUPRA* NOTE 67 AND ACCOMPANYING TEXT.

83 ANDY COURT, *SHE KNEW THE SYSTEM WOULD FAIL HER*, AM. LAW., June 1992, at 110 (citing the 1990 FBI Supplemental Homicide Report).

84 MELINDA BECK ET AL., *MURDEROUS OBSESSION*, NEWSWEEK, July 13, 1992, at 60.

The LAPD recognizes the existence of stalkers who "fixate on someone and refuse to let go," after a sexual or emotional relationship ends. The LAPD terms these stalkers as "simple obsessional," but also includes casual-acquaintance-stalkers[85] (included in the Borderline Erotomanic category in this Note) in this category. Forty-eight percent of its stalking caseload is comprised of this type of stalker.[86] While the LAPD characterizes Former Intimate stalkers as individuals who "refuse to let go," a more accurate understanding is that these individuals refuse to be rejected. These stalkers differ from delusional erotomanics in that they do not fantasize reciprocal idealized love; such stalkers have had intimate relationships with their targets, while borderline erotomanics have not.

In many cases, Former Intimate stalkers have a prior history of abusive relationships. Not surprisingly, most of the information regarding this type of stalker is found in the domestic violence literature. Data indicating that this type of stalker is differentially more violent than other types of stalkers is not available, but many such cases result in assault or death.[87] Contrary to general public perception, these stalkers are both men and women. Numerous case examples exist of former female intimates who engage in harassing and stalking behaviors, as well as acts of vengeful and aggressive retaliation for terminated relationships.[88]

Several psychological characteristics of Former Intimate stalkers are salient: they are intensely emotionally dependent on

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85 BY DEFINITION, CASUAL-ACQUAINTANCE STALKERS HAVE NOT HAD AN INTIMATE RELATIONSHIP WITH THEIR VICTIMS. THEREFORE, THEY SHOULD BE CONSIDERED BORDERLINE EROTOMANICS, AND NOT CONFUSED WITH INDIVIDUALS WHO REFUSE TO TERMINATE AN ACTUAL INTIMATE RELATIONSHIP.

86 BROWN, *SUPRA* NOTE 67.

87 *SEE* NOEL A. CAZANAVE & MARGARET A. ZAHN, *WOMEN, MURDER, AND MALE DOMINATION: POLICE REPORTS OF DOMESTIC VIOLENCE IN CHICAGO AND PHILADELPHIA, IN* INTIMATE VIOLENCE; INTERDISCIPLINARY PERSPECTIVES 83, 92 (Emilio C. Viano ed., 1992) [hereinafter INTIMATE VIOLENCE] ("In all these 'victim attempted to leave the relationship' type homicides, the killings appear to entail the enforcement of norms held by the offender that death is the penalty for the failure of the victim to continue the relationship."); *see also* ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES; THE DYNAMICS OF DOMESTIC VIOLENCE 55 (1987) ("[O]nce he had to call the police when he moved out because she blocked the doorway and would attack him when he tried to leave . . . . A month ago she came to his new apartment . . . came into his room and stabbed at his groin with a pair of scissors, puncturing his scrotum."); Beck et al., *supra* note 83; Brown, *supra* note 66; Court, *supra* note 82; Laird, *supra* note 56.

88 *SEE* SHUPE ET AL., *supra* note 87 at 45 ("[A] number of battered men telephoned women's shelters every year seeking help as victims of violence.").

their partner, yet at the same time, they are highly ambivalent over their dependence. They may also be jealous of real or imagined infidelities and exhibit a significant need to control their former partner. As with borderline erotomanics, these individuals experience rejection as abandonment. In contrast to the borderline erotomanic, however, Former Intimate stalkers have an actual history of emotional dependence upon their partner that is severed when the relationship is terminated. Shupe, Stacey, and Hazlewood believe that in some cases, "He is so dependent on her that he would kill her rather than let her go and not be able to live without her."[89] The Former Intimate stalker is unable to tolerate the panic and "abandonment anxiety" that result when his partner leaves the relationship.[90]

Vaselle-Augenstein and Ehrlich cite observations made by clinicians and researchers in the field of domestic violence that indicate that batterers experience significant ambivalence between their need for interpersonal intimacy and their fear of engulfment by it. They observe: "the outcome [of ambivalence] is that batterers feel both emotionally isolated and also exaggeratedly dependent on their wives or girlfriends."[91] Ambivalence over dependency needs is closely tied to the heightened levels of jealousy that batterers and Former Intimate stalkers demonstrate: "outsiders are seen as intruders and there is a desire to bond even closer. However, when this feeling is not mutual, anger erupts and there ensues an increased risk of violence."[92] Former Intimate stalkers may target the current lover or spouse of their victim in an attempt to rid themselves of what they perceive to be the obstacle to reunification.[93] In fact, Dietz *et al.* conclude that the "person perceived to be standing in the way of the object" is at the greatest risk for victimization by the stalker.[94]

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89 *Id.* AT 37.

90 RENATA VASELLE-AUGENSTEIN & ANNETTE EHRLICH, *MALE BATTERERS: EVIDENCE FOR PSYCHOPATHOLOGY, IN* INTIMATE VIOLENCE, *supra* note 86, at 139-40 (relying on K.H. Coleman, *Conjugal Violence: What Thirty-Three Men Report*, 6 J. MARITAL & FAM. THERAPY 207 (1980); J. Weitzman & K. Dreen, *Wife Beating: A View of the Marital Dyad*, 63 SOCIAL CASEWORK 259, 259-65 (1982)).

91 *Id.* at 141.

92 DANIEL J. SONKIN ET AL., THE MALE BATTERER: A TREATMENT APPROACH 43 (1985).

93 *See* Laird, *supra* note 57 (Four years after stalking a former girlfriend and her husband, "[v]owing both love and revenge, Jimmy had slashed the couple's van tires, [and] pulled up their azaleas . . . . Now, at 10 on a Sunday night, Jimmy had decided to carry out his threat of murdering [the stalking victim's husband].").

94 Meloy, *supra* note 45, at 479.

While the Former Intimate characteristics of emotional dependence, ambivalence, and jealousy may seem pitiable, the last characteristic—the need to control their former partner—has far more negative implications. Typically, batterers and some Former Intimate stalkers regard their intimates as personal possessions that can be treated as such. The propensity for batterers to apply force to exert control or domination over their partners is widely accepted by clinicians[95] and the general public. Abusive partners may perceive a threat to their dominance when their partner expresses a desire for independence, and they may consequently threaten to apply force to maintain their position within the relationship—even *after* the relationship ends.

A study by Rouse concludes that "[i]ndividuals with a need to be in control in a relationship may be successful without recourse to force but can be viewed as being at higher risk of violence when their position of dominance is threatened."[96] The termination of the intimate relationship on which the "stalker" was emotionally dependent is a situation that threatens the dominance of the abusive partner, and it may increase the risk of stalking behaviors and aggressive behavior.

It is impossible to identify a single mental illness associated only with Former Intimate stalkers because both current and former abusive partners are considered to be cases of domestic violence. In an analysis of "risk markers" of violent men in intimate relationships, however, Sugarman and Hotaling identified six characteristics more likely to be found in male perpetrators than in nonviolent men.[97] Several of them are symptoms of DSM-III-R personality disorders or clinical disorders. They are: low self-esteem, low income levels, low occupational status, more frequent abuse of alcohol, a history of physical abuse victimization as a child, and the witnessing of parental violence as a child.

The statistical prevalence of Former Intimate stalking is not known, and until former and current lover/spouse abuse are considered separately, a true accounting will be difficult.

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95 *See, e.g.*, Vaselle-Augenstein & Ehrlich, *supra* note 90, at 86.

96 Linda P. Rouse, *The Dominance Motive in Abusive Partners: Identifying Couples at Risk*, 31 J. C. STUDENT DEV. 330, 334 (1990).

97 David B. Sugarman & Gerald T. Hotaling, *Violent Men In Intimate Relationships: An Analysis of Risk Markers*, 19 J. APPLIED SOC. PSYCHOL. 1034, 1035 (1989).

4. Sociopathic Stalkers

Two groups of criminals that are notably absent from the "stalking" literature are serial murderers and serial rapists, an absence that is all the more remarkable given that the behavioral activities proscribed by most stalking laws[98] are familiar characteristics of such individuals. Ted Poe, a Texas district court judge, often hears testimony from rape and assault victims that they saw their assailant on repeated occasions "at the grocery store, at their child's school, in a car" prior to their assault.[99]

Two distinct features differentiate Sociopathic stalkers from the three other types. First, they do not appear to be seeking to initiate or maintain an interpersonal relationship with their victim. Second, they seek individuals that fit their assault criteria—they first formulate the characteristics of the "ideal victim" and then seek an "acceptable example" to fit the criteria.[100]

Faith Leibman analyzed the life histories of four serial murderers: Ted Bundy, Albert De Salvo, Edmund Kemper, and Jerome Brudos.[101] She identifies several personality features and life events that she believes predisposed these men to pursue a pattern of murder:

—Cruel and extremely violent parenting.
—A rejection in childhood by the parents.
—A rejection by a member of the opposite sex in adulthood.
—Contact with the criminal justice system—adult or juvenile.
—Commitment to a mental health facility.
—Aberrant sexual patterns.
—A loner.

Certainly, not all individuals who experience these events or who demonstrate these characteristics become serial murderers or rapists. Leibman concludes that, after repressing their childhood rage (at being abused or rejected) for many years, finding themselves unable to control their environment, and then experiencing rejec-

98 *See infra* Part IV-B.

99 Laird, *supra* note 57; *see also* STANTON E. SAMENOW, INSIDE THE CRIMINAL MIND 104 (1984) (example of a rapist who stalked his victim before committing the crime).

100 *See* Laird, *supra* note 57 (Serial rapist Gary Wayne Sheppard identified his targets in newspaper society and fashion sections. He would then call their home, visit at least once, ostensibly seeking directions, and would later return to effectuate the rape.).

101 Faith H. Leibman, *Serial Murderers: Four Case Histories*, 53 FED. PROBATION 41, 42 (1989) (Leibman is a forensic psychologist with the Atlantic County Jail and criminal justice professor at Temple University.).

tion again as an adult, some individuals displace their anger onto their victims in adulthood.[102] In one of the cases analyzed, that of Edmund Kemper, Leibman reports that between the ages of ten and thirteen, Kemper "began to follow women down the street fantasizing that they would love him."[103] Though not enough information is available to determine the extent of Kemper's stalking behavior, his fantasizing is suggestive of Borderline Erotomania.[104] Similarly, Leibman reports that Bundy

> met a woman he could not get out of his mind. He dated this woman, . . . could not tell her the truth about his status in life, . . . began to threaten her[,] and press her to have sex in unusual ways . . . . She then told him never to call her again. Shortly thereafter, Bundy's first victim was abducted. Other victims followed the January 1974 one, many sexually molested and brutally slain.[105]

This pattern of behavior is similar to those of Former Intimate stalkers, except that his victim was not the former intimate herself. In three of the four cases that Leibman presents, the serial murderer also either began his "career" by sexually assaulting his victims (De Salvo and Brudos) or the sexual assault took place prior to the victim's murder (Bundy).[106]

Several of the features that Leibman identifies in serial murderers can be found in the life histories of many borderline erotomanics and Former Intimate stalkers. The relationship between the various types of stalkers is unclear, but additional research is necessary to determine by which mechanisms some individuals become Sociopathic stalkers.

B. Correlates of Violence

The ability to predict with a high degree of confidence the risk posed to society by stalkers is the laudable, but formidable, goal of forensic scientists and mental health professionals. The American Psychiatric Association observes that "neither psychiatrists nor anyone else has reliably demonstrated an ability to predict future violence or dangerousness."[107] Despite this candid admis-

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102 *Id.*
103 *Id.* at 44.
104 *See supra* Part II-A(2).
105 *Id.*
106 *Id.* at 44-45.
107 Margaret K. Cooke & Jeffrey H. Goldstein, *Social Isolation and Violent Behavior*, 2

sion, research continues to examine possible causes of violence. As research proceeds in various disciplines of study, a growing consensus is emerging that "violence" is multi-determined—it results from interactions among multiple environmental, psychological, and biological factors.[108]

1. Psychobiologic Correlates of Violence

An imbalance between activating (norepinephrine and dopamine) and inhibitory (serotonin and gamma-aminobutyric acid) neurotransmitters may be associated with violence and aggression. Cushing's Syndrome, Addison's Disease, and Gonadal Hormone Dysfunction are three endocrinological states that may also be associated with increased aggression. Structural brain lesions (such as frontal lobe damage) and diffuse brain damage are recognized as correlates of violence. In addition, there is an observable relationship between violence and epileptic seizures, as well as a relationship between violence and the medications used to treat these seizures (phenobarbital and tranxene, in particular), is observed. Similarly, medications used to treat the symptoms of both delirium and dementia are associated with increased aggressive behavior.[109] The relationship between these neurobiologic factors and the risk of violence in stalkers is not fully understood. Dr. Paul Nestor observes, "Violence mediated by clear-cut neurological factors is most likely to be characterized as unplanned, impulsive, unprovoked and primitive."[110] Though the majority of stalking incidents do not appear to fit this description, additional research

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FORENSIC REP. 287 (1989) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 20 (1974) (task force reports)); *see* Barefoot v. Estelle, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting).

108 Herman Jones, *Neuropsychology of Violence*, 5 FORENSIC REP. 221 (1992); Jan Volavka et al., *Psychobiology of the Violent Offender*, 37 J. FORENSIC SCI. 237 (1991).

109 *See* Jones, *supra* note 108, at 222-30; *see also* Volavka et al., *supra* note 108, at 241-44 (literature reviews on the psychobiologic correlates of violence); KAPLAN & SADOCK, *supra* note 63, at 257 (describing the etiology, clinical features, and diagnosis of Organic Delusional Syndrome and Disorder); *id.* at 265 (describing the interictal psychotic states which are manifested "most prominently by paranoid delusions and hallucinations"); *id.* at 268 (describing the changes in personality, cognition, and neurological functioning that occur in endocrine disorders).

110 Paul G. Nestor, *Neuropsychological and Clinical Correlates of Murder and Other Forms of Extreme Violence in a Forensic Psychiatric Population*, 180 J. NERVOUS & MENTAL DISEASE 418, 418 (1992) (quoting D.M. Treiman, *Epilepsy and Violence: Medical and Legal Issues*, 27 EPILEPSIA 77 (Supp. 2, 1986)) (Dr. Nestor is a member of the Department of Psychiatry at Harvard Medical School and the Department of Psychology at Bridgewater State Hospital in Bridgewater, Massachusetts.).

is necessary to identify the neurobiologic factors that may be related to the development of delusional disorders and other violent behavior.[111]

2. Environmental Correlates of Violence

Several environmental risk factors are hypothesized to predispose an individual to violence. Some of these factors present during childhood and adolescence have lingering emotional and interpersonal effects that may give rise to violence in adulthood.

Sugarman and Hotaling identified two factors that differentiated violent from nonviolent men in intimate relationships: lower economic status and witnessing violence in their own family of origin.[112] Volavka *et al.* review the data that link the experience of childhood abuse to the perpetration of violent offenses as adults.[113] Further, in light of studies that link diffuse brain injury—often sustained by children in abusive situations—to violence, they caution that "[w]e must consider that abused children who have had brain injury develop an especially elevated predisposition for violent behavior."[114]

In addition to lower socioeconomic status ("SES") and a history of childhood victimization, other environmental risk factors correlate with violent behavior. Cooke and Goldstein[115] identify two social isolation variables that are able to differentiate males charged with an FBI violent index crime (homicide, robbery, rape, and aggravated assault) from those charged with any other crime. These variables, living alone and not discussing problems with anyone, were significantly better at differentiating the groups than other variables included in their study.[116]

Finally, Dr. Daniel Martell reports that "homelessness does significantly increase the risk of indictment for violent criminal behavior among mentally disordered offenders, . . . [this is] particularly true of indictments for assault."[117] He cautions that this

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111 *See* KAPLAN & SADOCK, *supra* note 64, at 343 ("Patients with delusional disorders have no identifiable organic basis for their delusions.").

112 Sugarman & Hotaling, *supra* note 97, at 1044.

113 Volavka et al, *supra* note 108, at 238.

114 *Id.*

115 Cooke & Goldstein, *supra* note 107, at 292.

116 A $p < .05$ level of statistical significance. This is the level of statistical significance necessary to attribute the results to something other than chance.

117 Daniel A. Martell, *Homeless Mentally Disordered Offenders and Violent Crimes; Preliminary Research Findings*, 15 L. & HUM. BEHAV. 333, 342 (1991) (Dr. Martell is a member of

finding may be a result of differential treatment by the judicial system, and he also observes that additional factors associated with homelessness—such as the vulnerability to stress—may increase the risk of violent behavior among homeless individuals who are mentally ill.[118]

A thorough study of the interaction between environmental factors associated with violence—low SES, childhood victimization, social isolation, and homelessness—must be conducted before any accurate prediction of violence can be made, whether considering the risk for violence in general, or the potential for violence among stalkers in particular.

3. Intrapsychic Correlates of Violence

For the purposes of this Note, the term "intrapsychic" refers to the cognitive and emotional processes that occur below the level of an individual's cognitive awareness. Some of the processes to be reviewed include the way in which individuals attribute meaning to others' communication towards them; the manner in which individuals prefer to relate to others, even if unaware of this preference; and the ways in which individuals protect their egos from uncomfortable situations or emotions.

In their study of violent men in intimate relationships, Sugarman and Hotaling observe that battering husbands appear to have an "aggressive attributional bias"[119] that causes an individual to interpret neutral or ambivalent communications or behaviors as being hostile or critical. Hotaling also independently concluded in a prior study that a husband's potential for aggression towards his wife was likely to escalate if he perceived her actions to be intentional and aggressive, if she "threaten[ed] his identity, [or] violat[ed] a dyadic norm."[120]

Sugarman and Hotaling also report previous research findings that children who are prone to act aggressively tend to "impute malevolent intent to accidental or ambiguous aggressive acts . . . and as a consequence are more likely to retaliate against the perceived aggressor."[121] This finding has profound relevance to the

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the Nathan S. Kline Institute for Psychiatric Research, New York University Medical Center, and Kirby Forensic Psychiatric Center.).

118 *Id.* at 342, 343.

119 Sugarman & Hotaling, *supra* note 97, at 1046 (quoting G.T. Hotaling, *Attributional Processes in Husband-Wife Violence*, *in* THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE 136-54 (M.A. Straus & G.T. Hotaling eds., 1980)).

120 *Id.* at 1045.

121 *id.* at 1046 (quoting K.A. Dodge & B.A. Richard, *Peer Perception, Aggression, and*

role of attributional style in stalkers and to the prediction of their possible violent behavior.

The desire for dominance is another risk factor for violent behavior, especially in cases where the individual in question is accused of violence in prior relationships or situations. Rouse found that higher scores on a Dominance/Possessive Index ("DPI") were related to respondents' reports of using physical force against their partner,[122] and Meloy concluded that "[p]urposeful devaluation of heterosexual objects through emotional or physical injury conveys the necessity for psychopathically disturbed erotomanic individuals to relate on the basis of dominance and intimidation, rather than affection."[123] Because the desire to dominate another individual is characteristic of Former Intimate and Sociopathic stalkers, these individuals must be considered potentially violent.

Individuals who come to the attention of mental health clinicians often reflect a tendency to protect themselves from uncomfortable memories, insights, or emotions. Some individuals typically develop patterns of "ego defenses," or other similar mental processes when they are forced to deal with internal drives, "real" life situations, and emotions. Some of these patterns strongly correlate with violent behavior.

In an empirical study of sixty psychiatric inpatients, Apter *et al.* determined that the use of "denial," "projection," and "displacement" as defenses were highly correlated to the use of violence.[124] The habitual denial of reality tends to direct one's aggressive drives outward, *i.e.*, others become the culprits while the actual perpetrator of violence steadfastly assumes, and believes in, his or her own innocence. Similar conclusions were made by Vaselle-Augenstein and Ehrlich[125] and Sonkin, Martin, and Walker.[126]

The individual who uses "projection," the defense that most positively correlates with violence, attributes unacceptable emotions

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Peer Relations, *in* THE DEVELOPMENT OF SOCIAL COGNITION 35-58 (J.B. Pryor & J.D. Day eds., 1986)).

122 Rouse, *supra* note 96, at 334; *see also id.* at 334 (The DPI, as developed by Rouse, measured behaviors which are "controlling and manipulative (e.g., closely monitoring the partner's time, isolating the partner by discouraging outside friendships, and ridiculing or being overly critical of the partner.")).

123 Meloy, *supra* note 46, at 487.

124 Alan Apter et al., *Defense Mechanisms in Risk of Suicide and Risk of Violence*, 146 AM. J. PSYCHIATRY 1027, 1030 (1989).

125 Vaselle-Augenstein & Ehrlich, *supra* note 90, at 145.

126 SONKIN ET AL., *supra* note 92, at 42.

or impulses, such as anger and aggression, to others in the environment.[127] Apter *et al.* also determined that "displacement," *i.e.*, the transference "of aggression from primary objects onto symbolic representations of or substitutes for those objects,"[128] was highly correlated with violence. Finally, "splitting," defined previously in the description of the borderline erotomanic, is correlated with violence.[129] These defenses are not merely theoretical. Ted Bundy's killings are an excellent example of the outcome of a Sociopathic stalker's displacement. When Bundy was rejected by the object of his obsession, he displaced his anger onto "substitute" victims, and he killed them.[130]

4. Psychiatric Correlates of Violence

A number of studies examine the relationship between violent behavior and specific psychiatric disorders or disturbances. Several studies focus on the relationship between affective and anxiety disorders and violence, while others focus on the relationship between alcohol or drug use and the propensity towards violence. Finally, the relationship between psychotic illnesses, particularly schizophrenia, and violence is examined in the literature.

