The Model Stalking Code
Revisited

Responding to the New Realities of Stalking

THE NATIONAL CENTER FOR
Victims of Crime

National Center for Victims of Crime

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Section 1 Introductory Overview

The National Center for Victims of Crime has developed *The Model Stalking Code Revisited: Responding to the New Realities of Stalking* to assist states that are working to strengthen their stalking laws. This report examines and recommends updates to the 1993 *Model Anti-Stalking Code for the States* developed at the direction of Congress by the National Institute of Justice, U.S. Department of Justice.[1]

Introduction

How to Use This Document

The Model Stalking Code Revisited: Responding to the New Realities of Stalking suggests legislative language that may be used to better define and address the current realities of stalking, hold stalkers accountable, and enhance the safety of stalking victims.

States may use this document as a guide to analyze current stalking statutes and to identify changes needed in their law.[2] The statutory language recommended in this report and the accompanying commentary are designed to

1 National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States*, (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1993).

2 The model legislation offered in this document is also applicable to territories and tribes. For ease of writing and reading, we have chosen to use only "states" throughout this document.

help legislators, criminal justice and victim assistance professionals, and others work toward amending current laws by expanding their awareness of the range of options available to them and of the impact that legislative language and structure can have on the enforcement of the law.

Document Roadmap

This document is presented in four sections. **Section One** provides an overview that includes a historical perspective of stalking legislation, a rationale for revisiting the 1993 *Model Anti-Stalking Code for the States,* and a description of the process used to update the code. **Section Two** provides model language for state stalking laws. **Section Three** provides a detailed commentary on each section of the model legislation, and **Section Four** provides a summation. The **Appendices** provide additional resource materials, including the 1993 *Model Anti-Stalking Code for the States*; a fact sheet produced by the Stalking Resource Center of the National Center for Victims of Crime that provides a comprehensive overview of all current relevant data on stalking; and the *Strengthening Antistalking Statutes Bulletin*, published by the Office for Victims of Crime, U.S. Department of Justice.

Historical Perspective

The criminalization of stalking occurred only after several high-profile cases, including the 1989 murder of actress Rebecca Schaeffer, gained national attention. Prior to its common usage and designation as a crime, stalking was referred to as harassment, obsession, or in some cases, domestic violence.

Stalking is a crime of intimidation and psychological terror that often escalates into violence against its victims. Stalkers can destroy the lives of victims, terrorizing them through a course of conduct that may include monitoring, following, threatening, or harassing victims in a variety of ways. Stalking often has devastating consequences for victims. Many are forced to profoundly alter their lives—going as far as relocating to another state and changing their identities—to protect themselves and their families.

Victims' experiences vary greatly—both the actual experience of being stalked and the subsequent interactions with the criminal justice system and

victim services field. The victim experience is largely dependent on the extent to which state laws hold offenders accountable and help keep victims safe.

In 1990, California enacted the first state stalking law. Since then, all fifty states, the District of Columbia, and the federal government have passed laws criminalizing stalking. In 1996, Congress criminalized interstate stalking as a federal offense, later amending the statute to include stalking via electronic communications.[3] An amendment adopted in 2006 expanded the federal stalking statute to include conduct which causes the victim substantial emotional distress.[4] The new law also added language that would cover surveillance of a victim by a global positioning system (GPS).[5]

Following the introduction of federal and state stalking laws—which vary greatly in scope and severity of penalties—law enforcement officers, prosecutors, and victim service providers began to steadily strengthen their response to stalking and their support for victims. But, as will be discussed later in this section, the laws have not kept pace with rapidly evolving stalking methods and have, in fact, posed serious barriers to law enforcement officers and prosecutors in making arrests and securing convictions.

1993 Model Anti-Stalking Code

In 1993, Congress directed the National Institute of Justice (NIJ) at the U.S. Department of Justice to develop a model anti-stalking code to encourage states to adopt anti-stalking measures and to provide them with direction in drating such laws.[6] NIJ entered into a cooperative agreement with the National Criminal Justice Association (NCJA) to research existing stalking laws and develop model legislative language. NCJA sought additional expertise and input from the National Conference of State Legislatures, the American Bar Association, the National Governors' Association, the Police Executive Research Forum, the National Center for Victims of Crime, and other national organizations.

3 18 U.S.C. § 2261A(2006).

4 18 U.S.C. § 2261A(2)(B).

5 18 U.S.C. § 2261A(2)(A).

6 U.S. Departments of Commerce, Justice, and State, and the Judiciary and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-395, § 109(b).

When NCJA drafted the original anti-stalking code, many states had yet to enact stalking statutes, and stalking laws that had been enacted were new and untested in the courts. Because few courts had ruled on any constitutional challenges to stalking laws, the drafters created a model law designed to withstand the legal arguments that experts predicted at the time.

The 1993 *Model Anti-Stalking Code for the States* served as an excellent template for its time, an important early step toward ensuring that state criminal justice systems responded appropriately to stalking crimes. Many states incorporated provisions of the original model code when drafting or expanding their state stalking statutes, and some courts referred to the model law when interpreting provisions in state stalking laws. (See Appendix A of this document for the 1993 model anti-stalking code.)

Rationale for Revisiting the 1993 Model Anti-Stalking Code

Since the 1993 model anti-stalking code was developed, much more is known about the behavior of stalkers and the effectiveness of state stalking laws.[7] We have witnessed an alarming rise in the use by stalkers of sophisticated—yet widely available—tracking and monitoring technology. We also now possess quantifiable national data that documents the prevalence and severity of stalking.

These developments strongly suggest the need for revisiting and updating the original model stalking code so that it reflects the current realities of stalking.

Research on Stalking

Until recently, very little empirical data was available about stalking in the United States. A more accurate picture of stalking began to emerge with the release of results from three major studies: the National Violence Against Women Survey in 1998, the Intimate Partner Stalking and Femicide Study in 1999, and the National Sexual Victimization of College Women Survey

7 In 1993, the drafters titled the sample law the "Model Anti-Stalking Code for the States." Due to the current practice across the country of labeling such state laws "stalking laws" instead of "anti-stalking laws," the updated sample law is called the "Model Stalking Code for the States."

in 2000.[8] These studies provided new data on the prevalence of stalking, the relationship between victim and stalker, the lethality of stalking, and common stalking behaviors.[9]

According to the National Violence Against Women Survey, an estimated 1.4 million people are stalked annually in the United States. This means that one in 12 women and one in 45 men will be stalked at some point in their lives.[10] Seventy-eight percent of stalking victims are women, and 74 percent are between the ages of 18 and 39. Overall, 87 percent of stalkers are men: ninety-four percent of women and 60 percent of men are stalked by men. Seventy-seven percent of female stalking victims (and 64 percent of male victims) are stalked by someone they know, and 59 percent of female stalking victims (and 30 percent of male victims) are stalked by an intimate partner or former intimate partner.[11]

The Intimate Partner Stalking and Femicide Study, which studied female murder victims who had been killed by intimate partners, found that 76 percent of femicide victims and 85 percent of attempted femicide victims had been stalked by their intimate partners in the year prior to their murders.[12]

The National Sexual Victimization of College Women Survey showed a particular vulnerability within a specific subgroup of victims, with thirteen percent of college women reporting that they had been victimized by a stalker in one six- to nine-month period.[13] Consistent with the findings from other stud-

8 Tjaden and Thoennes, "Stalking in America"; Judith McFarlane et al., "Stalking and Intimate Partner Femicide," *Homicide Studies* 3, number 4 (November 1999); Bonnie Fisher, Francis T. Cullen, and Michael G. Turner, *Sexual Victimization of College Women*, (Washington, DC: National Institute of Justice, U.S. Department of Justice, 2000).

9 Beginning in 2006, stalking will be included in the annual *National Crime Victimization Survey*, conducted annually by the Bureau of Justice Statistics, U.S. Department of Justice, providing a reliable and regularly updated source of data on stalking prevalence rates.

10 Tjaden and Thoennes, "Stalking in America," 3.

11 Ibid., 5-6.

12 McFarlane et al., "Stalking and Intimate Partner Femicide," 308. Femicide is the murder of a female.

13 Fisher, Cullen, and Turner, *Sexual Victimization of College Women Survey*, 27.

ies, more than 80 percent of these women knew their stalker, who was often a current or former boyfriend.[14]

These landmark studies shed new light on specific stalking behaviors. The most commonly reported stalking behaviors were surveillance behaviors, such as following or spying on the victim, or waiting outside the victim's home, work, or school. Unwanted phone calls, letters, and gifts were also commonly reported by victims. Fewer than 50 percent of victims reported being directly threatened by their stalkers. (For additional stalking data, see the stalking fact sheet in Appendix B of this document.)

Significance of These Studies. The findings from this research provide crucial cues to drafters of stalking legislation. The research shows, for example, that stalking is often linked closely with intimate partner violence. Law enforcement experts and victim advocates understand intimate partner violence as a pattern of controlling behavior that one intimate partner directs at another. When a victim leaves an abusive relationship, the risk of violence actually increases because the victim has challenged the perpetrator's unilateral exercise of power and control. The perpetrator often lashes out violently toward the victim in an attempt to retain or regain power and control. This "separation violence" often includes both stalking and physical violence.[15] Stalking laws need to be drafted in such a way that law enforcement can intervene as early as possible in intimate partner situations, before behaviors escalate into more serious violence.

The research also shows that surveillance is the most common type of stalking behavior victims experience. Stalkers can now terrorize their victims in almost any environment. Additionally, stalkers inflict terror and severe emotional distress without ever communicating direct or overt threats. Stalkers

14 Ibid., 28.

15 "Stalking in America: The National Violence Against Women Survey," by Tjaden and Thoennes, documented the danger of separation violence by asking women who had been stalked by their former husbands or partners at what point in the course of the relationship the stalking had occurred. Twenty-one percent of the victims said the stalking occurred only before the relationship ended; 43 percent said it occurred only after the relationship ended; and 36 percent said it occurred both before and after the relationship ended. Callie Marie Rennison and Sarah Welchans, in "Special Report: Intimate Partner Violence," with results drawn from the *National Crime Victimization Survey*, also found that divorced or separated persons were subjected to the highest rates of intimate partner victimization.

torment their victims, who often cannot perform everyday tasks such as answering their phones, reading their mail, or using their computers without fear of unwanted contact from the person who is stalking them.

The variability of stalking behaviors suggests that laws must be broad enough to address stalking in all its forms.

Stalking through New Technology

Stalkers increasingly use technology to surveil, monitor, track, and terrorize victims. When the original model anti-stalking code and most of the state stalking statutes were drafted in the early 1990s, many of today's technologies did not exist or were not affordable or readily available to the public. New, affordable technology has fundamentally and profoundly changed the way stalkers monitor and initiate contact with their victims. A stalker no longer needs to be in close proximity to his victim to monitor or surveil her. He can use a global positioning system (GPS) to track her in her car as she travels to virtually any location. He can put a small hidden camera (often called a "spycam") in his victim's home and have access to even the most private moments of her life. He can put a spyware program on her computer and intercept all of her e-mails and Internet searches.

All of these forms of technological stalking can be done from a distance—something that was not anticipated when the early stalking laws were drafted to prohibit physically following and pursuing another person. In the early 1990s, many stalking laws required physical proximity to satisfy the definition of stalking—a requirement made irrelevant by the new widely available monitoring technology.

Stalkers' use of e-mail to contact victims has prompted many jurisdictions to pass so-called "cyberstalking" laws. While these laws provide another means of holding stalkers accountable, enacting multiple statutes that criminalize different types of stalking behavior has significant drawbacks. Stalkers often use a variety of methods to terrorize victims, and the course of conduct required under many stalking laws is established by looking at the totality of the stalker's conduct. Passing separate laws for stalking and cyberstalking often creates unintended consequences such that prosecutors have trouble choosing the statute under which to prosecute a case. The bifurcation of stalking laws,

for example, can make it difficult to collect sufficient evidence to convict under one or the other statute.

In addition, cyberstalking laws typically only address stalking committed through the Internet (cyberspace). Instead of a state passing a new law to cover each new method of stalking, the focus should be on drafting a single law that covers stalking by any method, whether in person or by vehicle, telephone, pager, GPS, e-mail, spycam, or other means. The challenge is to enact laws that address stalking perpetrated through all of the currently known technologies, as well as through future technologies not yet developed or available to stalkers.

The National Center Experience

For nearly two decades, the National Center for Victims of Crime has led the field in enhancing our country's response to stalking. Since the enactment of the country's first state stalking law in 1990, the National Center has supported scores of legislators and victim advocates across the country in their efforts to pass state stalking laws or strengthen existing laws.

The National Center has also played a pivotal role in shaping federal stalking law by providing technical assistance to lawmakers, commenting on proposed legislation, and testifying before Congress. The National Center was critical in ensuring that legal protections keep pace with technology by advocating that the federal stalking statute include stalking behaviors that occur via the Internet or by other electronic means, such as tracking by GPS.

In 2000, the National Center established the Stalking Resource Center, the only national training and technical assistance center focused solely on stalking. The Stalking Resource Center has provided training to tens of thousands of victim service providers and criminal justice practitioners throughout the United States and has fostered innovations in programs for stalking victims and practitioners who support them.

The National Center operates the National Crime Victim Helpline, 1-800-FYI-CALL, through which victims receive one-on-one support to help them understand the impact of crime, access victim compensation, develop safety plans, navigate the criminal justice and social service systems, learn about their legal rights and options, and find the most appropriate local services. Nearly one-fifth of the calls received by the National Center come from

stalking victims, many of whom relay disturbing experiences with a criminal justice system that poses significant hurdles to making stalkers accountable for this crime.

The National Center's extensive stalking policy and training experience and its regular interaction with law enforcement professionals, victim service providers, and victims of crime have provided a unique insight into the inadequacies of the nation's current body of stalking laws. We've learned that:

- Stalkers often can "get away" with their criminal behavior and continue to wreak havoc on a victim's life with little or no risk of intervention by law enforcement.
- The burden of proof is so high under many stalking laws that it is extremely difficult to secure convictions.
- In most jurisdictions, stalking is only a misdemeanor crime, and sentences longer than a few days or weeks are rare. Most stalkers spend a remarkably short time in custody if and when they are arrested, prosecuted, and convicted.
- Statutory provisions written with the "stranger" stalker in mind restrict the types of stalking behavior that can be prosecuted when the stalker and victim are in a relationship.
- Without a full appreciation of the role of *context* in a stalking situation—the private meaning of certain behaviors that would not necessarily be evident to an outside observer—many stalking behaviors can be viewed as harmless, when in fact the behaviors may terrify the victim. A love letter left on the doorstep of a victim's apartment, for example, might seem benign to a law enforcement officer. Without knowing the context, the officer cannot fully appreciate how terrifying that apparently harmless gesture is for a victim who believed her stalker did not know where she was.
- Current state laws do not address the full range of stalking behaviors, making it virtually impossible to arrest and prosecute an offender for many of those behaviors. Consider, for example, a situation in which a stalker is constantly watching and monitoring a victim's daily activities and has posted information about the victim on the Internet, but has never communicated directly with the victim or threatened the

victim in any way. If, as is often the case, the applicable statute requires proof of some type of communication or threatening contact by the stalker, it is unlikely that a stalking charge could be brought. Many state stalking laws simply do not address surveillance by stalkers with newer forms of technology that do not require proximity to or communication with the victim.

Constitutional Challenges

Broadening the definition of stalking to allow the criminal justice system to intervene before stalking escalates into violence is the ultimate goal. Changes in existing stalking laws, however, should always be made with careful consideration of constitutional limits established by the courts.

Since 1993, courts across the nation have heard appeals from defendants challenging their convictions on constitutional grounds, with stalking laws standing up to constitutional challenges time after time.

