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A SEARCH FOR SOLUTIONS: EVALUATING THE LATEST ANTI-STALKING DEVELOPMENTS AND THE NATIONAL INSTITUTE OF JUSTICE MODEL STALKING CODE

KIMBERLY A. TOLHURST*

Beatings by men are the leading cause of injury for American women.¹ Many people ask why these women do not leave their batterers. The answer often has its roots in the crime of stalking. As the mother of a battered woman who was stalked and murdered by her abuser explains, "People ask 'Why don't battered women leave?' They get killed. That's why."² Unwilling to relinquish control, "batterers [can] become stalkers, pursuing their victims after the victims leave the abusive relationship."³ Stalking is a problem faced not only by domestic violence victims or women in general. Virtually anyone can fall prey to a stalker.

First, this Comment will define stalking and explain the urgency of the issue. Second, it will discuss and evaluate the stalking laws developed by the states. Third, it will compare the state laws with the National Institute of Justice Model Anti-Stalking Code for States in order to determine which provisions best protect stalking victims.

I. STALKING DEFINED

Most states define stalking as the "willful, malicious, and repeated following and harassing of another person."⁴ Although stalking can happen to anyone, it usually occurs in one of two contexts.⁵ The first type involves stalkers who do not know their victims or have only a passing acquaintance with the victim.⁶

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1. George Lardner, *After the Murder, Massachusetts Gets a Common-Sense Law*, WASH. POST, Nov. 22, 1992, at C3.

2. Ann Jones, *Why Doesn't She Leave?*, MIRABELLA, Nov. 1993, at 180.

3. Laurie Salame, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67, 85 (1993).

4. NATIONAL INST. OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR STATES: RESEARCH REPORT 13 (1993) [hereinafter NIJ RESEARCH REPORT]; Silvija A. Strikis, Note, *Stopping Stalking*, 81 GEO. L.J. 2771, 2782 (1993).

5. Lowell T. Woods, Jr., Note, *Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders*, 27 IND. L. REV. 449, 450 (1993).

6. *Id.*

This type is called erotomania, or "phantom lover syndrome."⁷ The far more prevalent type of stalking behavior is part of a cycle of domestic violence and occurs when a lover or spouse is rejected.⁸

Stalking horrifies its victims and often makes it impossible for them to conduct their daily lives in a normal fashion. Anecdotal evidence from stalking victims reveals the many forms that stalking can take, from calling, writing, and making threats to following and carrying out actual attacks.⁹ Pennsylvania prosecutor Barbara Jo Cohan was stalked for twenty years by a man she counseled during her "short career as a psychiatric social worker."¹⁰ The stalker believed that he had a romantic relationship with Cohan and repeatedly told her he wanted her to bear his children.¹¹ He even wrote a letter to her supervisor, explaining how much Cohan loved him.¹² The ceaseless stalking played a large role in Cohan's decision to go to law school. "In 1974," Cohan explained, "I had judges telling me [that being stalked is] an occupational hazard I saw him go into court and walk away [a free man]. After a while, I gave up on the . . . criminal justice system."¹³ Recently, Cohan's stalker was apprehended after he was found searching for her in a federal courthouse with a large knife.¹⁴ Cohan is pleased with the creation of stalking legislation and wishes it had been in place when her stalker first targeted her twenty years ago.¹⁵

In contrast, Maryann Michalski is not satisfied with the stalking law in her state of Illinois and feels that the court system has failed her.¹⁶ The Chicago woman fled from a courtroom in June 1993 after her former boyfriend was sentenced to probation on an aggravated stalking charge. In tears, she exclaimed, "He's going to kill me. He's going to kill me."¹⁷ The judge indicated that he could not incarcerate the stalker because the former couple had maintained a friendship after their live-in relationship

7. *Id.*

8. *Id.*

9. *See infra* notes 10-24 and accompanying text.

10. Lisa Brennan, *Prosecutor Grateful for Stalking Legislation*, LEGAL INTELLIGENCER, June 25, 1993, at 1.

11. *Id.*

12. *Id.*

13. *Id.* (second alteration in original).

14. *Id.*

15. *Id.*

16. *Accused Stalker Gets Probation*, LEGAL INTELLIGENCER, June 11, 1993, at 5.

17. *Id.*

ended.¹⁸ For many judges, the existence of an amicable relationship casts doubt on the reasonableness of the stalking victim's fear.¹⁹

Recently, the highly publicized account of Swarthmore College student Alexis Clinansmith's claim that she was being stalked by fellow student Ewart Yearwood created more questions regarding what behavioral patterns constitute stalking.²⁰ According to Clinansmith, Yearwood appeared wherever Clinansmith went, entered her room without her permission, and stood outside her dormitory for hours.²¹ Swarthmore President Alfred H. Bloom determined that Yearwood had not "harassed" Clinansmith, but rather he had displayed a "pattern of intimidation."²² Bloom directed Yearwood to leave school for a year, but Swarthmore agreed to pay Yearwood's tuition at another institution.²³ In December 1993 Clinansmith asked the Delaware County District Attorney to consider bringing charges against Yearwood, but Clinansmith later decided not to pursue the matter and no charges were filed.²⁴ The difficulties Clinansmith had in showing she had been stalked are indicative of the lack of consensus of what constitutes stalking.