In a review of data from 1140 male convicted felons, Collins and Bailey found a statistically significant relationship between dysthymia (a chronic moderate level of depression) and adulthood fighting.[131] They found a similar relationship between depressive "symptoms" and fighting, even after controlling for the potentially confounding influences of alcohol abuse. They conclude that "the depressive features of mood disorders increase the likelihood that individuals will resort to violence in interpersonal relations."[132] Collins and Bailey admit that their results may not be generalizable to the public at large, since their sample was not random, but was comprised of convicted felons. Collins and Bailey also observe that their study does not allow for the analysis of the temporal relationship between depression symptoms and violence, and they are thus unable to determine whether depressive symp-

127 Apter et al., *supra* note 124, at 1030.

128 *Id.*

129 Meloy, *supra* note 46, at 482; *see also supra* text accompanying note 76.

130 *See* Leibman, *supra* note 101, at 44.

131 James J. Collins & Susan L. Bailey, *Relationship of Mood Disorders to Violence*, 178 J. NERVOUS & MENTAL DISEASE 44, 46 (1990).

132 *Id.*

toms precede violence or develop as a result of having committed a violent act.[133]

Swanson, Holzer, Ganju, and Jono[134] sought to determine whether particular DSM-III-R diagnoses were predictive of violence using a pooled data base of approximately 10,000 individuals from the National Institute of Mental Health ("NIMH") Epidemiologic Catchment Area Surveys. They examined violent and nonviolent individuals who had features of a singular DSM-III-R diagnosis as well as those individuals who fit the criteria for more than one diagnosis.

Swanson *et al.* compared the data on 368 individuals who admitted engaging in some violent behavior in the previous year with those who denied engaging in violence. They concluded that an increased risk of violence was present among the individuals meeting the criteria for a DSM-III-R diagnosis over those individuals who did not fit the criteria for any diagnostic group. A total of 55.5 percent of those reporting violence met the criteria for a psychiatric disorder, compared to only 19.6 percent of nonviolent respondents. Little difference was present in the risk of violence perpetrated by individuals in different diagnostic categories.[135] A notable exception to this finding, however, was among individuals with substance abuse disorders. Swanson *et al.* observed that the most prevalent diagnosis among violent respondents was substance abuse. A full 41.64 percent of violent respondents fit the diagnostic criteria for substance abuse, as compared to only 4.93 percent of the nonviolent respondents.[136] Swanson *et al.* conclude that "[w]e have shown that the interaction between substance abuse and major psychopathology is a statistically significant predictor of violence."[137] Their finding is consistent with those reported elsewhere.[138]

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133 *Id.*

134 Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence From the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761 (1990).

135 *Id.* at 765.

136 *Id.* at 765.

137 *Id.* at 769.

138 Collins & Bailey, *supra* note 131, at 47. *But see* Volavka et al., *supra* note 108, at 239 (reporting research critical of studies that report a simple associative relationship between alcohol abuse and violence, and explaining that these studies have not "controlled for associated psychopathology" that may explain both the alcohol use and the use of violence).

The Swanson *et al.* study also strongly supports the hypothesis that the risk of violence increases if an individual meets the criteria for multiple DSM-III-R diagnoses.[139] Additionally, they conclude that the risk of violence increases even more "substantially" if the individual in question is male, young, and of lower socioeconomic status.[140]

Research also focuses on the risk for violent behavior among psychotic individuals within psychiatric institutions and the community at large. Volavka *et al.* reviewed the contradictory findings regarding the prevalence of, and risk for, violence among psychotic individuals such as schizophrenics.[141] The Swanson *et al.* study demonstrates that, statistically, the public is more at risk from the violence perpetrated by individuals who fit the diagnostic criteria for alcohol abuse than from those determined to be schizophrenic. They conclude, therefore, that the public fear towards schizophrenics is "largely unwarranted, though not totally groundless."[142]

This brief review of the research on violence illustrates that various psychobiologic, environmental, intrapsychic, and psychiatric factors contribute to the development of a violent individual. Until a comprehensive model of violent behavior is developed and studied, however, the ability to predict, with a high degree of confidence, which stalkers will commit violent acts and which will not, remains a desirable, but elusive goal.

C. *The Impact of Stalking on the Victim*

Empirical data pertaining to the actual number of victims who experience physical or sexual violence at the hands of stalkers does not exist. While not all victims of stalkers become victims of physical assault, violence need not be physical in order to elicit "substantial" and "actual" emotional reactions.[143] Some studies of "violence" even specify that the term "violence" does not only refer to acts of physical assault but also encompasses the *threat* to attack *and* verbal attacks made on individuals.[144] This under-

139 Swanson et al., *supra* note 134, at 766.

140 *Id.* at 768.

141 Volavka et al., *supra* note 108, at 241.

142 Swanson et al., *supra* note 134, at 769.

143 *See infra* Part IV-B91)(e).

144 *See* Thomas K. Greenfield et al., *Violent Behavior and Length of Psychiatric Hospitalization*, 40 HOSP. & COMMUNITY PSYCHIATRY 809, 810 (1989).

standing of violence is a premise of the criminal sanctions found in anti-stalking laws and of the discussion that follows.

No two individuals react to the same traumatic emotional event or act of violence in an identical manner. Clinicians, however, often observe similar behavioral, emotional, and cognitive reactions in victims of emotional or physical trauma. The American Psychiatric Association defines this characteristic and recognizable pattern as "Post-traumatic Stress Disorder" ("PTSD").[145] The DSM-III-R PTSD diagnosis is reserved for individuals who have

> experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone, e.g., serious threat to one's life or physical integrity; serious threat or harm to one's children, spouse, or other close relatives.[146]

In addition, the diagnosis applies to those who manifest *re-experiencing, avoidance,* and increased *arousal* symptoms for at least one month.[147]

A review of stalking victims' responses to their ordeals indicates the presence of several PTSD symptoms, some of which persist even after the stalking ceases.[148] Anecdotal evidence suggests

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145 AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 250; *see also* Mary P. Koss, *The Women's Mental Health Research Agenda: Violence Against Women,* 45 AM. PSYCHOLOGIST 374, 375 (1990). *See generally* Herbert I. Levit, *Battered Women: Syndrome Versus Self-Defense,* 9 AM. J. FORENSIC PSYCHOLOGY 29, 30 (1991) (describing the impact which battering has on mental and emotional functioning).

146 AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 250.

147 *Id.* at 250 (According to the DSM-III-R, some of the *re-experiencing* symptoms include: having "recurrent and intrusive distressing recollections of the event;" having "recurrent distressing dreams of the event;" suddenly "acting or feeling as if the traumatic event were recurring;" and "intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event." Some of the *avoidance* symptoms include: "efforts to avoid thoughts or feelings associated with the trauma;" efforts "to avoid activities or situations that arouse recollections of the trauma;" an "inability to recall an important aspect of the trauma (psychogenic amnesia);" a "markedly diminished interest in significant activities;" a "feeling of detachment or estrangement from others;" having a "restricted range of affect, e.g., unable to have loving feelings;" having a "sense of foreshortened future." The *arousal* symptoms include "difficulty falling or staying asleep;" "irritability or outbursts of anger;" having "difficulty concentrating;" being "hypervigilant;" having an "exaggerated startle response;" and experiencing "physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event." At least one of the *re-experiencing* symptoms, three of the *avoidance* symptoms, and two of the *arousal* symptoms must be present before the diagnosis of PTSD can be made. In addition, these symptoms must be present for at least one month, regardless of when the symptoms appear. If the symptoms appear more than six months after the trauma, *delayed onset* is specified in the PTSD diagnosis. This Note should not be considered complete, and the reader is encouraged to refer to the DSM-III-R, as cited.).

148 *See* Dunlop, *supra* note 58, at 831 ("However, over the months, the employee be-

that in cases where the stalking victim does not meet the full diagnostic criteria for PTSD, the victim may exhibit one or more post-traumatic symptoms.[149] In general, these symptoms may vary in severity and duration. Pynoos, Sorenson, and Steinberg state that the "[o]utcome may range from a relatively successful adaptation that includes restored psychological, interpersonal, and occupational functioning, to severe trauma-related pathology and pervasive functional impairment."[150] On the "severe" end of the spectrum, victims of trauma may experience reactions other than PTSD such as depression, substance abuse, phobic anxiety, generalized anxiety, obsessive-compulsive behaviors, and dissociative disorders.[151]

In addition, some longitudinal research indicates that "a proportion of victims of violence remain symptomatic for years, and that if anxiety or PTSD symptoms persist beyond three months, they are not likely to remit without intervention."[152] This finding

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came quite frightened by the patient's [following] behavior and finally, on request to the store's management, she was transferred to Hull so that she could be away from the patient's attentions."); *see also* Brown, *supra* note 67 ("But the minute I start feeling relief, he starts up again . . . . It's really hard to carry on a normal life . . . . I watch over my shoulder all the time," says a woman stalked by a former lover. She has changed her telephone number four times and has broken off a new relationship for fear that her former lover will harm her current boyfriend."); Court, *supra* note 83 ("As always, the curtains . . . were drawn tightly . . . . A pair of scissors lay carefully positioned on the kitchen table . . . . [The stalking victim] rarely left the apartment."); Jane Kwaitkowski, *Peeping Tom Case Stirs Fear, Anguish, Emotion*, BUFFALO NEWS, Nov. 5, 1992, *available in* LEXIS, Nexis Library, Papers File ("During the time of her [stalking] problems with Giarratano, the woman said a sense of fear was constantly with her. She complained of nightmares."); Laird, *supra* note 57 ("Linda . . . always carries a gun, even though it's illegal . . . she still flinches whenever she sees a pickup truck in her rearview mirror." This woman ate at her desk, became suspicious of strangers, and "wondered whether it might be her fault."); Puente, *supra* note 2, at 9A ("She changed her name, her job, her hair. She installed a security system. She dropped all her old friends. Then, she disappeared. That was six years ago and she's still in hiding—still afraid of the man who stalked and threatened to kill her." Another woman "moved in with roommates, had co-workers follow her home, and screened her calls. He broke in . . . kidnapped her, shot her, set her body on fire and dumped it in a creek."); Mike Royko, *Mediation Order Is An Obscene Call*, CHI. TRIB., Sept. 18, 1992, at C3 ("'This wasn't just some kid's prank,' Nancy said. 'He threatened and terrified me for months.'").

149 It is impossible to identify the number and severity of PTSD symptoms on the basis of case examples alone. Further studies should examine the lingering effects which victims experience in the months and years following their stalking.

150 Robert S. Pynoos et al., *Interpersonal Violence and Traumatic Stress Reactions*, *in* HANDBOOK OF STRESS; THEORETICAL AND CLINICAL ASPECTS 573, 580 (Leo Goldberger & Shlomo Breznitz eds., 2d ed. 1993).

151 *Id.* at 580 (relying on I. Winfield et al., *Sexual Assault and Psychiatric Disorders Among a Community Sample of Women*, 147 AM. J. PSYCHIATRY 335-41 (1990)).

152 *Id.* at 581 (quoting D.G. Kilpatrick et al., *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHOPSYCHIATRY 658-59 (1979)).

implies that victims of traumatic events, including victims of stalkers' emotional or physical assaults, should be encouraged to seek professional help if symptoms persist for more than one month.[153]

This Note will not describe the various factors that influence the impact of a stressful or traumatic situation on any particular victim of trauma. Similarly, we will not discuss the specific cognitive and physiological effects of victimization. These and related issues should be examined in future research as they relate to male and female victims of stalkers—noting any gender differences that may exist in the way that trauma and post-traumatic reactions are experienced.

D. Prospects for Treatment

Until science can predict which stalkers are likely to stalk repeatedly or behave violently, mental health specialists must approach each stalking case individually. The approach must be multi-faceted in order to address the factors that lead to stalking behavior.

1. Treatment Prospects for Erotomania and de Clérambault's Syndrome

Once the evaluating psychiatrist determines that the stalker fits the criteria for a Delusional Disorder, erotomanic subtype, and rules out other disorders of which erotomanic delusions may be symptomatic, she faces three treatment options.[154]

First, the psychiatrist must consider whether to hospitalize the delusional erotomanic. Kaplan and Sadock state: "The possibility of suicide or homicide, severe impairment in occupational or social functioning, and the need for a diagnostic workup are strong indications for hospitalization."[155] If the stalker refuses to be hospitalized, but the psychiatrist can demonstrate the need to hospitalize, an involuntary legal commitment may be necessary.

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153 *See* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 251 (The diagnosis of PTSD is only appropriate if the symptoms persist for more than one month. In addition, a diagnosis of "PTSD with delayed onset" is made if the symptoms do not appear for at least six months after the traumatic event has occurred.).

154 KAPLAN & SADOCK, *supra* note 64, at 348.

155 *Id.*

The psychiatrist's second treatment option is to use medication.[156] Antipsychotic drugs are currently considered the drugs of choice for individuals with chronic delusional disorders, "although adequate proof of their efficacy is lacking."[157] Some research suggests that Erotomania responds to pimozide, a diphenylbutylpiperidine antipsychotic.[158] Meloy cautions, however, that "[t]here is currently no published research, except anecdotal reports, concerning the pharmacological management of the erotomanic patient."[159] Another difficulty with using medication on delusional patients is that they are generally noncompliant with physicians' instructions to take medications.[160]

The psychiatrist's third treatment option is psychotherapy.[161] Kaplan and Sadock recommend that the early stages of therapy should focus on helping the delusional individual manage his anxiety or irritability, without confronting or criticizing the actual delusion. As treatment proceeds, and as the erotomanic develops trust in the therapist, the therapeutic focus can shift to the adverse effects that the actual delusion has on the individual's life. Meloy also suggests that the clinical evaluator should look for personality disturbances that are "masked" by the delusions of the erotomanic.[162] Some of these personality disturbances—paranoid, histrionic, borderline, and anti-social traits—may influence the behavioral activities of the erotomanic and should be addressed in therapy.[163]

Kaplan and Sadock conclude, "A good therapeutic outcome depends on the psychiatrist's ability to respond to the patient's mistrust of others and the resulting interpersonal conflicts, frustrations, and failures."[164] They also identify the factors that corre-

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156 *Id.* at 349.

157 *Id.*

158 Ghaziuddin & Tsai, *supra* note 52, at 127 (relying on A. Munro et al., *Two Cases of 'Pure' or 'Primary' Erotomania Successfully Treated with Pimozide*, 30 CANADIAN J. PSYCHIATRY 619-22 (1985)) (Ghaziuddin & Tsai indicate that only "pure" Erotomania responds to pimozide. "Pure" Erotomania refers to the case where the delusional erotomania does not coexist with, nor is a symptom of, another psychiatric disorder.).

159 Meloy, *supra* note 46, at 489. (Meloy also suggests that, in the absence of published research findings, psychiatrists should not "be dissuaded from trying various medications that might be efficacious.").

160 *See* KAPLAN AND SADOCK, *supra* note 64, at 349 (explaining that the delusional individual will "incorporate the administration of drugs into their delusional system").

161 *Id.*

162 Meloy, *supra* note 46, at 489.

163 *See* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49.

164 KAPLAN & SADOCK, *supra* note 64, at 350.

late with a good prognosis for delusional individuals: "high levels of occupational, social, and functional adjustment; female sex;[165] onset before age thirty; acute onset; short duration of illness; and the presence of precipitating factors. Patients with persecutory, somatic, and erotic delusions have a better prognosis than do patients with grandiose and jealous delusions."[166]

2. Treatment Prospects for the Borderline Erotomanic

The term "Borderline Erotomania," and the narrowly defined category of stalkers it describes, is relatively new.[167] Because borderline erotomanics are diagnostically distinct from delusional erotomanics, the literature that pertains to the treatment of erotomanic delusionals should not automatically be applied to the treatment of these individuals. The treatment options that Kaplan and Sadock identify for delusional erotomanics may be helpful, however, in developing appropriate treatment techniques for borderline erotomanics.

The evaluating psychiatrist should first determine whether the borderline erotomanic needs to be hospitalized. The criteria that Kaplan and Sadock set for the delusional erotomanic's hospitalization should also apply to the borderline erotomanic.[168] These criteria—the serious risk of suicide or homicide and severe social or occupational impairment—are general guidelines that psychiatrists consider before hospitalizing any client, regardless of diagnosis.

The use of antipsychotic medications to "cure" these stalkers of their erotomanic symptoms may be inappropriate because, unlike the delusional erotomanic, there is no delusional process involved with the borderline erotomanic. The evaluating psychiatrist must determine, however, whether the borderline erotomanic's symptoms are secondary to other disorders such as schizophrenia, mood disorders, or organic disorders, because erotomanic symptoms may accompany these diagnoses.[169] These other diagnoses can be appropriately treated with medications. For

165 Kaplan and Sadock do not explain why female delusionals have a better prognosis.

166 *Id.* at 345; *see also* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 200 (definitions of persecutory, somatic, grandiose, and jealous delusional subtypes).

167 Meloy, *supra* note 46, at 478.

168 *See* KAPLAN & SADOCK *supra* note 64, at 348.

169 Meloy, *supra* note 46, at 489.

example, Meloy suggests that borderline erotomanics who experience an affective component to their disorder may find symptomatic relief from other pharmacotherapy, such as lithium carbonate.[170]

The evaluating psychiatrist may determine that psychotherapy is appropriate for the borderline erotomanic stalker. In this case, personality disorders that may accompany the borderline erotomanic's symptoms[171] should be addressed in therapy. The Narcissistic, Histrionic, Antisocial, Borderline, and Paranoid personality disorders that Meloy identifies are defined in the DSM-III-R,[172] and mental health professionals currently use various psychotherapeutic approaches when treating individuals who have personality disorders.[173] Similar therapeutic approaches may be appropriate for the borderline erotomanic who exhibits these character disorder traits.

3. Treatment Prospects for Former Intimate Stalkers

The Former Intimate stalker exhibits several of the same personality characteristics and defense mechanisms that domestically violent individuals exhibit. Several types of treatment programs are designed for men and women who batter their partners; because of the psychological similarities between these types of individuals, some of these treatment techniques may also be effective with Former Intimate stalkers.[174] As with the delusional erotomanic

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170 *Id.* at 489; *see also id.* (citing Goldstein, *supra* note 66, at 267-74).

171 Meloy, *supra* note 46, at 481.

172 *See* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 49, at 351 (diagnostic criteria for Narcissistic Personality Disorder); *see also id.* at 349 (diagnostic criteria for Histrionic Personality Disorder);. *id.* at 345 (diagnostic criteria for Antisocial Personality Disorder); *id.* at 347 (diagnostic criteria for Borderline Personality Disorder); *id.* at 339 (diagnostic criteria for Paranoid Personality Disorder).

173 *See* KAPLAN & SADOCK, *supra* note 64, at 531 (treatment recommendations for Narcissistic Personality Disorder); *see also id.* (treatment recommendations for Histrionic Personality Disorder); *id.* at 532 (treatment recommendations for Antisocial Personality Disorder); *id.* at 534 (treatment recommendations for Borderline Personality Disorder); *id.* at 528 (treatment recommendations for Paranoid Personality Disorder).

174 Beck et al., *supra* note 84, at 60; *see* SHUPE ET AL., *supra* note 87, at 118 (Reality therapy, cognitive structuring, and various types of anger management techniques are used, as are individual therapy, group therapy, or a combination of both. Their research indicates that "no one counseling format is indispensable;" but that a range of approaches can have an impact on batterers. They consider three elements essential to these programs: holding the violent person responsible for the violent behavior; trying to get objective, independent information on the violent individual and monitoring him when necessary; and stressing that physical and emotional abuse are inappropriate, inexcusable, and abnormal.).

and the borderline erotomanic, the evaluating psychiatrist should first determine whether the Former Intimate stalker needs to be hospitalized and whether medication is appropriate.

A batterer is often referred into psychological treatment as part of probation,[175] and in some instances, if the batterer meets certain prerequisites, he will be diverted into a counseling and education program as an alternative to criminal prosecution.[176] This alternative is not recommended for the Former Intimate stalker because of the threatening nature of his stalking behavior and the effect of his behavior on his victim. Counseling and education, however, are both recommended as treatment alternatives after sentencing.

Former Intimate stalkers are highly ambivalent about interpersonal intimacy and emotional dependency. In addition, they experience rejection as abandonment, and feel the need to control their former partners. These issues must be addressed in therapy. The therapeutic techniques generally used with domestic violence offenders, however, are brief in duration, educational in nature, and focused on the acquisition of new communication and anger management skills.[177] Vaselle-Augenstein and Ehrlich recommend, "Because we believe that many batterers exhibit serious psychopathology, we would argue that treatment not merely be longer but that a specific attempt be made to deal with deeper psychodynamic issues."[178] This recommendation, and the specific issues of ambivalence, abandonment, and control, should be considered when a mental health professional formulates the treatment plan for a Former Intimate stalker.

The primary treatment goal of Sonkin *et al.* for their own work with domestic violence offenders, a goal that is also appropriate for Former Intimate stalkers—is to stop violent behavior, including "physical, sexual, property, and psychological violence."[179] They admit that other secondary goals are more likely to assure long-term change than a singular focus on developing anger management skills. Some of these secondary goals, also appropriate for the Former Intimate stalker, include: to increase feelings of self-

175 *See* Sonkin et al., *supra* note 92, at 125.

176 *See id.* at 55 (citing special Proceedings in Cases Involving Domestic Violence, CAL. PENAL CODE §§ 1000.6-.11).

177 Vaselle-Augenstein & Ehrlich, *supra* note 90, at 150.

178 *Id.* at 151.

179 Sonkin et al., *supra* note 92, at 90.

esteem, to decrease isolation and develop interpersonal support systems, to increase a sense of personal responsibility for his behavior, and to increase acceptance of the consequences of his behavior.[180]

4. Treatment Prospects for Sociopathic Stalkers

The prospects for treating sociopathic stalkers is not promising. Currently, there is no known cure for the condition.[181] The prospect of incarceration does not deter Sociopathic criminals. Dr. John MacDonald observes that sadistic murderers, who "figure prominently in the ranks of serial murders,"[182] are indifferent to the suffering of others. He concludes: "Long periods in a penitentiary or a mental hospital do not seem to turn them away from their homicidal inclinations. While in custody, their behavior is without reproach and their custodians are too often deceived by this unreliable predictor of dangerousness."[183] These observations suggest that additional research is necessary regarding the viability of different treatment techniques for Sociopathic stalkers. Before any one technique is implemented, additional research is also necessary on the rates, and risks, of recidivism within this criminal population.

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180 *Id.* at 90-93.