Many cases challenging the constitutionality of stalking laws have focused on one of two questions: (1) whether the statute is overbroad and therefore violates the First Amendment, or (2) whether the statute is vague and violates the Fifth and Fourteenth Amendments of the United States Constitution.[16]

Courts have determined that most stalking laws are not overbroad or vague and do not deny defendants their due process rights. Those cases in which courts have struck down stalking law provisions have helped legislators understand the constitutional parameters of stalking laws.[17] (For more detailed

16 Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, "Strengthening Antistalking Statutes," *Legal Series Bulletin* 1 (January 2002): 3.

The First Amendment "doctrine of substantial overbreadth" allows a person to challenge a stalking statute on the grounds that it may be unconstitutionally applied to legal behaviors. The Fifth and Fourteenth amendments guarantee citizens due process rights, including effective notice of the behavior that is criminalized by stalking statutes. 16 Am. Jur. 2d *Constitutional Law* § 140 (2006).

A person may also challenge a stalking statute on the ground that the notice given (via the statute) is so vague that it leaves a person without knowledge of the nature of activity that is prohibited. 16B Am. Jur. 2d *Constitutional Law* § 920 (2006).

17 For example, in *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 637 N.E.2d 854 (Mass. 1994), the court found the stalking statute unconstitutionally vague and overturned the defendant's conviction, but then interpreted the statute and defined exactly what type of behavior would be covered by the statute.

discussion on constitutional challenges to stalking laws, see "OVC Bulletin: Strengthening Antistalking Statutes," Appendix C.)

Process of Updating the Model Stalking Code

Legal Research

The National Center for Victims of Crime began this project by reviewing each state's stalking law and analyzing several elements in the laws, including:

- Prohibited acts
- Level of intent (general or specific)
- Type of fear required (reasonable person, actual fear, or both)
- Degree of fear (e.g., serious bodily injury or emotional distress)
- Target of stalker's acts (victim, victim's family, other third parties)
- Threat requirements
- Coverage of technology and surveillance
- Other miscellaneous or innovative provisions

These elements make up the core of almost all stalking laws, but the language and standards adopted by the states vary greatly. In fact, what constitutes a crime in one state may be completely legal in another. The variances in these elements determine what prosecutors must prove to hold stalkers accountable, as well what stalking victims must experience before the criminal justice system can intervene.

The Model Stalking Code drafting committee compared each state's treatment of the above elements. The specific findings of this research are integrated throughout "Commentary to the Code" in Section Three of this document.

The goal of this project is not necessarily to produce uniformity among the states on all of the reviewed elements, but rather to highlight common issues for states to consider in modifying existing or developing new laws.

Role of the Model Stalking Code Advisory Board

The National Center for Victims of Crime convened an advisory board of experts to review the drafting committee's legal research, identify key issues, and define the scope of problems that proposed legislative language should address. The advisory board also provided recommendations to the drafting committee

about each of the major legal elements of the model stalking code. Many of these recommendations have been incorporated into the updated model stalking code.

Advisory board members represented local stalking and domestic violence programs as well as national organizations, and included police officers, prosecutors, civil attorneys, judges, victim advocates, law professors, social workers, and researchers with a wealth of experience regarding stalking and legislative drafting. (See "Acknowledgements" on for complete advisory board participant list.)

Advisory board members shared their perspectives on how a model stalking law could address the stalking behaviors they observed in actual criminal stalking cases. (See following box.)

Box A. Examples of Stalking Behaviors State Laws Should Cover

The following list of stalking behaviors, generated by the Model Stalking Code Advisory Board, in no way reflects the full scope of possible actions in which a stalker might engage, but rather, provides key examples of behaviors the advisory board felt should be covered under a model code.

- Violating protection orders
- Using the legal system to harass a victim ("litigation abuse") by continuously filing motions for contempt or modifications, or by filing retaliatory protection order applications or criminal charges against victims
- Harassing a victim through visitation or custody arrangements
- Stalking a victim in the workplace
- Using surveillance in person, through technology, or through third parties
- Using the Internet or a computer to steal a victim's identity or to interfere with a victim's credit
- Engaging in obsessive or controlling behaviors
- Targeting third parties (e.g., a victim's family member, friend, or child) to scare a victim
- Committing burglary or trespassing or moving items in a victim's home
- Killing animals
- Using cultural context to stalk or scare a victim, such as immigration-related threats
- Attempting to harm self in a victim's presence
- Sending flowers, cards, or e-mail messages to a victim's home or workplace
- Contacting a victim's employer or forcing a victim to take time off from work
- Using humiliating or degrading tactics such as posting pictures of a victim on the Internet, or disseminating embarrassing or inaccurate information about a victim
- Following a victim without the victim's knowledge with the intent of sexually assaulting her
- Assaulting a victim
- Using children to harass or monitor a victim
- Impersonating a victim through technology or other means

Section 2
Model Stalking Code for the States

This section provides the text for the updated "Model Stalking Code for the States," which states are encouraged to consider when reviewing and modifying their existing stalking laws. Although legislation is written and presented differently from state to state, the following sections of the model stalking code are representative of a format commonly used by state legislatures.

Section One	Legislative Intent
Section Two	Offense
Section Three	Definitions
Section Four	Defenses
Optional Provisions	
Section Five	Classification
Section Six	Jurisdiction

Model Stalking Code for the States

Section One: Legislative Intent

The Legislature finds that stalking is a serious problem in this state and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time. The Legislature recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the Legislature enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences.

The Legislature intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The Legislature recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

Section Two: Offense

Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:

(a) fear for his or her safety or the safety of a third person; or

(b) suffer other emotional distress

is guilty of stalking.

Section Three: Definitions

As used in this Model Statute:

(a) "Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils,

threatens, or communicates to or about, a person, or interferes with a person's property.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) "Reasonable person" means a reasonable person in the victim's circumstances.

Section Four: Defenses

In any prosecution under this law, it shall not be a defense that:

(a) the actor was not given actual notice that the course of conduct was unwanted; or

(b) the actor did not intend to cause the victim fear or other emotional distress.

Optional Provisions

Section Five: Classification

Stalking is a felony.

Aggravating factors.

The following aggravating factors shall increase the penalty for stalking:

(a) the defendant violated any order prohibiting contact with the victim; or

(b) the defendant was convicted of stalking any person within the previous 10 years; or

(c) the defendant used force or a weapon or threatened to use force or a weapon; or

(d) the victim is a minor.

Section Six: Jurisdiction

As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction.

Section 3
Commentary to the Code

The following commentary explains, section-by-section, the rationale for the language chosen by the drafters of the "Model Stalking Code for the States," as presented in Section Two of this document. The analysis and commentary also provide alternative options states may want to consider in crafting their own legislation. The drafters recognize that states have different statutory limitations, guidelines, and political climates that may dictate the use of language other than that recommended in this document.

SECTION ONE: LEGISLATIVE INTENT

The Legislature finds that stalking is a serious problem in this state and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time. The Legislature recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the Legislature enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has even more serious or lethal consequences.

The Legislature intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The Legislature recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

Analysis and Commentary

The updated "Model Stalking Code for the States" recommends that states set forth their legislature's intent to recognize stalking as a serious crime, encourage early intervention by the criminal justice system, and encompass a wide range of stalking behaviors in their stalking laws.

The 1993 model anti-stalking code did not include a legislative intent section. Several states, including Colorado and Nebraska, specifically express their legislature's intent in their stalking laws. While New York's legislature does not include a legislative intent section within the text of its stalking statute, such language was enacted in the same bill and is set out in the editor's notes which accompany New York's stalking law.[18]

The case of *People v. Ewing* is a good illustration of the importance of including a legislative intent provision.[19] In that case, the California Fourth District Court of Appeals unanimously reversed the defendant's stalking conviction. Because California's stalking law, Penal Code § 646.9, did not contain a legislative intent section, the court would have had to rely on the law's legislative history. After the enactment of Penal Code § 646.9 in 1993, the California legislature amended it many times to strengthen penalties against violators and to broaden the scope of protection for stalking victims. However, this history was apparently overlooked by the court. In an attempt to clarify the meaning of "substantial emotional distress," the court failed to consider the law's legislative history, in particular a 1996 amendment lowering the fear element of the law from the victim's "fear of death or great bodily harm" to "fear for his

18 N.Y. Penal Law § 120.45 (Consol. 2006), notes § 2.

19 *People v. Ewing*, 76 Cal. App 4th 199 (1999).

or her safety." This created a paradox between the legislative objectives underlying section 646.9 and its judicial interpretation. As was noted in an article evaluating the appellate court's analysis:

> The *Ewing* opinion did not adequately consider the legislative objectives that propelled the creation and subsequent amendments of Penal Code section 646.9. Instead, the outcome in *Ewing* creates a critical paradox in the successful prosecution of stalkers and protection of victims. While the legislature designed section 646.9 to preempt potential harm to victims, the *Ewing* court's decision implies that a stalker cannot be successfully prosecuted until the victim has sought medical treatment, psychological counseling, or some other form of assistance evidencing "substantial emotional distress." Theoretically, under *Ewing*, forcing victims to endure prolonged harassment while seeking other types of assistance before law enforcement will intervene, forces them to jeopardize their safety and their families' safety. This proposition clearly contradicts the legislature's intent to prevent harm to stalking victims.[20]

The first section of the model stalking code, which discusses legislative intent, emphasizes the gravity of stalking in our country. Although the prevalence of stalking may vary by state, a national study sponsored by the Centers for Disease Control and Prevention and the National Institute of Justice estimates that one in 12 women and one in 45 men in the United States will be stalked during her or his lifetime.[21] This section helps criminal justice professionals understand the seriousness of stalking by outlining the context in which the crime of stalking occurs and highlighting the impact of stalking on victims.

The legislative intent section also sets the tone for early intervention by the criminal justice system, particularly in jurisdictions where law enforcement may not have previously recognized the seriousness of stalking. This section acknowledges that stalking behavior often escalates over time and that the inability or unwillingness of the criminal justice system to promptly intervene may give some stalkers greater opportunity to engage in increasingly violent acts. It also recognizes the strong connections between stalking and other crimes, such as domestic violence and sexual assault.[22]

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20 Julie A. Finney, "The Paradox of Actual Substantial Emotional Distress within the Context of California's Criminal Stalking Law," *W. St. U.L. Rev.* 341, number 29 (Spring 2002): 353-54.

21 Tjaden and Thoennes, "Stalking in America," 3.

22 Eighty-one percent of women who were stalked by a current or former husband or cohabiting partner were also physically assaulted by that partner, and 31 percent were sexually assaulted as well. Tjaden and Thoennes, "Stalking in America," 2.

Colorado's legislature recognized this need for earlier intervention in stalking cases as is evidenced by the following excerpt from the legislative intent section of its stalking statute:

> Because stalking involves highly inappropriate intensity, persistence, and possessiveness, it entails great unpredictability and creates great stress and fear for the victim. Stalking involves severe intrusions on the victim's personal privacy and autonomy, with an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim, even in the absence of express threats of physical harm. The general assembly hereby recognizes the seriousness posed by stalking and adopts [these] provisions…with the goal of encouraging and authorizing effective intervention before stalking can escalate into behavior that has even more serious consequences.[23]

This premise has also been recognized by courts interpreting stalking laws. As a Wisconsin court reasoned, "[Anti-stalking legislation] serves significant and substantial state interests by providing law enforcement officials with a means of intervention in potentially dangerous situations before actual violence occurs, and it enables citizens to protect themselves from recurring intimidation, fear-provoking conduct and physical violence."[24]

Finally, the model stalking code's legislative intent provision expresses the legislature's deliberate intention to cover a wide range of acts in its stalking law. It encompasses common stalking behaviors that police and prosecutors have identified in the past, but have been unable to address under many existing stalking laws. These include burglary or interfering with a victim's property—for example, entering a victim's home and moving objects around to communicate to the victim that the stalker has been there, or deflating the tires on a victim's car. Similarly, the law is designed to hold perpetrators accountable for using new forms of technology to stalk, such as surveillance of the victim through the use of global positioning systems, or using the Internet to track a victim's activities, steal a victim's identity, or interfere with a victim's credit.

Because stalking may be perpetrated both directly and indirectly against victims, the legislative intent section also seeks to expand the behaviors that

23 Colo. Rev. Stat. Ann. § 18-9-111(4)(a) (2005). Note, two sentences in the Model Stalking Code's legislative intent section closely track lines from Colorado's statute because it so powerfully describes the impact that stalking has on its victims' lives.

24 *State v. Ruesch*, 571 N.W.2d 898, 903 (Wis. App. 1997).

are covered by the statute to include indirect stalking behaviors. In the past, some state stalking laws have been limited to acts perpetrated by the stalker directly against the victim, such as when a stalker calls a victim repeatedly, follows him or her from place to place, or shows up at the victim's home uninvited. However, many stalkers use indirect means to threaten or monitor victims or even stalk through third parties. For example, stalkers may ask third parties to deliver gift packages to victims or post private information about the victim in public places or on the Internet, acts that may not seem dangerous unless taken in context. Stalkers may also indirectly intimidate or threaten the victim by making contact with the victim's employer, children, or other family members. Some stalkers have been known to use the power of the courts to maintain contact and control over victims by repeatedly filing civil or criminal cases against them.

The model stalking code's legislative intent provision recognizes that these types of behavior could constitute stalking if they meet the elements of the offense. Including the legislature's intent within the statutory language provides guidance to state courts, enabling them to liberally interpret a stalking law after enactment, rather than restricting the application of the law to a narrow set of acts.

The updated "Model Stalking Code for the States" encourages states to incorporate a legislative intent section in their stalking laws to highlight the seriousness of stalking and encompass a wide range of stalking acts so that the criminal justice system may intervene before the conduct escalates to violence.

SECTION TWO: OFFENSE

Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:

(a) fear for his or her safety or the safety of a third person; or

(b) suffer other emotional distress

is guilty of stalking.

Analysis and Commentary

Level of Intent

The updated "Model Stalking Code for the States" recommends that states incorporate a general intent requirement into their stalking laws instead of a specific intent requirement.

Virtually every criminal code requires that the defendant intended to commit the actions that constitute a crime. With the crime of stalking, however, proving what the defendant intended by his or her action can be particularly difficult.

Generally, the intent requirement is divided into two categories—"general intent" and "specific intent."

"General intent" means that the stalker must intend the actions in which he or she is engaging (e.g., following, watching, or calling), but must not necessarily intend the consequences of those actions. In a jurisdiction with a general intent statute, a stalker who claims that he or she followed his or her ex-girlfriend or ex-boyfriend around every day for two months, but did not intend to frighten him or her, could still be found guilty of stalking, as long as he or she knows or should have known that his or her behavior would frighten a reasonable person.

"Specific intent" means that the stalker must intend to cause a specific reaction in the victim, such as fear for his or her own safety or the safety of others. According to the definition of specific intent from the American Jurisprudence second edition of *Criminal Law*, "Conviction with respect to a crime involving an element of specific intent requires the state to prove that the defendant intended to commit some further act, or intended some additional consequence, or intended to achieve some additional purpose, beyond the prohibited conduct itself."[25] Thus, a prosecutor in a jurisdiction with a specific intent stalking statute must prove that the stalker engaged in the prohibited behavior with the intent to cause the victim fear, emotional distress, or whatever other reaction is required by the statute.

25 21 Am. Jur. 2d *Criminal Law* § 128 (2006).

The 1993 model anti-stalking code also recommended the adoption of a general intent requirement. When it was drafted in 1993 only thirteen states had a general intent requirement in their stalking laws, and the others all had stalking laws with specific intent requirements. Currently, over half of states have some version of a general intent requirement in their stalking laws.[26] Some of states require only that the defendant intentionally committed prohibited acts.[27] Others require instead that, in committing the acts, he or she knew or reasonably should have known, that their actions would cause fear in a reasonable person.[28]

In a case interpreting the intent requirement of Iowa's stalking law, the court held that "the legislative choice of general over specific intent reflects sound public policy," noting that:

> Commentators have interpreted the [M]odel [C]ode to contain a general-intent provision. . . . Stalkers may suffer from a mental disorder that causes them to believe that their victim will begin to return their feelings of love or affection. . . . The drafters of the Model Code believed that the stalker's behavior, rather than his motivation, should be the most significant factor in determining whether to press charges. The Model Code's general intent requirement holds the accused stalker responsible for his intentional behavior if, at the very least, he should have known that his actions would cause the victim to be afraid. . . . By placing the focus on the stalker's behavior, the Model Code effectively eliminates the possibility that a stalker could assert a successful defense by claiming that he did not intend to cause the victim to be afraid, but was instead expressing his feelings and opinions.[29]

26 It often can be difficult to determine the intent element of a state's stalking law. In some states, stalking can be either a general or specific intent crime depending on the conduct. This count is based on the interpretation by the Model Code Drafting Committee of the statutory language of each state's stalking law.