II. WHY IS STALKING AN URGENT ISSUE?

The foregoing examples represent only three of the thousands of stalking cases nationwide. In 1993 it was estimated that there were as many as 200,000 stalkers in the United States.²⁵ Such evidence points to the need for effective stalking laws. Successful stalking laws could save countless lives: approximately ninety percent of all women killed by their husbands or boyfriends were stalked by them prior to the fatal attack.²⁶

18. *Id.*

19. See *infra* notes 31-33 and accompanying text.

20. Mary Jordan, *Case of He Said, She Said Embroils Swarthmore in 'Sexual Politics,'* WASH. POST, Jan. 27, 1994, at A3.

21. *Id.*

22. *Id.*

23. *Id.*

24. Marie McCullough, *Swarthmore Freshman Won't Face Stalking Charge in a Case That Got National Attention: The Student Who Sought Charges Said She Wants to Drop the Case*, PHILA. INQUIRER, Mar. 2, 1994, at MD1.

25. *Antistalking Proposals: Hearing on Combating [sic] Stalking and Family Violence Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 3 (1993) (statement of Sen. Joseph R. Biden, Chairman).

26. *Id.* at 10 (statement of Sen. William S. Cohen).

Although the need for stalking laws is great, creating effective legislation is not an easy task due to the special nature of stalking. As many as seventy-five to eighty percent of all stalking cases involve people who were once married or dating.²⁷ One concern is that judges and police do not take seriously what they regard as a family matter.²⁸ Another complication is that, as with other crimes involving husbands and boyfriends, women often decline to report attacks in stalking situations.²⁹ A recent survey indicated that eighteen percent of all women attacked by their husbands or boyfriends did not report the attack to the police, compared with three percent of victims attacked by strangers.³⁰ Finally, a judge may have difficulty "in discerning a credible threat from a casual remark."³¹ Northwestern University Law Professor Ronald Allen provides one example of this difficulty: a husband who says "Remember New Jersey?" may seem harmless to a judge, but the wife may know that the husband is referring to an incident in New Jersey during which he beat her severely.³² This difficulty is a particularly large obstacle to overcome. The goal of stalking laws "is to personalize threats," but what constitutes a threat "cannot possibly be captured by a rule."³³

Another difficulty in drafting stalking legislation relates to those stalking situations between strangers or acquaintances, as well as situations involving people who were once married or dating. Stalking laws, to be effective, must be invoked at an earlier stage than other criminal laws.³⁴ Legislative attorney Kenneth Thomas argues that stalking laws create "a tension between what criminal law traditionally has done—punish past behavior—and using criminal law in a more preventative way."³⁵ The traditional method for dealing with this crime, civil protection orders, simply does not provide enough protection against

27. Michele Ingrassia, *Stalked to Death?*, NEWSWEEK, Nov. 1, 1993, at 28.

28. Jones, *supra* note 2, at 178.

29. *Most Female Crime Victims Knew Attackers Study Finds*, WASH. POST, Jan. 31, 1994, at A5.

30. *Id.*

31. See Ingrassia, *supra* note 27, at 28.

32. *Id.*

33. *Id.* (quoting Professor Ronald Allen of Northwestern University).

34. See Strikis, *supra* note 4, at 2777, 2779 (proposing that stalking laws bring offenders into the judicial system before the escalation to physical harm that most criminal statutes prohibit).

35. Renée Cordes, *Watching Over the Watched: Greater Protection Sought for Stalking Victims*, TRIAL, Oct. 1993, at 12, 13.

stalkers.³⁶ One reason is the widespread lack of enforcement.³⁷ A national study found that when violators of civil protection orders flee before the police arrive, the officers typically do not pursue the offender or obtain an arrest warrant.³⁸ Additionally, the reach of legislation providing for the use of protection orders is often limited to certain types of abuse, certain persons, and certain forms of relief.³⁹

Despite the many difficulties involved in crafting a stalking law, a rising death toll and growing public outcry forced states to act. In 1990, following the murder of actress Rebecca Schaeffer by a stalker, California passed the nation's first stalking law.⁴⁰ California's action was a positive step, both symbolically and tactically. Symbolically, anti-stalking legislation provides the victim with the advantage of a criminal complaint; it promotes recognition of the seriousness of stalking.⁴¹ The legislation also sends a message that violence against women will not be tolerated;⁴² this message is especially important considering that, historically, society has accepted wifebeating.⁴³ Tactically, stalking laws enable police officers to stop the violence before it escalates by breaking the typical chain of misdemeanor prosecutions which does nothing to stop the ultimate threat to a victim's safety.⁴⁴

III. STATE STALKING LAWS

A. *California Responds: The Nation's First Stalking Law*

California's stalking law defines a stalker as one who "willfully, maliciously, and repeatedly follows or harasses another person

36. Strikis, *supra* note 4, at 2776 (citing Peter Finn & Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, in ISSUES AND PRACTICES IN CRIMINAL JUSTICE 2-3 (National Inst. of Justice ed., 1990)).

37. Peter Finn & Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, in ISSUES AND PRACTICES IN CRIMINAL JUSTICE 2-3 (National Inst. of Justice ed., 1990).

38. *Id.*

39. Woods, *supra* note 5, at 451. For an in-depth discussion of the way civil protection orders operate in harassment cases, see *id.* at 452-56.

40. Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 992 (1993); see statute *infra* note 45.

41. Strikis, *supra* note 4, at 2777.

42. *Id.* at 2777-82.

43. JUDITH LORBER, PARADOXES OF GENDER 73 (1994).

44. Salame, *supra* note 3, at 98-99.

and who 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."⁴⁵

45. CAL. PENAL CODE § 646.9(a) (West Supp. 1994). The statute reads in full:

(a) Any person who willfully, maliciously, and repeatedly follows or harasses another person and who 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, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years.

(c) Every person who, having been convicted of a felony under this section, commits a second or subsequent violation of this section shall be punished by imprisonment in the state prison for two, three, or four years.

(d) For purposes of this section, "harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

(e) For the purposes of this section, "credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

(f) This section shall not apply to conduct which occurs during labor picketing.