181 In Barefoot v. Estelle, 463 U.S. 880 (1983), the Supreme Court addressed the constitutional limitations of the use of psychiatric testimony to predict violent behavior of capital defendants. . The Court held that expert testimony predicting defendant's future dangerousness was admissible at trial. At defendant Barefoot's state trial, psychiatrist John Holbrook testified that Barefoot was a criminal sociopath and that Holbrook knew of no treatment that could change this condition. *Id.* at 918 (Blackmun, J., dissenting). Dr. James Grigson also testified that Barefoot had a sociopathic personality disorder and that no known cure exists for the condition. *Id.* at 919. Other psychiatrists and forensic experts have reached similar conclusions.

182 JOHN M. MACDONALD, THE MURDERER AND HIS VICTIM 25 (1986); *see id.* at 148 (describing the psychological profile of serial murderers) (Dr. MacDonald is Professor of Psychiatry and Director of Forensic Psychiatry, University of Colorado Health Sciences Center); *see also supra* notes 102-03 and accompanying text (cases of serial killers who also stalked).

183 PANEL ON RESEARCH ON REHABILITATIVE TECHNIQUES, NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS (Susan E. Martin et al. eds., 1981) [hereinafter NEW DIRECTIONS] (The panel concludes: "Rather than continue to try to develop offender typologies in the abstract, the panel recommends the formulation and adoption of a 'template-matching technique' to guide the assignment of offenders to programs. One creates a template of the kind of person that is most likely to succeed in a program according to the theoretical propositions underlying a treatment when supported by empirical findings. Then offenders are selected to fit the template. Thus, the program clients are theoretically suggested.").

Treatment techniques for the four types of stalkers identified in this Note should be evaluated according to the guidelines suggested by the Panel on Research on Rehabilitative Techniques, with special emphasis on their recommendation that "intervention programs must be designed for and tested with a theoretically suggested, clearly specified target population."[184]

E. Conclusion

A review of the literature suggests that at least four types of stalkers exist: delusional erotomanics, borderline erotomanics, Former Intimate stalkers, and Sociopathic stalkers. While stalkers in each of these categories may behave in similar ways, the etiology of their behavior and the motives for their actions differ.

The delusional erotomanic believes that his affections are reciprocated by his victim, and he seeks to "continue" a relationship that he believes already exists. By contrast, the borderline erotomanic seeks to establish a relationship with an individual who does not "yet" reciprocate his affections. In both of these cases, no history of an actual *intimate* relationship between stalker and victim exists. The Former Intimate stalker does have an actual history of relationship with his target. In some cases, the Former Intimate stalker is trying desperately to salvage a failed relationship and in others is only seeking revenge for the break-up. Finally, the Sociopathic stalker is neither seeking to establish a relationship nor expressing revenge for a failed relationship. He stalks an individual who "fits" a particular victim-profile. Adequate forensic or demographic data on the risk posed by each of these stalker "types" is lacking, though by definition the Sociopathic stalker poses a significant and credible risk to society. More research must be done, and more accurate crime statistics compiled, before the prevalence of, and risk posed by, these individuals are known.

The stalker profiles described are useful not only as an aid to understanding stalking behavior, but are of practical import to both the defendant and the state in stalking litigation. Based on psychological studies conducted to date, and the diagnostic tools available to mental health professionals, a mental health expert could use the "stalker" profiles described here to help prove[185]

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184 *Id.* at 24.

185 F.R.E. 704(b) does not, however, permit an expert witness to testify specifically whether the defendant "did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." *Id. See generally* Anne Lawson

whether a person charged with stalking acted, or did not act, with the requisite state of mind.[186] For example, if a Former Intimate stalker commits a proscribed act, he may have acted out of narcissistic or abandonment rage and therefore may or may not have acted with the requisite intent.[187] A defense attorney may, if the case is appropriate, be able to base an insanity defense on a diagnosis of Erotomania or Sociopathy.[188] Former Chief Judge Sol Wachtler's attorneys considered basing an insanity defense for him on a diagnosis of Erotomania.[189] Thus, depending on whether the defendant fits the criteria of one of the stalking profiles described above, expert testimony may be useful for proving or disproving that the defendant acted with the requisite intent or that such a person creates a reasonable threat to the victim.

A person arrested for stalking may fit one of the stalking profiles described above. Before trial, a comprehensive neurological, psychiatric, medical, and psychological evaluation should be conducted by specialists in these fields.[190] The goal of such an

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Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620 (1987).

186 *See* People v. Elder, 579 N.E.2d 420, 422 (Ill. App. Ct. 1991) ("Defendant's expert testified that the defendant did not have a personality disorder. He also testified that the defendant did have a 'dependent personality pattern' and that, under the circumstances, the commission of the crime in this case was a normal reaction for a person with that type of personality." The court held that it was proper rebuttal evidence for the prosecution's expert to testify that a "dependent personality pattern" was not a recognized personality disorder under DSM-III.)For a general discussion of the use of expert psychiatrist or psychologist testimony to prove or disprove state of mind through expert testimony on character, see Andrew E. Taslitz, *Psychological Character Evidence and the Attribution of Responsibility*, 52 MD. L. REV. 1 (1993). Taslitz discusses various uses of this type of testimony. In State v. Hickman, 337 N.W.2d 512 (Iowa 1983), the Supreme Court of Iowa held that it was proper for the state to use expert testimony to show that the defendant was in a class of "hatred rapists," and therefore his assault on the victim was probably by force and not consensual. *Id.* at 9; *Hickman*, 337 N.W.2d at 516. Taslitz also discusses United States v. Roberts. 887 F.2d 534 (5th Cir. 1989). In that case, the defendant used expert psychiatric testimony regarding the defendant's naive and autocratic character to prove that the defendant did not intend to distribute cocaine. Taslitz, *supra*, at 11-12.

187 See *supra* notes 89-96 and accompanying text for examples of the intent with which Former Intimate stalkers may act. *See also* People v. Robbins, 755 P.2d 355 (Cal. 1988) (expert witness testimony used to prove that, because the defendant acted out of sexual frustration and rage, he did not murder the victim intentionally).

188 David Lewis, who represented Carolyn Warmus in a "so called 'fatal attraction' murder" trial, used her obsession with the victim as the basis for an insanity defense. John Riley, *Wachtler Case: Is Insanity a Crazy Idea?*, NEWSDAY (Nassau & Suffolk ed.), Feb. 11, 1993, at 8.

189 *Id.* Former Chief Judge Wachtler subsequently pleaded guilty to the charges against him. Kleinfeld, *supra* note 9, at A1.

190 *See supra* notes 107-42 and accompanying text. It is critical that the following fac-

evaluation is fourfold: to determine the appropriate stalker "classification," to establish the stalker's motives, to determine his risk for violent behavior, and to decide the appropriate clinical treatment, sentence, or both. A neurological examination of the accused or indicted stalker can identify the presence of organic brain damage and seizure activity, and a medical evaluation can determine endocrinological and neurochemical imbalances that are correlated with violent behavior. The results of these evaluations may help to determine whether the defendant acted with the requisite state of mind. Further, a psychiatric evaluation can determine the presence of psychosis or other DSM-III-R disorders—particularly important in determining legal competence for the delusional erotomanics and Sociopathic stalkers. A psychological evaluation can determine personality features, the presence of DSM-III-R disorders, antecedent attachment or bonding disturbances, and the relational style of these individuals.

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tors or correlates of violence be considered when administering a formal evaluation of an accused or indicted stalker:

—the presence of diffuse brain damage
—endocrinological or neurochemical imbalances
—the presence of psychiatric illnesses
—the presence of delusions
—childhood attachment deficiencies
—witnessing and/or experiencing family violence as a child
—Narcissistic, Borderline, Histrionic, and Anti-social Personality traits as defined by DSM-III-R criteria
—substance abuse
—a history of criminal activity
—low socio-economic status
—social isolation
—high dominance motives
—ambivalence regarding dependency needs
—a history of aggression towards intimates
—former mental health treatment
—the use of denial, projection, and displacement as ego defenses
—having no one with whom to talk about problems

While some of these correlates may not be as robust as others, they must not be overlooked during evaluation by the mental health professional or forensic specialist. *See also* Meloy, *supra* note 46, at 489 (Meloy recommends that the evaluator consider the degree of narcissism, hysteria, paranoia, and psychopathy in the accused stalker "because these factors may predict the degree of violent acting out that could occur. Generally, the more obvious the presence of paranoid and psychopathic traits, the greater the risk of violence, especially if the erotomanic individual meets other criteria, such as use of alcohol or psychostimulants, that correlate with violence." *Id.* In addition, Meloy recommends and justifies the use of specific projective tests during the evaluation phase.).

Finally, the psychological impact that stalkers have on their victims must not be minimized or overlooked in the law enforcement process. Both the acute and long-term emotional and practical effects of the stalking experience are actual and substantial, and every effort should be made to protect the victim from further emotional and physical harm.[191]

III. A HISTORY OF MODERN ANGLO-AMERICAN LAW AND STALKING BEHAVIORS

Law enforcement has long faced the behaviors that anti-stalking laws attempt to prevent, punish, or otherwise control. William Blackstone, in his *Commentaries*, discusses the ways in which English monarchs, parliamentarians, and judges attempted to stop contemporary manifestations of the same or similar behaviors covered by anti-stalking laws. The history of Anglo-American efforts to control people who threaten to breach the peace[192] or who threaten the personal security of others through stalking-type behaviors—a course of conduct that creates a credible threat of bodily harm or that causes substantial emotional distress—provides a helpful perspective for evaluating modern stalking laws.

A. Criminal Law and Stalking Behaviors

> [T]he absolute rights of each individual [include] . . . the right of personal security . . . so that the wrongs or injuries affecting [that right] must consequently be of a correspondent nature.
>
> —Blackstone[193]

English criminal law as it existed at the time of the American Revolution was distinctly spotty in the protection it gave against the behaviors covered by a modern anti-stalking law.[194] "Lyeing

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191 *See supra* Part II-D.

192 Only acts of violence were breaches of the king's peace. 2 FREDRICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW 453-54, 462-66 (2d ed. 1923). Also, the king's peace did not extend to every person in the realm, but was limited, at the time of the Norman conquest, "to persons, or at places . . . specially protected by royal power." *Id.* at 253 (footnote omitted); *see also* 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 47-50 (1923) (discussion of the development of the idea that offenses against the king's peace were crimes against the state and not solely against private individuals). For another discussion of the concept of the king's peace, see JULIUS GOEBEL, JR., FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF CRIMINAL LAW 1-44, 423-40 (1976).

193 3 BLACKSTONE, *supra* note 44, at *119.

194 These behaviors could constitute a "course of conduct" that "seriously alarms or

in wait," analogous to the surveillance-type behaviors in which some modern stalkers engage, was not a crime, although it could be an element in other crimes. Specific statutory punishments were provided for threatening letters, and in some cases for what Blackstone describes generically as "menaces." In addition, a quasi-criminal proceeding was provided through which a victim of repeated threats or harassment could require the perpetrator to put up sureties of the peace.[195] While all these provisions had gaps, English criminal law at least dealt severely with one behavior that, if repeatedly done, would be a stalking behavior today—sending threatening letters.[196]

1. Offenses Against the Peace:[197] Threatening Letters

In fifteenth-century England, unknown persons were "casting bills" into the houses of citizens in the city of Cambridge and in the counties of Essex and Kent. The bills demanded that money be placed at a specified place at a specified time or else the person receiving the bill would have his house or other property burned. The houses and chattels of several people were burned in this way, impoverishing many. A law passed in 1429 made "all such burnings of houses of any person . . . high treason."[198] The language of the statute, however, was ambiguous as to whether the act of *sending* such a threatening letter was *part of the offense* of burning or was a *separate offense* of high treason. Blackstone, though, adopted the separate offense interpretation.[199] At this time, the punishment for high treason was death[200] and forfei-

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annoys" and that would cause a reasonable person to suffer "substantial emotional distress." *See supra* note 23.

195 *See supra* Part II-A(3).

196 It could be part of a course of conduct that violates an anti-stalking statute.

197 This title comes from 4 BLACKSTONE, *supra* note 44, at *142.

198 8 Hen. 6, ch. 6 (1429), *repealed by* 1 Edw. 6, ch. 12 (1547) (Blackstone cites this statute as 8 Hen. 5, ch. 6. 4 BLACKSTONE, *supra* note 44, at *144.).

199 4 BLACKSTONE, *supra* note 44, at *144. The Statute of Treasons, 25 Edw. 3, st. 5 ch. 2 (1351), distinguished felonies from treason and went on to specify six treasonous offenses. High treason was treason against the king, whereas petit treason was treason against a superior. 2 HOLDSWORTH, *supra* note 192, at 449-50. Holdsworth comments that statutes passed in the fourteenth and fifteenth centuries after the Statute of Treasons were passed due to "political necessities" or to "repress a particularly prevalent offense." *Id.* at 450. The persons sending the demand letters were either literate themselves or conspired with someone who wrote the letters for them. Literate persons could escape the death penalty if convicted of a felony that had the "benefit of clergy." *See* ROBERT E. RODES, JR., LAY AUTHORITY AND THE REFORMATION IN THE ENGLISH CHURCH 29-33 (1982).

200 Since before Edward I's reign, high treason was punishable by death. 1 POLLOCK

ture of the traitor's lands to the crown.[201] Effective for a time, the statute was repealed under a general pruning of the law of treason in 1547.[202]

In 1722, a group of armed men, called the "Blacks," so named because they blackened their faces, terrorized the countryside. The Blacks committed many illegal acts and did "great damage to several persons." One of their activities was sending demand letters. To combat this activity, Parliament passed a statute making the sending of this type of letter a felony.[203] Parliament outlawed demand letters[204] that threatened the receiver with arson, threatened to maliciously shoot a person, or demanded any valuable thing, whether the letter was unsigned or signed with a fictitious name.[205] In 1754, Parliament expanded the law to make the sending of *nondemanding* threatening letters a felony.[206] Thus, after 1754, sending a letter threatening to "kill or murder any of his Majesty's . . . subjects, or to burn their houses [or other property]," though the sender made no demand for payment on the receiver, was a felony.[207] The statute prescribed the death penalty for those convicted of sending *nondemanding* threatening letters.[208] Thus, shortly before the American Revolution, the act of sending demand or non-demand letters that threatened bodily harm or destruction of property was considered a capital offense.

& MAITLAND, *supra* note 188, at 51.

201 3 HOLDSWORTH, *supra* note 192, at 71.

202 *See supra* note 198.

203 9 Geo. 1. ch. 22 (1722). The class of offenses entitled felonies predates statutory classification of treasonous offenses and also misdemeanors (which developed from the action of trespass). 2 HOLDSWORTH, *supra* note 192, at 357-58; 3 HOLDSWORTH, *supra* note 192, at 289. Originally, a felony described "those offenses which involved a breach of the obligation between lord and vassal." Later, the scope of felonies was widened to include serious offenses which occurred between subjects, but not necessarily between lord and vassal. The offenses were serious, and thus felonies, because they were "breaches of the king's peace." 2 HOLDSWORTH, *supra* note 192, at 358. Conceptualizing felonies in this way creates some difficulty in distinguishing felonies from treasonous offenses. Holdsworth comments that, in the fourteenth and fifteenth centuries, the line between treasons and felonies was "difficult to draw." 3 HOLDSWORTH, *supra* note 192, at 289. For a general discussion of statutes and case law on threatening letters from 1722 to 1806, see 2 EDWARD HYDE EAST, PLEAS OF THE CROWN 1104-26 (1806).

204 These are letters demanding money in exchange for the non-occurrence of the threatened event.

205 Presumably, demand letters properly signed by the sender would also be punished under the statute.

206 27 Geo. 2, ch. 15 (1754).

207 *Id.*

208 Until the beginning of the nineteenth century in England, almost all felonies were punishable by death. 3 HOLDSWORTH, *supra* note 192, at 294 n.4.

In the United States today, two federal statutes punish the transmission of threatening communications through the mail or interstate commerce.[209] States also punish such communications under "terroristic threat," harassment, and intimidation statutes.[210] These laws are similar to the earlier English "threatening letter" laws.[211] Most of them criminalize communications that threaten the receiver either with bodily harm or with the destruction of his property. Other laws apply even if the threat is to a third person. For example, Georgia's terroristic threat statute criminalizes the act of "threaten[ing] to commit any crime of violence or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building."[212] Illinois' intimidation statute makes it a crime to communicate to another a threat of physical harm or a threat to harm property.[213] Finally, Hawaii's harassment statute makes it an offense to communicate by telephone or facsimile an intent to cause the receiver bodily injury or damage to the receiver's property.[214] While some statutes may not criminalize threats to property, these three statutes are otherwise representative of this body of law. Below, we evaluate these statutes and their continued usefulness in those states that have adopted anti-stalking laws.[215]

2. Offenses Against Persons:[216] Criminal Menacing, "Lyeing in Waite," and Attempt Laws

Other stalking behaviors, particularly following and surveillance-type behaviors,[217] traditionally are not regarded as crimes,

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209 18 U.S.C. §§ 875(c), 876 (1988). Section 875(c) punishes anyone making an interstate communication threatening injury to another and § 876 punishes anyone who "knowingly so deposits or causes to be delivered [through the mails] any communication with or without a name . . . containing . . . any threat to injure the person of the addressee or of another." *Id.* Violators face a fine of $1000, up to 5 years in prison, or both. *Id.*

210 *See infra* Part IV.

211 The language of § 875 and § 876 is similar to 9 Geo. 1, ch. 22.

212 GA. CODE ANN. § 16-11-37 (1992).

213 ILL. REV. STAT. ch. 720, para. 5/12-6 (Smith-Hurd 1993).

214 HAW. REV. STAT. ANN. § 711-1106 (Michie 1988).

215 *See infra* Part IV.

216 This title comes from 4 BLACKSTONE, *supra* note 44, at *205. These offenses affect the security of persons. For Blackstone's explanation of why these are public wrongs, see *id.* at *176.

217 See the story of Kathleen, stalked for approximately seven years by a man who claimed to be a former classmate. This stalker committed a series of "stalking" behaviors, including watching her parents' home. Vernon J. Geberth, *Stalkers*, LAW & ORDER, Oct.

but rather as a prelude to crime or as important evidence of the *mens rea* needed for some target offense. For example, Blackstone and Hale did not consider "menacings antecedent" (undefined acts that threaten bodily injury to the point where a person's business is interrupted)[218] as crimes, but said that menacings might be proof of the *mens rea* element of murder.[219] Unlike threatening letters or assaults,[220] this type of threatening behavior was treated merely as a private wrong subject to tort and equitable remedies.[221] The only other activity analogous to a stalking behavior addressed by English criminal law was the act of "lyeing in waite." Lying in wait was not a crime itself, but could be an *element* of another crime, such as mayhem.[222] As to other crimes such as murder, lying in wait could be evidence of the *mens rea* (*e.g.*, malice aforethought)[223] needed for a conviction.[224]

Thus, the criminal law of England through the eighteenth century did not criminalize many of the behaviors that might constitute a course of conduct that we would call "stalking." Ac-

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1992, at 138, 140. After Kathleen's stalker finally kidnapped her, the court sentenced the stalker to eight years. Her stalker indicated to the court that he would continue stalking Kathleen when he was released. *Id.* at 141; *see also id.* (the story of Judy, a 10-year old, stalked by a 24-year old man who, through the course of his stalking, sent notes to Judy indicating that he had been watching her as she played in her neighborhood).

218 3 BLACKSTONE, *supra* note 44, at *120 (a person who threatened another to the point where the latter's business is interrupted could have an action for trespass *vi et armis*).

219 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 451 (1800) ("The evidences of such malice must arise from external circumstances discovering inward intention, as lying in wait, menacings antecedent . . . ."); 4 BLACKSTONE, *supra* note 44, at *198-99.

220 An assault is "an attempt or offer to beat another, without touching him." 3 BLACKSTONE, *supra* note 44, at *120. An assault was a crime and a private wrong. 4 BLACKSTONE, *supra* note 44, at *216-17.

221 *See* 25 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 1060-61 (Charles F. Williams ed., 1887); *see also infra* note 297 and accompanying text (trespass *vi et armis* for threats and menacings).

222 At common law, mayhem occurred when one of the king's subjects violently deprived another of a body part such as a hand, finger, or eye which, once lost, would "abate[] the courage" of the victim. 4 BLACKSTONE *supra* note 44, at *205. Further, mayhem was "a breach of the king's peace, and an offense tending to deprive him of the aid and assistance of his subjects." *Id.* By Charles II's reign, it was a felony to lie in wait and then to attack and maim a person, even if the body part damaged were of less import. 22 & 23 Car. 2, ch. 1 (1670 & 1671). A necessary element of this crime was that the mayhem had to be done "by lyeing in waite." The catalyst for this statute was an attack upon Sir John Coventry, a member of the House of Commons, by a group of men who held him down and slit his nose as well as delivering other wounds. The Coventry Act, 23 Car. 2, ch. 1, became part of the common law of the United States.

223 4 BLACKSTONE, *supra* note 44, at 199; 1 HALE, *supra* note 219, at 451.

224 This would be needed for murder, but not manslaughter. 1 HALE, *supra* note 219.

cordingly, acts that are the essence of stalking, repeated acts directed at an individual that create a credible threat and cause substantial emotional distress to a reasonable person, were not criminal. For example, if someone in eighteenth-century England followed a ten year old girl to the market every day, it would not be an offense. But the act of sending a threatening letter was a serious offense—so much so that it was a "felony without benefit of clergy."[225]

Another theory of criminal liability that might have been useful to prevent or punish stalking behavior was the law of criminal attempt.[226] Criminal attempt laws authorize the courts to punish a perpetrator at a point in time before he successfully commits a contemplated offense.[227] They do not, however, protect persons who suffer substantial harm from activities that fall substantially short of the crime itself, even if those activities may be the prelude to serious physical injury.[228] Therefore, although

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225 4 BLACKSTONE, *supra* note 44, at *144; *see also* RODES, *supra* note 199, at 29-33 (Since Thomas Becket's murder, clerics could not be punished for a felony by the secular courts. By the seventeenth century, however, this clerical privilege was extended to lay people who could read—or successfully pretend to read a well-known verse of the Bible. Thus, a lay person convicted of a felony would not be hung if he could "read.").