27 *See*, for example, Ariz. Rev. Stat. § 13-2923 (2005); 11 Del. Code § 1312A (2005); Idaho Code § 18-7906 (2005); Me. Rev. Stat. Ann. tit. 17-A, § 210-A (2005); N.D. Cent. Code § 12.1-17-07.1 (2005); and Okla. Stat. Ann. tit. 21, § 1173 (West 2005).

28 *See*, for example, Iowa Code § 708.11 (2005); Md. Code Ann., Crim. Law §3-802 (2005); Minn. Stat. Ann. § 609.749 (West 2005); N.Y. Penal Law § 120.45 (Consol. 2005); Utah Code Ann. §76-5-106.5 (2005); Va. Code Ann. § 18.2-60.3 (Michie 2005); and Wash. Rev. Code Ann. § 9A.46.110 (West 2005).

29 *State of Iowa v. Neuzil*, 589 N.W.2d 708, 711-12 (Iowa 1999)(finding that reading a specific intent into the stalking statute would essentially negate its purpose), quoting Christine B. Gregson, Comment, "California's Antistalking Statute: The Pivotal Roles of Intent," *Golden Gate U.L. Rev.* 221, number 28 (1998): 244-45.

Prosecutors report difficulty proving stalking cases under specific intent statutes. They find that they must litigate what was in the defendant's mind when he or she engaged in the stalking behavior. In considering language for the model stalking code, the advisory board concluded that any person who purposefully engaged in a particular course of conduct that constituted stalking should be held accountable for stalking, regardless of whether the stalker intended to cause a particular reaction—such as actual fear—on the part of the victim. In other words, the fact that the perpetrator chose to engage in the conduct should be enough to prove that the conduct itself was intended and should satisfy the general intent requirement. "Where a particular crime requires only a showing of general intent, the prosecution need not establish that the accused intended the precise harm or precise result which resulted from his acts. For general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of acts which have been declared criminal; the element of intent is presumed from the actions constituting the offense."[30]

In addition to the heavy burden it places on prosecutors, a specific intent requirement loses sight of a critical issue: if the stalker's actions would cause a reasonable person to feel fear, the behavior should be actionable under criminal law. Minnesota has addressed this exact issue in its stalking statute by stating, "No proof of specific intent [is] required. In a prosecution under this section, the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated, or…that the actor intended to cause any other result."[31]

Section Four ("Defenses") of the model stalking code reinforces that stalking is a general intent crime by specifically excluding as a defense that the actor did not intend to cause the victim fear or other emotional distress.

Fear Element—Standard of Fear

The updated "Model Stalking Code for the States" recommends that states utilize a "reasonable person" standard of fear instead of an "actual fear" stan-

30 21 Am. Jur. 2d *Criminal Law* § 127 (2006).

31 Minn. Stat. Ann. § 609.749 (West 2005).

dard, and that this standard be interpreted to mean "a reasonable person in the victim's circumstances."

A "reasonable person" standard of fear asks the question, "Would the perpetrator's conduct cause a reasonable person in similar circumstances to be afraid?"

An "actual fear" standard asks the question, "Did the defendant's conduct actually cause this particular victim to feel afraid?" thereby creating a burden of proof that can often only be satisfied by having the victim take the stand and testify in court.

The 1993 model anti-stalking code recommended that states incorporate a dual standard of fear: an objective "reasonable person" standard and a subjective "actual fear" standard.

At present, state stalking statutes vary in terms of what is required regarding the victim's fear. Slightly more than half of states apply the dual standard of "reasonable person" and "actual" fear recommended by the 1993 model anti-stalking code to some or all of the conduct covered by their stalking laws.[32] For example, under Indiana's stalking statute, "'stalk' means a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened ['reasonable person' standard of fear] and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened ['actual' standard of fear]."[33] In states like Indiana, prosecutors have to prove not only that the perpetrator's acts would cause a reasonable person to be fearful but also that he or she succeeded in causing the victim of the crime to actually feel afraid.

Currently, at least fourteen states impose the "reasonable person" standard of fear in their stalking laws[34] while at least five states require the subjec-

32 *See*, for example, Ariz. Rev. Stat. § 13-2923 (2005); Idaho Code § 18-7906 (2005); Ind. Code Ann. § 35-45-10-1 (Michie 2005); Iowa Code § 708.11 (2005); Kan. Stat. Ann. § 21-3438 (2005); Ky. Rev. Stat. § 508.150 (Michie 2005); Me. Rev. Stat. Ann. tit. 17-A § 210-A (West 2005); Mass. Gen. Laws Ann. ch. 265, § 43 (West 2005); Or. Rev. Stat. § 163.732 (2005); Wis. Stat. Ann. § 940.32 (West 2005); and Wyo. Stat. Ann. § 6-2-506 (Michie 2005).

33 Ind. Code Ann. § 35-45-10-1 (Michie 2005).

34 *See*, for example, Ala. Code § 13A-6-90 (2005); La. Rev. Stat. Ann. § 14:40.2; Md. Code Ann., Crim. Law § 3-802 (2005); N.J. Stat. Ann. § 2C:12-10 (West 2005); N.M. Stat. Ann. § 30-3A-3 (Michie

tive "actual fear" standard—that the perpetrator caused the victim to suffer actual fear.[35]

The Model Stalking Code Advisory Board considered two main factors when determining the model stalking code's standard of fear: (1) the impact the standard would have on the victim; and (2) the importance of context in relation to the stalking conduct.

(1) Impact on the Victim. The updated model stalking code drafters rejected the subjective "actual fear" standard because it places an unnecessary burden on prosecutors and victims, requiring prosecutors to prove that the victim actually was in fear and forcing the victim to have to justify his or her fear in the presence of the perpetrator. While many stalking victims do, in fact, experience fear, it should not be necessary to expose them to the added trauma of proving their fear. The problem with stalking laws that impose the "actual fear" standard is articulated in the following law review excerpt:

> The result of such statutes is that stalking victims must take the stand and painfully testify before the court and before the defendant to their state of fear and/or how emotionally disturbed they have become [as a result of the defendant's conduct].... Ironically,...while states have created a stalking offense to punish those who invade the privacy of others, a victim must relinquish that privacy in order to secure a conviction. While stalking statutes were passed to protect the physical safety and lives of victims, a victim must testify to her fear and emotional distress before she will be capable of securing such safety. While stalking statutes provide the victim with the ability to control her life by working within the criminal system to remove a dangerous offender from her life, she gains such control only by testifying to her helplessness in the face of the defendant.[36]

In addition, an "actual fear" standard inappropriately punishes only those stalkers who have "successfully" caused the victim fear, rather than holding all stalkers accountable for committing acts that would cause a reasonable person to feel fear.

2005); R.I. Gen. Laws §§ 11-59-1 and 11-59-2 (2005); Va. Code Ann. § 18.2-60.3 (Michie 2005); and W.Va. Code § 61-2-9a (2005).

35 *See*, for example, Alaska Stat. § 11.41.270 (Michie 2005); Minn. Stat. Ann. § 609.749 (West 2005); Mont. Code Ann. § 45-5-220 (2005); Neb. Rev. Stat. §§ 28-311.02 and 28-311.03 (2005); and Ohio Rev. Code Ann. § 2903.211 (West 2005).

36 Carol E. Jordan et al., "Stalking: Cultural, Clinical and Legal Considerations," *Brandeis Law J* 38, number 3 (2000): 513, 574.

The model stalking code follows the lead of states with stalking laws that provide for the solely objective "reasonable person" standard of fear—that the stalker's conduct would place a reasonable person in fear.[37]

> "Solely objective" means that the focus is not on the particular victim and a particular emotional distress she suffers, but rather, is solely on the defendant: his intent and how his conduct would affect a "reasonable" person. In this group of statutes, any requirement that the defendant's conduct actually result in the victim experiencing heightened fear or substantial emotional distress is completely absent.... In these states, the stalking statutes do not subject the victim to such minute scrutiny, nor require that the prosecution demonstrate the severe distress in which the defendant has succeeded in placing her. Rather, these statutes adhere more to the structure of other criminal statutes—one not particularly targeted for female victims—such as robbery, for example, where all the prosecution must show is that the defendant committed the prohibited act with the designated intent. Notably, such prosecutions fail to require that the state demonstrate that the victim was reduced to hysterics from the criminal actions of the defendant.[38]

(2) Context Surrounding the Stalking Conduct. In recommending the objective "reasonable person" standard of fear, the advisory board also determined that it was important to consider the context surrounding the stalking conduct. Because stalkers often target their former intimate partners, stalking laws must capture the context of the stalker's behavior when evaluating its impact on the victim in order to be effective. For example, if a stalker sends a dozen roses, this gesture may seem benign and loving to the casual observer. However, if that same victim has been told by her stalker numerous times that the day she receives a dozen roses is the day he is going to kill her, those same roses, understood in the context of the victim's experience, mean a very different thing. Those roses may be viewed as a direct threat to kill the victim. Advisory board members viewed it as critical for practitioners to consider the context of a stalker's behavior in every stalking case. Thus, the model stalking code defines "reasonable person" to mean "a reasonable person in the victim's circumstances."

37 *See*, for example, note 36.

38 Jordan, "Stalking: Cultural, Clinical, and Legal Considerations," 556–57.

Fear Element—Level of Fear

The updated "Model Stalking Code for the States" recommends two statutory prongs that establish the level of fear required to constitute stalking: (1) that a reasonable person would fear for his or her safety or the safety of a third person; or (2) that a reasonable person would suffer other emotional distress.

The 1993 model anti-stalking code encouraged states to require a high level of fear—fear of bodily injury or death. While a number of states have followed the 1993 model anti-stalking code's lead and incorporated this high level of fear into their stalking laws,[39] many other states have reduced the level of fear required in their stalking statutes in an attempt to provide earlier and better protection for stalking victims.

Some states require the victim to feel "terrorized, frightened, intimidated, or threatened"[40] or to fear "that the stalker intends to injure the person, another person, or property of the person or of another person."[41] Some states do not specify the consequences that the victim must fear, opting for a more generalized fear, requiring the victim to fear for his or her "safety."[42] In addition to the required element of fear, a number of states' stalking laws include conduct that would cause a reasonable person to suffer some form of mental or emotional distress, or require that the victim actually suffer such distress.[43] Some of these states refer to conduct that seriously "alarms," "annoys," "torments," or "ter-

39 *See*, for example, Alaska Stat. § 11.41.270 (Michie 2005); D.C. Code Ann. § 22-404 (2005); Ky. Rev. Stat. Ann. § 508.150 (Michie 2005); Md. Code Ann., Crim. Law § 3-802 (2005); N.J. Stat. Ann. § 2C:12-10 (West 2005); and W.Va. Code § 61-2-9a (2005).

40 *See*, for example, Mich. Comp. Laws § 750.411h (2005); Minn. Stat. Ann. § 609.749 (West 2005); Neb. Rev. Stat. § 28-311.03 (2005); Nev. Rev. Stat. Ann. § 200.575 (Michie 2005); N.D. Cent. Code § 12.1-17-07.1 (2005); Okla. Stat. Ann. tit. 21, § 1173 (West 2005); and Tenn. Code Ann. § 39-17-315 (2005).

41 *See*, for example, Del. Code Ann. tit. 11, § 1312A (2005); 720 Ill. Comp. Stat. 5/12-7.3 (West 2005); N.Y. Penal Law § 120.45 (Consol. 2005); and R.I. Gen. Laws § 11-59-2 (2005); and Wash. Rev. Code Ann. § 9A.46.110 (2005).

42 *See*, for example, Ariz. Rev. Stat. § 13-2923 (2005); Cal. Penal Code § 646.9 (Deering 2005); Colo. Rev. Stat. § 18-9-111 (2005); Conn. Gen. Stat. § 53a-181d (2005); Fla. Stat. Ann. § 784.048 (West 2005)(in definition of "credible threat"); Ga. Code Ann. § 16-5-90 (2005); Kan. Stat. Ann. § 21-3438 (2005); Mo. Rev. Stat. § 565.225 (2005)(in definition of "credible threat"); N.H. Rev. Stat. Ann. § 633:3-a (2005); N.M. Stat. Ann. § 30-3A-3 (Michie 2005); N.C. Gen. Stat. § 14-277.3 (2005); Or. Rev. Stat. § 163.732 (2005); and Vt. Stat. Ann. tit. 13, § 1061 (2005).

43 *See*, for example, Colo. Rev. Stat. Ann. § 18-9-111 (West 2005); La. Rev. Stat. Ann. § 14:40.2 (West 2005); N.C. Gen. Stat. § 14-277.3 (2005); Utah Code Ann. § 76-5-106.5 (2005); and Vt. Stat. Ann. tit. 13, § 1061 (2005).

rorizes" the victim and require that the conduct result in substantial emotional distress.[44]

The advisory board carefully considered what level of fear would allow the criminal justice system to address the greatest number of stalking cases without exposing innocent persons to potential criminal charges. Based on their observations, the updated model stalking code incorporates a statutory provision that combines elements from existing state laws and recommends the inclusion of two statutory prongs: (1) that a reasonable person would fear for his or her safety or the safety of a third person; or (2) that a reasonable person would suffer other emotional distress. The "reasonable person" standard provides a protective mechanism to ensure that an overly sensitive neighbor, for example, could not successfully lodge a false stalking complaint against an individual who walks by his or her house every day.

(1) Fear for Safety. The seriousness of stalking behavior often escalates over time. The updated "Model Stalking Code for the States" recommends a general fear requirement that would address conduct that may lead to more violent acts in the future. The model stalking code incorporates the "fear for safety" standard adopted in at least 13 states[45] instead of the more stringent standard of fear recommended by the 1993 model anti-stalking code—the fear of bodily injury or death. While the stalking conduct needs to address behavior that goes beyond merely annoying the victim, requiring the victim to fear bodily injury or death creates a situation that may impede timely intervention by the criminal justice system. Intervention and victim assistance before stalking conduct has escalated to this level is critical. Courts have also upheld the use of the term "safety," finding that it is neither unconstitutionally vague or overbroad. A California court recognized that the term "has a commonly understood meaning which gives adequate notice of the conduct proscribed."[46]

In addition, because stalking behavior is as varied as the people who commit the crime, a stalking victim may not be able to predict what the stalker will do next. Fear of the unknown can be just as strong as the fear of death or

44 Kan. Stat. Ann. § 21-3438 (2005). *See also* Idaho Code § 18-7906 (Michie 2005); Ky. Rev. Stat. Ann. § 508.130 (Michie 2005).

45 *See*, for example, note 44.

46 *In re* Joseph G., 7 Cal. App. 3d 695, 703 (1970).

serious physical harm. Fear of other consequences may also be equally traumatizing to a victim, depending on the circumstances surrounding the stalking. Many victims fear that they will be sexually assaulted by the individual who is stalking them. A mother who feels that her child is in danger due to a stalker's behavior might be more fearful that the child will be kidnapped or harmed than concerned about her own personal safety. The "fear for safety" language helps ensure that any of these fears would be covered under a state's stalking law.

(2) Other Emotional Distress. In addition to conduct that would cause a reasonable person to fear for his or her safety or the safety of a third person, the model stalking code recommends that conduct that would cause a reasonable person to suffer other emotional distress, defined as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling," be addressed in state stalking laws.