(g) If probation is granted, or the execution or imposition of a sentence is suspended, for any person convicted under this section, it shall be a condition of probation that the person participate in counseling, as designated by the court. However, the court, upon a showing of good cause, may find that the counseling requirement shall not be imposed.

(h) The court shall also consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. The duration of the restraining order may be longer than five years only in an extreme case, where a longer duration is necessary to protect the safety of the victim or his or her immediate family.

(i) For purposes of this section, "immediate family" means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who,

The California statute, like most state statutes that followed it, has two main components: a threat requirement and an intent requirement. The threat requirement in California's stalking law is that of a "credible threat," which is a threat made with the intent and apparent ability to carry out that threat.⁴⁶ These elements are found in the language of the statute.⁴⁷ The apparent ability element is supported by the phrase "reasonably fear for ... her safety or the safety of ... her immediate family."⁴⁸ That is, it would not be reasonable to fear harm from a person who was physically incapable of doing harm.

The California statute also requires the victim's fear resulting from the threat to meet objective and subjective standards. The stalker's conduct must "cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person."⁴⁹ California's intent requirement provides that the stalker must both intend to cause and actually cause reasonable fear on the part of his⁵⁰ victim.⁵¹ It would not be enough that the offender wanted to frighten his victim if she were not actually afraid. Conversely, even if an offender's actions did frighten a victim, the offender would not be liable under the California stalking statute if he did not intend to frighten the victim.

within the prior six months, regularly resided in the household.

(j) The court shall consider whether the defendant would benefit from treatment pursuant to Section 2684. If it is determined to be appropriate, the court shall recommend that the Department of Corrections make a certification as provided in Section 2684. Upon the certification, the defendant shall be evaluated and transferred to the appropriate hospital for treatment pursuant to Section 2684.

Id. § 646.9.

46. *Id.* § 646.9(e); NIJ RESEARCH REPORT, *supra* note 4, at 22.

47. CAL. PENAL CODE § 646.9(e).

48. *Id.* This is not the original California stalking statute, but rather the statute as amended in 1993. The original statute, enacted in 1990, prohibited only placing the victim in fear of her own life or body, but not the lives or bodies of her immediate family. CAL. PENAL CODE § 646.9(a) (1990) (amended 1993). The 1993 version is more inclusive, defining "immediate family" to include not only spouses, children, and other conventional family members, but also any "person who regularly resides in the household, or who, within the prior six months, regularly resided in the household." CAL. PENAL CODE § 646.9(i) (1993).

49. *Id.* § 646.9(d).

50. Stalkers are overwhelmingly male, Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?* 15 CARDOZO L. REV. 525, 528 & n.18 (1993), and this Comment will use the masculine pronoun to refer to stalkers. Similarly, this Comment will use the feminine pronoun to refer to stalking victims, as women represent the majority of stalking victims. Strikis, *supra* note 4, at 2771 & n.16.

51. *Id.* § 646.9(e).

Like many stalking statutes, California's statute specifically prohibits "following" and "harassing" in addition to what it defines generally as stalking.⁵² Harassment is defined as a "knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person and which serves no legitimate purpose."⁵³

Finally, California provides for two levels of punishment for the crime of stalking—misdemeanor and felony.⁵⁴ If convicted of violating the statute, a stalker can be sentenced to a maximum of one year in jail and fined up to one thousand dollars.⁵⁵ If the violation occurs while a restraining order, injunction, or other court order related to the stalking charge is already in place in connection with the same party, the crime is a felony and the punishment is imprisonment in a state prison for two, three, or four years.⁵⁶ Any stalking violation that follows a prior felony stalking conviction is a felony punishable by two, three, or four years in prison.⁵⁷

The first of its kind, California's stalking law served as a call to arms for many state legislatures. Victims' advocates and law enforcement officers applauded California's efforts.⁵⁸ The legislative history of the statute indicates that it was implemented primarily to help victims of domestic violence, providing them with stronger weapons than the civil protection orders upon which they were once forced to rely.⁵⁹ Such protection is vital because, as domestic violence experts agree, men who batter will go to extremes unless someone intervenes.⁶⁰ With tough stalking laws, that "someone" can now be the criminal justice system. Additionally, the classification of stalking as a felony rather than a misdemeanor sends a message that the concerns of stalking victims are being taken seriously.⁶¹ The stiffer penalties associated with the felony classification incapacitate the stalker and provide the victim with at least a temporary reprieve from the terror she faces daily.⁶² Because a stalker who receives probation

52. *Id.* § 646.9(a).

53. *Id.* § 646.9(d).

54. *Id.* § 646.9(a).

55. *Id.*

56. *Id.* § 646.9(b).

57. *Id.* § 646.9(c).

58. Bernstein, *supra* note 50, at 544-45.

59. *Id.* at 545.

60. *Id.* at 557-59.

61. See Strikis, *supra* note 4, at 2777-78.

62. See *id.* at 2778-79, 2781.

or a slight sentence will quickly regain access to the victim, "the goal of maximum protection for stalking victims dictates the need for rigorous sentencing and criminal penalties."⁶³

Not everyone is satisfied with the California stalking law. Some commentators are concerned with possible constitutional problems. One potential challenge is "void-for-vagueness."⁶⁴ To survive a void-for-vagueness challenge, a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."⁶⁵ Because the California statute defines stalking in accordance with this standard, it would probably survive any such challenge.⁶⁶

Although the term "credible threat" may seem ambiguous, the statute requires "the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family."⁶⁷ Intent has been construed to mean that the stalker "need only have the apparent ability to carry out the threat and the intent to cause the victim to fear."⁶⁸ Additionally, the term "course of conduct" is defined specifically, and would likely be upheld.⁶⁹

Another possible challenge to the California statute could be based on the First Amendment of the United States Constitution; it could be argued that calling, writing, and following are protected expressive conduct.⁷⁰ First, "harassing conduct such as threats required under antistalking statutes would probably not rise to the level of protected speech."⁷¹ The California statute also contains specific provisions that would enable it to survive

63. Salame, *supra* note 3, at 91.

64. Guy, *supra* note 40, at 1012-13.

65. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (holding a California statute to be unconstitutionally vague for insufficiently clarifying the term "credible and reliable" identification).