226 Criminal attempt is a recent development in the law. As late as 1769, the notion that to attempt to commit a crime was, independently, a punishable act was not generally accepted. Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV, 821, 833 (1928). Lord Mansfield is credited with formulating the doctrine in Rex v. Scofield, Cald. 397 (1784), in which he highlighted the two facets of criminal attempt: intention and action. He wrote, "The intent may make an act, innocent in itself, criminal; nor is the completion of an act, criminal in itself, necessary to constitute criminality." *Id.* at 40. The requisite intent of criminal attempt has been described as the "specific intent to effect some consequence which constitutes a crime" and "that the actor should have had the purpose for bringing about the commission of the substantive offense."

227 As such, they authorize police intervention before the commission of the target offense. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 18 (1986). A person is guilty of criminal attempt when he has "done all he believes to be necessary to commit the offense in question." MODEL PENAL CODE § 5.01, cmt. at 321 (1986); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 636 (5th ed. 1989). The difficult attempt cases are those situations when the person does not complete all of the necessary steps. Attempt must be something more than preparation and less than completion. Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 821 (1940). As one court aptly noted, "there is some point between the formation of a criminal plan in one's mind and one's action in trying or making an effort to commit the crime that the law, for society's protection, imposes criminal sanctions even though the crime is never consummated." Brahm v. State, 571 P.2d 631, 636 (Alaska 1977).

228 What action constitutes the requisite *actus reus* for attempt is variously determined by the traditional proximity approach, the indispensable element approach, the probable desistance test, and the *res ipsa loquitur* (equivocality) test. *See* LAFAVE &SCOTT, *supra* note

the law of criminal attempt may share a common purpose with anti-stalking laws, it does not usually encompass stalking behavior. The relationship between attempt and anti-stalking laws is discussed below.[229]

The English criminal law remedy designed to prevent stalking behaviors was "giving sureties of the peace." A surety of the peace was a means of coercing potential breakers of the peace to leave their victims alone by requiring the offender to put up money for his good behavior and to find two other people to do the same. Because sureties of the peace were the most important, though limited, Anglo-American legal device used for protecting victims of stalking behaviors, we will examine more extensively how these were and are used in both England and the United States.

3. A Remedy for Preventing a Breach of the Peace: Surety of the Peace[230]

The giving of sureties of the peace[231] was a practice that probably existed at common law before 1360.[232] The defendant was required to give a certain amount of money as security to ensure that he would keep the peace. The defendant could also satisfy the demand by finding other individuals to oblige themselves to pay a certain sum if he broke the peace. Sureties of the peace were authorized in England by statute in 1360[233] and in the United States by common law and statute. The purpose of this legal device is to prevent breaches of the peace before they occur.[234] Sureties could be had when a justice of the peace or a

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227, § 6.2, at 31-38; *see also* MODEL PENAL CODE § 5.01, cmt. at 321-29 (1985) (both provide a general introduction to the different approaches).

229 *See infra* Part IV-A.

230 *See generally* 4 BLACKSTONE, *supra* note 44, at *248-54 (requiring sureties or other obligation of one who gives probable ground to suspect will breach the peace in the future is a legal device which dates to the Saxon King Alfred in the ninth century). For a general discussion of the history of sureties of the peace and of the construction of the statute 34 Edw. 3, c.1, see Lansbury v. Riley, [1914] 3 K.B. 229 (1913). We will not discuss fully a related topic, "sureties for good behavior." A prisoner awaiting trial may be required to find such sureties to ensure his good behavior until trial. 2 SIR MATTHEW HALE, PLEAS OF THE CROWN 136 n.2 (1847).

231 1 WILLIAM HAWKINS, PLEAS OF THE CROWN 252 (6th ed. 1787) (security against breaches of the peace before they happen; sureties could also be required post-conviction); 2 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 221, at 516-20 (general discussion of sureties and grounds for requiring sureties); 25 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 221, at 1064-65 (threats for which sureties may be had).

232 Lansbury v. Riley, [1914] 3 K.B. 229, 236-37 (1913) (Avory, J.).

233 34 Edw. 3 ch. 1.

234 The peace could be broken by acts of violence actually causing, or having the po-

court perceived that the defendant, by words or behavior, threatened a person with bodily harm. A justice of the peace could grant a surety of the peace "wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief."[235] Thus, a wife whose husband threatened to beat her could get a surety.[236] Also, women could obtain sureties against former suitors. For example, in a 1704 Queen's Bench case, *Dennis v. Lane*,[237] a doctor and former suitor of Dennis' daughter "intrud[ed] rudely into [the Dennis] house, follow[ed] the young lady on a journey . . . , assault[ed] the person under whose protection [the daughter was] placed and threatened to force her from her [protector]."[238] The court held that the plaintiffs were in sufficient fear of bodily harm, and it ordered Lane to give a recognizance for a year of two hundred pounds and to find two more sureties for one hundred pounds each.

A person could obtain a surety of the peace by giving the justice of the peace assurance "upon oath" (later "articles of the peace")[239] that he or she was "actually under such fear; and has just cause to be so, by reason of the other's having threatened to beat him, or lain in wait for that purpose."[240] A surety could be granted only if the articles of peace contained a "reasonable foundation . . . to induce a fear of personal danger."[241] If the defendant did not expressly threaten to do bodily harm or if the defendant did not assault the plaintiff or someone close to her, the

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tential to cause, bodily harm. *See supra* note 188. We have not explored the extent to which actions against property (beside arson) could constitute a breach of the peace.

235 1 HAWKINS, *supra* note 231, at 254.

236 *Id.* at 253. Husbands could also get sureties from wives, though Hawkins does not say what for.

237 87 Eng. Rep. 887 (Q.B. 1704).

238 In another case, three women obtained a surety against three men. King v. Nettle, *reported in* 1 HAWKINS, *supra* note 227, at 254 n.2.

239 21 Jam. 1, ch. 8 (1623) ("An Act to Prevent and Punish the Abuses in Procuring Process and Sureties of the Peace and Writ of Certiorari"); 2 HALE, *supra* note 226, at 135-36 n.2 ("The court of Chancery and the court of King's Bench cannot grant surety of the peace upon the mere oath of the party, as formerly, but only on the exhibition of articles of the peace."). Articles of the peace are a complaint made by one who "makes an oath that he is fear of death or bodily harm from some one who has threatened or attempted to do him injury." BLACK'S LAW DICTIONARY 112 (6th ed. 1990).

240 1 HAWKINS, *supra* note 231, at 254.

241 2 S.B. HARRISON, HARRISON'S DIGEST, ALL THE REPORTED CASES 1756-1829, at 425 (1829) (citing Rex v. Doherty, 104 Eng. Rep. 334 (K.B. 1810)).

articles had to contain a statement by the plaintiff that she feared for her bodily safety.[242]

The legal rules of sureties may be illustrated by *Regina v. Dunn*,[243] an 1840 case from the court of Queen's Bench, which posed an issue of first impression: whether a plaintiff, after alleging sufficient facts to show that she reasonably feared for her safety, had to expressly state that she feared for her safety in the articles of peace. The defendant, Richard Dunn, Esq. followed a young woman, A.G.B. Coutts, for approximately a year. Dunn, a stranger to Coutts, sent several letters to her,[244] followed her in her travels, watched her at places where she stayed, caused disturbances while trying to contact her during church services, followed her and her friends when she went out, tried to accost[245] her on the street, and followed her to a house where she took refuge. As a result, Coutts lived in fear of harm from Dunn and drastically curtailed her normal habits.[246] At the time, Dunn was under an order to give a surety to keep the peace, but when he did not procure a surety, he served time in jail. In *Dunn*, Coutts sought a second surety for her safety.

The court examined the articles of the peace Coutts presented to see whether they contained both a reasonable basis for her fear of bodily harm and whether an actual threat was alleged.[247] "Articles of the peace are not sufficient unless they shew a threat. The threat need not be in words [from the defendant], but may be inferred from a course of conduct."[248] Once the threat was shown by the articles, the person against whom sureties were sought could not swear his own affidavits or otherwise controvert the facts of the articles.[249] Coutts's articles met the objective re-

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242 This was because sureties could only be obtained for breaches of the peace, which are by definition, acts of violence.

243 113 Eng. Rep. 939 (Q.B. 1840).

244 One letter stated: "If you refuse [to meet with me], you will, when it is too late, repent a course, the consequences of which will sooner or later fall on yourself and your family." *Id.* at 942, 947.

245 Coutts's manservant put himself between Dunn and Coutts and convinced Dunn to leave. *Id.* at 942.

246 *Id.* at 943.

247 In Rex v. Tregarthen, 110 Eng. Rep. 941 (K.B. 1833), the court held that the hearing authority (here the mayor) had discretion to determine whether there was a threat of bodily harm. In this case, the defendant threatened the plaintiff using metaphorical language. The mayor had ordered the defendant to give sureties and the King's Bench affirmed.

248 *Dunn*, 113 Eng. Rep. at 939.

249 2 S.B. HARRISON, *supra* note 241 ("Where a person exhibits articles of the peace,

quirement, but the court found that she did not sufficiently plead the subjective element. Since Dunn did not expressly state that he would do her bodily harm,[250] the court held that Coutts's belief would be sufficient *only if* stated in the articles. On the other hand, as long as the victim alleged fear in the articles,[251] the court would not substitute its judgment for the victim's.

After the articles were given, courts recorded the sureties or recognizance.[252] If the defendant could not obtain a surety, he could be jailed indefinitely, though after 1861 the maximum sentence was one year.[253] The defendant could later forfeit the recognizance by "actual violence" or "even by words directly tending to a breach of the peace, as by challenging one to fight, or in his presence, threatening to beat him."[254] A person did not forfeit a surety, however, for using "bare words of heat . . . calling a man a knave, teller of lies, rascal, drunkard . . . [because these] do not directly challenge him [to breach the peace] nor does it appear that the speaker designed to carry his resentment any further."[255] Blackstone says that a "bare trespass upon the lands or goods of another" would also not result in a forfeiture.[256] So, even if Coutts had been successful in obtaining a surety from Dunn, he could have, without forfeiting the bond, engaged in a certain amount of name calling and even trespassing upon her property.[257] Under the standard Hawkins sets forth, though, Dunn would have forfeited his surety if a justice of the peace believed his behavior showed a "design" to do something more.

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and swears that her life is in danger, the truth of the facts cannot be controverted.") (citing Lord Vane's case).

250 Apparently, the most threatening sentence in his many letters to Coutts was the line in *supra* note 244.

251 *Dunn*, 113 Eng. Rep. at 939.

252 2 BLACKSTONE, *supra* note 44, at *253.

253 *Id.* at *256 n.6.

254 1 HAWKINS, *supra* note 231, at 258.

255 *Id.* at 259.

256 4 BLACKSTONE, *supra* note 44, at *252-53.

257 She could still bring a civil action against him. *Id.*

In the United States, sureties of the peace,[258] also known as security against a breach of the peace,[259] recognizances to keep the peace,[260] and "peace bonds"[261] were adopted by the states as part of the common law or by statute.[262] From 1798[263] until 1984,[264] federal judges and magistrates were authorized to re-

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258 Respublica v. Donagan, 2 Yeates 437 (Pa. 1799) (After acquittal on charges of murder, the court required defendants to give surety to keep the peace of $10,000 each and to find "two good sureties in 10,000 dollars each." The prisoners argued that the court was de facto sentencing them to life imprisonment. The court affirmed the trial court's order saying that the trial court had the discretion to order sureties for "such a length of time, as they judged would best answer the ends of public justice."); Commonwealth v. Bartlett, 28 Va. (1 Leigh) 586 (Gen. Ct. Va. 1829).

259 12 AM. JUR. 2D *Breach of the Peace* §§ 41-51 (1964 & West Supp. 1988).

260 Commonwealth v. Morey, 8 Mass. 78 (1811) (A justice of the peace had required Morey to find sureties of the peace after hearing a complaint against him. Morey refused to find sureties and was jailed. The court held, on this petition for habeas corpus, that requiring sureties for a year was illegal, but the justice could require a petitioner to give a recognizance to keep the peace until his court date.); State *ex rel.* Yost v. Scouszzio, 27 S.E.2d 451 (W. Va. 1943) (recognizance is the only form of security permitted by statute).

261 Cox v. State, 47 So. 1025 (Ala. 1908) (discussing threatening behavior as grounds under a state statute permitting courts to require a peace bond); Shirley v. Terrell, 67 S.E. 436 (Ga. 1910) (discussing grounds for recovery for breach of a peace bond); Stone v. City of Paducah, 86 S.W. 531 (Ky. 1905) (state statute requiring persons who cannot or refuse to give sureties to keep the peace to go to jail does not violate the 13th Amendment because these prisoners are not required to labor); Adams v. Ashby, 5 Ky. (2 Bibb) 96 (1810) (could be had in criminal matters); *In re* Bordelon, 29 So.2d 162 (La. 1946); Ford v. State, 50 So. 497 (Miss. 1909) (deciding jurisdictional issues regarding a state statute permitting peace bonds for persons threatening harm to the person or property of another); Croy v. State, Wright 135 (Ohio 1832) (a bond could be required rather than a recognizance).

262 11 C.J.S. *Breach of Peace* § 77 (1938 & West Supp. 1992); Shaugnessy v. Mezei, 345 U.S. 206 (1953) (Jackson, J., dissenting). *Mezei* concerned the due process rights of a former resident alien detained on Ellis Island. The Attorney General detained Mezei for undisclosed reasons, the disclosure of which would be "prejudicial to the public interest." Commenting on the constitutionality of the detention procedure, Justice Jackson said the following about 18 U.S.C. § 3043:

> [T]he concept of due process is not so paralyzing that it forbids all detention of an alien as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. In some circumstances, even the citizen in default of bail has long been subject to federal imprisonment for security of the peace and good behavior.

Id. at 223.

263 Act of July 16, 1798, Ch. 83, 1 Stat. 609.

264 Act of July 16, 1798, Ch. 83, 1 Stat. 609 (codified at 18 U.S.C. § 3043 (1948)) *repealed by* Act of Oct. 12, 1984, Pub. L. 98-473, § 204(c), 98 Stat. 1986. Congress issued 13 committee reports regarding the repeal of a number of sections, including § 3043, but these do not discuss why § 3043 was repealed. Section 3043 was, however, repealed as part of the "Bail Reform Act of 1984," a subpart of the Comprehensive Crime Control Act of 1984. Apparently, Congress viewed peace bonds as a bail device, though courts used them more broadly throughout their history. Pub. L. 98-473. *See* S. REP. NO. 225,

quire security to keep the peace.[265] Security to keep the peace could be had if an individual's actions threatened the complainant with bodily harm.[266] Further, many jurisdictions permitted security to keep the peace when a person threatened to destroy the property of another.[267] Though the Supreme Court never passed on the constitutionality of requiring security to keep the peace, state courts held that certain provisions of security of the peace laws were constitutional,[268] while other provisions were not.[269] Since the late 1970s, a brief survey of state case law shows, however, a distinct trend toward the disuse of security to keep the peace and a concomitant increase in the use of restraining orders or other injunctions to stop stalking and other threatening behav-

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98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.

265 Creel v. Creel, 184 F.2d 449, 453 (D.C. Cir. 1950). In dicta and citing § 3043, the *Creel* court said that the appellant could get a peace bond against the appellee if appellant made a proper showing that the appellee was harassing him and threatening his life. In a Second Circuit case involving the conviction of defendants for conspiring to advocate and teach the overthrow of the United States, the court distinguishes between the situation where a court may require a § 3043 bond (where one "threat[ens] to commit a crime") and the situation where a court *expects* that a convicted person awaiting appeal will commit a crime. Williamson v. United States, 184 F.2d 280, 282 n.7 (2d Cir. 1950).

266 Engler v. Creekmore, 119 S.W.2d 497 (Ark. 1938) (threat to kill not necessary); Schwartz v. Schwartz, 240 N.W. 177 (Wis. 1932) (complainant must have just cause to fear that the threatening party will commit the offense).

267 Psinakis v. Psinakis, 221 F.2d 418 (3d Cir. 1955) (Pennsylvania Surety of Peace Act may be used to protect property); Robinson v. Bradley, 300 F. Supp. 665 (D. Mass. 1969); Commonwealth v. Voils, 34 S.W.2d 934 (Ky. 1931) (persons and property). The English common law did not, in general, recognize threats to property as actionable. The inclusion of threats to destroy one's house probably derives from the laws against threatening arson. 2 SIR JOHN COMYNS, LAWS OF ENGLAND 131 (1793). *But see Ex parte* Harfourd, 16 Fla. 283 (1877) (holding that a person cannot be required to give security for threatening to destroy property (a schooner)).

268 Commonwealth v. Miller, 305 A.2d 346 (Pa. 1973) (due process not violated because statute permits bond on less than proof of truth of assertions beyond a reasonable doubt); State v. Gray, 580 P.2d 765 (Ariz. App. 1978) (quantum of proof required for peace bond does not violate due process); Cook v. State, 537 S.W.2d 18 (Tex. Crim. App. 1976) (requiring defendant, who had threatened to shoot his sister, to post a peace bond was not former jeopardy barring a subsequent prosecution for aggravated assault); Commonwealth v. Cushard, 132 A.2d 366 (Pa. Super. Ct. 1957) (security to keep the peace statutes constitutional).

269 Kolvek v. Napple, 212 S.E.2d 614 (W. Va. 1975) (defendant's incarceration for one year under peace bond statute because of his financial inability to post the $500 bond violates equal protection); Santos v. Nahiwa, 487 P.2d 283 (Haw. 1971) (peace bond statute violates due process because it does not require proof of guilt beyond a reasonable doubt); *Ex parte* James, 303 So.2d 133, *quashed*, 303 So.2d 145 (Ala. Crim. App. 1974) (peace bond statute's imprisonment for financial inability to post bond violated the 14th Amendment's equal protection clause).

iors.[270] In those states where sureties of the peace are constitutional, these devices may, therefore, be used in conjunction with stalking laws to prevent or deter stalking behaviors. We examine below the use and effectiveness of injunctions to prevent stalking.[271]

A few observations can be made from a review of the sureties laws in England and the United States. For a surety of the peace to be granted in England or the United States, the offending party has to express, in words or deeds, a threat of bodily harm to another. Also, both countries retained a similar penal philosophy regarding security to keep the peace. In both countries, the primary goal of requiring security is to *prevent*[272] the offender from doing the threatened act, rather than to *punish*[273] the offender for engaging in threatening activities. Neither country's law of sureties of the peace included any provision regarding prevention through treatment of the emotionally disturbed or mentally disordered offender.

The Anglo-American law of "sureties of the peace" differs from anti-stalking laws primarily in two aspects. First, anti-stalking laws are conceptually different because they treat stalking behavior as a crime and not as a prelude to crime. Stalking causes mental, emotional, and economic harm to the victim and the victim's family, harm serious enough to warrant criminal classification. Second, anti-stalking laws can be more punitive than modern sureties of the peace laws.[274] Some laws provide for imprisonment of up to ten years for multiple convictions.[275] While anti-stalking laws are also designed to prevent stalking, they do this, in part, through *punishing* the offender for engaging in the proscribed acts. The appropriate penal goals of stalking laws are discussed below.[276] Thus, in the area of "peace" law, the historical movement in the Anglo-American tradition reflects a recognition that

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270 4 NINTH DECENNIAL DIGEST, *Breach of the Peace* §§ 15, 16 (West 1982); 6 TENTH DECENNIAL DIGEST, *Breach of the Peace* § 15 (West 1992).

271 *See infra* Part III-B.

272 12 AM. JUR. 2D *Breach of the Peace* § 41 (1964 & Supp. 1988).

273 Ford v. State, 50 So. 497, 498 (Miss. 1909) ("To threaten an offense on the person or property of another is not an offense against the law for which a person may be punished. At most, . . . he may be restrained from so doing by proper proceedings, but not punished by fine and imprisonment.") (citation omitted).

274 This is assuming a state has held unconstitutional the common law penalty of indefinite imprisonment for failure to give security to keep the peace.

275 OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993).

276 *See infra* Part IV-A.

"harm" to an individual's mental and emotional health can be serious and deserves more protection from the state.

B. Civil Law and Stalking Behaviors

1. Injunctions

Stalking laws emerged, in part, because injunctions frequently fail to protect victims from threatening behavior and bodily harm.[277] On a national level, it is not known how often individuals violate protective orders.[278] The Department of Justice does not collect statistics on how often protective injunctions are broken and on the consequences to the protected person of the violation.[279] Some state statistical,[280] as well as anecdotal, evidence shows that court injunctions do not always provide the protection needed by people who have reason to believe they are the target of future violence from another. Joan Zorza, senior attorney for the National Battered Women's Law Project in New

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277 The person who stalked and murdered Kristin Lardner, daughter of Pulitzer Prize winning journalist George Lardner, Jr., violated a temporary restraining order by telephoning Kristin, violated a permanent restraining order, and was on probation for beating up another former girlfriend when he murdered Lardner. George Lardner, Jr., *The Stalking of Kristin: The Law Made it Easy for My Daughter's Killer*, WASH. POST, Nov. 22, 1992, at C1. Sandra Poland, testifying before the Senate Judiciary Committee, stated "[d]espite the threats Doe has made against our lives, despite his repeated violations of restraining orders . . . [the assistant district attorney] has said that there is nothing he can do until [Doe] has 'done something.'" *See Hearings*, *supra* note 3; *see also* Colman McCarthy, *Better Protection for Women in Danger*, WASH. POST, June 12, 1992, at A21 (estranged spouse stalked his wife, was jailed for violating a temporary restraining order, but released by another judge on due process grounds); *North Stars Draw Closer to Dallas Move*, ARIZ. REP., Feb. 19, 1993, at E2, *available in* WESTLAW, Dialog, Papers File (Broncos tight end Clarence Kay, who had punched his former girlfriend in the face and stalked her, was jailed for violating a temporary restraining order); *Gunfire in Domestic Dispute Leaves 3 Dead, 2 Hurt*, ARIZ. REP., Dec. 29, 1992, *available in* WESTLAW, Dialog, Papers File (San Francisco man kills two police officers and wounds his estranged wife after returning to her home in violation of a temporary restraining order).

278 The National Institute of Justice reports no study on the effectiveness of civil protection orders in preventing bodily harm. PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT 1 (1990). We use the term "protective injunctions" to cover all types of injunctions requiring an individual to refrain from contacting another individual because he or she presents a threat of harm to the other person.