The advisory board recognized that certain types of stalking behavior committed as part of a course of conduct, such as making repeated telephone calls to a victim at a workplace, possibly endangering her job, or engaging in conduct that destroys the victim's credit history, depending on the context, might not meet the "fear for safety" standard. By incorporating "other emotional distress," the model stalking code enables states to prosecute such acts under their stalking laws.

While the 1993 model anti-stalking code did not include an "emotional distress" prong, the inclusion of "emotional distress" is well supported in state stalking statutes and related case law. Roughly half of states incorporate terms equivalent to "emotional distress" somewhere in their stalking laws,[47] primarily in the definition of "course of conduct,"[48] "harassment,"[49] or the offense itself.[50]

47 *See*, for example, Ala. Code § 13A-6-92 (2005) ("mental anxiety"); and W.Va. Code § 61-2-9a (2005) ("mental injury").

48 *See*, for example, Kan. Stat. Ann. § 21-3438 (2005) and Miss. Code Ann. § 97-3-107 (2005).

49 *See*, for example, Fla. Stat. Ann. § 784.048 (West 2005); Ga. Code Ann. § 16-5-90 (2005); Mich. Comp. Laws Ann. § 750.411h (West 2005); Mo. Rev. Stat. § 565.225 (2005); R.I. Gen. Laws § 11-59-1 (2005); and Wyo. Stat. Ann. § 6-2-506 (Michie 2005).

50 *See*, for example, D.C. Code Ann. § 22-404 (2005); La. Rev. Stat. Ann. § 14:40.2 (West 2005); Mont. Code Ann. § 45-5-220 (2005); 18 Pa. Cons. Stat. Ann. § 2709.1 (West 2005); and Utah Code Ann. § 76-5-106.5 (2005).

In the case of *State v. Culmo*, the court acknowledged the mental impact that stalking has on a victim's ability to enjoy his or her daily life, noting that:

> [The] state's interest in criminalizing stalking behavior . . . is compelling. . . . Providing protection from stalking conduct is at the heart of the state's social contract with its citizens, who should be able to go about their daily business free of the concern that they may be the targets of systematic surveillance by predators who wish them ill. The freedom to go about one's daily business is hollow, indeed, if one's peace of mind is being destroyed, and safety endangered, by the threatening presence of an unwanted pursuer.[51]

The model stalking code includes the alternative statutory prong that allows states to hold stalkers accountable if their behavior would cause a reasonable person to suffer other emotional distress.

Lack of Threat Requirement

As with the 1993 *Model Anti-Stalking Code for the States,* the updated model stalking code does not include a threat requirement. Although a few state stalking laws retain a "credible threat" requirement, many others have eliminated such a requirement. The model stalking code adopts this approach because stalkers often do not make any threats at all or make veiled threats in seemingly innocent language. Further, what might be threatening in one cultural frame of reference could appear harmless in another environment.

Threats can vary greatly and often are symbolic or contain references that only the victim understands. For example, if a victim is attempting to hide from a stalker and moves into a new apartment, then finds a single yellow rose on her doorstep—the same gesture the stalker has made to her each time he assaulted her in the past—she is likely to view the rose as a signal that she has been found and that she is in danger. On the other hand, someone who does not know the history between the parties may view the rose as a lovely gesture. As a result, including a threat requirement in statutory language may limit the cases that can be successfully prosecuted. Instead, the model stalking code includes the term "threatens" as one possible action a stalker may commit in a "course of conduct," but does not require an offender to make a threat to meet the statutory definition of stalking.

51 *State v. Culmo*, 642 A.2d 90, 101–102 (Conn. Super. Ct. 1993).

Inclusion of "Third Person" as a Target of Stalker's Acts

The updated "Model Stalking Code for the States" recommends a standard of "fear for the safety of a third person" in addition to fear for the victim's own safety.

The 1993 model anti-stalking code recommended that conduct directed toward the victim's immediate family that elicited the requisite level of fear should be covered by a state's stalking law. (See Appendix A for the1993 *Model Anti-Stalking Code for the States*.) The definition of "immediate family" was limited to the traditional nuclear family members or "any other person who regularly resides in the household or who within the prior six months regularly resided in the household."[52] In the commentary accompanying the 1993 model anti-stalking code, its drafters cautioned states that expanding the definition of "immediate family" too much might subject their stalking laws to challenges that they are overly broad,[53] a concern which has proven to be generally unfounded.

Most state stalking laws follow the 1993 model anti-stalking code and require the victim to fear that she or he is in danger or that an immediate family member is in danger. However, a number of states extend the application of their stalking statutes to include a victim's fear for his or her friends, companions, or neighbors, or to anyone the victim knows. For example, in Colorado, stalking conduct directed at "someone with whom [the victim] has or has had a continuing relationship" which causes the victim to fear for that person is covered.[54] In addition to immediate family, West Virginia's stalking law extends to "a person with whom [the victim] has or in the past has had or with whom he or she seeks to establish a personal or social relationship, whether or not the intention is reciprocated,…[the victim's] current social companion, [or the victim's] professional counselor or attorney."[55] Louisiana's stalking law applies if a reasonable person would feel alarmed or suffer emotional distress as a result

52 National Institute of Justice, "Project to Develop a Model Anti-Stalking Code for States," (Washington, DC: National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, 1993), 43.

53 Ibid., 45.

54 Colo. Rev. Stat. § 18-9-111 (2005).

55 W.Va. Code § 61-2-9a (2005).

of verbal or behaviorally implied threats of criminal acts toward "any person with whom [the victim] is acquainted."[56]

A few states are even more inclusive. Delaware and Maryland use the catchall "third person," while the Washington stalking law covers cases in which the victim is placed in fear of injury to "another person" or the property of "another person." To date, no state law that recommends a standard of fear for the safety of a third person, in addition to fear for the victim's own safety, has been challenged as being overbroad.

The model stalking code recommends the standard of "fear for the victim's safety or for the safety of a third person," for several reasons. First, most stalking takes place in the context of domestic violence. When stalkers know their victims well, they usually know the individuals who are important to the victim. Whether it is the victim's parent, child, employer, or new intimate partner, a stalker may deliberately target those close to the victim to further terrorize the victim. Second, if the victim lives in a particular immigrant, religious, or cultural community, the stalker may target those persons who provide support to the victim, even if they are not the victim's family members.

By encouraging states to expand the scope of their stalking laws to include the victim's fear for the safety of other people, the model stalking code seeks to ensure that stalkers who prey on the victim's fears for the safety of a third person do not elude prosecution.

SECTION THREE: DEFINITIONS

As used in this Model Statute:

> **(a) "Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.**

56 La. Rev. Stat. Ann. § 14:40.2 (West 2005). See also N.Y. Penal Law § 120.45 (Consol. 2005) ("a third party with whom such person is acquainted"); and N.C. Gen. Stat. §14-277.3 (2005) ("close personal associates").

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling;

(c) "Reasonable person" means a reasonable person in the victim's circumstances.

Analysis and Commentary

1. *"Course of Conduct"*

State stalking laws typically require the stalker to engage in a "course of conduct" directed at a specific person or require that he or she act "repeatedly." Generally, definitions for "course of conduct" include the number of acts required and the type of acts prohibited. With the emergence of ever advancing technology, states must also consider whether their stalking laws cover conduct that is accomplished through the use of current and possible future technological innovations.

Number of Acts Required. The updated "Model Stalking Code for the States" recommends that a "course of conduct" be defined as "two or more acts" of the requisite behavior.

Under the 1993 model anti-stalking code, a stalker was required to commit the specified acts "repeatedly" to establish a "course of conduct."[57] "Repeatedly" was defined as "on two or more occasions."[58]

In a number of states, two or more separate acts are necessary to constitute a "course of conduct,"[59] or the acts in question must be committed on

57 National Institute of Justice, "Project to Develop a Model Anti-Stalking Code for States," 43.

58 Ibid.

59 *See*, for example, Cal. Penal Code § 646.9(f) (West 2005); Ky. Rev. Stat. Ann. § 508.130(2) (Michie 2005); N.H. Rev. Sat. Ann. § 633:3-a (II)(a) (2005); Okla. Stat. Ann. tit. 21, § 1173(F)(2) (2005); and Tenn. Code Ann. § 39-17-315(a)(1) (2005).

two or more occasions to meet the definition of "repeatedly."[60] Some of these states require that the acts occur within a certain period of time. Arkansas requires "two or more acts separated by at least 36 hours, but occurring within one year" to establish a "course of conduct."[61] Minnesota defines a "pattern of harassing conduct" as "two or more acts within a five-year period."[62] Colorado, New Mexico, North Carolina, Texas, and Virginia require acts that are committed on "more than one occasion."[63] Pennsylvania defines "course of conduct" as "a pattern of actions composed of more than one act."[64]

In many of the remaining states, a "course of conduct" is a "series of acts over a period of time" with no minimum number of acts specified,[65] or the perpetrator must "repeatedly" commit the specified acts and the term "repeatedly" is not defined.

Like the 1993 *Model Anti-Stalking Code for the States* and many of the states' stalking laws, the updated model stalking code urges that two acts with no time restrictions between the acts be sufficient to establish a "course of conduct" to allow for the earliest possible intervention by the criminal justice system.

Inclusion of a List of Prohibited Acts. The model stalking code recommends that the definition of "course of conduct" include some guidance to state courts regarding the breadth of acts the statute was designed to address, without including an exclusive list of specific examples.

The 1993 model anti-stalking code intentionally chose not to "list specific types of actions that could be construed as stalking [because] some courts had ruled that if a statute includes a specific list, the list is exclusive."[66] However,

60 *See*, for example, Iowa Code § 708.11(1)(d) (2005); Me. Rev. Stat. Ann. tit. 17-A, § 210-A(2)(C) (West 2005); and N.J. Stat. Ann. § 2C:12-10(1)(a)(2) (West 2005).

61 Ark. Code Ann. § 5-71-229 (Michie 2005).

62 Minn. Stat. Ann. § 609.749 (West 2005).

63 Colo. Rev. Stat. Ann. § 18-9-111(4)(c)(IV) (2005); N.M. Stat. Ann. § 30-3A-3(A) (Michie 2005); N.C. Gen. Stat. § 14-277.3(a) (2005); Tex. Penal Code Ann. § 42.072(a) (West 2005); and Va. Code Ann. § 18.2-60.3(A) (Michie 2005).

64 18 Pa. Cons. Stat. Ann. § 2709.1(f) (West 2005).

65 *See*, for example Alaska Stat. § 11.41.270(b)(1) (Michie 2005); R.I. Gen. Laws § 11-59-1(1) (2005); S.D. Codified Laws § 22-19A-5 (Michie 2005); and Wyo. Stat. Ann. § 6-2-506(a)(i) (Michie 2005).

66 National Institute of Justice, "Project to Develop a Model Anti-Stalking Code for States," 44.

the definition of "course of conduct" in the 1993 anti-stalking model code is somewhat limiting, requiring the perpetrator to maintain a visual or physical proximity to the victim, convey explicit or implicit threats, or engage in a combination of those two behaviors.

State stalking laws vary in terms of whether they provide a list of specific examples of prohibited behavior, generally phrased as conduct that "includes, but is not limited to . . . [list of acts]."[67] This type of statutory language can provide prosecutors and courts with guidance as to the types of behavior that legislatures intended to sanction. It also educates criminal justice system practitioners about the nature of stalking. Despite these advantages, such lists can never be all-inclusive and may lead law enforcement to disregard stalking behaviors that are not included on the list or provide courts with a basis for interpreting those provisions as limited to the conduct listed.

The advisory board considered whether the benefits of identifying specific examples of acts that could constitute a "course of conduct" were outweighed by the potential misuse of such a list. Board members concluded that the definition of "course of conduct" should include some guidance to state courts regarding the breadth of acts the statute was designed to address, without including an exclusive list of specific examples. Toward that end, the definition of "course of conduct" highlights general categories of acts accomplished in any manner possible by using the following language: "such acts include, but are not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property."

67 For example, Wisconsin's statute includes the following acts in its definition of "course of conduct": maintaining visual or physical proximity to the victim; approaching or confronting the victim; appearing at the victim's workplace or contacting the victim's employer or coworkers; appearing at the victim's home or contacting the victim's neighbors; entering property owned, leased, or occupied by the victim; contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly, regardless of whether a conversation ensues; photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim; sending material by any means to the victim or for the purpose of obtaining or disseminating information about, or communicating with, the victim to a member of the victim's family or household or an employer, coworker, or friend of the victim; placing an object on or delivering an object to property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim; causing someone else to engage in any of these acts. Wis. Stat. § 940.32(1)(a) (2005).

The language used is intended to cover the wide range of methods currently used to commit stalking, such as acts perpetrated by mail, telephonic or telecommunications devices, electronic mail, Internet communications or postings, global positioning systems, hidden video cameras, harassing litigation, and facsimile, as well as unanticipated future methods of stalking. It is also designed to cover stalking tactics in which stalkers indirectly harass victims through thirdparties. For example, stalkers have posted messages on the Internet suggesting that victims like to be raped and listing the victims' addresses, thereby inciting third parties to take action against victims.[68] The statute does not provide a list of more specific examples since such a list could quickly become outdated.

Coverage of Emerging Forms of Technology or Surveillance. The updated model stalking code sets forth a definition of "course of conduct" intended to encompass stalking behavior that is accomplished by or through the use of "any action, method, device, or means" in order to include current and future technology or surveillance methods that stalkers may use to monitor, track, or terrorize victims in the future.

As with the 1993 model anti-stalking code, which requires a stalker to "maintain a visual or physical proximity," some state stalking laws do not set forth clearly whether certain types of surveillance are prohibited, and also require a stalker's "visual or physical presence" for surveillance to be considered an act of stalking.[69] Increasingly, however, stalkers are using new technologies such as tiny hidden cameras, global positioning systems, and computer spyware programs to track victims. These actions may or may not be considered "visual

68 A few states have addressed the use of technology by stalkers who post personal information about their victims on-line that encourages others to contact them for illicit purposes. Michigan created a separate offense to specifically prohibit a person from posting "a message through the use of any medium of communication, including the Internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent," if certain conditions apply. Mich. Comp. Laws § 750.411s (2005).

Nevada's stalking law covers this type of conduct by stating that a person commits the crime of stalking when he or she uses "an Internet or network site or electronic mail or any other similar means of communication to *publish, display or distribute information in a manner that substantially increases the risk of harm or violence to the victim*." Nev. Rev. Stat. Ann. § 200.575(3) (Michie 2005) (emphasis added).

69 *See*, for example, N.J. Stat. Ann. §2C:12-10 (West 2005) and Utah Code Ann. § 76-5-106.5 (2005).

or physical presence" under existing laws, making the laws vulnerable to judicial scrutiny and interpretation.

Therefore, the updated model stalking code recommends a more general definition of "course of conduct" to capture stalking behavior accomplished through currently available means and future technologies and to provide law enforcement, prosecutors, and courts wider latitude when applying the law.

2. *"Emotional Distress"*

The updated "Model Stalking Code for the States" recommends that "emotional distress" be defined as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." As previously discussed in Section Two of "Commentary to the Code," the model stalking code includes the term "other emotional distress" in one statutory prong of the offense. This language conveys a level of suffering that is significant but that does not necessarily rise to the level of psychological trauma requiring medical intervention or proof of any type of long-term ill effects. A number of courts have held that independent expert testimony is not necessary to prove "emotional distress."[70]

The 1993 model anti-stalking code recommended a high level of fear—the fear of serious injury or death. Therefore, a definition of emotional distress was not included.

While roughly half of states include the term "emotional distress" or something similar in their stalking laws,[71] only a few provide a definition for the term. For example, in Pennsylvania, "emotional distress" is "a temporary or permanent state of mental anguish."[72] Both Michigan's and Oklahoma's stalking laws define "emotional distress" as "significant mental suffering or distress, that may, but does not necessarily require, medical or other professional treatment or counseling."[73] The drafters of the updated model stalking code chose

70 *Delaware v. Knight*, 1994 Del Super. LEXIS 2 (Del. Sup. Ct. 1994); *Ohio v. Tichon*, 658 N.E.2d. 16 (Oh. Ct. App. 1995).