66. Guy, *supra* note 40, at 1014-16.

67. CAL. PENAL CODE § 646.9(e); *see* Guy, *supra* note 40, at 1014-15.

68. Guy, *supra* note 40, at 1014. The alternative construction is that "the stalker must have the intent to carry out the threat." *Id.* Under this alternative construction, the stalking statute would have no advantage over traditional statutes, as both would require the stalker to undertake the commission of the threat before incurring criminal liability. *Id.*

69. *Id.* at 1015-16; *see* *Bachowski v. Salamone*, 407 N.W.2d 533, 537 (Wis. 1987).

70. U.S. CONST. amend I. "Congress shall make no law ... abridging the freedom of speech, or of the press ..."; *see* Strikis, *supra* note 4, at 2784.

71. Strikis, *supra* note 4, at 2785 (relying on *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), and *Colten v. Kentucky*, 407 U.S. 104 (1972)).

this challenge. For instance, the statute specifically exempts labor picketing from its provisions.⁷² Additionally, the statute evinces a clear intent to remove constitutionally protected activity from its scope with the blanket statement, "[c]onstitutionally protected activity is not included within the meaning of 'course of conduct.'"⁷³ Activities not specifically mentioned, such as newspaper or television reporting, would not fall under the statute even without the blanket statement. The statute's definition of "harass" describes a willful course of conduct "which seriously alarms, annoys, torments, or terrorizes [a victim], and which serves no legitimate purpose."⁷⁴ Reporting and similar activities have legitimate purposes. Finally, if the statute does not impact adversely on First Amendment freedoms, a challenge of facial vagueness would likely succeed only if the statute were overly vague in all possible applications.⁷⁵

Constitutional issues aside, questions still remain regarding the effectiveness of the California stalking statute. John Lane, head of the innovative Los Angeles Police Department (LAPD) Threat Management Unit, indicated that the primary difficulty police face in apprehending stalkers is the "credible threat" requirement.⁷⁶ "Many suspects don't overtly threaten [victims] even though their behavior is terrorizing," Lane explained.⁷⁷ Deputy District Attorney Rhonda Sanders expressed a similar concern, maintaining that the law is often an "inadequate defense against former lovers and husbands with a propensity for violence. Their behavior may look ambiguous or even innocent to a judge or a police officer, but can be clearly threatening to the victim."⁷⁸ For this reason, the standard that is used to determine the reasonable fear component of the threat requirement may be inappropriate for victims of domestic violence.⁷⁹ Although some modifications may be needed, such as changing the "credible threat" language, the California legislature should be commended for being the first to establish the crime of stalking. California's statute has served as a model and a starting point for the rest of the nation.

72. CAL. PENAL CODE § 646.9(f).

73. *Id.* § 646.9(d).

74. *Id.*

75. Strikis, *supra* note 4, at 2785.

76. Cordes, *supra* note 35, at 13.

77. *Id.*

78. Nina Schuyler, *No Place to Hide*, CAL. LAW., June 1993, at 18, 20; see *supra* notes 31-33 and accompanying text.

79. Bernstein, *supra* note 50, at 549.

B. Other States Follow Suit

Other states quickly followed the California legislature and by early 1994 almost every state in the nation had a criminal stalking law.⁸⁰ With so many states enacting their own legislation, the laws have many substantive differences as well as subtle variations.⁸¹ Nonetheless, a few major trends have emerged in threat and intent requirements.⁸²

1. Threat Requirements

The most easily fulfilled threat requirement is one that calls for either threat or conduct, as exemplified by the Virginia stalking statute.⁸³ Finding such a threat requirement to "prohibit actions that would cause a reasonable person to feel threatened," and finding that an explicit threat "is not required to satisfy an element of the crime," the National Institute of Justice notes that more than twenty-five states have this type of threat re-

80. For some time Maine and Arizona were the only states without laws specifically addressing stalking. Maine recently developed a statute recognizing the crime of stalking. ME. REV. STAT. ANN. tit. 17-A, § 506-A (West 1994 & Supp. 1993). Arizona still relies on its terrorism statute to deal with the problem. ARIZ. REV. STAT. ANN. § 13-2308.01 (1989).

81. See *infra* notes 83-137 and accompanying text.

82. NIJ RESEARCH REPORT, *supra* note 4, at 22-27.

83. VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1994). The statute reads in full:

A. Any person who on more than one occasion engages in conduct directed at another person with the intent to place, or with the knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's spouse or child shall be guilty of a Class 2 misdemeanor.

B. However, any person who is convicted of a first offense in violation of subsection A when, at the time of the offense, there was in effect any order prohibiting contact between the defendant and the victim or the victim's spouse or child, shall be guilty of a Class 1 misdemeanor.

C. A second conviction occurring within five years of a first conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class 1 misdemeanor. A third or subsequent conviction occurring within five years of a conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class 6 felony.

D. A person may be convicted under this section irrespective of the jurisdiction or jurisdictions within the Commonwealth wherein the conduct described in subsection A occurred, if the person engaged in that conduct on at least one occasion in the jurisdiction where the person is tried.

E. Upon finding a person guilty under this section, the court shall, in addition to the sentence imposed, issue an order prohibiting contact between the defendant and the victim or the victim's spouse or child.