279 FBI, U.S. JUSTICE DEP'T, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1990). There is a bill pending in Congress that would require the Justice Department to begin keeping statistics on stalking and other forms of domestic violence. H.R. 840, *supra* note 28.

280 *See* Caristone, *supra* note 7, at 3 (35,346 order-of-protection violations reported in Illinois in a five-month period in 1992).

York, agrees that one type of protective injunction, restraining orders,[281] do not provide enough protection. She explains:

> [M]any of these guys [abusive husbands and boyfriends] know what the definition of domestic violence is and officially avoid it. Nevertheless, they are forever following their girlfriends or wives. They block her entrance way to the door, if she wants to leave her home. They follow her around. They call her repeatedly.[282]

Law enforcement agencies may also not adequately enforce protective injunctions.[283] In a National Institute of Justice report on civil protective orders, the authors discuss recent efforts by states to improve enforcement.[284] In thirty states, a violation of a protective injunction is a misdemeanor; in Ohio, the third violation is a fourth degree felony.[285] Many of these statutes permit police officers to make warrantless arrests for violations in their presence. Besides increasing the penalty for violations and facilitating speedy arrest, other measures that Finn and Colson identify for encouraging compliance include: providing clear and specific instructions from the bench to both offender and victim concerning compliance, providing procedures for modifying orders, providing victims with a way to get an order during evenings and weekends, providing effective monitoring of compliance, and in-

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281 With respect to conflicts between natural persons involving bodily harm, a restraining order is an injunction issued in an emergency situation by a court against a person who has harmed, who has attempted to harm, or who has threatened to harm another. The major difference between a temporary restraining order ("TRO"), FED. R. CIV. P. 65(b), and a temporary injunction is that the restraining order may be issued *ex parte*. 42 AM. JUR. 2D *Injunctions* §§ 12, 14 (1969 & Supp. 1992). By definition, the TRO lasts only until a court can hold a hearing to issue a temporary injunction, 10 days, or 20 days maximum if a subsequent TRO is issued. 42 AM. JUR. 2D *Injunctions* §§ 12, 14 (1969 & Supp. 1992). After trial, a court may issue a permanent injunction against the defendant. For a more thorough discussion of the requirements for different types of injunctions, see 43 & 43A C.J.S. *Injunctions* §§ 1-342 (1978 & Supp. 1992); 42 AM. JUR. 2D *Injunctions* §§ 1-385 (1969 & Supp. 1992).

282 Ross, *supra* note 36.

283 With regard to civil protection orders, the National Institute of Justice study states, "Enforcement is the Achilles' heel of the civil protection order." FINN & COLSON, *supra* note 274, at 49 (discussing ways to improve enforcement).

284 *Id.* at 49. Under some civil protection order statutes, a violator of a restraining order may not be arrested or jailed, depending on the punishment prescribed by the statute. *Center for Women Policy Studies*, RESPONSE (Ctr. for Women Pol'y Stud.), Sept./Oct. 1983, at 2.

285 *Id.*

dicting on an upgraded offense, in a addition to contempt, where appropriate.[286]

Prior to 1990, and in those states that do not have anti-stalking laws, a court might decide that a person who is the target of stalking behavior does not meet the "irreparable injury" requirement for an injunction. In *Alberti v. Cruise*,[287] the Fourth Circuit reversed a lower court's decision to issue an injunction in a case where Mireille Alberti, the paramour of Mary Cruise's husband, engaged in a series of stalking behaviors toward the Cruise family. Alberti's acts included: contacting Cruise under false pretenses, using devious means to find the names and addresses of her family members, sending letters to family members defaming Cruise, sending defamatory letters to her husband's military superiors, following Cruise and her family to church, and following her husband to work.[288] Though the Fourth Circuit invalidated the injunction, the court's rationale left open the possibility that, on similar facts, an injunction would be proper where irreparable injury was sufficiently pleaded and included as a finding of fact in the injunction.[289]

Even if a victim suffered legally sufficient harm to secure a protective injunction, the procedures for obtaining it may be too burdensome on the victim, thereby discouraging the victim from seeking available protection. Procedures for obtaining an injunction require time, effort, and possibly attorney fees.[290] Also, an applicant may not be eligible, under a state's protective order statute, to get an injunction.[291] In states with adequate stalking laws, however, the complainant does not need to obtain an injunction to get immediate protection from the stalker. If the stalker commits the requisite acts, the police have the authority to arrest him. This relieves the complainant of the burden of pursuing an injunction. But before the police can arrest a stalker, the offender has to have engaged in a threatening "course of conduct" against the victim.[292] Pending trial, the offender may be released on

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286 FINN & COLSON, *supra* note 278, at 49-63.

287 383 F.2d 268 (4th Cir. 1967).

288 *Id.* at 270.

289 *Id.* at 272. In dicta, the court noted that the injunction was invalid as a prior restraint on the Alberti's speech.

290 *See* Lardner, *supra* note 277.

291 In Ohio, a complainant can get an "anti-stalking protection order" as a condition of pre-trial release. OHIO REV. CODE ANN. § 2903.13.

292 The victim is in a similar situation with regards to obtaining an injunction. For

bail. If the offender is mentally or emotionally disturbed and is not evaluated prior to bail being set, release may also be inappropriate and may endanger the victim. If the offender is sufficiently rational in his behavior, the stiffer penalties provided under anti-stalking laws should more effectively deter the offender from further contacting the victim.[293]

2. Tort Remedies

By the mid-eighteenth century, English common law recognized and provided a cause of action for one type of behavior that is included in anti-stalking laws. An individual could sue in trespass for "threats and menaces," acts that threatened bodily harm, but that were not threats rising to the level of assault.[294] The de-

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example, a person who wants a temporary restraining order must show "immanency of harm." Often, the petitioner must already be a victim of harm before a court will grant a temporary restraining order. *See, e.g.*, FLA. STAT. ch. 784.046 (West 1992) (requiring two acts of violence for a protective injunction); CAL. CIV. PROC. CODE § 527.6 (West Supp. 1992) (requiring a course of conduct by harasser that results in actual substantial emotional distress). Also, when the person subject to the injunction disobeys it, he may not serve a jail sentence and may only be further enraged at any enforcement attempt. Erotomanics and borderline erotomanics may become violent when the police or courts attempt to keep them away from the target of their activity or from accomplishing their ends. "In erotomanics, the risk of violence may increase when third parties, such as the court or friends, attempt to dissuade erotomanic persons from the pursuit of their object." Meloy, *supra* note 46, at 486; *see also* Dietz et al., *supra* note 52, at 190 (In a letter to a female actress, the subject, who fits the criteria for Borderline Erotomania, told how he escaped from a psychiatric hospital, stole a gun and ammunition, and engaged police in a gunfight when he felt the actress "was being starved by police.").

293 In most states, anti-stalking laws provide more protection to the victim by incapacitating first-time offenders for six to five years. Six months: COLO. REV. STAT. ANN. § 18-9-111 (West Supp. 1992); 1992 Conn. Legis. Serv. 701; LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); MISS. CODE ANN. § 97-3-107 (Supp. 1992); N.Y. PENAL LAW §§ 120.13-.14, 240.25 (McKinney Supp. 1993); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992); Act of Mar. 24, 1993, H.B. 2023 (amending and re-enacting W. VA. CODE § 61-2-9a (1992)). One year: CAL. PENAL CODE § 646.9 (West 1991 & Supp. 1993); 1992 Conn. Legis. Serv. 701; IDAHO CODE § 18-7905 (Supp. 1992); 1992 Iowa Legis. Serv. 190 (West) (to be codified at IOWA CODE § 708.11); KY. REV. STAT. ANN. §508.130-.150 (Baldwin 1992); 1992 Mich. Legis. Serv. 1165 (West) (to be codified at MICH. COMP. LAWS §§ 750.411I); 1992 Neb. Laws 1098; OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-19A-1 to -6 (Supp. 1992); TENN. CODE ANN. § 39-17-315 (Supp. 1992); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993). Three years: ILL. COMP. STAT. ANN. ch. 720, para. 5/12-7.3 to -7.4 (Smith-Hurd 1993). Up to five years: MASS. ANN. LAWS ch. 265, § 43 (Law. Co-op. Supp. 1993). Anti-stalking laws also may provide hefty monetary penalties.

294 Blackstone says that assault occurs when the violence is "considerably higher than bare threats." No injury was needed to recover for an assault. 3 BLACKSTONE *supra* note 44, at *120.

fining characteristic of an actionable threat or menace was *fear*—the magnitude of which caused "a man's business [to be] interrupted."[295] The rationale for providing a remedy for threats and menaces was that, though not breaches of the peace, these were actions against the security of a person.[296] In Blackstone's time, threats and menaces were actionable as a trespass *vi et armis*.[297] As Blackstone observes, the injury was not corporal in nature, but an injury to the victim's ability to carry on tasks of daily living. "A menace alone, without a consequent inconvenience, makes not the injury; but to complete the wrong, there must be both of them together."[298] Thus, in addition to threatening harm to the victim's person, the common law required that the threat be one which actually disrupts the life of the victim.[299]

English tort law since the late nineteenth century,[300] and American tort law for most of the twentieth century,[301] recognized two possible tort remedies for harm caused by stalking behaviors: the torts of intentional[302] and negligent[303] infliction of

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295 *Id.*

296 *See supra* Part III.A.3.; *see also* Petstede v. Marreys, Y.B. 4 Edw. 2, 29 (1310), *reprinted in* 22 SELDEN SOC'Y 29 (1907) (stating, "Although 'with force and arms' be contained in the writ, she does not expect to recover damages for that; but rather for the trespass done to her. So the writ is good enough." The defendant had stolen the animals which made up her dower.) (Brabazon, C.J.).

297 3 BLACKSTONE, *supra* note 44, at *120. A trespass *vi et armis* was available even though actual bodily injury did not occur.

298 *Id.* at *120.

299 *See* COMYNS, *supra* note 267, at 131 ("So a threat is not a trespass, if no inconvenience ensues."); *id.* at 132 ("For a threat, assault, battery or mayhem, the party shall have a remedy by action of trespass.").

300 Wilkinson v. Downton, 2 Q.B. 57 (1897) (early cases recognizing the tort of intentional infliction of mental distress).

301 Early twentieth century American cases did not permit a tort recovery for "mere words, however violent," which threatened or insulted the plaintiff. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56-57 (5th ed. 1984). Prosser and Keeton think that the tort of intentional infliction of mental or emotional distress emerged around 1930. *Id.* at 60. The general rule is that one is liable for "conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." *Id.*

302 Blakeley v. Shortal's Estate, 20 N.W.2d 28 (Iowa 1945); Price v. Yellow Pine Paper Mill, Co., 240 S.W. 588 (Tex. Ct. Civ. App. 1922).

303 Hambrook v. Stokes Brothers, [1925] 1 K.B. 141 (earliest English case recognizing the tort of negligent infliction of emotional distress). The earliest American case recognizing a cause of action for negligent infliction of emotional distress when a plaintiff is placed by the defendant in the "ordinary range of physical peril" is Waube v. Warrington, 258 N.W. 497 (Wis. 1935). Dillon v. Legg, 441 P.2d 912 (Cal. 1968), recognized a cause of action for the negligent infliction of emotional distress where the plaintiff was not in danger herself, but witnessed an accident involving her child.

emotional distress. While a history of the development of these torts is beyond the scope of this Note, an overview of cases from the last half of the century shows an increasing sensitivity in American law and society to the consequences of behaviors that result in a significant loss to the plaintiff of his or her mental and emotional health or tranquility.

In 1947, the American Law Institute revised section 46 of the *Restatement of Torts* to permit recovery for mental or emotional distress alone, without regard to whether the plaintiff suffered from physical symptoms.[304] In a passage particularly applicable to stalking activities, Prosser and Keeton note that, while tort law does not permit recovery for every insult or inconvenience, when the defendant's actions are "prolonged or repeated to the point of hounding," the defendant's behavior may be actionable.[305] The leading American case on intentional infliction of mental distress through stalking-type actions is *Flamm v. Van Nierop*.[306] In *Flamm*, the defendant engaged in a course of conduct beginning in October of 1966 that caused Flamm to suffer substantial emotional distress. Among other actions, the defendant

> [d]ashed at the plaintiff in a threatening manner in various public places . . . [drove] his automobile behind that of the plaintiff at a dangerously close distance; walked closely behind, or beside, or in front of the plaintiff in public streets; and con-

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304 RESTATEMENT (SECOND) OF TORTS § 46 (1965) ("One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable for such emotional distress, and for bodily harm resulting from it."); *see also id.* cmt. d (rationale for the change in § 46: behaviors resulting in severe emotional distress have no social utility and should not be protected).

305 KEETON ET AL., *supra* note 301, at 6 (the behavior must be considered "outrageous" by people in decent society); Webber v. Gray, 307 S.W.2d 80 (Ark. 1957) (the female defendant, a former mistress of plaintiff, hounded him and his family, with incidents of aggravation, in an effort to renew the association).

306 291 N.Y.S.2d 189 (Sup. Ct. 1968); *see also* Ruple v. Brooks, 352 N.W.2d 652 (S.D. 1984) (The court upheld a verdict for the plaintiff in a case where the defendant made several telephone calls to plaintiff's home, some of which were obscene. Plaintiff sued for intentional infliction of emotional distress winning $5000 in actual and $20,000 in punitive damages.); Samms v. Eccles, 358 P.2d 344 (Utah 1961) (defendant repeatedly and illicitly invited the plaintiff to have sexual intercourse); Tate v. Canonica, 5 Cal. Rptr. 28 (Cal. App. 1960) (plaintiffs brought a wrongful death action claiming that defendants' "threats, statements and accusations" resulted in plaintiffs' decedent committing suicide); Halio v. Lurie, 222 N.Y.S.2d 759 (App. Div. 1961) (plaintiff need not have physical contact with the defendant in order to recover for intentional infliction of emotional distress); Mitran v. Willimson, 197 N.Y.S.2d 689 (App. Div. 1960) (The court denied defendant's motion to dismiss, finding that the jury could find that defendant's series of sexual advances could result in severe emotional disturbance, resulting in physical injuries.).

> stantly telephoned the plaintiff at his home and place of business . . . [and] all of this has been maliciously done and for the purpose of causing physical and mental damage.[307]

Though defendant moved to dismiss for failure to state a cause of action, the court held that the plaintiff had a cause of action for intentional infliction of mental distress.[308]

Acts directed at a third person, a family member of the plaintiff for example, that cause the plaintiff mental or emotional distress were traditionally not actionable.[309] Some courts permitted recovery on the basis that the mental distress suffered by the plaintiff was directed at the plaintiff and was so intended by the defendant. For example, recovery for mental distress was allowed where a defendant told a woman he would kill her husband and then later did so.[310] That the mental injury to the plaintiff was foreseeable was another basis of recovery. Courts that allow recovery for foreseeable mental or emotional distress, however, require "a very high degree of probability that mental disturbance would follow [defendant's act], and that the defendant proceeded in conscious and deliberate disregard of it, so that the defendant's conduct would properly be called wilful, wanton or reckless."[311]

Victims of stalking may want to pursue a common law tort action for damages. Some states, such as Wyoming, encourage victims to pursue a civil action by allowing victims to recover exemplary damages, reasonable attorney's fees, and costs.[312] The torts of intentional infliction of emotional distress and negligent infliction of emotional distress should be used in conjunction with criminal sanctions to further dissuade stalkers from their criminal activity. The deterrent effect of a tort action, however, may be minimal if the stalker is an individual who is emotionally disturbed or mentally disordered. A possible disadvantage to the victim of bringing a tort action is that the pressure and stress of having to defend a tort action may be the catalyst for more violent behavior by the stalker.

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307 *Flamm*, 56 Misc. 2d at 1060.

308 *Id.* at 1061.

309 KEETON ET AL., *supra* note 301, at 65.

310 Knierim v. Izzo, 174 N.E.2d 157 (Ill. 1961).

311 KEETON ET AL., *supra* note 301, at 65.

312 *See, e.g.*, Act of Feb. 25, 1993, ch. 92 (to be codified at WYO. STAT. §§ 1-1-126, 6-2-506, 7-3-506); Ca. A.B. 1548, 1993-94 Reg. Sess. (1993) (bill providing for exemplary damages in a civil action for harm from stalking).

IV. ANTI-STALKING LAWS: AN ANALYSIS

A. *Laws Used Before 1990 to Prevent Stalking Behaviors*

Though legal definitions of stalking differ, California's definition is typical. An individual is guilty of stalking if he or she

> willfully, maliciously, and repeatedly follows or harasses another person and makes a credible threat with the intent to place that person in reasonable fear of death or great bodily harm or to place that person in reasonable fear of the death of or great bodily injury of his or her immediate family.[313]

Before California adopted its anti-stalking law in 1990, courts and police combatted stalking behavior using other laws. All fifty states have criminalized some form of harassment, defined by one commentator as "persistent and unwelcome communication of demands or feelings."[314] States also have laws forbidding menacing,[315] loitering,[316] trespassing,[317] intimidation,[318] and terroristic threatening.[319] Some argue that these laws render anti-stalking legislation unnecessary.[320] Anti-stalking laws, however,

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313 CAL. PENAL CODE § 646.9(a) (West 1991 & Supp. 1993).

314 Andrea J. Robinson, Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507, 507 (1984).

315 *See, e.g.*, ALA. CODE § 13A-6-23 (1982); COLO. REV. STAT. ANN. § 18-3-206 (West 1990); DEL. CODE ANN. tit. 11, § 602 (Supp. 1992); KY. REV. STAT. ANN. § 508.050 (Baldwin 1984); N.Y. PENAL LAW §§ 120.13-.15 (McKinney Supp. 1993); N.D. CENT. CODE § 12.1-17-05 (1985); OHIO REV. CODE ANN. §§ 2903.21-.22 (Anderson 1993); OR. REV. STAT. § 163.190 (1990).

316 *See, e.g.*, ALA. CODE § 13A-11-9 (1982); ARIZ. REV. STAT. ANN. § 13-2905 (1989); COLO. REV. STAT. ANN. § 18-9-112 (West 1990); KY. REV. STAT. ANN. § 525.090 (Baldwin 1984).

317 For purposes of discussing trespassing as an element of stalking behavior, this Note is referring to third degree trespassing, which is usually defined as a person "knowingly enter[ing] or remain[ing] unlawfully upon real property." DEL. CODE ANN. tit. 11, § 821 (Supp. 1992); *see also* FLA. STAT. ANN. § 810.09 (Supp. 1993); IDAHO CODE § 18-7011 (Supp. 1992); KY. REV. STAT. ANN. § 511-080 (1984).

318 *See, e.g.*, ILL. COMP. STAT. ch. 720, para. 5/12-6 (Smith-Hurd 1993); MONT. CODE ANN. § 45-5-203 (1991).

319 *See, e.g.*, ALASKA STAT. § 11.56.810 (1989); ARK. CODE ANN. § 5-13-301 (Michie 1987); DEL. CODE ANN. tit. 11, § 621 (Supp. 1992); GA. CODE ANN. § 16-11-37 (1992); HAW. REV. STAT. §§ 707-715 to -717 (1988 & Supp. 1992); KAN. STAT. ANN. § 21-3419 (1988); KY. REV. STAT. ANN. § 508.080 (Baldwin 1984); MINN. STAT. ANN. § 609.713 (1987 & Supp. 1993); NEB. REV. STAT. § 28-311.01 (1989); N.J. STAT. ANN. § 2C:12-3 (1982); 18 PA. CONS. STAT. ANN. § 2706 (1983); R.I. GEN. LAWS § 11-53-2 (Supp. 1992); TEX. PENAL CODE ANN. § 22.07 (West 1989); Act of Feb. 25, 1993, ch. 92 (to be codified at WYO. STAT. § 6-2-505).

320 Collina, *supra* note 40.

provide a different conceptual and legal framework for these separate acts of harassment by treating a "series" of these acts as a more serious crime, rather than as a stream of unrelated minor offenses.[321]

Anti-stalking laws reflect a legislative decision that stalking is fundamentally different from harassment crimes, and therefore, the penalties for stalking must be correspondingly more severe.[322] While harassment, intimidation, threats, trespass, and loitering laws (collectively "anti-harassment" laws) address activities that also may constitute the crime of stalking, they do not adequately address the harm that citizens suffer when an individual repeats one or more of these actions. Unlike anti-stalking statutes, they do not impose heavier penalties for repeat offenses against the same victim.

Laws previously used against stalking behavior, such as menacing[323] and criminal trespass,[324] address single incidents. Though individuals are more likely to break anti-harassment than anti-stalking laws because the anti-harassment laws do not require the perpetrator to "repeatedly follow"[325] or "engage in a course of conduct,"[326] their scope is also narrower. Most menacing statutes require that the victim be "in fear of immanent serious physical injury."[327] Therefore, if a person repeatedly follows an individual and threatens "I'm going to kill you," but without contemporaneously possessing the means to carry out the threat, the person would not be guilty of menacing. In contrast, only one of the anti-stalking statutes contains "immanency" language.[328] If a person repeatedly follows an individual, whether he threatens bodily harm

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321 *See infra* note 369 (anti-stalking laws allow following and several other actions, falling under the purview of "harasses," to be combined to create "stalking").

322 *See infra* note 423 and accompanying text (anti-stalking laws provide heavier penalties for subsequent stalking actions directed at the same victim).

323 Court, *supra* note 83, at 110.

324 Joseph Kirby, *Stalking Law Sends A New Signal*, CHI. TRIB. (North Sports ed.), Apr. 13, 1992, at 1 ("'Ten years ago, this guy might just have been brought up on charges of criminal trespass,' said Mary Schostok, an assistant state's attorney in Lake County.").

325 *See infra* Part IV-B(1)(b).

326 *See infra* Part IV-B(1)(d).

327 "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person "in fear of imminent serious physical injury." ALA. CODE § 13A-6-23 (1982).

328 1993 Ark. Acts 388 § 1(a): "A person commits stalking in the second degree if: he purposefully engages in a course of conduct that harasses another person and makes a terroristic threat with the intent to place that person in *imminent* fear of death or serious bodily injury . . . ." *Id.* (emphasis added).

or whether a danger thereof is immanent, the person could be charged with stalking in some states (if he was otherwise a credible threat). Some anti-stalking laws require the stalker to have the apparent ability to carry out "a credible threat with the intent to place that person in reasonable fear of death or serious bodily injury" and that the stalker actually issue such a threat.