71 For additional discussion of the concept of emotional distress, please refer back to Section Two of "Commentary to the Code," page 40.

72 18 Pa. Cons. Stat. Ann. § 2709.1(f) (West 2005).

73 Okla. Stat. Ann. tit. 21, § 1173(F)(3) (West 2005) and Mich. Comp. Laws Ann. § 750.411h(1)(b) (West 2005).

to borrow the language used by Michigan and Oklahoma to define "emotional distress."

Relevant case law supports the use of this definition. For example, the Missouri Court of Appeals, in *Wallace v. Van Pelt*,...compared the use of the term "emotional distress" in criminal stalking statutes to the use of the term in intentional infliction of emotional distress tort claims. The Missouri court recognized that "emotional distress" was previously defined in the Restatement (Second) of Torts § 46, as including "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."[74]

The term "emotional distress" is intended to cover a reasonable person's reaction to many stalking behaviors, such as ongoing harassing telephone calls or being placed under constant surveillance.

3. *"Reasonable Person"*

The updated "Model Stalking Code for the States" recommends that "reasonable person" be defined as a "reasonable person in the victim's circumstances."

The 1993 model anti-stalking code also recommended a "reasonable person" standard of fear but did not provide a definition for the term.

Several states' definitions of a "reasonable person" are similar to the recommended definition of a "reasonable person in the victim's circumstances." For example, Oregon provides that the crime of stalking is committed if "it is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact."[75] South Carolina's stalking statute proscribes criminal behavior that would cause "a reasonable person in the targeted person's position to be in fear."[76]

Furthermore, several courts have discussed the significance of considering the victim's circumstances when determining whether a reasonable person would have been afraid. For example, in *State v. Breen*,[77] the Supreme Court of

74 *Wallace v. Van Pelt*, 969 S.W.2d 380 (Mo. Ct. App. 1998) at 386, citing Restatement (Second) of Torts § 46, cmt. j (1965).

75 Or. Rev. Stat. § 163.732 (2005).

76 S.C. Code Ann. § 16-3-1700 (Law. Co-op 2005).

77 *State v. Breen*, 767 A.2d 50 (R.I. 2001).

Rhode Island affirmed a defendant's stalking conviction, using the evidence of a prior stalking conviction with the same victim as justification for the victim suffering substantial emotional distress, despite the fact that the defendant had only left letters of poetry on the victim's windshield and mailed a few non-threatening cards to her house. The court reasoned that the defendant's behavior met the definition of harassment in the state's stalking statute because the defendant initiated these communications on the exact date that his probation ended for a prior conviction for stalking of the same victim. The court determined that, "Given the history of the relationship between defendant and complainant, we agree that the new series of specific instances of conduct by defendant and the impact they had on complainant constituted sufficient evidence for the jury to find the elements of harassment beyond a reasonable doubt under [Rhode Island's stalking statute]."[78]

Similarly, the Supreme Court of New Jersey noted that "the reasonable standard refers to persons in the victim's position and with the victim's knowledge of the defendant. 'Courts must…consider [the victim's] individual circumstances and background in determining whether a reasonable person in that situation would have believed the defendant's threat.'"[79]

The updated model stalking code adopts the standard of requiring that the behavior cause a reasonable person to feel fear, rather than requiring a state to prove the particular victim actually felt fearful.[80] It further defines a "reasonable person" to mean "a reasonable person in the victim's circumstances."[81] Including "in the victim's circumstances" underscores the importance of context when evaluating a stalking case, as was discussed more thoroughly earlier in the commentary (page 37).

78 Ibid., 56.

79 *H.E.S. v. J.C.S.*, 815 A.2d 405, 417 (N.J. 2003) quoting from *Cesare v. Cesare*, 713 A.2d 390 (N.J. 1998).

80 For additional discussion of the concept of reasonable fear, please refer back to Section Two under "Commentary to the Code," page 34.

81 Ibid.

SECTION FOUR: DEFENSES

In any prosecution under this law, it shall not be a defense that:

> **(a) the actor was not given actual notice that the course of conduct was unwanted; or**
> **(b) the actor did not intend to cause the victim fear or other emotional distress.**

Analysis and Commentary

Defenses

The updated "Model Stalking Code for the States" recommends that state stalking laws specifically exempt two typical defenses claimed by stalkers: (1) that the perpetrator was not given actual notice by the victim that his or her conduct was not wanted; or (2) that the stalker did not intend to cause the victim fear or other emotional distress.

While the 1993 model anti-stalking code did not address the issue of defenses such as these, several states have chosen to do so. North Dakota's stalking statute provides that "it is not a defense that the actor was not given actual notice that the person did not want the actor to contact or follow the person; nor is it a defense that the actor did not intend to frighten, intimidate, or harass the person."[82] Similar language is used in Washington's stalking law.[83] In these and other states, evidence that the defendant continued to engage in the course of conduct after being asked to stop by the victim creates a rebuttable presumption that the continuation of the course of conduct caused the victim to feel frightened, intimidated, or harassed.[84]

82 N.D. Cent. Code § 12.1-17-07.1(3) (2005).

83 Wash. Rev. Code Ann. § 9A.46.110(2)(a) and (b) (West 2005).

84 *See,* for example, Mich. Comp. Laws Ann. § 750.411h(4) (West 2005); Mont. Code Ann. § 45-5-220(6) (2005); and Tenn. Code Ann. § 39-17-315(f) (2005).

The model stalking code includes a statutory provision that makes these same two defenses unavailable to perpetrators charged with stalking crimes. Often, a stalker will claim that he did not know that the victim did not want him to engage in certain behaviors, or that he did not intend to cause the victim fear. In cases where the stalker suffers under the delusion that the victim is actually in love with him or her or that, if properly pursued, the victim will fall in love with him, he or she may not intend to cause the victim fear, but instead intends to form a relationship with the victim. It can be difficult for prosecutors to overcome such claims—even when they are untrue. By specifically prohibiting defendants from asserting such defenses, the updated model stalking code relieves prosecutors of the burden of refuting such claims.

The model stalking code's adoption of a general intent requirement makes it irrelevant that a stalker did not intend to cause the victim fear or other emotional distress. Specifically prohibiting a stalker from asserting a claim that he did not intend to cause such a reaction as a defense to the crime supports the model stalking code's intention to make stalking a general intent crime.

The model stalking code also does not require victims to give stalkers actual notice that the course of conduct is unwanted. Stalkers can be unreasonable and unpredictable. Recommending that a victim confront or try to reason with the individual who is stalking him or her can be dangerous and may unnecessarily increase the victim's risk of harm. Instead, the updated model stalking code places the responsibility on stalkers not to engage in behaviors that would cause a reasonable person to fear for his or her safety or to suffer other emotional distress.

Lack of Exemptions. A number of states include exemptions or affirmative defenses to stalking crimes for certain categories of persons, such as law enforcement officers, private investigators, or process servers.[85] Where these exceptions are not narrowly drawn, they raise the possibility that a stalker who happens to be employed in one of these professions or who uses one of these persons as an agent to conduct stalking could evade prosecution. There are many cases, for example, in which stalkers have hired private investigators to

85 *See*, for example, Ark. Code Ann. § 5-71-229(c) (Michie 2005); Del. Code Ann. tit. 11, § 1312A(d) (2005); Nev. Rev. Stat. Ann. § 200.575(e) (Michie 2005); Va. Code Ann. § 18.2-60.3(A) (Michie 2005); and Wash. Rev. Code Ann. § 9A.46.110 (West 2005).

track down victims. The advisory board felt strongly that these stalkers should be held accountable under the law.

Other state laws create exceptions for stalking in certain locations, such as the defendant's own home.[86] This type of language could exempt many domestic offenders from prosecution. As a result, the model stalking code does not include any exemptions or affirmative defenses for such persons or situations.

Some state stalking laws also include an exemption in their statutes for "constitutionally protected behavior,"[87] such as labor picketing or political demonstrations. This language was purposefully excluded from the model stalking code because the advisory board felt that such behavior is already covered by the Constitution and would not be criminalized under state stalking statutes.

OPTIONAL PROVISIONS

Acknowledging that states vary greatly in their approach to classifying crimes, the advisory board offers the following optional provisions to give states added perspective as they review their stalking laws.

SECTION FIVE: CLASSIFICATION

Stalking is a felony.

Aggravating factors.

The following aggravating factors shall increase the penalty for stalking:

(a) the defendant violated a protective order prohibiting contact with the victim; or

(b) the defendant was convicted of stalking any person within the previous 10 years; or

86 *See*, for example, Ga. Code Ann. § 16-5-90(a)(1) (2005); 720 Ill. Comp. Stat. 5/12-7.3(d) (West 2005); and Wyo. Stat. Ann. § 6-2-506(b)(ii) (Michie 2005).

87 *See*, for example, Ark. Code Ann. § 5-71-229(d)(1)(B)(i) (West 2005); Cal. Penal Code § 646.9(g) (West 2005); Idaho Code § 18-7906(2)(a) (2005); and Nev. Rev. Stat. Ann. § 200.575(e)(1) (Michie 2005).

(c) the defendant used force or a weapon or threatened to use force or a weapon; or
(d) the victim is a minor.

Analysis and Commentary

Classification

As with the 1993 model anti-stalking code, the updated "Model Stalking Code for States" recommends that states classify stalking as a felony. Such a classification communicates to the public that stalking is dangerous and will be taken seriously, and it assists criminal justice system professionals in holding stalkers accountable for their crimes. The longer terms of confinement generally available when a crime is classified as a felony may offer more protection for stalking victims.

Recognizing the danger of stalking, many state laws already have begun to classify stalking crimes as felonies. At present, fifteen states can classify stalking as a felony upon the first offense,[88] and thirty-four states classify stalking as a felony upon the second offense[89] and/or when the crime involves aggravating factors.[90] Only Maryland classifies all stalking cases as misdemeanor crimes.[91]

The advisory board concluded that the enactment of felony stalking statutes would enable law enforcement to have a significant impact on a stalker's

88 Alabama, Arizona, Arkansas, California (first offense stalking can be charged as a felony or a misdemeanor at the discretion of the prosecutor), Colorado, Delaware (first offense stalking can be charged as a felony if it induces actual fear in the victim), Illinois, Indiana, Kansas, Massachusetts, New Jersey, Rhode Island, South Carolina, Texas, and Wisconsin.

89 For example, Alaska, Connecticut, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

90 For example, Alaska, Connecticut, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

91 Md. Code Ann., Crim. Law § 3-802 (2005). Note: Although all stalking offenses in Maryland are classified as misdemeanors, stalkers can be sentenced up to five years.

behavior at an earlier stage and would allow more intensive post-conviction supervision. The model stalking code encourages states to classify stalking as a felony offense because the obsessive, controlling, and persistent nature of stalking presents a serious danger to victims even when other factors—such as weapons—are not involved. Although the model stalking code recommends that states establish one felony stalking offense, in states where this would not be feasible, legislatures may wish to consider creating a two-tier structure. In those states, stalking would become a felony (or higher class felony) for the commission of a second offense or if any other aggravating factors were present. This concept was also presented in the 1993 model anti-stalking code: "If stalking is not treated as a felony [upon a first offense], a state may wish to consider incorporating a system of aggravating factors into its stalking sentencing policy so that a particular stalking incident can be elevated from a misdemeanor to a felony if those aggravating factors are present."[92]

Aggravating Factors

The updated "Model Stalking Code for the States" includes an optional classification structure which incorporates aggravating factors to provide states with more flexibility in sentencing stalkers in a graduated manner which more appropriately reflects the circumstances surrounding the commission of the crime. Even in states that already treat stalking as a felony, certain aggravating circumstances may justify the imposition of enhanced penalties.

While the 1993 model anti-stalking code did not recommend specific language relating to aggravating factors for states to use in their stalking laws, it did encourage states to consider incorporating sentencing enhancements in cases involving aggravating factors, particularly when the perpetrator has committed a previous felony or stalking offense against the same victim, or when he or she has a prior conviction for stalking against a different victim.[93] The rationale behind imposing enhanced penalties in stalking cases that involve repeat offenders is that the potential for receiving a longer sentence may deter some stalkers from stalking again.

92 National Institute of Justice, "Project to Develop a Model Anti-Stalking Code for States," 49.

93 Ibid., 50.

Many states impose enhanced penalties when aggravating factors are involved in the commission of a stalking offense. The aggravating factors listed in Section Five ("Classification") of the "Model Stalking Code for the States" are those most commonly found in state stalking laws. Two-thirds of the states have increased penalties when stalking is committed in violation of a protective order.[94] At least 14 states authorize the imposition of more stringent penalties if a deadly or dangerous weapon was used during the commission of the crime.[95] A vast majority of state stalking laws include a previous conviction for a stalking offense as an aggravating factor,[96] and stalking of a minor is considered a more serious offense in at least 14 states.[97]

Some states include additional aggravating factors that trigger the imposition of enhanced penalties. In Delaware, stalking escalates from a class A misdemeanor to a class F felony if "the actor's conduct induces fear in the victim."[98] A person commits aggravated stalking in Illinois when, in conjunction with committing the offense of stalking, he or she also "causes bodily harm to the victim" or "confines or restrains the victim."[99] Ohio's stalking law includes a list of ten aggravating factors that make the offense a felony, including if: the offender has a history of violence directed toward the victim; the offender caused serious physical harm to the victim's residence or personal property; or the victim was an employee of a public children's services agency and the stalking relates to the employee's performance of official responsibilities or duties.[100]

94 *See*, for example, Ark. Code Ann. § 5-71-229 (Michie 2005); Ga. Code Ann. § 16-5-90 (2005); Ind. Code Ann. § 35-45-10-5 (Michie 2005); and Miss. Code Ann. 97-3-107 (2005).

95 *See*, for example, Iowa Code § 708.11 (2005); Ky. Rev. Stat. Ann. § 508.140 (Michie 2005); Minn. Stat. Ann. § 609.749 (West 2005); Utah Code Ann. § 76-5-106.5 (2005); and Wash. Rev. Code Ann. § 9A.46.110 (West 2005).

96 *See*, for example, Ark. Code Ann. § 5-71-229 (Michie 2005); Ga. Code Ann. § 16-5-90 (2005); Iowa Code § 708.11 (2005); Neb. Rev. Stat. § 28-311.04 (2005); and S.C. Code Ann. § 16-3-1720 (Law. Co-op. 2005).

97 *See*, for example, Alaska Stat. § 11.41.260 (Michie 2005); Conn. Gen. Stat. § 53a-181c (West 2005); Iowa Code § 708.11 (2005); and S.D. Codified Laws § 22-19A-7 (Michie 2005).

98 Del. Code Ann. tit. 11, § 1312A(e) (2005).

99 720 Ill. Comp. Stat. 5/12-7.4 (West 2005).

100 Ohio Rev. Code Ann. § 2903.211 (West 2005).

States also vary in how sentencing enhancements are reflected in their laws. Generally, states create a separate offense of "aggravated stalking,"[101] designate varying degrees of stalking (usually first and second degree),[102] or elevate the classification of the offense, or provide for harsher penalties, directly in the language of their stalking law when aggravating factors are involved.[103]

Following the lead of state stalking laws, the updated model stalking code gives states the option to incorporate a sentencing hierarchy that allows for the imposition of enhanced penalties in stalking cases that involve certain aggravating factors. The four aggravating factors selected for inclusion in this optional provision of the model stalking code were chosen for several reasons. First, they are the aggravating factors most commonly selected by states. Second, stalking involving any of these factors may pose a particularly high level of risk to victims. Finally, two of these factors—violation of a protective order and previous stalking conviction—recognize that stalkers are often recidivists who may not cease their stalking behavior without stern intervention by the criminal justice system.

The model stalking code increases the penalty for stalking when a perpetrator violates a protection order. In such cases, a criminal or civil court already has ordered a stalker to refrain from certain behaviors (e.g., from contacting the victim), and the stalker has disobeyed the court's order. The stalker's blatant disregard of a court order suggests that the stalker may go to any length to control or harm the victim.