Id.

quirement.⁸⁴ This threat requirement helps to alleviate the problem cited by John Lane of the LAPD regarding the difficulty police officers face in enforcing California's law because of its "credible threat" standard.⁸⁵ Because no explicit threat is required, the lack of an overt threat that troubles Lane would not necessarily be problematic under Virginia's stalking law.

New Jersey uses another type of threat requirement, the threat or conduct standard, but with the additional requirement of intent and apparent ability.⁸⁶ No other state stalking statutes employ this combination of mandatory factors to meet its threat requirement.⁸⁷ Pursuant to the New Jersey statute, if, at the time of the threat, a stalker does not look strong or well-armed enough to carry out his threat, then he would not be guilty of stalking.⁸⁸ New Jersey's "intent and apparent ability" language, however, may not be necessary to accomplish this result. Both the Virginia and the New Jersey statutes contain intent provi-

84. NIJ RESEARCH REPORT, *supra* note 4, at 22-24. *See, e.g.*, ALASKA STAT. §§ 11.41.260, .270 (Supp. 1993); CONN. GEN. STAT. §§ 53a-181c, d (Supp. 1994); MD. ANN. CODE art. 27, § 121B (Supp. 1994); 18 PA. CONS. STAT. ANN. § 2709 (Supp. 1994); VT. STAT. ANN. tit. 13, §§ 1061-1063 (Supp. 1994).

85. *See supra* notes 76-77 and accompanying text.

86. N.J. REV. STAT. ANN. § 2C:12-10 (West 1982 & Supp. 1994). The statute reads in pertinent part:

a. As used in this act:

(1) "Course of conduct" means a knowing and willful course of conduct directed at a specific person, composed of a series of acts over a period of time, however short, evidencing a continuity of purpose which alarms or annoys that person and which serves no legitimate purpose. The course of conduct must be such as to cause a reasonable person to suffer emotional distress. Constitutionally protected activity is not included within the meaning of "course of conduct."

(2) "Credible threat" means an explicit or implicit threat made with the intent and the apparent ability to carry out the threat, so as to cause the person who is the target of the threat to reasonably fear for that person's safety.

b. A person is guilty of stalking, a crime of the fourth degree, if he purposely and repeatedly follows another person and engages in a course of conduct or makes a credible threat with the intent of annoying or placing that person in reasonable fear of death or bodily injury.

c. A person is guilty of a crime of the third degree if he commits the crime of stalking in violation of an existing court order prohibiting the behavior.

d. A person who commits a second or subsequent offense of stalking which involves an act of violence or a credible threat of violence against the same victim is guilty of a crime of the third degree.

e. This act shall not apply to conduct which occurs during organized group picketing.

Id.

87. NIJ RESEARCH REPORT, *supra* note 4, at 22-24.

88. N.J. REV. STAT. ANN. § 2C:12-10(a)(2).

sions elsewhere, and although Virginia does not use the phrase "apparent ability," it does require that the victim's fear be reasonable.⁸⁹ Arguably, if the perpetrator does not appear to have the ability to carry out his threat, any fear on the part of the victim would be unreasonable.⁹⁰

A third type of threat requirement calls for a threat *and* conduct, but does not include the intent and apparent ability language. Fewer than ten states use this type of threat standard.⁹¹ Because both a threat and conduct are required, and because some of these states also employ a reasonable person standard regarding the victim's fear,⁹² domestic violence victims are inadequately protected by this type of stalking statute. An ex-husband, for example, may know his former wife very well and may be able to engage in an act which he knows will terrify

89. VA. CODE ANN. § 18.2-60.3(A).

90. See *Carter v. State*, 758 S.W.2d 150, 153 (Mo. Ct. App. 1988) (noting that a threat and the apparent ability to carry out the threat create reasonable fear).

91. NIJ RESEARCH REPORT, *supra* note 4, at 22-24; see, e.g., MASS. GEN. L. ch. 265, § 43 (1958 & Supp. 1994). The statute reads in pertinent part:

(a) Whoever willfully, maliciously, and repeatedly follows or harasses another person and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars, or imprisonment in the house of correction for not more than two and one-half years or both.

(b) Whoever commits the crime of stalking in violation of a temporary or permanent vacate, restraining, or no-contact order or judgment issued pursuant to sections eighteen, thirty-four B, or thirty-four C of chapter two hundred and eight; or section thirty-two of chapter two hundred and nine; or sections three, four, or five of chapter two hundred and nine A; or sections fifteen or twenty of chapter two hundred and nine C; or a temporary restraining order or preliminary or permanent injunction issued by the superior court, shall be punished by imprisonment in a jail or the state prison for not less than one year and not more than five years. No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of one year. . . .

(c) Whoever, after having been convicted of the crime of stalking, commits a second or subsequent such crime shall be punished by imprisonment in a jail or the state prison for not less than two years and not more than ten years. No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of two years. . . .

(d) For the purposes of this section, "harasses" means a knowing and willful pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms or annoys the person. Said conduct must be such as would cause a reasonable person to suffer substantial emotional distress.

Id.