Loitering[329] statutes are more limited tools against stalking conduct due to their precise requirements. Therefore, though an individual would have to repeatedly loiter in some proximity to the victim before being charged with stalking, anti-stalking laws are more useful than loitering laws because they encompass a greater variety of conduct under the heading of "harasses."[330] Loitering statutes also fail to adequately displace anti-stalking laws because they emphasize the general nuisance that a person presents to his surroundings, while anti-stalking statutes require repeated stalker-victim contact.[331]

In some states, harassment statutes are more effective tools against stalking behaviors than loitering or menacing because they criminalize more types of conduct. Yet, despite the broader scope of harassment statutes, anti-stalking laws are broader still. Anti-harassment statutes criminalize threats and obscene language made

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329 Colorado's definition of loitering is typical:

> (1) The word "loiter" means to be dilatory, to stand idly around, to linger, delay, or wander about, or to remain, abide, or tarry in a public place.
> (2) A person commits a class 1 petty offense if he:
> (a) Loiters for the purpose of begging; or
> (b) Loiters for the purpose of unlawful gambling with cards, dice, or other gambling paraphernalia; or
> (c) Loiters for the purpose of engaging or soliciting another person to engage in prostitution for deviate sexual intercourse; or
> (d) With intent to interfere with or disrupt the school program or with intent to interfere with or endanger schoolchildren, loiters in a school building or on school grounds or within one hundred feet of school grounds when persons under the age of eighteen are present in the building or on the grounds, not having any reason or relationship involving custody of, or responsibility for, a pupil or any other specific, legitimate reason for being there, and having been asked to leave by a school administrator or his representative or by a peace officer; or
> (e) Loiters with one or more persons for the purpose of unlawfully using or possessing a controlled substance . . . .

COLO. REV. STAT. § 18-9-112 (1992).

330 *See infra* Part IV-B(1)(c).

331 Most anti-stalking statutes' definition of "harasses" requires that the stalker's conduct be directed at a specific person. *See, e.g.*, IDAHO CODE § 18-7905(d)(1) (harasses is a "knowing and wilful course of conduct directed at a specific person").

or said to the victim either in person,[332] in a writing,[333] or over the telephone.[334] Though some states' harassment statutes criminalize offensive physical contact,[335] more often, harassment statutes focus on the communication of threats made by the harasser.[336] In fact, thirty states specifically criminalize threats or obscene statements made by telephone.[337] These statutes are de-

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332 *See, e.g.*, DEL. CODE ANN. tit. 11, § 1311(1) (1987) (A person is guilty of harassment when "he insults, taunts or challenges another person or engages in any other course of alarming or distressing conduct in a manner which he knows is likely to provoke a violent or disorderly response.").

333 *See, e.g.*, TEX. PENAL CODE ANN. § 42.07(a)(2) (West 1989) (A person is guilty of harassment if, with the intent to harass, annoy, alarm, abuse, torment, or embarrass, he "threatens . . . in writing, in a manner reasonably likely to alarm the person receiving the threat, to inflict serious bodily injury on the person or to commit a felony against the person, a member of his family or his property.").

334 *See, e.g.*, HAW. REV STAT. § 711-1106 (1)(c) (1988) (A person is guilty of harassment when, with the intent to harass, annoy, or alarm another person, that person "makes a telephone call or facsimile transmission without purpose of legitimate communication which would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another, or damage to the property of the recipient or another.").

335 ALA. CODE § 13A-11-8 (1982) ("Strikes, shoves, kicks or otherwise touches a person or subjects him to physical contact"); ARK. CODE ANN. §§ 5-71-208 (Michie 1987) ("Strikes, shoves, kicks, or otherwise touches a person, subjects him to offensive physical contact or attempts or threatens to do so"); COLO. REV. STAT. ANN. § 18-9-111 (West 1990) ("Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact" or "offensive physical contact"); HAW. REV. STAT. § 711-1106 (Supp. 1992) ("Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact"); KY. REV. STAT. §§ 525.070 (Baldwin 1984) ("Strikes, shoves, kicks or otherwise subjects him to physical contact or attempts or threatens to do the same"); N.J. STAT. ANN. § 2C:33-4 (West Supp. 1992) ("Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so"); OR. REV. STAT. § 166.065 (1990) ("offensive physical contact"); 18 PA. CONST. STAT. ANN. § 2709 (1983) ("strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same").

336 Robinson, *supra* note 314, at 553-54.

337 ARIZ. REV. STAT. ANN. § 13-2916 (1989); CAL. PENAL CODE § 653m (West Supp. 1993); FLA. STAT. ANN. § 784.048 (West Supp. 1993); GA. CODE ANN. § 46-5-21 (Michie 1992); IDAHO CODE §§ 86-6710, 86-6711 (1987); ILL. ANN. STAT. ch. 135, para. 1-1 (Smith-Hurd 1993); KAN. STAT. ANN. § 21-4113 (1988); LA. REV. STAT. ANN. § 14-285 (West 1986); ME. REV. STAT. ANN. tit. 17A, § 506 (West 1983); MD. ANN. CODE art. 27, § 555A (1992); MASS. GEN. LAWS ANN. ch. 269, § 14A (West 1992); MINN. STAT. ANN. § 609.79 (West 1987); MISS. CODE ANN. § 97-29, 97-45 (Supp. 1992); MONT. CODE ANN. § 45-8-213 (1992); NEB. REV. STAT. § 28-1310 (1989); NEV. REV. STAT. ANN. § 201.255 (Michie 1992); N.H. REV. STAT. ANN. § 644:4 (1986); N.M. STAT. ANN. § 30-20-12 (Michie 1988); N.C. GEN. STAT. § 14-196 (Supp. 1992); OHIO REV. CODE ANN. § 2917.21 (Anderson 1987); OKLA. STAT. ANN. tit. 21, § 1172 (West Supp. 1993); R.I. GEN. LAWS § 11-35-17 (1981); S.C. CODE ANN. § 16-17-430 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 49-31-31 to -33 (1983); UTAH CODE ANN. § 76-9-201 (Supp. 1992); VT. STAT. ANN. tit. 13, § 1027 (1974); VA. CODE ANN. § 18.2-427, 18.2-429 (Michie 1988 & Supp. 1992); WASH.

ficient against some stalkers because they do not address one particular recurring stalking behavior: following.[338] At least one state legislature considered including "following" in its anti-harassment statute, but declined to do so.[339]

States also use terroristic threat statutes to combat stalking behaviors.[340] These statutes criminalize the act of threatening another with "death or serious bodily injury."[341] This language protects stalking victims more than menacing laws do because terroristic threat statutes do not require a threat of "immanent" bodily harm. A similarity between terroristic threat laws and anti-stalking laws is their requirement that the offender present a credible threat: "The threat must be against the life, or a threat to cause serious bodily injury to a person."[342]

Even though terroristic threat statutes target injuries similar to those targeted by anti-stalking laws (alarm or fear of harm), they are limited tools against stalkers and insufficient in themselves to battle the stalking problem. A stalker's "threat" may be in the context of the series of behaviors. A series of unwanted "love" letters from an ex-lover, acquaintance, or stranger is likely to threaten its recipient—especially if the content of these letters indicates that the sender views the recipient as an object for the sender's sexual gratification. While many anti-stalking laws require that the stalker issue a threat, just as many statutes do not. In fact, several states presently requiring an explicit "threat" have bills pending that would eliminate this requirement.[343] Not all anti-stalking laws require that a stalker issue an actual verbal threat.[344] Although a terrorist threat statute can be violated by a nonverbal, symbolic threat,[345] it is doubtful that sending "love" letters, the act of "following," or other surveillance behaviors would qualify as

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REV. CODE ANN. §§ 9.61.230-.250 (West 1988 & Supp. 1993); W. VA. CODE § 61-8-16 (1992); Act of Feb. 25, 1993, ch. 92 (to be codified at WYO. STAT. § 6-6-103).

338 "Following" is a frequently reported element of stalking. *See, e.g.*, Mareva Brown, *State Anti-Stalking Law Shadows Lovers Who Won't Let Go*, SACRAMENTO BEE, Nov. 29, 1992, at A1 (former boyfriend who harassed woman by telephone also followed her to a relative's house over 100 miles away).

339 *See* ALA. CODE § 13A-11-8 commentary at 441 (1982).

340 For a general discussion of terroristic threat statutes, see John P. Ludington, Annotation, *Validity and Construction of Terroristic Threat Statutes*, 45 A.L.R. 4th 949 (1986).

341 ARK. CODE ANN. § 5-13-301 (Michie 1987).

342 DEL. CODE ANN. tit. 11, § 1312A(b)(3) (1992).

343 California, Rhode Island and Tennessee have bills pending.

344 *See infra* Part IV-B(1)(f).

345 State v. Miller, 629 P.2d 748 (Kan. 1981).

such symbols. Another problem with terroristic threat statutes is their scarcity: only fourteen states have such laws.[346]

One other type of statute that might be used against a stalker, especially by a separated spouse, is an involuntary commitment or involuntary admission statute.[347] These laws allow family members, neighbors, doctors, or certain institution directors to request the court to commit a person involuntarily because of his or her dangerous conduct.[348] These statutes might diffuse hostile situations because they allow police officers to take dangerous individuals into custody so that they can receive short-term treatment.[349] Typically, involuntary commitment laws require a judicial hearing before commitment, at which it must be proven by clear and convincing evidence that the person is mentally ill and likely to cause serious harm to himself or others.[350] Involuntary commitment hearings are probably a way to regain security and peace of mind for only a small number of stalking victims.

Anti-stalking laws, in addition to achieving their primary goal of criminalizing a series of threatening behaviors, are also a welcome addition to laws providing for early and effective law enforcement intervention in cases where the potential batterer or murderer makes unwanted contact with his victim before committing a crime involving physical injury. Unfortunately, the law of

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346 *See supra* note 319.

347 *See, e.g., In re* Adams, 607 N.E. 2d 681 (Ill. App. Ct. 1993) (involuntary commitment petition filed by woman who had received threatening phone calls from friend for three years; petition was ultimately rejected because she had failed to list the names and addresses of friend's family). For a general discussion of civil commitment of the mentally ill, see Note, *Civil Commitment and the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966).

348 *See, e.g.*, CAL. WELF. & INST. CODE § 5150 (1984); ILL. REV. STAT. ch. 91 1/2, para. 3-700 to -706 (Smith-Hurd 1987); N.Y. MENTAL HYG. LAW §§ 9.27, 9.37, 9.41, 9.43, 9.45 (McKinney 1988 & Supp. 1993); TEX. HEALTH & SAFETY CODE ANN. § 574.001 (West 1992).

349 The California statute provides:

> When any person, as a result of mental disorder, is a danger to others, or to himself or herself, . . . a peace officer . . . may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

CAL. WELF. & INST. CODE § 5150.

350 *See* TEX. HEALTH & SAFETY CODE ANN. § 574.0. In at least one state, New York, persons can be deemed mentally ill and involuntarily committed based solely on the word of two examining physicians and their accompanying statements. N.Y. MENTAL HYG. LAW §§ 9.27, 9.41.

criminal attempt[351] may not reach much stalking activity, even where it preludes a crime of bodily injury. Frustrated with the inadequacy of attempt and other laws to reach the harm caused by stalking, legislators passed anti-stalking laws. The relationship of attempt laws to anti-stalking laws, and their historical development, is similar to that of burglary.

> The initial development of the offense of burglary, as well as much of the later expansion of the offense, probably resulted from an effort to compensate for defects of the traditional law of attempt. The common law of attempt ordinarily did not reach a person who embarked on a course of criminal behavior unless he came very close to his goal . . . . Under that view of the law of attempt, a person apprehended while breaking into a dwelling with intent to commit a felony therein would not have committed an attempt, for he would not have arrived at the scene of his projected theft, rape, or murder . . . . The development and expansion of the offense of burglary provided a partial solution . . . . Making entry with criminal intent an independent substantive offense carrying serious sanctions moved back the moment when the law could intervene in a criminal design and authorized penalties more nearly in accord with the seriousness of the actor's conduct.[352]

Traditionally, most stalking conduct is not thought of as a "substantial step."[353] The action of a stalker, such as repeated "following," may or may not foreshadow another crime. Therefore, since it is difficult to tell what the underlying substantive offense will be, the conduct if not an attempt. Because stalking acts take place over a period of time, the acts are often not proximate enough to the substantive offense. Stalking does not happen in a single day, and by definition cannot be a single occurrence.[354]

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351 *See supra* notes 226-29 and accompanying text.

352 MODEL PENAL CODE § 221.1, cmt. 1, 62-63 (1980).

353 "Substantial step" is the requisite act test utilized by the Model Penal Code and, in some comparable form, by two thirds of the federal circuits and about half of the states. KADISH & SCHULHOFER, *supra* note 223, at 651. For a list of federal circuits and states which have adopted the "substantial step" test, see Young v. State, 493 A.2d 352, 361 (Md. 1985) (appendices A & B). The approach taken by the Model Penal Code punishes the actor's *mens rea* as evidenced by these sufficiently proximate acts. MODEL PENAL CODE § 5.01(1)(c) (1985). *See also* Penny Bender, *Biden Chastises Delaware on Actions In Stalking Cases*, Gannett News Service, Mar. 17, 1993, *available in* LEXIS, Nexis Library, Wires File (unaware of the extent of a man's threats against his wife, judge simply fined man; later that same evening, the man set fire to his family's house, killing his wife, two children, and a neighbor).

354 *See, e.g.*, DEL. CODE ANN. tit. 11, § 1312A(a) (Supp. 1992) ("Any person who will-

Stalking scenarios involve a series of individual acts, such as harassing phone calls and slashed tires, that build on one another.[355] Too often, the conduct does not end until serious physical injury, or even death, results.[356] In contrast, most criminal attempt cases involve a same day occurrence.[357]

For the step to be "substantial," it must be "strongly corroborative of the firmness of the actor's purpose,"[358] which often means proximate to the intended crime.[359] Ironically, now that stalking is a crime, prosecutors may be more willing to characterize following, threatening, and other stalking behavior as "strongly corroborative" of intent to commit a substantive offense, though they do not know, without some indication from the perpetrator, what the offense was going to be. In the context of drug operations, courts hold that acts constituting a distribution scheme are a "substantial step" toward the target offense.[360] A similar approach in the stalking area is warranted.

In addition to the difficulty of characterizing stalking behavior as a substantial step, many stalking scenarios would fail to satisfy the *mens rea* requirement of criminal attempt statutes. Though it is impossible to generalize as to the initial intent of stalkers, many

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fully, maliciously and *repeatedly* follows or harasses another person . . . is guilty of the crime of stalking.") (emphasis added).

355 *See, e.g., Good Morning America*, (ABC television broadcast, Mar. 18, 1993), *available in* LEXIS, Nexis Library, Wires File ("Well, there was a whole series in which over time, he built up more and more hostility . . . . Again, the threats build up," said Sen. Bob Krueger, describing the conduct of an ex-employee who has been stalking his family since 1984.).

356 *See, e.g.*, Kevin Fagan, *New Focus on Deadly Stalkers*, SAN FRANCISCO CHRON., Jan. 11, 1993, at A1 (man who continually broke into his ex-wife's home and beat her, finally shot her and his 14-year-old son, then killed two police officers and himself); *see also* Lenhart, *supra* note 9.

357 *See, e.g.*, United States v. Woodards, 962 F.2d 1308, 1312 (8th Cir. 1992) ("By driving to the bank with disguises and weapons, slowly circling the bank three times, and stopping once to open the door of the vehicle, the three crossed the 'shadowy line' from mere preparation to attempt.") (citing United States v. Joyce, 693 F.2d 838, 840 (8th Cir. 1982).

358 *See* COLO. REV. STAT. ANN. § 18-2-101 (West Supp. 1992).

359 *See, e.g.*, People v. Colp, 537 N.Y.S.2d 715 (N.Y. App. Div. 1989) ("The act tending to effect the commission of the crime need not be the final one toward the completion of the offense, but it must carry the project forward within dangerous proximity to the commission of the crime.").

360 *See, e.g.*, United States v. Wagner, 884 F.2d 1091, 1096 (8th Cir. 1989) ("This Court previously has held that conduct consisting of ordering, receiving, and possessing the chemicals and equipment necessary to manufacture methamphetamine constituted a 'substantial step' toward manufacturing methamphetamine.") (citing United States v. Mazzella, 768 F.2d 235, 240 (8th Cir.), *cert. denied*, 474 U.S. 1006 (1985).

begin their infatuations lacking the intent to harm or kill their victims. The stalker may initially intend merely to observe from afar, to talk with, or to become lovers with their target. At some point, however, the intent (if the person is capable of forming an intent) to harm the victim takes root. Criminal attempt laws require the actor specifically to intend the proscribed result. Therefore, a criminal attempt statute may not be an appropriate preventive measure in stalking scenarios, because attempt laws do not recognize a crime until the stalker has actually physically attacked the victim,[361] at which point the law serves no preventative purpose.

Anti-stalking laws are, however, not a new type of attempt law. Such laws were passed to control and prevent behavior state legislators deem to be criminal, independent of whether such anti-stalking laws are also effective or constitutional early intervention laws. Criminal attempt laws do not address the effect of the less than "substantial steps" on the victim. Though courts may recognize that "the apprehension which the *particular* crime is calculated to excite"[362] aids in distinguishing preparation from attempt, attempt law does not recognize the criminality of the personal, social, and economic harm caused by the victim's reasonable and actual apprehension of bodily injury. In contrast, anti-stalking laws recognize that actions as seemingly innocent as "following," when done repeatedly and when targeted at an individual, generate fear and warrant prosecution.[363] Thus, the victim's state of mind is an important component of many anti-stalking laws. The stalker's

361 But note that in many stalking situations, stalkers have voiced their intention to kill or injure their victims at an early stage in the "course of conduct." *See supra* notes 1-5.

362 Commonwealth v. Peaslee, 59 N.E. 55 (Mass. 1901) (Holmes, J.). Holmes argued that the more serious the crime attempted, the further back along the "preparation" continuum the criminal law should reach. Sayre, *supra* note 222, at 845; *see also* Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 313 ("If the substantive crime at which the act is aimed is of a serious nature, it would seem that a relatively small act would be sufficient to be requisite."). Holmes believed that in the law of attempts, "Acts should be judged by their tendency under the known circumstances, not by the actual intent which accompanies them." OLIVER W. HOLMES, THE COMMON LAW 66 (1938). As this comment suggests, Holmes' analysis of criminal attempt did not concentrate on the actor's *mens rea*, but his *actus reus*, and required that the perpetrator's overt act "is immediately and not merely remotely connected with the commission of it, and the doing of it cannot reasonably be regarded as having any other purpose than the commission of the specific crime." KADISH & SCHULHOFER, *supra* note 227, at 635.

363 *See, e.g.*, IDAHO CODE § 18-7905(a) (Supp. 1992) ("Any person who wilfully, maliciously and repeatedly follows or harasses another person or a member of that person's family is guilty of the crime of stalking . . . .").

conduct must "cause a reasonable person to suffer substantial emotional distress."[364]

Practically, anti-stalking laws will provide earlier law enforcement intervention in cases where the stalker intends another crime, though law enforcement officials may have no reason to know that this is the case, absent direct threats. This secondary effect of anti-stalking laws is justified on the same grounds as criminal attempt laws. In cases where the potential offender is someone who plans the crime, historical and empirical evidence shows that stalking behaviors are the prelude to crimes involving bodily injury.[365] Our historical experience and our increased understanding of the danger inherent in repeated, threatening acts is a sufficient justification for early intervention under anti-stalking laws.

The criminal statutes discussed above, as well as commitment statutes and civil injunctions,[366] are not appropriately tailored or are ineffective tools against the violence and fear caused by stalkers. Although they may successfully punish single stalking incidents, they were not created to combat repeated threatening or harassing behavior, which is the dominant characteristic of stalking. This gap limits their usefulness against stalkers.

B. Anti-Stalking Laws

A core group of states use the California[367] statute as their model and develop their laws around a set of definitions, including "stalking," "harasses," "course of conduct," and "a credible threat." Statutes not utilizing this exact language still echo the concerns and proscribed conduct mentioned in the California statute. In addition to outlining the elements of the crime, the anti-stalking laws provide grading elements that punish more severely the crime of "aggravated stalking," or distinguish first degree from second degree stalking. Anti-stalking statutes also address the problem of repeat offenses against the same victim.

Critics argue that anti-stalking statutes lack precision and are, therefore, "void-for-vagueness."[368] Though no anti-stalking cases

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364 *Id.* § 18-7905(d)(1). Substantial emotional distress must be the result of a course of conduct directed at a specific person by the stalker.

365 *See supra* Parts II and III.

366 *See supra* Part III-B.

367 CAL. PENAL CODE § 646.0 (West 1991), *amended by* 1992 Cal. Stat. 627.

368 *See, e.g.*, Sue Carlton, *Tampa Man Acquitted of Stalking Charges*, ST. PETERSBURG

have been published, courts have examined similar language in other contexts. Therefore, when examining the separate components of the statutes below, we will address some due process concerns.

1. Definitions in the Statutes

(a) Stalking.—In California, a person must either follow another person and make a credible threat, or harass another person and make a credible threat, to be guilty of stalking.[369] Roughly half of the states with anti-stalking statutes require one of these combinations,[370] while the other half either do not mention a credible threat;[371] allow a threat to suffice as a third alter-

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TIMES, Jan. 28, 1993, at 3B (had defendant been convicted of stalking, public defender would have argued that Florida's anti-stalking law is unconstitutional because it is vague and does not adequately define the elements of the crime). At common law, the void-for-vagueness doctrine was the practice of courts to refuse to enforce legislation that was "too uncertain." LAFAVE & SCOTT, *supra* note 227, § 2.3, at 90.