Similarly, the model stalking code's second aggravating factor increases the penalty against stalkers who have been previously convicted of stalking. This provision is designed to punish stalkers who are recidivists and seem undeterred by initial criminal justice system intervention.

101 *See*, for example, Ala. Code § 13A-6-91 (2005); Ga. Code Ann. § 16-5-91 (2005); Haw. Rev. Stat. § 711-1106.4 (Michie 2005); 720 Ill. Comp. Stat. 5/12-7.4 (West 2005); N.M. Stat. Ann. § 30-3A-3.1 (Michie 2005); S.C. Code Ann. § 16-3-1730 (Law Co-op. 2005); and Vt. Stat. Ann. tit. 13, § 1063 (2005).

102 *See*, for example, Alaska Stat. §§ 11.41.260 and 270 (Michie 2005); Conn. Gen. Stat. §§ 53a-181c—181e (West 2005); Idaho Code §§ 18-7905 and 7906 (2005); Ky. Rev. Stat. Ann. §§ 508.140 and 150 (Michie 2005); and N.Y. Penal Law §§ 120.45—60 (Consol. 2005).

103 *See*, for example, D.C. Code Ann. § 22-404 (2005); Ind. Code Ann. § 35-45-10-5 (Michie 2005); Iowa Code § 708.11 (2005); Kan. Stat. Ann. § 21-3438 (2005); and La. Rev. Stat. Ann. § 14:40.2 (West 2005).

The model stalking code also increases the penalty for stalking in cases in which the stalker used, or threatened to use, force or a weapon to commit the crime. Like many state stalking laws, the model stalking code acknowledges that where force or weapons are present or threatened, the stalker's level of dangerousness is higher.[104] While all stalking behavior is controlling, a stalker's willingness to use a weapon is a higher indication that he or she is capable of severe violence.[105] Therefore, the model stalking code increases the penalty in stalking cases in which weapons or threats of force are present.

Finally, the model stalking code provides enhanced penalties when stalkers prey on minor victims because they are particularly vulnerable. This provision could be extended to other vulnerable victims such as the elderly or victims who have physical or mental disabilities.

The model stalking code encourages states to consider these aggravating factors and enhanced penalties when developing sentencing provisions relating to their criminal stalking laws.

SECTION SIX: JURISDICTION

As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction.

Analysis and Commentary

Jurisdiction

The updated "Model Stalking Code for the States" recommends that a person who has committed the crime of stalking can be prosecuted in any jurisdiction

104 *See* note 97.

105 Lethality assessments in the domestic violence field often screen for the presence of weapons for this reason. *See also,* Jacquelyn C. Campbell et al., "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study," *American J. of Pub. Health* 93, number 7 (July 2003), which finds that abusers' previous threats with a weapon and threats to kill were associated with substantially higher risks for femicide and that abusers' access to firearms was strongly associated with intimate partner femicide.

where any of the acts constituting the requisite course of conduct were initiated or had an effect on the victim.

The 1993 model anti-stalking code did not provide any guidance regarding jurisdictional issues. A few states include language relating to the proper jurisdiction for prosecuting a stalking case when acts are committed in multiple states. For example, Pennsylvania's stalking law states that "[a]cts indicating a course of conduct which occur in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct."[106] The Superior Court of Pennsylvania determined that "criminal jurisdiction is conferred upon Pennsylvania courts if an element of a crime was committed in Pennsylvania" based on the jurisdictional language included in Pennsylvania's stalking statute.[107] In that case, the defendant followed the victim for six years prior to showing up at her house in Pennsylvania and raping her. The court allowed incidents committed in three other states to be used as evidence to establish the requisite course of conduct necessary to then establish the crime of stalking under Pennsylvania law, stating:

> [A] "course of conduct" for the crime of stalking is established by showing that more than one act of stalking occurred over a period of time. Because 18 Pa. C.S.A. § 102(a)(1) looks also to the "result" of certain conduct, [that section] does not require that all stalking acts occur in Pennsylvania. See, Bighum; Ohle. Accordingly, the Commonwealth may prosecute for stalking when one of a series of stalking acts occurs in Pennsylvania and when that stalking act completes a "course of conduct" for purposes of the stalking statute.[108]

Stalkers often cross state or tribal lines to monitor, harass, or commit violence against victims. Advancements in technology have made it possible for stalkers to terrorize victims who live not only in different states but virtually anywhere in the world. State and local prosecutors face difficulty in prosecuting stalking cases on the state level when stalkers commit acts in different jurisdictions. The model stalking code seeks to solve this problem by permitting prosecutors to bring a stalking case in a particular jurisdiction as long as the stalker

106 18 Pa. Cons. Stat. Ann. § 2709.1(b) (West 2005).

107 *Commonwealth v. Giusto*, 810 A.2d. 123, 126 (Pa. Super. 2002).

108 Ibid., 127; 18 Pa Cons. Stat. Ann. §§ 102(a)(1) and 2709(b) (West 2005).

initiated one act in the jurisdiction, or as long as one act had an effect on the victim in the jurisdiction. For example, if a stalker followed and assaulted a victim in California, and then made a telephone threat to kill her when the victim moved to New York, courts in either California or in New York would have jurisdiction over the stalking case. This provision ensures that stalkers cannot evade prosecution simply by committing acts in different jurisdictions.

Interstate stalking may demonstrate that a stalker is particularly persistent or dangerous due to the obsessive lengths to which the stalker will go to track the victim. Under Federal Interstate Stalking Law (18 USC §2261A), it is illegal to stalk across state or tribal lines or to use mail, e-mail, the Internet, or surveillance technology to stalk someone across state lines. The jurisdiction provision of the model stalking code is not intended to supplant the Federal law; rather, it provides additional protections for stalking victims.

Section 4 Conclusion

Stalking is a serious, prevalent crime that wreaks havoc on its victims. Victims feel great fear for their personal safety and, in many cases, their lives. Research indicates that stalking is not just a crime of harassment and annoyance but that it can be a precursor to serious violence—most often occurring between people who know each other. The use of technology by stalkers to terrorize and surveil victims, which first emerged in the 1990s, is likely to increase in the coming years. Law enforcement officials, prosecutors, and judges need to be equipped with the legal tools to allow early and effective intervention that responds to the ever-expanding methods used by stalkers.

The Model Stalking Code Advisory Board and drafters of the updated model stalking code hope that the proposed legislative language will provide a roadmap for ensuring the safety of stalking victims and holding offenders accountable. In summary, the updated "Model Stalking Code for the States" recommends that states review and, as necessary, modify their stalking laws to:

- Include a legislative intent section that emphasizes the strong connections between stalking and domestic violence and between stalking and sexual assault, and underscores the importance of early intervention by law enforcement;
- Incorporate a general intent requirement instead of a specific intent requirement;
- Use a reasonable person standard of fear instead of an actual fear standard, intending that this standard be interpreted to mean a reasonable person in the victim's circumstances;

- Include two statutory prongs that establish the level of fear required to constitute stalking: (1) that a reasonable person would fear for his or her safety or the safety of a third person; or (2) that a reasonable person would suffer other emotional distress;
- Eliminate any credible threat requirement;
- Expand the standard of fear to include fear for the safety of a third person in addition to fear for the victim's own safety;
- Define "course of conduct" to include guidance regarding the range of acts contemplated and to encompass stalking behavior accomplished by or through the use of any action, method, device, or means to ensure that current and other forms of technology or surveillance that stalkers may use are covered;
- Specifically exempt two defenses typically claimed by stalkers: (1) that the perpetrator was not given actual notice by the victim that his or her conduct was not wanted; or (2) that the stalker did not intend to cause the victim fear or to suffer other emotional distress;
- Classify stalking as a felony and/or consider a two-tiered system whereby enhanced penalties can be imposed in cases that involve aggravating factors; and
- Allow prosecution of the crime of stalking in any jurisdiction where any of the acts constituting the requisite course of conduct was initiated or had an effect on the victim.

Other Legislative Considerations

Although the updated model stalking code attempts to capture the most pressing concerns facing practitioners in the field, it may not address every stalking issue a jurisdiction may face. The following are legislative considerations that states may want to contemplate in conjunction with a review of their stalking laws.

Protective Provisions. Ensuring the safety of stalking victims should be a paramount goal for state legislatures working to strengthen their stalking and related laws. One way to accomplish this is to adopt statutory protective provisions for stalking victims both within and outside of a state's criminal code. For

example, legislation included in the criminal code can provide law enforcement and courts with the authority needed to monitor stalkers in order to better protect victims. Other measures may grant stalking victims access to civil remedies that they can pursue outside of the criminal justice process.[109] State lawmakers may wish to consider enacting legislation that addresses some of the following:

- Maintaining the confidentiality of information, the disclosure of which could endanger the victim;[110]
- Setting strict bail conditions;[111]
- Issuing an order while a case is pending or at sentencing that prohibits the defendant from contacting the victim, the victim's family, or associates of the victim;[112]
- Ordering the stalker to pay restitution to the victim;
- Requiring that a detention facility notify the victim or the victim's designee upon the release of the stalker;[113] or
- Ordering supervised probation upon the stalker's release from jail.[114]

Harassment and Cyberstalking Laws. Legislators may also want to review harassment laws in their states to make sure that individuals who engage in harassing behavior that does not rise to the level of stalking are held accountable. In addition, they may find it beneficial to re-evaluate any cyberstalking or cyberharassment laws that have been passed.[115] The advisory board intended the updated model stalking code to cover all forms of stalking, including stalk-

109 *See*, for example, Ky. Rev. Stat. Ann. § 400 (Michie 2005); R.I. Gen. Laws § 9-1-2.1; Va. Code Ann. § 8.01-42.3 (Michie 2005); and Wyo. Stat. Ann. § 1-1-126 (Michie 2005).

110 *See*, for example, Mass. Gen. Laws Ann. ch. 9A, §§ 1—7 (West 2005), Neb. Rev. Stat. §§ 42-1201—1210 (2005), and Okla. Stat. Ann. tit. 22, § 60.14 (West 2005) (address confidentiality programs); Cal. Veh. Code § 1808.2 (West 2005) and Fla. Stat. Ann. § 119.071 (West 2005) (confidentiality of personal information in certain department of motor vehicles records); and Ariz. Rev. Stat. Ann. § 16-153 (West 2005) and N.J. Stat. Ann. § 19:31-3.2 (West 2005) (address confidentiality in voter registration records).

111 *See*, for example, 725 Ill. Comp. Stat. 5/110-6.3 and 10; Ohio Rev. Code Ann. § 2903.212 (West 2005); Tenn. Code Ann. § 40-11-150 (2005); and Tex. Code Crim. P. art. 17.46 (West 2005).

112 See, for example, Alaska Stat. § 12.30.025; Conn. Gen. Stat. § 54-1k (West 2005); and Tenn. Code Ann. § 39-17-315 (2005).

113 *See*, for example, Cal. Penal Code § 3058.61 (2005) and Ga. Code Ann. § 16-5-93 (2005).

114 *See*, for example, Cal. Penal Code § 646.94 (West 2005).

115 *See*, for example, 720 Ill Comp. Stat. 5/12-7.5; N.C. Gen. Stat. § 14-196.3 (2005); R.I. Gen. Laws § 11-52-4.2; and Wis. Stat. Ann. § 947.0125 (West 2005).

ing accomplished through the use of a computer or any other form of technology. Having a separate law on the books for stalking via a particular form of technology (e.g., "cyber" technically refers to anything related to computers and networking, and likely would not cover stalking by global positioning systems or spycams), may create problems when the stalker is employing multiple methods of stalking. For example, if a stalker makes a threatening phone call and sends a threatening e-mail in a jurisdiction which has both a stalking law and a cyberstalking law, the state must make a choice whether to prosecute under one or the other. It is conceivable that the behaviors may not establish the course of conduct necessary to meet the elements of either statute, based simply on the different methods employed. Loopholes like this can be closed by the enactment of one solid stalking law. The model stalking code was designed to give states the tools to create just such a law.

Looking Ahead

The advisory board and the drafters of the updated "Model Stalking Code for the States" encourage legislators and other policy makers to remain vigilant in their efforts to address the crime of stalking. Ensuring victim safety and offender accountability requires an ongoing commitment to: review and amend stalking laws as needed; monitor law enforcement agents, prosecutors, judges, and other criminal justice professionals to make certain that stalking laws are enforced to the fullest extent possible; and promote public awareness about the crime of stalking and the services available to assist stalking victims.

For More Help

The Stalking Resource Center of the National Center for Victims of Crime helps communities across the country develop multidisciplinary responses to stalking through direct technical assistance and training. The Stalking Resource Center compiles a comprehensive and continually updated collection of state stalking laws; stays apprised of the latest trends and issues in stalking; and issues a wide range of articles, reports, and fact sheets on issues related to stalking. For more assistance, please visit our Web site at *www.ncvc.org/src* or call 202-467-8700.

Section 4

Appendices

Appendix A

"Project to Develop a Model Anti-Stalking Code for States," 43-48
National Institute of Justice, U.S. Department of Justice

Appendix B

"Stalking Fact Sheet"
Stalking Resource Center, National Center for Victims of Crime

Appendix C

"Strengthening Antistalking Statutes," Legal Series Bulletin #1
Office for Victims of Crime, U.S. Department of Justice

U.S. Department of Justice
Office of Justice Programs
National Institute of Justice

National Institute of Justice

Research Report

Project To Develop a Model Anti-Stalking Code for States

APPENDIX A

CHAPTER II

A MODEL ANTI-STALKING CODE FOR THE STATES

The model anti-stalking code development project has sought to formulate a constitutional and enforceable legal framework for addressing the problem of stalking.

The model code encourages legislators to make stalking a felony offense; to establish penalties for stalking that reflect and are commensurate with the seriousness of the crime; and to provide criminal justice officials with the authority and legal tools to arrest, prosecute, and sentence stalkers.

The Model Anti-Stalking Code for the States

Section 1. For purposes of this code:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;

(b) "Repeatedly" means on two or more occasions;

(c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

Section 2. Any person who:

(a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and

(b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and

(c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;

is guilty of stalking.

Analysis and Commentary on Code Language

Section 1. For purposes of this code:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;

(b) "Repeatedly" means on two or more occasions;

(c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

Commentary

Prohibited Acts

Unlike many state stalking statutes, the model code does not list specific types of actions that could be construed as "stalking." Examples of specific acts frequently proscribed in existing stalking statutes include following, non-consensual communication, harassing, and trespassing.

Some courts have ruled that if a statute includes a specific list, the list is exclusive. The model code, therefore, does not list specifically proscribed acts because ingenuity on the part of an alleged stalker should not permit him to skirt the law. Instead, the model code prohibits defendants from engaging in "a course of conduct" that would cause a reasonable person fear.

Credible Threat

Unlike many state stalking statutes, the model code does not use the language "credible threat." Stalking defendants often will not threaten their victims verbally or in writing but will instead engage in conduct which, taken in context, would cause a reasonable person fear. The model code is intended to apply to such "threats implied by conduct." Therefore the "credible threat" language, which might be construed as requiring an actual verbal or written threat, was not used in the model code.

"Immediate Family"

A stalking defendant may, in addition to threatening the primary victim, threaten to harm members of the primary victim's family. Under the provisions of the model code, such a threat to harm an immediate family member could be used as evidence of stalking in the prosecution for stalking of the primary victim.

The model code uses a definition of "immediate family" similar to one currently pending in the California legislature. This definition is broader than the traditional nuclear family, encompassing "any other person who regularly resides in the household or who within the prior six months regularly resided in the household."

If states want to consider further expanding the definition of "immediate family," they should be aware that broadening it too much may lead to challenges that the statute is overly broad.

Section 2. Any person who:

(a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and

(b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and

(c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;

is guilty of stalking.

Commentary

Classification as a Felony

States should consider creating a stalking felony to address serious, persistent, and obsessive behavior that causes a victim to fear bodily injury or death. The felony statute could be used to handle the most egregious cases of stalking-type behavior. Less egregious cases could be handled under existing harassment or intimidation statutes. As an alternative, states may wish to consider adopting both misdemeanor and felony stalking statutes.