92. See, e.g., MASS. GEN. L. ch. 265, § 43(d).

her, which she will recognize as a threat, and which the ex-husband intends to be a threat, but which no judge would recognize as a threat.⁹³ Without an explicit threat in addition to his conduct, this man would remain on the streets, free to stalk his former spouse. Thus, although the threat *and* conduct requirement may be less likely than other threat requirements to fall under constitutional challenges, it will leave unpunished stalkers that the Virginia and even the New Jersey statutes would recognize.⁹⁴

Finally, the last type of threat requirement is that of both threat and conduct *and* intent and apparent ability. This requirement is found in the California statute.⁹⁵ Only five other states use this strict standard.⁹⁶ As discussed, this standard may be constitutionally strong, but it does not satisfy many victims and legal officers.⁹⁷ One California victim, Terry, was terrorized for years by her ex-husband, who would call her as much as one hundred times a night, follow her and her friends, and sit outside her night school classes in his car.⁹⁸ Because the ex-husband did not explicitly voice a threat, he could not be charged under the California stalking law. After two years of following and calling Terry, Terry's ex-husband finally attacked her with a knife.⁹⁹ Under a law with a less stringent and detailed threat requirement, perhaps Terry's ex-husband could have been charged before his violent attack on her life.¹⁰⁰

2. Intent Requirements

The effectiveness of a given type of threat requirement depends in part on its counterpart, the intent requirement.¹⁰¹ The

93. See *supra* notes 31-33 and accompanying text; see also Bernstein, *supra* note 50, at 562-63 (explaining that stalkers may know the law and attempt to circumvent it).

94. See statutes *supra* notes 83, 86.

95. See *supra* notes 46-48 and accompanying text.

96. NIJ RESEARCH REPORT, *supra* note 4, at 22-24. See ALA. CODE § 13A-6-90 to -94 (1975); see also OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1994); R.I. GEN. LAWS § 11-59-1 to -3 (Supp. 1993); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1993); WIS. STAT. ANN. § 947.013 (West 1993).

97. See *supra* notes 76-79 and accompanying text.

98. Schuyler, *supra* note 78, at 18.

99. *Id.*

100. For example, under Virginia's stalking statute, which does not require an explicit threat, Terry's ex-husband could have been charged with stalking if he made multiple telephone calls or followed her with the intent to frighten her or with the knowledge that his actions would cause her reasonable fear. See *supra* notes 83-85 and accompanying text.

101. In some statutes, the concepts of threat and intent are intertwined. For example,

intent requirement is the second major component of stalking laws. States approach the intent requirement in three different ways.¹⁰² The first approach requires that the stalker intend to cause as well as actually cause reasonable fear, and is exemplified by the California stalking statute.¹⁰³ As previously discussed, the reasonable fear portion of this requirement may do a substantial disservice to domestic violence victims.¹⁰⁴ It does, however, protect innocent people from being charged with stalking by acting "as a threshold to ensure the serious intent is indeed present."¹⁰⁵

A second approach to the intent requirement provides that the stalker must intend to cause and actually cause alarm or annoyance.¹⁰⁶ The New Jersey stalking statute is an example of this form of intent.¹⁰⁷ In order to be held liable under this language, one need not even intend to frighten one's victim, but merely to annoy her. The New Jersey statute's definition of "credible threat," however, mandates that the stalking victim fear for his or her safety.¹⁰⁸ Behavior that is no more than annoying, therefore, is not actually illegal under the New Jersey stalking statute.

The third and final approach to intent is the complete absence of an intent requirement.¹⁰⁹ This approach mandates that the stalker's actions actually cause reasonable fear.¹¹⁰ This provision

Virginia's threat requirement can include an examination of the stalker's intent. *See supra* notes 83-84 and accompanying text.

102. NIJ RESEARCH REPORT, *supra* note 4, at 25-27.

103. *See* CAL. PENAL CODE § 646.9(a), (e) (West Supp. 1994).

104. *See* notes 78-79 and accompanying text.

105. Guy, *supra* note 40, at 1002.

106. NIJ RESEARCH REPORT, *supra* note 4, at 25-27.

107. N.J. REV. STAT. ANN. § 2C:12-10 (West 1982 & Supp. 1994).

108. *Id.* § (a)(2).

109. NIJ RESEARCH REPORT, *supra* note 4, at 25-27.

110. *See, e.g.,* NEV. REV. STAT. ANN. § 200.575 (Michie 1993). The statute reads in pertinent part:

1. A person who, without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that actually causes the victim to feel terrorized, frightened, intimidated or harassed, commits the crime of stalking. . . .

5. As used in this section:

(a) "Course of conduct" means a pattern of conduct which consists of a series of acts over time that evidences a continuity of purpose directed at a specific person.

(b) "Without lawful authority" includes acts which are initiated or continued without the victim's consent. The term does not include acts which are otherwise protected or authorized by constitutional or statutory law, regulation or order of a court of competent jurisdiction, including, but not

would allow prosecution of an erotomaniac, who wilfully performs certain frightening acts but has the notion that his actions are desired by the victim, or at least are not frightening to the victim.¹¹¹ This scenario might be comforting to victims, but it would probably alarm civil libertarians and others with concerns for the mentally ill.¹¹²

3. *Proscribed Acts*

In addition to generally defining stalking, many states specifically prohibit certain activities by name. Some states expressly list only one or two prohibited acts, whereas others offer a whole litany of forbidden behavior.¹¹³ For example, although the New Jersey stalking statute specifically proscribes only pursuing or following, Michigan's stalking statute proscribes "appearing within the sight of the individual," approaching, confronting, contacting, or harassing her.¹¹⁴ Other acts that have been specifically pro-

limited to:

- (1) Picketing which occurs during a strike, work stoppage or any other labor dispute.
- (2) The activities of a reporter, photographer, cameraman or other person while gathering information for communication to the public if that person is employed or engaged by or has contracted with a newspaper, periodical, press association or radio or television station and is acting solely within that professional capacity.
- (3) The activities of any person that are carried out in the normal course of his lawful employment.
- (4) Any activities carried out in the exercise of the constitutionally protected rights of freedom of speech and assembly.

Id.

111. See Woods, *supra* note 5, at 450.

112. *Id.* at 466-67.