369 CAL. PENAL CODE § 646.9; *see also* 1993 N.M. Laws 86, § 3(A); 1993 Tex. Gen. Laws 10.

370 ALA. CODE §§ 13A-6-90(a) (Supp. 1992) (threat may be either expressed or implied); 1993 Ark. Acts 388(1)(a); COLO. REV. STAT. ANN. § 18-9-111(4)(a)(I)-(II) (West Supp. 1993); 1992 West Legis. Serv. 408 (to be codified at IOWA CODE § 708.11(1)(a)); ILL. ANN. STAT. ch. 720, para. 5/12-7.3(a) (Smith-Hurd 1993) (uses "transmits to another a threat"); KY. REV. STAT. ANN. § 508.140 (Baldwin 1992) (threat may be either explicit or implicit); LA. REV. STAT. ANN. § 14:40.2(A) (West 1992); MASS. ANN. LAWS ch. 265, § 43(a) (Law Co-op. Supp. 1993) (threat is not required to be "credible"); 1992 Neb. Laws 1098 § 4 (amending NEB. REV. STAT. §§ 28-101, 42-903, 42-924 (1988)); 1993 N.M. Laws 86 (this statute uses the term "credible threat," but not as a separate act than either following or "harasses," but instead as a descriptive term, characterizing the following or harassment); OKLA. STAT. ANN. tit. 21, § 1173(A) (West Supp. 1993); R.I. GEN. LAWS § 11-59-2 (Supp. 1992); S.C. CODE ANN. § 16-3-1070(B) (Law Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-19A-1 (Supp. 1992); TENN. CODE ANN. § 39-17-315(a) (Supp. 1992); 1993 Tex. Gen. Laws 10 (amending TEX. PENAL CODE § 42.07) (the threat can be "either words or acts); UTAH CODE ANN. § 76-5-106.5(2) (Supp. 1992); 1992 Wis. Laws 194 (to be codified at WIS. STAT. § 940.32(2)).

371 1992 Conn. Acts 92-237(2)(a) (Reg. Sess.); HAW. REV. STAT. § 711-1106.5(1) (Supp. 1992); IDAHO CODE § 18-7905(a) (Supp. 1993); 1992 Kan. Sess. Laws 298 (to be codified at KAN. STAT. ANN. § 95 (a)) (requires following and harassment, but not a credible threat); N.Y. PENAL LAW §§ 120.13-.14, 240.25 (McKinney Supp. 1993); N.C. GEN. STAT. § 14-277.3(a) (Supp. 1992) (requires following or being in the presence of another person without legal purpose, but not credible threat); OHIO REV. CODE ANN. §§ 2903.211 (Anderson 1993); VA. CODE ANN. § 18.2-60.3(A) (Michie Supp. 1992) (does not speak of following, harassing, or threatening, but merely "engages in conduct"); WASH. REV. CODE ANN. § 9A.46.110(1) (West Supp. 1993) (requires following in all instances, but no credible threats); Act of Feb. 25, 1993, ch. 92 (to be codified WYO. STAT. §§ 6-2-506(b)).

native to following or harassing;[372] or include a threat as a grading feature.[373]

In order to meet overbreadth concerns, states exclude certain activities from their definition of stalking: "lawful business activity,"[374] picketing or demonstrations,[375] engaging in a private detective business,[376] activities of a law enforcement officer in the performance of his duties,[377] "constitutionally protected" activities,[378] or activities with a "legitimate purpose."[379] Other states employ a presumption that certain activities are not stalking. Delaware establishes a presumption that labor picketing is not stalking.[380] Still others permit a person charged with stalking to raise legitimacy as an affirmative defense.[381] Washington permits an accused to raise a legitimacy defense if he or she is "a licensed private detective acting within the capacity of his or her license."[382]

A "legitimate purpose" exclusion of some type is necessary to prevent anti-stalking laws from being overbroad, yet legitimate purpose clauses beg the question as to what *is* legitimate activity. If a group, such as Operation Rescue, for example, decides to put up several "Wanted" posters with the face of a doctor who performs abortions,[383] is this a legitimate activity or is it stalking? Also, who decides the legitimacy of the activity? Has the state legislature

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372 DEL. CODE ANN. tit. 11, § 1312A(a) (Supp. 1992) (credible threat must be made repeatedly); MISS. CODE ANN. § 97-3-107(1) (Supp. 1992); W. VA. CODE § 61-2-9a(1) (1992) (does not mention harasses, but "lies in wait").

373 FLA. STAT. ANN. § 784.048(3) (Supp. 1993) (a credible threat makes stalking a felony offense); 1992 Mich. Pub. Acts 261 (to be codified at MICH. COMP. LAWS § 750.411i(2)(c)) (a course of conduct which includes a threat against a member of the victim's family will result in a charge of aggravated stalking).

374 *See, e.g.*, TENN. CODE ANN. § 39-17-315(c).

375 *See, e.g.*, ILL. ANN. STAT. ch. 720, para. 5/12-7.3(c) & -7.4(c) (anti-stalking law does not apply to picketing occurring at the workplace that is otherwise lawful and does arise out of a bona fide labor dispute); 1993 N.M. 86, § 4(A) (picketing and public demonstrations "otherwise lawful or that arise out of a bona fide labor dispute").

376 *See, e.g.*, DEL. CODE ANN. tit. 11, § 1312A(f).

377 *See, e.g.*, 1993 N.M. Laws 86, § 4(B).

378 *See, e.g.*, R.I. GEN. LAWS § 11-59-1(b); 1993 N.D. Laws 120.

379 *See, e.g.*, CAL. PENAL CODE § 646.9; 1992 La. Acts 80, § 40.2(e)(1); MISS. CODE ANN. § 97-3-107(4); N.C. GEN. STAT. § 14-277.3(a); UTAH CODE ANN. § 76-5-106-5(1)(a)(i).

380 Delaware provides a rebuttable presumption that labor picketers are engaging in a lawful activity and not stalking activity. DEL. CODE ANN. tit. 11, § 1312A(c).

381 1993 Ark. Acts 388, § 1(d) (available for law enforcement officers, attorneys, process servers, and others).

382 WASH. REV. CODE ANN. § 9A.46.110(3); *see also* 1993 Ala. Acts 388, § 2(c).

383 *See supra* note 42.

already decided that it is criminal or is the legislature waiting for the courts to decide? Accordingly, challenges to legitimate purpose clauses may be expected in the future.

(b) Repeatedly Follows.—In 1984, though most states criminalized some form of harassment (predominantly telephonic), only five included "following" in their list of proscribed conduct.[384] In contrast, thirty-one of the thirty-six anti-stalking statutes list "repeated following" or "repeatedly follows" as a necessary or possible component of stalking behavior.[385] Even in the handful of states that do not explicitly list "repeatedly follows" as a component of stalking behavior, following would probably satisfy their general standard of prohibited conduct.[386] Wisconsin is the only state which defines "follow" in its anti-stalking statute.[387] By lessening the amount of physical contact required between the victim and the stalker, this provision provides the victim with needed protection.[388]

(c) Harass.—Most anti-stalking statutes utilize the term "harasses" or "harassment" to cover actions, other than "following," that people find to be threatening. Harassment statutes typically outlaw threats made over the telephone[389] and by other means of communication, or they outlaw certain forms of physical contact.[390] When used in the context of anti-stalking statutes, the

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384 ARK. STAT. ANN. §§ 41-2909 to -2910 (1977); COLO. REV. STAT. § 18-9-111 (1978); KY. REV. STAT. §§ 525.070-.080; N.Y. PENAL LAW §240.25, .30, .31 (McKinney 1980 & Supp. 1983-84); 18 PA CONS. STAT. ANN. §2709 (Purdon 1983). For a condensed compilation of state statutes criminalizing harassment, see Robinson, *supra* note 310, at 535-44.

385 Georgia's anti-stalking law only requires that a person "follows," not repeatedly follows. 1993 Ga. Laws 560.

386 1993 Ark Acts 388 (repeated following would probably satisfy the Act's definition of "course of conduct," as set out in section 3 of the Act); HAW. REV. STAT. § 711-1106.5(1) (uses "pursues" instead of follows); KY. REV. STAT. ANN. § 508.130 (repeated following would probably satisfy the section's definition of "course of conduct"); OHIO REV. CODE ANN. § 2903.211(A)-(C)(1) (repeated following would probably satisfy the section's "pattern of conduct" definition); VA. CODE ANN. § 18.2-60.3(A) (following would probably satisfy section's requirement that stalker "engages in conduct with the intent to cause emotional distress to another person").

387 "Follow" means to walk or proceed after a person for no legitimate purpose. 1991 Wis. Laws 739. This definition is different than a lay person's. *See, e.g.*, THE RANDOM HOUSE COLLEGE DICTIONARY 512 (1982) ("to go or come after; move behind in the same direction").

388 *See* Rosalind Resnick, *California Takes Lead; States Enact 'Stalking' Laws*, NAT'L L.J., May 11, 1992, at 3.

389 *Supra* note 337.

390 *Supra* note 334.

words "harass" or "harassment" often mean something very different. California defines harassment as "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes the person, and which serves no legitimate purpose."[391] This use of the term "course of conduct" broadens the scope of "harasses" to include behaviors that would not be outside the scope of a typical harassment statute.[392]

(d) Course of Conduct.—A dominant characteristic of anti-stalking laws is their requirement that the stalker's threatening behavior occur more than once. Also, the subsequent acts *need not be the same* as the original. Most statutes utilize the term "course of conduct" to inject the notion of repeated actions into the "harasses" definition. California defines "course of conduct" as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose."[393] Most of the other statutes utilize the language "series of acts," but some are more specific and list the actual number of required actions.[394] Some statutes also omit the phrase "however short" when describing the period of time over which the acts must occur to constitute a "course of conduct,"[395] while some give a more definite time frame.[396]

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391 CAL. PENAL CODE § 646.9(e).

392 *See, e.g.*, ALA. CODE § 13A-11-8 (Supp. 1992):

> (a) Harassment.-(1) A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, he:
> a. Strikes, shoves, kicks or otherwise touches a person or subjects him to physical contact; or
> b. Directs abusive or obscene language or makes an obscene gesture towards another person.

Id.

393 CAL. PENAL CODE § 649.9(e); 1993 N.D. Laws 120 ("'Course of conduct'" means a pattern of conduct consisting of two or more acts evidencing a continuity of purpose."); OHIO REV. CODE ANN. § 2903.211(C)(1) (defining pattern of conduct).

394 *See, e.g.*, 1993 Ala. Acts 388 ("two or more acts separated by at least thirty-six hours"); ILL. ANN. STAT. ch. 720, para. 5/12-7.3(a) ("does any one or more of the following acts on at least 2 separate occasions"); 1992 Mich. Pub. Acts 261 ("two or more separate noncontinuous acts").

395 1992 Ala. Acts 675; R.I. GEN LAWS § 11-59-1.

396 Arkansas' statute states: "Course of conduct means a pattern of conduct composed of two (2) or more acts separated by at least thirty-six (36) hours but occurring within one year." 1993 Ark. Acts 388.

(e) Harm to the Victim.—In addition to defining what a "course of conduct" is, stalking statutes mandate the effect the "course of conduct" must have on the victim in order to constitute stalking. Several states[397] mimic the California statute that requires the course of conduct "be such as would cause a reasonable person to suffer substantial emotional distress, and must cause actual emotional distress."[398] Michigan's statute, for example, does not specifically require substantial emotional distress, but only the existence of actual "emotional distress."[399] Though other statutes require that the stalker's conduct be such as "would cause a reasonable person to suffer substantial emotional distress," they do not explicitly require actual distress.[400] Hawaii and Utah, however, do not include any language regarding emotional distress in their statutes.[401]

(f) Credible Threat.—An idle threat will not satisfy the California definition of a "credible threat."[402] The threatener must possess the apparent ability to carry out the threat, and the threat must cause reasonable fear in the person threatened. The majority of statutes that contain the "credible threat" language include the "apparent ability" requirement, but some statutes omit the ability requirement.[403]

California deems a threat to be "credible" if it causes a person to fear for the safety of herself or her family.[404] This proviso is not the norm. Most anti-stalking statutes do not allow threats pertaining to family members to satisfy the criteria for a credible

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397 ALA. CODE §§ 13A-6-93(c); DEL. CODE ANN. tit. 11, § 1312A(b)(1); 1992 Kan. Sess. Laws 298; LA. REV. STAT. ANN. § 14:40.2(E)(1); MISS. CODE ANN. § 97-3-107(4); 1992 Neb. Laws 1098, § 1; OKLA. STAT. ANN. tit. 21, § 1173(E)(1); R.I. GEN. LAWS § 11-59-1; S.C. CODE ANN. § 16-3-1070(A)(1); TENN. CODE ANN. § 39-17-315((a)(3); WASH. REV. CODE ANN. § 9A.46.110(1)(b); 1992 Wis. Laws 194; Act. of Feb. 25, 1993, ch. 92 (Wyoming).

398 CAL. PENAL CODE § 646.9(e).

399 Senate Bill 719, 86th Legis (Act 261, Michigan Public Acts of 1992) ("emotional distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling).

400 IDAHO CODE §18-7905(d)(1); MASS. ANN. LAWS ch. 265, § 43(d); 1992 N.J. Sess. Law Serv. 265 (West); 1993 N.M. Laws 86; UTAH CODE ANN. § 76-5-106.5((1)(a)(ii).

401 HAW. REV. STAT. § 711-1106.5; UTAH CODE ANN § 76-5-106.5.

402 Arkansas substitutes "terroristic threatening" for credible threat. 1993 Ark. Acts 388.

403 COLO. REV. STAT. ANN. § 18-9-111(4)(b); FLA. STAT. ANN. § 784.048(1)(c); 1992 Mich. Pub. Acts 261; UTAH CODE ANN. § 76-5-106.5((1)(b).

404 CAL PENAL CODE § 649.9(f); *see also* 1993 Ark. Act 388, § (1)(a)-(2)(a).

threat.[405] On the other hand, Michigan broadens the scope of a credible threat to include a threat that would cause an individual to reasonably fear for the safety of another individual.[406] Hawaii and Utah go even further, including a threat of "damage to the property of the other person or another" as sufficient grounds for a stalking charge.[407]

2. Constitutionality of the "Course of Conduct" Requirement

The scope of "course of conduct" is qualified in many statutes. Most statutes say that the course of conduct must "serve no legitimate purpose"[408] in order to qualify as stalking behavior. The California statute provides that, "Constitutionally protected activity is not included within the meaning of 'course of conduct.'" This phraseology occurs in sixteen other statutes.[409]

The Court of Appeals for the Sixth Circuit addressed the question of whether the term "course of conduct" is unconstitu-

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405 COLO. REV. STAT. ANN. § 18-9-111(4)(b); DEL. CODE ANN. tit. 11, § 1312A(b)(3); FLA. STAT. ANN. § 784.048(1)(c); ILL. ANN. STAT. ch. 720, para. 5/12-7.3(a) (only requires a threat); IOWA CODE § 708.11(b)(1); KY. REV. STAT. ANN. § 508.140 (2) ("explicit or implicit threat"); LA. REV. STAT. ANN. § 14:40.2(E)(3); MISS. CODE ANN. § 97-3-107(5); 1992 Neb. Laws 1098, § 3; 1992 N.J. Sess. Law Serv. 265; 1993 New Mexico 86; R.I. GEN. LAWS § 11-59-1(c); S.C. CODE ANN. § 16-3-1070(A)(3); S.D. CODIFIED LAWS ANN. § 22-19A-6; TENN. CODE ANN. § 39-17-315(a)(2) (only includes "threatens"); UTAH CODE ANN. § 76-5-106.5(1)(b); W. VA. CODE § 61-2-9a(1) (threat must be directed at an individual with whom the threatener had formerly co-habitated or had sexual relations).

406 1992 Mich. Pub. Acts 261.

407 Note that in Hawaii, harassment by stalking is only a petty misdemeanor, punishable by up to 30 days in jail. This might explain the inclusion of property. HAW. REV. STAT. § 711-1106.5(2). In Utah, however, stalking is a class B misdemeanor which allows for up to six months in jail. UTAH CODE ANN. § 76-5-106.5(3).

408 ALA. CODE §§ 13A-6-92(c); 1993 Ark. Acts 388, § 3(a)); CAL. PENAL CODE § 646.9(e); DEL. CODE ANN. tit. 11, § 1312A(b)(1); FLA. STAT. ANN. § 784.048(1)(a); HAW. REV. STAT. § 711-1106.5(1)(a); IDAHO CODE § 18-7905(1)(d)(1); 1992 Kan. Sess. Laws 298; KY. REV. STAT. ANN. § 508.103(3); LA. REV. STAT. ANN. § 14:40.2(E)(1); 1992 Mich. Pub. Acts 261; MISS. CODE ANN. § 97-3-107(4); 1992 Neb. Laws 1098, § 1; 1992 N.J. Sess. Law Serv. 265, § 1; 1993 N.M. Laws 86, § 2(A)); N.C. GEN. STAT. § 14-277.3(a); OKLA. STAT. ANN. tit. 21, § 1173(E)(1); R.I. GEN. LAWS § 11-59-1(a); S.C. CODE ANN. § 16-3-1070(A)(1); S.D. CODIFIED LAWS ANN. § 22-19A-4; TENN. CODE ANN. § 39-17-315(1)(B); UTAH CODE ANN. § 76-5-106.5(1)(a)(i); WASH. REV. CODE ANN. § 9A.46.110(1) ("without lawful authority"); 1992 Wis. Laws 194.

409 ALA. CODE §§ 13A-6-92(c); 1993 Ark. Acts 388, § 3; DEL. CODE ANN. tit. 11, § 1312A(b)(2); FLA. STAT. ANN. § 784.048(1)(b); IDAHO CODE § 18-7905(1)(d)(2); 1992 Kan. Sess. Laws 298; KY. REV. STAT. ANN. §508.130(2); LA. REV. STAT. ANN. § 14:40.2(E)(2); 1992 Mich. Pub. Acts 261; MISS. CODE ANN. § 97-3-107(4); 1992 Neb. Laws 1098, § 1(2)); 1992 N.J. Sess. Law Serv. 265, § 1(a)(1); OKLA. STAT. ANN. tit. 21, § 1173(E)(2); R.I. GEN. LAWS § 11-59-1(b); S.C. CODE ANN. § 16-3-1070(A)(2); S.D. CODIFIED LAWS ANN. § 22-19A-5.

tionally vague.[410] In *Robinson v. Township of Waterford*,[411] the Sixth Circuit rejected the appellant's contention that a township's harassment ordinance was void because its definition of harassment included: "Engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another person, and which acts or conduct serve no legitimate purpose."[412] The court noted that the statute lacked a contextual or specific conduct requirement that could lessen its vagueness and that the use of the words "alarms" and "annoys" did not help clarify the statute.[413] The court upheld the statute, however, because it required that the person act with the specific intent to annoy others.[414]

In explaining its decision, the *Robinson* court referred to *Kramer v. Price*,[415] a 1983 Fifth Circuit decision that held comparable "course of conduct" language in a Texas harassment statute void-for-vagueness, despite the statute's specific intent requirement.[416] In explaining its rationale for disregarding the Fifth Circuit's opinion, the Sixth Circuit noted that *Kramer* was a 2-1 decision, with a strong dissent from Judge Rubin;[417] that it was "the

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410 The void-for-vagueness doctrine addresses two concerns regarding statutes: whether the law gives adequate notice of its content, and whether the law sufficiently outlines the power of the police to enforce the law. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.9, at 950 (4th ed. 1991). If a law is deficient in either of these areas, the courts will not enforce it because to do so would amount to a denial of due process. *See generally*, LAFAVE & SCOTT, *supra* note 223, § 11, at 83-85. *But cf.* Note, *The Void-For-Vagueness Doctrine in The Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960). One commentator argues that the court really uses the doctrine as "a practical instrument mediating between, on the one hand, all of the organs of the public coercion of a state, and on the other, the *institution* of federal protection of the individual's private interest." *Id.* Another commentator has referred to the void-for-vagueness doctrine as an "avoidance tool," whereby the Supreme Court can avoid ruling on the substantive issue of the case. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS 158-59 (1962).

411 883 F.2d 75 (6th Cir. 1989) (reported at 1989 U.S. App. LEXIS 12347).

412 Waterford Township Ordinance No. 87, § 5.3 (cited in *Robinson*, 1989 U.S. App. LEXIS at *5).

413 *Id.* at *10.

414 *Id.* at *13. "[W]e agree, that the ordinance is saved from a vagueness challenge because of the specific intent requirement. The Supreme Court repeatedly has recognized that a scienter requirement may save a statute that might otherwise be unconstitutionally vague." *Id.* (citation omitted).

415 712 F.2d 174 (5th Cir. 1983).

416 *Id.* at 178. The Fifth Circuit wrote, "Specifying an intent element does not save § 42.07 from vagueness because the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague." *Id.*

417 In his dissent, Judge Rubin first argued that the use of the word "annoys" was not unconstitutionally vague because it was used in a limited way. "[T]he statute limits unlawful conduct to what not only 'may' but is also intended to annoy or uttered heed-

only case striking down a disorderly conduct statute despite a clear intent requirement;" and finally, that although the Fifth Circuit had upheld the lower court's dismissal of the action, it did so "without approving or adopting its rationale."[418]

Therefore, the Sixth Circuit's reasoning and holding, that a specific intent requirement may save an otherwise vague statute, suggests that "course of conduct" language will withstand constitutional scrutiny because most anti-stalking statutes require the stalker to possess "the intent to harass, annoy, or alarm another person" or some equivalent language.[419] The split between the Fifth and Sixth Circuits, however, may eventually prompt the Supreme Court to grant certiorari in an appropriate case.

In other contexts, the Supreme Court has offered definitions of the word "pattern" (as in "pattern of conduct"), a concept similar to course of conduct, and lower courts hold it constitutional.[420]

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less of its capacity to annoy a particular person." *Id.* at 180. Rubin then addressed the specific intent issue:

> The possibility of arbitrary or discriminatory enforcement is minimal because the statute requires that the state prove not only that the recipient was annoyed or alarmed but also that the communicator intentionally or recklessly caused that perturbation. The focus of the statute on two identifiable parties, and the requirement that the accused's conduct be tailored to evoke a response in the victim or be reckless in its disregard of that impact removes the indefiniteness that was fatal to the ordinance in *Coates*.

Id.

418 *Robinson*, 1989 U.S. App. LEXIS at *13.

419 Delaware's anti-stalking law requires that the stalker have the intent to place that person in reasonable fear of death or serious physical injury. DEL. CODE ANN. § 1312A(a).