Since stalking defendants' behavior often is characterized by a series of increasingly serious acts, states should consider establishing a continuum of charges that could be used by law enforcement officials to intervene at various stages. Initially, defendants may engage in behavior that causes a victim emotional distress but does not cause the victim to fear bodily injury or death. For example, a defendant may make frequent but non-threatening telephone calls. Existing harassment or intimidation statutes could be used to address this type of behavior. States also may want to consider enacting aggravated harassment or intimidation statutes that could be used in situations in which a defendant persistently engages in annoying behavior. The enactment of a felony stalking statute would allow law enforcement officials to intervene in situations that may pose an imminent and serious danger to a potential victim.

Classification as a felony would assist in the development of the public's understanding of stalking as a unique crime,[84] as well as permit the imposition of penalties that would punish appropriately the defendant and provide protection for the victim.

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[84] This idea is further explained in a soon-to-be-published comment in *Georgetown Law Journal*: "Aside from statutorily defined components of stalking, a generally recognized notion of 'stalking' is evolving. Not only do anti-stalking statutes indicate recognition of stalking, public and judicial perceptions indicate that stalking is a discretely identifiable behavior. Although this public perception of stalking does not obviate the need for concise definitions in anti-stalking statutes, it does provide guidance as to the types of activity society is trying to limit through these statutes." Strikis, *supra*.

Of utmost importance is a state's decision to require the criminal justice system and related disciplines to take stalking incidents seriously.[85] A state's decision on how to classify stalking and how to establish its continuum of charges is of less importance.

"Conduct Directed at a Specific Person"

Under the model code's language, the stalking conduct must be directed at a "specific person." Threatening behavior not aimed at a specific individual would not be punishable under a statute similar to the model code. For example, a teenager who regularly drives at high speed through a neighborhood, scaring the residents, could not be charged under a stalking statute based upon the model code.

Fear of Sexual Assault

The model code language does not apply if the victim fears sexual assault but does not fear bodily injury. It is likely that victims who fear that a defendant may sexually assault them most likely also fear that the defendant would physically injure them if they resisted. Furthermore, since the human immunodeficiency virus (HIV), which causes acquired immunodeficiency syndrome (AIDS), could be contracted through a sexual assault, a victim is more likely to fear bodily injury or death, as well as psychological injury. Nevertheless, due to the nature of stalking offenses, states may want to consider expanding the language of their felony stalking statutes to include explicitly behavior that would cause a reasonable person to fear sexual assault in addition to behavior that would cause a reasonable person to fear bodily injury or death.

Intent Element

Under the provisions of the model anti-stalking code, a defendant must engage purposefully in activity that would cause a reasonable person fear and have or should have knowledge that the person toward whom the conduct is directed will be placed in reasonable fear. In other words, if a defendant consciously engages in conduct that he knows or should know would cause fear in the person at whom the conduct is directed, the intent element of the model code is satisfied.

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[85] *Id.*

A suspected stalker often suffers under a delusion that the victim actually is in love with him or that, if properly pursued, the victim will begin to love him. Therefore, a stalking defendant actually may not intend to cause fear; he instead may intend to establish a relationship with his victim. Nevertheless, the suspected stalker's actions cause fear in his victim. As long as a stalking defendant knows or should know that his actions cause fear, the alleged stalker can be prosecuted for stalking. Protection orders can serve as notice to a defendant that his behavior is unwanted and that it is causing the victim to fear.

Fear Element

Since stalking statutes criminalize what otherwise would be legitimate behavior based upon the fact that the behavior induces fear, the level of fear induced in a stalking victim is a crucial element of the stalking offense. The model code, which treats stalking as a felony, requires a high level of fear -- fear of bodily injury or death. Acts that induce annoyance or emotional distress would be punishable under statutes such as harassment or trespassing, that do not rise to the felony level and carry less severe penalties.

In some instances, a defendant may be aware, through a past relationship with the victim, of an unusual phobia of the victim's and use this knowledge to cause fear in the victim. In order for such a defendant to be charged under provisions similar to those in the model code, the victim actually must fear bodily injury or death as a result of the defendant's behavior and a jury must determine that the victim's fear was reasonable under the circumstances.

Stalking resource center

www.ncvc.org/src
Tel. (202) 467-8700
E-mail: *src@ncvc.org*

stalking *fact sheet*

THE NATIONAL CENTER FOR Victims of Crime

Crime victims can call:
1-800-FYI-CALL
M-F 8:30 AM–8:30 PM

WHAT IS STALKING?

While legal definitions of stalking vary from one jurisdiction to another, a good working definition of stalking is *a course of conduct directed at a specific person that would cause a reasonable person to feel fear.*

STALKING IN AMERICA

- 1,006,970 women and 370,990 men are stalked annually in the U.S.
- 1 in 12 women and 1 in 45 men will be stalked in their lifetime.
- 77% of female victims and 64% of male victims know their stalker.
- 87% of stalkers are men.
- 59% of female victims and 30% of male victims are stalked by an intimate partner.
- 81% of women stalked by a current or former intimate partner are also physically assaulted by that partner.
- 31% of women stalked by a current or former intimate partner are also sexually assaulted by that partner.
- 73% of intimate partner stalkers verbally threatened victims with physical violence, and almost 46% of victims experienced one or more violent incidents by the stalker.
- The average duration of stalking is 1.8 years.
- If stalking involves intimate partners, the average duration of stalking increases to 2.2 years.
- 28% of female victims and 10% of male victims obtained a protective order. 69% of female victims and 81% of male victims had the protection order violated.

[Tjaden & Thoennes. (1998). "Stalking in America," NIJ.]

IMPACT OF STALKING ON VICTIMS

- 56% of women stalked took some type of self-protective measure, often as drastic as relocating (11%). [Tjaden & Thoennes. (1998). "Stalking in America," NIJ]
- 26% of stalking victims lost time from work as a result of their victimization, and 7% never returned to work. [Tjaden & Thoennes.]
- 30% of female victims and 20% of male victims sought psychological counseling. [Tjaden & Thoennes.]
- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population, especially if the stalking involves being followed or having one's property destroyed. [Blauuw et. al. (2002). "The Toll of Stalking," *Journal of Interpersonal Violence*]

RECON STUDY OF STALKERS

- 2/3 of stalkers pursue their victims at least once per week, many daily, using more than one method.
- 78% of stalkers use more than one means of approach.
- Weapons are used to harm or threaten victims in 1 out of 5 cases.
- Almost 1/3 of stalkers have stalked before.
- Intimate partner stalkers frequently approach their targets, and their behaviors escalate quickly.

[Mohandie et al. "The RECON Typology of Stalking: Reliability and Validity Based upon a Large Sample of North American Stalkers." (In Press, *Journal of Forensic Sciences 2006*).]

STALKING AND INTIMATE PARTNER FEMICIDE*

- 76% of intimate partner femicide (murder) victims had been stalked by their intimate partner.
- 67% had been physically abused by their intimate partner.
- 89% of femicide victims who had been physically abused had also been stalked in the 12 months before the murder.
- 79% of abused femicide victims reported stalking during the same period that they reported abuse.
- 54% of femicide victims reported stalking to police before they were killed by their stalkers.

**The murder of a woman.*

[McFarlane et al. (1999). "Stalking and Intimate Partner Femicide," *Homicide Studies*].

STALKING ON CAMPUS

- 13% of college women were stalked during one six- to nine-month period.
- 80% of campus stalking victims knew their stalkers.
- 3 in 10 college women reported being injured emotionally or psychologically from being stalked.

[Fisher, Cullen, and Turner. (2000). "The Sexual Victimization of College Women," NIJ/BJS.]

THE STALKING RESOURCE CENTER

The Stalking Resource Center is a program of the National Center for Victims of Crime. Our dual mission is to raise national awareness of stalking and to encourage the development and implementation of multidisciplinary responses to stalking in local communities across the country.

We can provide you with:

- Training and Technical Assistance
- Protocol Development
- Resources
- Help in collaborating with other agencies and systems in your community

Contact us at: 202-467-8700 or *src@ncvc.org*.

STATE LAWS[1]

- Stalking is a crime under the laws of all 50 states, the District of Columbia, and the Federal Government.
- 15 states classify stalking as a felony upon the first offense.
- 34 states classify stalking as a felony upon the second offense and/or when the crime involves aggravating factors.[2]
- Aggravating factors may include: possession of a deadly weapon; violation of a court order or condition of probation/parole; victim under 16; same victim as prior occasions.

[1] Last updated October 2005.
[2] In Maryland, stalking is always a misdemeanor.

For a compilation of state, tribal and Federal laws visit: www.ncvc.org/src

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Contact us at (202) 467-8700 or *src@ncvc.org.*

APPENDIX B

U.S. Department of Justice
Office of Justice Programs
Office for Victims of Crime

JANUARY 2002

STRENGTHENING ANTISTALKING STATUTES

LEGAL SERIES
#1
BULLETIN

Message From THE DIRECTOR

Over the past three decades, the criminal justice field has witnessed an astounding proliferation of statutory enhancements benefiting people who are most directly and intimately affected by crime. To date, all states have passed some form of legislation to benefit victims. In addition, 32 states have recognized the supreme importance of fundamental and express rights for crime victims by raising those protections to the constitutional level.

Of course, the nature, scope, and enforcement of victims' rights vary from state to state, and it is a complex and often frustrating matter for victims to determine what those rights mean for them. To help victims, victim advocates, and victim service providers understand the relevance of the myriad laws and constitutional guarantees, the Office for Victims of Crime awarded funding to the National Center for Victims of Crime to produce a series of bulletins addressing salient legal issues affecting crime victims.

Strengthening Antistalking Statutes, the first in the series, provides an overview of state legislation and current issues related to stalking. Although stalking is a crime in all 50 states, significant variation exists among statutes as to the type of behavior prohibited, the intent of the stalker, whether a threat is required, and the

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Introduction

Stalking is a crime of intimidation. Stalkers harass and even terrorize through conduct that causes fear or substantial emotional distress in their victims. A recent study sponsored by the National Institute of Justice (NIJ) (U.S. Department of Justice) and the Centers for Disease Control and Prevention estimates that 1 in 12 women and 1 in 45 men have been stalked during their lifetime.[1] Although stalking behavior has been around for many years, it has been identified as a crime only within the past decade. Most laws at the state level were passed between 1991 and 1992. As more is learned about stalking and stalkers, legislatures are attempting to improve their laws.[2]

In 1993, under a grant from NIJ, a working group of experts was assembled to develop a model state stalking law.[3] Many of its recommendations have been followed as states have amended their laws.[4]

Status of the Law

Generally, stalking is defined as the willful or intentional commission of a series of acts that would cause a reasonable person to fear death or serious bodily injury and that, in fact, does place the victim in fear of death or serious bodily injury. Stalking is a crime in every state. Every state has a stalking law, although the harassment laws of some states also encompass stalking behaviors. In most states, stalking is a Class A or first degree misdemeanor except under certain circumstances, which include stalking in violation of a protective order, stalking while armed, or repeat offenses. In addition, states typically have harassment statutes, and one state's harassment law might encompass behaviors that would be considered stalking in another state.

Significant variation exists among state stalking laws. These differences relate primarily to the type of repeated behavior that is prohibited, whether a threat is required as part of stalking, the reaction of the victim to the stalking, and the intent of the stalker.

Prohibited Behavior

Most states have broad definitions of the type of repeated behavior that is prohibited, using terms such as "harassing," "communicating," and "nonconsensual contact." In

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reaction of the victim to the stalking. This bulletin and the others in the Legal Series highlight various circumstances in which relevant laws are applied, emphasizing their successful implementation.

We hope that victims, victim advocates, victim service providers, criminal justice professionals, and policymakers in states across the Nation will find the bulletins in this series helpful in making sense of the criminal justice process and in identifying areas in which rights could be strengthened or more clearly defined. We encourage you to use these bulletins not simply as informational resources but as tools to support victims in their involvement with the criminal justice system.

John W. Gillis
Director

some states, specific descriptions of stalking behavior are included in the statute. For example, Michigan's stalking law provides that unconsented contact includes, but is not limited to, any of the following:

1. Following or appearing within sight of that individual.
2. Approaching or confronting that individual in a public place or on private property.
3. Appearing at that individual's workplace or residence.
4. Entering onto or remaining on property owned, leased, or occupied by that individual.
5. Contacting that individual by telephone.
6. Sending mail or electronic communications to that individual.
7. Placing an object on or delivering an object to property owned, leased, or occupied by that individual.[5]

A handful of states have narrow definitions of stalking. Illinois, for example, limits stalking to cases involving following or keeping a person under surveillance.[6] Maryland requires that the pattern of conduct include approaching or pursuing another person.[7] Hawaii is similar, limiting stalking to cases in which the stalker pursues the victim or conducts surveillance of the victim.[8] Connecticut limits stalking to following or lying in wait.[9] Wisconsin requires "maintaining a visual or physical proximity to a person."[10]

Threat

When stalking laws were first adopted in states across the country, many laws required the making of a "credible threat" as an element of the offense. Generally, this was defined as a threat made with the intent and apparent ability to carry out the threat. As understanding of stalking has grown, however, most states have modified or eliminated the credible-threat requirement. Stalkers often present an implied threat to their victims. For example, repeatedly following a person is generally perceived as threatening. The threat may not be expressed but may be implicit in the context of the case.

Only two states—Arkansas and Massachusetts—require the making of a threat to be part of stalking,[11] although a few other states require an express threat as an element of aggravated stalking. Most states currently define stalking to include implied threats or specify that threats can be, but are not required to be, part of the pattern of harassing behavior.

Reactions of the Victim

Stalking is defined in part by a victim's reaction. Typically, stalking is conduct that "would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family"[12] or "would cause a reasonable person to suffer substantial emotional distress"[13] and does cause the victim to have such a reaction. Some states refer to conduct that seriously "alarms," "annoys," "torments," or "terrorizes" the victim, although many of those states also require that the conduct result in substantial emotional distress.[14] Others refer to the victim's fear for his or her "personal safety";[15] feeling "frightened, intimidated, or threatened";[16] or fear "that the stalker intends to injure the person, another person, or property of the person."[17] In general, however, stalking statutes provide that the conduct must be of a nature that would cause a specified reaction on the part of the victim and in fact does cause the victim to have that reaction.[18]

Intentions of the Stalker

Originally, most stalking statutes were "specific intent" crimes; they required proof that the stalker intended to cause the victim to fear death or personal injury or to have some other particular reaction to the stalker's actions. The subjective intent of a person, however, can be difficult to prove. Therefore, many states have revised their statutes to make stalking a "general intent" crime; rather than requiring proof that the defendant intended to cause a reaction on the part of the victim, many states simply require that the stalker intentionally committed prohibited acts.

Other states require that in committing the acts, the defendant must know, or reasonably should know, that the acts would cause the victim to be placed in fear. The latter approach was recommended in the NIJ Model Antistalking Code project. At least two courts have discussed the model's language in finding that general intent is sufficient.[19]

Exceptions

Most states have explicit exceptions under their stalking laws for certain behaviors, commonly described simply as "constitutionally protected activity." Many also specifically exempt licensed investigators or other professionals operating within the scope of their duties;[20] however, it may not be necessary to provide such exceptions within the statute itself. The Supreme Court of Illinois interpreted that state's stalking laws to prohibit only conduct performed "without lawful authority," even though the laws do not contain that phrase. The court reasoned that "[t]his construction . . . accords with the legislature's intent in enacting the statutes to prevent violent attacks by allowing the police to act before the victim was actually injured and to prevent the terror produced by harassing actions."[21]

Aggravating Circumstances

Many state codes include an offense of aggravated stalking or define stalking offenses in the first and second degrees. Often, the higher level offense is defined as stalking in violation of a protective order,[22] stalking while armed with a deadly weapon,[23] a second or subsequent conviction of stalking,[24] or stalking a minor.[25] Many states without a separately defined higher offense provide for enhanced punishment for stalking under such conditions.