113. NIJ RESEARCH REPORT, *supra* note 4, at 16-20.

114. N.J. REV. STAT. ANN. § 2C:12-10; MICH. COMP. LAWS ANN. §§ 600.2950(a), 600.2954, 750.411(h)-(i), 764.15(b), 771.2, 771.2(a) (West 1994). The Michigan stalking statute reads, in pertinent part:

(1) As used in this section:

- (a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts, evidencing a continuity of purpose.
- (b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.
- (c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

scribed in various states include approaching,¹¹⁵ surveillance,¹¹⁶ lying in wait,¹¹⁷ and intimidation.¹¹⁸ Although listing certain acts as "illegal" adds clarity to a statute, doing so is problematic because of the possibility that such a list might be regarded as exclusive.¹¹⁹ Three states, Nevada, Ohio, and Wisconsin, do not specifically name any type of behavior as prohibited.¹²⁰

4. *Unique Provisions*

In addition to the basic framework of threat and intent requirements, a number of states have included some innovative

(d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

- (i) Following or appearing within the sight of the individual.
- (ii) Approaching or confronting that individual in a public place or on private property.
- (iii) Appearing at the workplace or residence of that individual.
- (iv) Entering onto or remaining on property owned, leased, or occupied by that individual.
- (v) Contacting that individual by telephone.
- (vi) Sending mail or electronic communications to that individual.
- (vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual . . .

MICH. COMP. LAWS ANN. § 750.411h.

115. ALASKA STAT. § 11.41.270(b)(3)(B) (Supp. 1993); MD. ANN. CODE art. 27, § 121B(a)(3) (Supp. 1994); MICH. COMP. LAWS ANN. § 750.411h(1)(e)(iii) (West 1994); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1994).

116. *See, e.g.*, GA. CODE ANN. § 16-5-90(a) (Supp. 1994).

117. CONN. GEN. STAT. § 53a-181d(a) (Supp. 1994); VT. STAT. ANN. tit. 13, § 1061(a) (Supp. 1994).

118. GA. CODE ANN. § 16-5-90(a) (Supp. 1994); MONT. CODE ANN. § 45-5-220(1)(b) (1993); N.H. REV. STAT. ANN. § 633:3-aII(c) (Supp. 1993); N.D. CENT. CODE § 12.1-17-07.1.1.b. (Supp. 1993).

119. NIJ RESEARCH REPORT, *supra* note 4, at 44. Case law reveals conflicting views on the issue of the exclusivity of statutory lists. *See* Langlois v. Noble, 465 So. 2d 108 (La. 1985) (finding a statutory list of classes of persons authorized to claim damages arising out of the death of another person to be exclusive and not merely illustrative); *see also* Burdine & Assocs. v. Noel, 550 So. 2d 677 (La. 1989) (finding that a statutory list categorizing actions that may be instituted by summary process to be exclusive, not illustrative). *Contra* Hall v. Hall, 589 N.E.2d 553 (Ill. 1991) (finding that a statutory list of child custody factors is not exclusive).

120. NEV. REV. STAT. ANN. § 200.575 (Michie 1993); OHIO REV. CODE ANN. § 2903.211 (Baldwin 1993); WIS. STAT. ANN. § 947.013 (West Supp. 1993); *see* NIJ RESEARCH REPORT, *supra* note 4, at 16-20.

special provisions in their stalking statutes. For example, some state statutes require special training for law enforcement, prosecutors, and the judiciary.¹²¹ This requirement is an important addition in light of the problems police officers have faced with stalking laws.¹²² Furthermore, given allegations that the legal system does not take stalking victims seriously, special training could improve judicial response to victims' fears.¹²³

For instance, some believe that prosecutors, judges, and juries require a higher standard of corroboration in domestic violence incidents than in cases involving strangers.¹²⁴ In the case of Terry, the California woman stalked by her ex-husband, her attorney "had her describe to the judge the terror of being stalked. [Terry] says that her husband's light sentence shows that the judge was unimpressed with her description."¹²⁵ Terry's ex-husband received five years probation.¹²⁶

Wyoming's stalking law includes a requirement that law enforcement provide emergency assistance to victims.¹²⁷ A Massachusetts study found that assistance provisions have a great influence.¹²⁸ The Massachusetts study found that seventy-one percent of women who obtained temporary restraining orders in one particular district court in 1982 did not appear at a hearing ten days later.¹²⁹ In contrast, in a different district that had a separate office for restraining orders, daily briefing sessions for women seeking restraining orders, and support groups run by the prosecutor's office, approximately three percent of the women failed to appear for the hearing.¹³⁰ Thus, "given a little help to negotiate a complicated and hostile system beset with obstacles, women follow through."¹³¹

Some states require electronic monitoring of a convicted stalker as a condition of pretrial release or probation.¹³² Colorado is

121. NIJ RESEARCH REPORT, *supra* note 4, at 36.

122. See *supra* note 28 and accompanying text.

123. Ingrassia, *supra* note 27, at 28.

124. Salame, *supra* note 3, at 99. Salame maintains that the difficulties that the legal system has in addressing the concerns of stalking victims are compounded by an inherent gender bias which battered women face from participants in the judicial process. *Id.*

125. Schuyler, *supra* note 78, at 20.

126. *Id.*

127. WYO. STAT. ANN. §§ 1-1-126, 6-2-505, 7-3-506 to -511 (Michie 1994); NIJ RESEARCH REPORT, *supra* note 4, at 36.

128. Jones, *supra* note 2, at 179.

129. *Id.*

130. *Id.*

131. *Id.*

132. NIJ RESEARCH REPORT, *supra* note 4, at 36.

experimenting with a system that requires known offenders to wear an electronic ankle bracelet which sets off an alarm if the stalker gets near his victim.¹³³ In Massachusetts, the state's domestic violence program includes court confiscation of weapons from alleged abusers, and requires that victims of crime be informed that they have the option to file criminal complaints as well as restraining orders.¹³⁴ Massachusetts also has a computer system to track assailants who violate protective orders.¹³⁵ These and other special provisions are tools that can be of great help to victims, prosecutors, judges, and police officers.¹³⁶