420 In H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) (Scalia, concurring), the Supreme Court re-examined RICO's "pattern" requirement in light of the "relationship plus continuity" test it had formulated in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). After *Sedima*, the "continuity plus relationship" test "promptly produced the widest and most persistent Circuit split on an issue of federal law in recent memory." H.J. Inc., 492 U.S. at 251. For a discussion of the lower courts' approach to the pattern requirement prior to *H.J. Inc.*, see Kim C. Murphy, Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83 (1986).

In presenting its rationale for the relationship plus continuity test, the Court examined the legislative history of the RICO statute and the normal usage of the word "pattern." The Court found:

> In normal usage the word 'pattern' here would be taken to require more than just a multiplicity of racketeering predicates. A 'pattern' is an 'arrangement or order of things or activity' and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order.

3. Grading of Offenses

(a) Stalking in Violation of Court Orders or Domestic Violence Laws.—A handful of states require that a court order exist, and be violated, before a person can be charged with stalking.[421] Most states consider a court order a grading element of the crime and not a necessary element. In California, a person is guilty of either a misdemeanor or a felony if found guilty of stalking while a court order is in effect that prohibits that person from engaging in stalking-like conduct.[422] Most anti-stalking statutes have heavier penalties for stalkers that violate court orders than for those

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H.J. Inc., 492 U.S. at 238-39 (citations omitted). Though the Court stated that the relationship plus continuity test "cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity exists,'" it was able to delineate the separate components. *Id.* at 240-41, 243.The Court found that the relationship factor was clearly set out in the RICO statute, but that "'continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future, with a threat of repetition." *Id.* at 241. In an effort to explain the continuity requirement, the Court noted several different scenarios which either would or would not satisfy the RICO pattern requirement. *Id.*

This discussion is relevant to the anti-stalking statutes' definition of "course of conduct" because those definitions explicitly speak of a "continuity of purpose." Though Justice Scalia in his concurring opinion found that the Court "had done little more than repromulgate those hints as to what RICO means," the circuit courts reject challengers who argue that the "relationship plus continuity" test is unconstitutionally vague. For a discussion of RICO cases claiming that the *H.J. Inc.* pattern test is vague, see Joseph E. Bauerschmidt, Note, *"Mother of Mercy-Is This The End of Rico?"—Justice Scalia Invites Constitutional Void-For-Vagueness Challenge to Rico "Pattern,"* 65 NOTRE DAME L. REV. 1106, 1133-36 (1990). Therefore, a definition that did not set out a definite number of events as requisite for a "course of conduct" should be constitutional. *See* United States v. Dischner, 974 F.2d 1502, 1509 (9th Cir. 1992) (post-*H.J. Inc.* circuit court cases upholding constitutionality of RICO collected).

421 DEL. CODE ANN. tit. 11, 1312A(d); 1992 Neb. Laws § 1098 § 2.

422 CAL. PENAL CODE § 646.9(b) reads:

> Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or for both that fine and imprisonment, or by imprisonment in the state prison.

Id.

stalkers who do not,[423] but Hawaii, Kansas, and Utah do not address this scenario in their statutes.[424]

(b) Subsequent Violations.—Subsequent stalking violations by the original stalker against the original victim, that occur within a certain period, often seven years, will usually result in a heavier penalty for the stalker.[425] Some statutes mandate a shorter time

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423 ALA. CODE §§ 13A-6-91 (aggravated stalking, a class B felony); COLO. REV. STAT. ANN. § 18-9-111(5)(b) (sentences for violating the court order and the stalking law run consecutively, not concurrently); 1992 Conn. Acts 92-237, § 1(a) (stalking in the first degree, a class D felony, carrying a one-five year sentence); DEL. CODE ANN. tit. 11, § 1312A(d) (imprisonment of not less than six months and fined not more than $1000); FLA. STAT. ANN. § 784.048(4) (aggravated stalking, a felony of the third degree, punishable by up to five years imprisonment); ILL. ANN. STAT. ch. 720, para. 5/12 -7.4(a)(3)-(b) (violation is aggravated stalking, a class 3 felony); IOWA CODE § 708.11(c) (serious misdemeanor); 1992 Kan. Sess. Laws 298 (violation of temporary restraining order or an injunction is a class A misdemeanor); KY. REV. STAT. ANN. § 508.140(1)(b)-(2) (violation of judicial order is a Class D felony); LA. REV. STAT. ANN. § 14:40.2(C) (stalker imprisoned not less than thirty days and up to one year and fined up to $5000, or both); MASS. ANN. LAWS ch. 265, § 43(b) (violation of court order shall be punished by imprisonment up to one year and not more than five years); 1992 Mich. Pub. Acts 261 (aggravated stalking if person, having actual notice of restraining order, violates the order, or the stalker's conduct violates various court orders); MISS. CODE ANN. § 97-3-107(2) (violation of temporary restraining order or injunction increases possible time of imprisonment to one year); 1992 N.J. Sess. Law Serv. 265, § 1 (crime in the third degree); N.C. GEN. STAT. § 14-277.3(b) (imprisonment of up to two years, fine up to $2,000, or both); OHIO REV. CODE ANN. § 2903.214(B) (violation of an "anti-stalking" protection order will be a misdemeanor of the first degree if the stalker had previously been found guilty of, or pled guilty to, a violation of the anti-stalking statute; if person not previously guilty of stalking, then violation of protective order is a misdemeanor of the fourth degree); OKLA. STAT. ANN. tit. 21, § 1173(3) (felony punishable by imprisonment of up to five years, by a fine up to $2500, or both); R.I. GEN. LAWS § 11-59-3 (felony punishable by imprisonment for up two years, by a fine up to $6000, or both); S.C. CODE ANN. § 16-3-1070(C) (increases possible jail time to two years); TENN. CODE ANN. § 39-17-315(b)(3) (class E felony if person "stalks" after having been enjoined by an order, diversion, or probation agreement from doing so); VA. CODE ANN. § 18.2-60.3(B) (class 1 misdemeanor if stalker violates a protective order or injunction prohibiting family abuse, or an order prohibiting contact between stalker and victim); WASH. REV. CODE ANN. § 9A.46.110(5) (class C felony); W. VA. CODE § 61-2-9a(b) (still a misdemeanor, but possible penalties increase); 1992 Wis. Laws 194 (class E felony if violation occurs when there is an order or injunction that limits the stalker's contact with the victim); Act of Feb. 25, 1993, ch. 92 (Wyoming) (felony stalking punishable by imprisonment of not more than ten years).

424 DEL. CODE ANN. § 18-9-111; IDAHO CODE § 18-7905; 1992 Kan. Sess. Laws 298; UTAH CODE ANN. § 76-5-106.5.

425 CAL. PENAL CODE § 646.9(c); DEL. CODE ANN. tit. 11, § 1312A(e); IDAHO CODE § 18-7905(c); LA. REV. STAT. ANN. § 14:40.2(D); MISS. CODE ANN. § 97-3-107(3); 1992 Neb. Laws 1098, § 3; S.C. CODE ANN. § 16-3-1070(D); S.D. CODIFIED LAWS ANN. § 22-19A-3; TENN. CODE ANN. § 39-17-315(a)(2); 1992 Wis. Laws 194.

period,[426] some a longer time;[427] while others do not expressly mention a time limit.[428]

4. Provision for Mental Evalutation and Treatment

Three states allow courts to order evalutation or some type of treatment for stalkers. Ohio's anti-stalking law contains the most extensive and detailed provisions for mental evaluation.[429] First, the court must consider the mental health of the arrestee in deciding whether to grant bail.[430] If the offender is charged with breaking an anti-stalking protection order, and if the defendant caused harm to the victim or the victim's property or if the victim believed that the defendant was going to do such harm,[431] the court may order a defendant to undergo a mental examination. Even if the defendant if released on bail, the court can still order an evalution. The statute also requires an examination by a qualified examiner and specifies reporting requirements.

Some states permit courts to order convicted stalkers to undergo counseling. Hawaii's anti-stalking law enables courts to order a convicted stalker to undergo counseling.[432] California requires mandatory counseling upon probation and Michigan gives the court discretion to order counseling upon probation.[433] In Illi-

426 1992 Iowa Legis. Serv. 408 (six years); KY. REV. STAT. ANN. § 508.140(3) (five years); N.C. GEN. STAT. §14-277.3(b) (five years); VA. CODE ANN. § 18.2-60.3(C) (five years); Act of Feb. 25, 1993, ch. 92 (Wyoming).

427 OKLA STAT. ANN. tit. 21, § 1173(B)(3)-(D) (10 years).

428 ILL. ANN. STAT. ch. 720, para. 5/12-7.3(b) ("A second or subsequent conviction for stalking is a Class 3 felony."); 1992 N.J. Sess. Law Serv. 209 ("a person who commits a second or subsequent offense of stalking which involves an act of violence or a credible threat of violence against the same victim is guilty of a crime of the third degree"); WASH. REV. CODE ANN. § 9A.46.110(5)(a) (person will be guilty of a class C felony when that person is guilty of stalking and has "previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact order or no-harassment order").

429 OHIO REV. CODE ANN. § 2903.215.

430 *Id.* § 29.03.212(A)(2).

431 *Id.* §2903.213.

432 HAW. STAT. ANN. § 711-1106.5(3) ("[a] person convicted under this section may be required to undergo a counseling program as ordered by the court").

433 CAL. PENAL CODE §646.9(h) ("[i]f probation is granted, or the execution or imposition of a sentence is suspended . . . it shall be a condition of probation, that the person participate in counseling"); 1992 Mich. Pub. Act. 216 ("If a term of probation is ordered, the court may . . . order the defendant to . . . be evaluated to determine the need for psychiatric, psychological, or social counseling, and if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense").

nois, court-ordered mental health treatment is available, but only for stalkers who are sentenced to prison (not just fined), and only as a condition of parole or mandatory supervised release.[434] The power to order evaluation and other kinds of recommended treatment may be implied by these provisions. If not, these and other states need the power to order psychological or psychiatric evaluation of persons charged (if the circumstances warrant) as well as evaluation of those convicted of stalking. Evaluation of a person charged with stalking would give the court a better basis for deciding whether or not the person should be released on bail pending trial. Post-conviction, the mental health evaluation provides guidelines for treatment, including, but not limited to, psychological counseling.

Most state statutes do not include provisions for evaluation and treatment, whether pre- or post- conviction. State legislators should consider providing for evaluation and treatment at various stages of the criminal justice process, both for the protection of the victim and to improve the possibility of compliance.

5. Other Significant Differences Between the Statutes

In addition to the slight variations on the California statute discussed above, several states have particular sections that set them apart, both procedurally and substantively, from the general field.

(a) Procedural.—Notice of release or escape provisions are probably a welcome addition, from the victim's point of view, to statutes which do not already have them. Texas and Washington require that the state authorities contact the stalking victim upon the stalker's release or escape from prison.[435] Further, Texas does not permit stalkers to be furloughed. Wyoming's statute has another type of victim protection provision, an "Emergency Assistance" provision. Wyoming authorizes police to give assistance to alleged stalking victims (*i.e.*, before the alleged stalker has been

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434 1992 Ill. Legis. Serv. 871 (to be codified at ILL. ANN. STAT. ch. 38, para 1003-14-5 (Smith Hurd)).

435 1993 Tex. Gen. Laws 10 (the victim of the stalking offense and the local police must be alerted thirty days before the stalker's release, or immediately, upon the stalker's escape from prison); WASH. REV. CODE ANN. §§ 9.9A.155 & 9A.46.060 (department of corrections must send a written notice of the stalker's release, community placement, parole, furlough, work release placement, or escape, to the victim, at least ten days before the release).

arrested or charged). Police can advise victims of criminal proceedings available, preserve evidence, and give any protection necessary to the victim.[436]

To encourage victims to bring tort suits against stalkers, Wyoming and Washington give the victim the right to recover attorney fees and costs when bringing a civil action. Some statutes permit a stalking victim to seek exemplary damages as well.[437] The stalking victim may institute a civil suit whether or not the stalker has been charged or convicted under the applicable anti-stalking statute.[438]

(b) Substantive.—A few notable substantive differences between the statutes includes the following: Connecticut's anti-stalking statute stipulates that the stalking of a person under sixteen elevates second degree stalking to first degree stalking.[439] West Virginia's original anti-stalking law only criminalized stalking behavior by one person against "any person with whom that person formerly engaged in a sexual or intimate relationship,"[440] but the legislature amended this statute so that it now resembles the majority of anti-stalking laws. Texas' statute requires that the victim report the stalker's previous conduct to a law enforcement agency before a stalking charge may be filed.[441] Florida allows the police to arrest a stalking suspect without a warrant.[442]

States attempt to protect victims from stalkers after the stalker's arrest and before the trial date through various means. Iowa's statute presumes an ineligibility for bail,[443] while Illiniois' anti-stalking law allows a denial of bail if the defendant "poses a real and present threat to the physical safety of the alleged victim,

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436 Act of Feb. 25, 1993, ch. 92 (Wyoming).

437 *See, e.g.*, 1992 Mich. Pub. Acts 262; Act of Feb. 25, 1993, ch. 92 (Wyoming).

438 *See, e.g.*, 1992 Mich. Pub. Acts 262; Act of Feb. 25, 1993, ch. 92 (Wyoming).

439 *See, e.g.*, 1992 Conn. Acts 92-237(1)(b); *see also* 1993 S.D. S.B. 291, § 6. The South Dakota statute specifically lists the repeated following or harassing of a child twelve years old and younger as stalking, but the penalty is the same as that for repeatedly following or harassing "another person." *Id.*

440 W. VA. CODE § 61-2-9a(a).

441 1993 Tex. Gen. Laws 10.

442 FLA. STAT. ANN. § 784.048(5). "Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section." *Id.*

443 1992 Iowa Legis. Serv. 408 (court will presume defendant ineligible for bail if charged with a third stalking violation; if defendant charged with first or second stalking violation, court will consider the likelihood that defendant will re-establish contact with the victim, when determining bail).

and denial of release . . . is necessary to prevent fulfillment of the threat upon which the charge is based."[444] Arkansas' statute mandates that the judicial officer "shall" enter a protective order upon the pre-trial release of the stalker.[445] Texas' anti-stalking law does not provide protective orders, but allows the magistrate, court, and parole board to set conditions on the stalker's release on bond, probation, or parole.[446]

These provisions reflect the legislation's growing awareness of the dangers of stalking. Though stalking behavior is not a recent development, it has taken legislators time to realize that existing laws do not adequately address the problem. Before 1990, the police and the courts had to treat stalking behavior piecemeal, combatting it with established crimes such as menacing or terroristic threatening. This haphazard approach meant that many victims were left without recourse because their situations did not fit into the guidelines of the penal codes.

To provide more protection, the new anti-stalking laws widen the scope of the criminal law to prohibit behavior which has previously gone unregulated, such as following. All anti-stalking statutes recognize that stalking behavior deserves treatment as an entity separate from other penal sanctions and some go even further, addressing the particular needs of both stalkers, for medical help, and victims, for continuing protection.

V. CONCLUSION

Since California passed the first anti-stalking statute in 1990, thirty-five states have adopted similar measures and the remaining states have anti-stalking bills pending. The core feature of these laws is that they make it either a misdemeanor or a felony, depending on the circumstances, for an individual to engage in a "course of conduct constituting a credible threat." This sets stalking laws apart from other laws, such as harassment, terroristic threatening, loitering, and criminal attempt laws.[447] These laws,

444 ILL. ANN. STAT. ch. 725, para. 5/110-6.3(a).

445 1993 Ark. Acts 2, § 1(b).

446 As a condition of release on bond, grant of probation, or parole, the stalker may be required not to: "(a) communicate directly or indirectly with the victim; or (b) go to the residence, place of employment, or business of the victim or to or near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance." 1993 Texas Gen. Laws 10, §§ 2, 3, 5.

447 *See supra* Part IV.A.

the only available means for imposing criminal sanctions on people engaging in stalking behavior before anti-stalking laws, were not designed to control stalking as a criminal phenomenon, but only individual stalking behaviors. The hodge-podge effect of this historical development perhaps prevented legislators from seeing stalking as a whole. By concentrating on the differences among harassing behaviors, legislators failed to recognize the commonality between the behaviors and the greater harm caused by the entire "course of conduct."

Objections to anti-stalking laws range from concerns about whether this behavior warrants criminal sanction at all, to questions about their constitutionality. The anecdotal and psychological evidence strongly rebuts the proposition that stalking is not serious enough to be a crime. The fact that stalking is so disruptive to its victims and that it has long term emotional and occupational effects also substantiates this point. As for constitutional concerns, courts have upheld "course of conduct" and similar language, like "pattern of conduct," in other criminal statutes. Also, having a sufficiently specific intent requirement may save these statutes from constitutional infirmity. As anti-stalking laws continue to proliferate and are implemented, the current split between the Fifth and the Sixth Circuits on the question of the constitutionality of "course of conduct" language may mean that the Supreme Court will address the issue in the next few years.

Though a very hopeful development towards protecting stalking victims, most anti-stalking laws have one major shortcoming—they do not adequately recognize that many stalkers, perhaps most, are emotionally disturbed or mentally ill. The proper penal goal of anti-stalking laws, therefore, should be incapacitation of the stalker. Deterrence is not an appropriate goal because stalkers, especially emotionally disturbed or mentally ill stalkers, will not cease their harmful behavior because of criminal penalties. The anecdotal and limited statistical evidence available shows that persons intent on stalking will break protection orders, and other laws, to contact their victim. Protection of the victim will be best served by basing sentencing provisions on the primary goal of incapacitation. From the victim's point of view, only so long as the stalker is incarcerated, will the victim feel safe and able to live a normal life. A possible alternative to incarceration might be twenty-four hour electronic monitoring.

No state includes all of the provisions necessary to comprehensively address stalking behaviors and their effects. We have

highlighted below those provisions that, in their present form, may be inadequate, unconstitutional, or otherwise overlooked by state legislatures.

Intent.—In the Sixth Circuit, a specific intent requirement is necessary to compensate for what the Court believes to be the vagueness inherent in "course of conduct" language. This requirement may mean that anti-stalking statutes will not reach people who, because they are delusional or otherwise, are not capable of forming the intent. The delusional offender may be acting out of "love" for the victim, or out of a belief that she is, or is meant to be, bonded to the victim. Even language, as in the Ohio statute, like "knowingly cause another to believe" may not reach the delusional offender. At the very least, anti-stalking statutes should avoid traditional *mens rea* terms such as "wilful" and "malicious." These terms do not have much content and "intent to" language is less vague.

Course of Conduct.—At first glance, it seems anti-stalking laws do not necessarily need to specify acts in an illegal "course of conduct" so long as the offender engaged in the course of conduct with the requisite intent. Most often, anti-stalking laws proscribe repeated following. Georgia also proscribes surveillance activities and "contacts" with the victim. A danger in enumeration is that one can never enumerate all the behaviors that could constitute a threatening course of conduct.[448] State legislatures need not enumerate proscribed behaviors, leaving it to the courts to give content to the term "course of conduct" on a case by case basis. Courts have done this with the "substantial step" language of the Model Penal Code. While "following" certainly can be included in a course of conduct, it is not clear why state legislators felt it necessary to enumerate this behavior and not others.

The number of stalking incidents required for a course of conduct in most states is two or three. Courts have held that two or three incidents can be a pattern or series. Two or three incidents helps law enforcement officers see that the relationship between the acts, what the acts have in common, is a criminal enterprise. The more acts one commits related to the criminal enterprise, the easier it is for law enforcement officials to see what the enterprise is. Thus, two or three activities seem sufficient to

448 KY. REV. STAT. ANN. § 525.070 commentary ("course of conduct is a catch-all provision . . . included because it is impossible to list all the specific types of prohibited conduct.").

establish the core of the crime of stalking—fear generated by repeated behaviors that establish a credible threat.

Credible Threat.—One difficulty with many anti-stalking statutes is that they require the stalker issue an explicit threat against the life of the victim or to cause great bodily injury to the victim. This requirement narrows the scope of anti-stalking laws and is inconsistent with human experience and judicial judgment that a threat can be implied or inherent in a course of conduct. Anti-stalking laws should, therefore, be modified to allow the stalker's conduct alone to suffice as a "credible threat."

Mental evaluation and treatment.—The limited number of states which currently provide for or mandate mental evaluation and treatment of the accused stalker illustrates an inadequate understanding of the complex, predisposing factors that may lead an individual to stalk. It is in the best interests of the state to mandate a comprehensive evaluation of a stalking defendant. Ideally, this evaluation should include both a medical and a psychiatric or psychological evaluation. A medical evaluation could alert the court to underlying medical problems that increase the stalker's risk of violent behavior. In addition, a psychiatric or psychological evaluation could test the defendant for organic brain damage, delusional disorders, and personality disturbances that influence the stalker's behavior—and importantly, the stalker's intent. Based on these evaluations, the court could determine the best course of pretrial action, and if warranted, appropriate sentencing. If the state fails to adequately assess the mental and emotional status of the stalker, it may jeopardize the right of the stalker to fair sentencing and appropriate treatment and the need of the victim for safety and privacy. In addition, because stalking victims often exhibit symptoms of post-traumatic stress disorder or other emotional disturbances, they may need counseling or other supportive services after the stalker is incapacitated. State victim assistance programs should expand their scope to include stalking victims.

Other Provisions.—Given the harm caused by stalking behavior, anti-stalking laws should include provisions that enable them to more comprehensively deal with stalking behavior. Future laws should cover threats made against family members. While family members would be protected by the anti-stalking laws in their own right, the primary victim should also be able to seek protection through an anti-stalking protective order.

In addition to providing some relief to the stalking victim by incarcerating the stalker, anti-stalking laws should include provisions that are "victim-friendly." Presently, only a few states have such provisions. Wyoming's emergency assistance provision, Texas' victim notice provision, and Ohio's anti-stalking protection order are examples. These provisions would provide more actual protection and peace of mind for the victim and therefore should be included in future anti-stalking laws. States could also bolster the deterrence potential of anti-stalking laws by including attorney fees and exemplary damages provisions to encourage victims to bring tort suits against their stalkers.

Anti-stalking laws recognize that harassing acts against individuals are more than simply imprudent, they are criminal. The task now, is to take one further step—having recognized the crime, legislators must provide greater protection for the victims.

> The common law expands with reason, living and growing in response to the needs of the community and the development of the nation.
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> —Judge Schwartzwald[449]

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449 Henderson v. Henderson, 169 N.Y.S.2d 106, 111 (1957).

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