Challenges to Stalking Laws

Most of the cases challenging the constitutionality of stalking laws focus on one of two questions: whether the statute is overbroad or whether it is unconstitutionally vague. A statute is unconstitutionally overbroad when it inadvertently criminalizes legitimate behavior. In a Pennsylvania case, the defendant claimed the stalking statute was unconstitutional because it criminalized a substantial amount of constitutionally protected conduct. In that case, the defendant engaged in a campaign of intimidating behavior against a judge who had ruled against him in a landlord-tenant case. For nearly a year, the defendant made regular phone calls and distributed leaflets calling the judge "Judge Bimbo," "a cockroach," "a gangster," and "a mobster." During one of his many calls to the judge's chambers, her secretary asked him if his intentions were "to alarm and disturb" the judge. The defendant replied, "I would hope that my calls alarm her. I am working very hard at it. If my calls are disturbing, wait until she sees what happens next." He also called and spoke about the bodyguard hired for the judge and the judge carrying a gun "to let [her] know that he's watching and knows what is going on."

The court in that case found that the statute was not overbroad and did not criminalize constitutionally protected behavior. The court noted that "[t]he appellant cites us no cases, nor are we able to locate any, announcing a constitutional right to 'engage in a course of conduct or repeatedly committed acts toward another person [with the] intent to cause substantial emotional distress to the person.' "[26]

Defendants have also argued that stalking laws are unconstitutionally vague. The essential test for vagueness was set out by the U.S. Supreme Court in 1926. A Government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[27] Whether a given term is unconstitutionally vague is left to the interpretation of each state's courts.

In a New Jersey stalking case, the court rejected the defendant's claim that the statute was unconstitutionally vague, finding the defendant's conduct "unquestionably proscribed by the statute." In that case, the defendant had maintained physical proximity to the victim on numerous occasions, late at night, that the court found to be threatening, purposeful, and directed at the victim. He repeatedly asked for sexual contact that he knew was unwanted, and he implied that she had better agree. "To suggest, as the defendant does, that his activity could be seen as the pursuit of 'normal social interaction' is absurd. On the contrary, his conduct was a patent violation of the statute."[28]

In a Michigan case, the defendant also argued that the stalking statutes were unconstitutionally vague and violated his first amendment right to free speech. The court disagreed. "Defendant's repeated telephone calls to the victim, sometimes 50 to 60 times a day whether the victim was at home or at work, and his verbal threats to kill her and her family do not constitute protected speech or conduct serving a legitimate purpose, even if that purpose is 'to attempt to reconcile,' as defendant asserts."[29]

Claims that stalking laws were unconstitutionally vague have focused on the wide range of terms commonly used in such laws. For example, courts have ruled that the following terms were not unconstitutionally vague: "repeatedly,"[30] "pattern of conduct,"[31] "series,"[32] "closely related in time,"[33] "follows,"[34] "lingering

outside,"[35] "harassing,"[36] "intimidating,"[37] "maliciously,"[38] "emotional distress"[39] "reasonable apprehension,"[40] "in connection with,"[41] and "contacting another person without the consent of the other person."[42]

Courts have also determined that terms such as "without lawful authority"[43] and "serves no legitimate purpose"[44] were not unconstitutionally vague. The Oregon Court of Appeals, however, did invalidate that state's stalking law on the grounds that the term "legitimate purpose" was unconstitutionally vague.[45] The court found that the statute did not tell a person of ordinary intelligence what was meant by the term "legitimate purpose"; therefore, the statute gave no warning as to what conduct must be avoided. The Oregon legislature later revised the statute to remove the phrase.

The Supreme Court of Kansas found that state's stalking statute unconstitutionally vague because it used the terms "alarms," "annoys," and "harasses" without defining them or using an objective standard to measure the prohibited conduct. "In the absence of an objective standard, the terms . . . subject the defendant to the particular sensibilities of the individual. . . . [C]onduct that annoys or alarms one person may not annoy or alarm another. . . . [A] victim may be of such a state of mind that conduct that would never annoy, alarm, or harass a reasonable person would seriously annoy, alarm, or harass this victim."[46] Kansas has since amended its statute, and the amended statute has been ruled constitutional. The court specifically found that the revised law included an objective standard, that is, the standard of a "reasonable person," and defined the key terms "course of conduct," "harassment," and "credible threat."[47]

Similarly, the Texas Court of Criminal Appeals found that state's original antistalking law unconstitutionally vague. Although there were several factors in this ruling, the expansive nature of the prohibited conduct was a key point in the decision. That conduct included actions that would "annoy" or "alarm" the victim. The court observed that "the First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed."[48] The Texas Legislature subsequently revised the law to correct the problem.

Massachusetts's stalking law was also declared unconstitutionally vague because it provided that a person could be guilty of stalking if that person repeatedly harassed the victim. "Harass" was defined as a pattern of conduct or series of acts. Thus, the court found that the statutory requirement of repeated harassment meant that a person "must engage repeatedly (certainly at least twice) in a pattern of conduct or series of acts over a period of time. . . . One pattern or one series would not be enough." The court noted that the legislature presumably intended a single pattern of conduct or a single series of acts to constitute the crime but did not state this with sufficient clarity to meet the constitutional challenges.[49] The Commonwealth has since revised its stalking law to address the issue.

Other courts have disagreed with the reasoning of the Massachusetts decision. The Rhode Island Supreme Court declared that the Massachusetts court's "metaplasmic[†] approach . . . has attracted little, if any following." The court found that the statute, as drafted, met the constitutional test by giving adequate warning to potential offenders of the prohibited conduct. "It indeed defies logic to conclude that a defendant would have to commit more than one series of harassing acts in order to be found guilty of stalking."[50] The D.C. Court of Appeals reached a similar conclusion.[51]

Attempted Stalking

At least one state has grappled with the question of whether a person can be charged with attempted stalking. In Georgia, a defendant made harassing and bizarre phone calls to his ex-wife. The defendant was arrested and released under the condition that he was to have "[a]bsolutely no contact with the victim or the victim's family." A few weeks later, he called his ex-wife's office, claiming to be the district attorney, and asked personal questions about his ex-wife. He later attempted to call his ex-wife at the office, but she was out of town. He told a coworker to tell his ex-wife that "when she gets home she can't get in." The Georgia Supreme Court found that it was not absurd or impractical to criminalize attempting to stalk, which under the terms of the statute meant attempting to follow, place under surveillance, or contact another, when it was done with the requisite specific intent to cause emotional distress by inducing a reasonable fear of death or bodily injury. A concurring Justice noted that to hold otherwise would be to permit a stalker "to intimidate and harass his intended victim simply by communicating his threats to third parties who (the stalker knows and expects) will inform the victim."[52]

[†] *Metaplasmia:* alteration of regular verbal, grammatical, or rhetorical structure usually by transposition of the letters or syllables of a word or of the words in a sentence. *Metaplasmic*, adj. (*Webster's Third New International Dictionary*, 1971).

Current Issues

Cyberstalking

As the use of computers for communication has increased, so have cases of "cyberstalking." A 1999 report by the U.S. Attorney General called cyberstalking a growing problem. After noting the number of people with access to the Internet, the report states, "Assuming the proportion of cyberstalking victims is even a fraction of the proportion of persons who have been the victims of offline stalking within the preceding 12 months, there may be potentially tens or even hundreds of thousands of victims of recent cyberstalking incidents in the United States."[53]

Many stalking laws are broad enough to encompass stalking via e-mail or other electronic communication, defining the prohibited conduct in terms of "communication," "harassment," or "threats" without specifying the means of such behavior. Others have specifically defined stalking via e-mail within their stalking or harassment statute.

For example, California recently amended its stalking law to expressly include stalking via the Internet.[54] Under California law, a person commits 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 for his or her safety, or the safety of his or her immediate family." The term "credible threat" includes "that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements." "Electronic communication device" includes "telephones, cellular phones, computers, video recorders, fax machines, or pagers."

Bail Restrictions

States are grappling with the matter of pretrial release of people charged with stalking. Because stalkers often remain dangerous after being charged with a crime, states have sought means to protect victims at the pretrial stage. Many states permit the court to enter a no-contact order as a condition of pretrial release.[55] A few give the court discretion to deny bail. For example, Illinois allows a court to deny bail when the court, after a hearing, "determines that the release of the defendant would pose a real and present threat to the physical safety of the alleged victim of the offense and denial of . . . bail . . . is necessary to prevent fulfillment of the threat upon which the charge is based."[56]

Lifetime Protection Orders

Stalkers frequently remain obsessed with their targets for years. Requiring victims to file for a new protective order every few years can be unduly burdensome. Because victims may have attempted to conceal their whereabouts from the stalkers, reapplying for a protective order may inadvertently reconnect stalkers with their victims. In New Jersey, this problem has been alleviated. A conviction for stalking in that state operates as an application for a permanent restraining order. The order may be dissolved on application of the victim.[57]

Conclusion

Stalking is a serious and pervasive criminal offense. The Nation is increasingly aware of the danger stalkers pose and of the need for effective intervention. Research into the nature and extent of stalking is ongoing. As more is learned about effective responses to stalkers, laws will continue to evolve. Victim advocates and victim service providers must work closely with law enforcement and prosecutors to identify what additional legislative changes are needed to better protect stalking victims.

About This Series

OVC Legal Series bulletins are designed to inform victim advocates and victim service providers about various legal issues relating to crime victims. The series is not meant to provide an exhaustive legal analysis of the topics presented; rather, it provides a digest of issues for professionals who work with victims of crime.

Each bulletin summarizes—

- Existing legislation.
- Important court decisions in cases where courts have addressed the issues.
- Current trends or "hot topics" relating to each legal issue.

Notes

1. Tjaden, Patricia, and Nancy Thoennes (1998). *Stalking in America: Findings From the National Violence Against Women Survey*. Washington, DC: U.S. Department of Justice, National Institute of Justice and the Centers for Disease Control and Prevention.

2. This bulletin focuses on state stalking laws. For the federal interstate stalking law, see 18 U.S.C. § 2261A (2001).

3. National Criminal Justice Association (1993). *Project To Develop a Model Anti-Stalking Code for States*. Washington, DC: National Institute of Justice. To receive a copy of the final report of this project, contact the National Criminal Justice Reference Service at 1–800–851–3420 and ask for publication NCJ 144477.

4. For more indepth information on the problem of stalking, see *Stalking and Domestic Violence: The Third Annual Report to Congress Under the Violence Against Women Act*, Washington, DC: U.S. Department of Justice, Violence Against Women Grants Office, 1998.

5. Mich. Stat. Ann. § 28.643(8) (2000).

6. 720 Ill. Comp. Stat. 5/12-7.3 (2001).

7. Md. Ann. Code art. 27, § 124 (2001).

8. Haw. Rev. Stat. §§ 711-1106.4, -1106.5 (2000).

9. Conn. Gen. Stat. §§ 53a-181d, -181e (2001).

10. Wis. Stat. Ann. § 940.32 (2000).

11. Ark. Stat. Ann. § 5-71-229 (2001); Mass. Gen. Laws Ann. ch. 265, § 43 (2001).

12. N.J. Stat. Ann. § 2C:12-10 (2001).

13. For example, Cal. Penal Code § 646.9 (Deering 2001); Kan. Stat. Ann. § 21-3438 (2000).

14. Kan. Stat. Ann. § 21-3438 (2000). See also Ky. Rev. Stat. § 508.150 (2001); Me. Rev. Stat. Ann. tit. 17-A, § 210-A (2000); Miss. Code Ann. § 97-3-107 (2001).

15. N.H. Rev. Stat. Ann. § 633:3-a (2000).

16. N.M. Stat. Ann. § 30-3A-3 (2000).

17. Wash. Rev. Code Ann. § 9A.46.110 (2001).

18. The specific terms are subject to the interpretation of each state's courts.

19. *State* v. *Neuzil*, 589 N.W.2d 708 (Iowa 1999); *State* v. *Cardell*, 318 N.J. Super. 175, 723 A.2d 111 (N.J. Super. Ct. App. Div. 1999).

20. For example, Ark. Stat. Ann. § 5-71-229 (2001).

21. *People* v. *Bailey*, 167 Ill. 2d 210, 657 N.E.2d 953 (1995).

22. For example, Ala. Code § 13A-6-91 (2001); N.M. Stat. Ann. § 30-3A-3.1 (2000).

23. For example, Ark. Stat. Ann. § 5-71-229 (2001) (stalking in the first degree).

24. For example, Vt. Stat. Ann. § 13-1063 (2001).

25. For example, Fla. Stat. § 784.048 (2000).

26. *Commonwealth* v. *Schierscher*, 447 Pa. Super. 61, 668 A.2d 164 (Pa. Super. Ct. 1995).

27. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

28. *State* v. *Cardell*, 318 N.J. Super. 175, 723 A.2d 111 (N.J. Super. Ct. App. Div. 1999).

29. *People* v. *White*, 212 Mich. App. 298, 536 N.W.2d 876 (Mich. Ct. App. 1995).

30. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995); *State* v. *McGill*, 536 N.W.2d 89 (S.D. 1995).

31. *State* v. *Dario*, 106 Ohio App. 3d 232, 665 N.E.2d 759 (Ohio Ct. App. 1995).

32. *State* v. *Randall*, 669 So.2d 223 (Ala. Crim. App. 1995).

33. *State* v. *Dario*, 106 Ohio App. 3d 232, 665 N.E.2d 759 (Ohio Ct. App. 1995).

34. *State* v. *Lee*, 135 Wash. 2d 369, 957 P.2d 741 (1998); *People* v. *Zamudio*, 293 Ill. App. 3d 976, 689 N.E.2d 254 (Ill. App. Ct. 1997).

35. *State* v. *Schleirermacher*, 924 S.W.2d 269 (Mo. 1996).

36. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995).

37. Id.

38. *State* v. *McGill*, 536 N.W.2d 89 (S.D. 1995).

39. *Woolfolk* v. *Commonwealth*, 18 Va. App. 840, 447 S.E.2d 530 (Va. Ct. App. 1994); *Salt Lake City* v. *Lopez*, 313 Utah Adv. Rep. 26, 935 P.2d 1259 (Utah Ct. App. 1997).

40. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995).

41. *People* v. *Baer*, 973 P.2d 1225 (Colo. 1999).

42. *Johnson* v. *State*, 264 Ga. 590, 449 S.E.2d 94 (1994).

43. *State* v. *Lee*, 135 Wash. 2d 369, 957 P.2d 741 (1998).

44. *People* v. *Tran*, 47 Cal. App. 4th 253, 54 Cal. Rptr. 2d 650 (Cal. Ct. App. 1996).

45. *State* v. *Norris-Romine*, 134 Or. App. 204, 894 P.2d 1221 (Or. Ct. App. 1995).

46. *State* v. *Bryan*, 259 Kan. 143, 910 P.2d 212 (1996).

47. *State* v. *Rucker*, 1999 Kan. LEXIS 410 (1999).

48. *Long* v. *State*, 931 S.W.2d 285, 290 n. 4 (Tex. Crim. App. 1996).

49. *Commonwealth* v. *Kwiatkowski*, 418 Mass. 543, 637 N.E.2d 854 (1994).

50. *State* v. *Fonseca*, 670 A.2d 1237 (R.I. 1996).

51. *United States* v. *Smith*, 685 A.2d 380 (App. D.C. 1996).

52. *State* v. *Rooks*, 266 Ga. 528, 468 S.E.2d 354 (1996).

53. *Cyberstalking: A New Challenge for Law Enforcement and Industry*, A Report From the Attorney General to the Vice President, August 1999, p. 6.

54. Cal. Penal Code § 646.9 (Deering 2001).

55. For example, Alaska Stat. § 12.30.025 (2001); Md. Ann. Code art. 27, § 616½ (2001).

56. 725 Ill. Comp. Stat. 5/110-4, -6.3 (2001).

57. N.J. Stat. § 2C:12-10.1 (2001).

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