V. NATIONAL INSTITUTE OF JUSTICE MODEL ANTI-STALKING CODE FOR STATES¹³⁷

The National Institute of Justice Model Anti-Stalking Code for States (Model Stalking Code) is a fairly simple stalking statute designed for states to use, adapt, or supplement as they see fit.¹³⁸ It reads:

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;

133. Woods, *supra* note 5, at 471; *Technology Takes Aim at Stalkers*, CHI. TRIB., Sept. 20, 1992, at 4.

134. *Id.*

135. Gera-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J., Nov. 1992, at 35, 36; see Lardner, *supra* note 1, at C3; see also George Lardner, *The Stalking of Kristin*, WASH. POST, Nov. 22, 1992, at C1 (describing the stalking and murder of the author's daughter). The murder of the author's daughter at the hands of her ex-boyfriend-turned-stalker received a great deal of attention and sparked the enactment of a new law in Massachusetts. Lardner, *supra* note 1, at C3. Kristin had filed numerous complaints against her ex-boyfriend and had obtained restraining orders in order to keep him away from her. At two hearings regarding the restraining orders the judges did not examine the stalker's lengthy and violent criminal record. *Id.* At the time of Kristin's murder, there were multiple outstanding complaints against her killer. *Id.* The computerized registry of protective order violators allows Massachusetts to "put[] resources rather than rhetoric behind its pledge to fight stalking." Kolarik, *supra*, at 36 (quoting Professor Jonathan Turlay of George Washington University National Law Center).

136. See *supra* notes 28-32, 121-31 and accompanying text.

137. (National Inst. of Justice 1993) available in NIJ RESEARCH REPORT, *supra* note 4, at 43-48 [hereinafter MODEL STALKING CODE]. The National Institute of Justice (NIJ) is the research and development agency of the U.S. Department of Justice. "NIJ was established to prevent and reduce crime and to improve the criminal justice system." NIJ RESEARCH REPORT, *supra* note 4, at inside cover.

138. NIJ RESEARCH REPORT, *supra* note 4, at 41.

(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.¹³⁹

Like the existing state statutes, the Model Stalking Code is based on requirements of threat and intent. It does not employ the "credible threat" language used by states such as California¹⁴⁰ because the drafters wanted to reach implied threats as well as overt threats.¹⁴¹ The commentary to the Model Stalking Code indicates that, "[s]talking 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."¹⁴² In allowing for implied threats¹⁴³ and using the term "in context,"¹⁴⁴ the Model Stalking Code may create the most effective threat requirement available to victims. Although the model statute contains both subjective¹⁴⁵ and objective¹⁴⁶ reasonableness requirements, it seems to allow for an interpretation that would permit the trier of fact to consider whether the victim's fear was

139. MODEL STALKING CODE §§ 1-2.

140. CAL. PENAL CODE § 646.9(a) (West Supp. 1994); see *supra* notes 46-48 and accompanying text.

141. NIJ RESEARCH REPORT, *supra* note 4, at 45.

142. MODEL STALKING CODE commentary at 45 (Credible Threat).

143. *Id.* § 1(a).

144. *Id.* commentary at 45 (Credible Threat).

145. *Id.* § 2(c).

146. *Id.* § 2(a).

reasonable under the victim's particular circumstances and will be particularly useful to domestic violence victims.¹⁴⁷ Because domestic violence victims make up a large percentage of stalking targets,¹⁴⁸ states should seriously consider adopting a threat requirement similar to that of the Model Stalking Code.

The Model Stalking Code requires that the conduct be "purposeful]"¹⁴⁹ and that the stalker "has knowledge or should have knowledge" that the victim will be fearful as a result of the stalker's conduct.¹⁵⁰ This standard is quite different from existing stalking statutes that hinge on "intent" and/or "actually cause" language in their intent requirements.¹⁵¹ The language in the Model Stalking Code is more clear. Although "intent" can be interpreted in many ways, the Model Stalking Code's language, "has knowledge or should have knowledge,"¹⁵² is fairly straightforward and not open to varying interpretation. Determining whether a person should have known something seems much simpler, based on a given set of facts, than proving that a person intended to cause a specific result or reaction. Determining whether a given course of conduct was purposeful is similarly straightforward, for one need only ask whether a person behaved a certain way on purpose, as opposed to accidentally.

Other aspects of the Model Stalking Code that represent significant departures from many state stalking statutes include the suggestion in the commentary that stalking should be made a felony and the absence of a list of prohibited acts.¹⁵³ Omitting a list of specifically prohibited acts is probably a wise idea because, as the Model Stalking Law's drafters noted, "some courts have ruled that if a state includes a specific list, that list is exclusive."¹⁵⁴ The drafters' suggestion that states treat stalking as a felony is indicative of how threatening they believed stalking to be.¹⁵⁵ The commentary to the Model Stalking Code suggests that, for less egregious acts, states could use their existing harassment

147. See *supra* notes 76-79 and accompanying text.

148. Woods, *supra* note 5, at 450.

149. MODEL STALKING CODE § 2(a).

150. *Id.* § 2(b).

151. See, e.g., CAL. PENAL CODE § 646.9; N.J. REV. STAT. ANN. § 2C:12-10 (West 1982 & Supp. 1994).

152. MODEL STALKING CODE § 2(b).

153. *Id.* commentary at 46 (Classification as a Felony).

154. *Id.* at 44 (Prohibited Acts); see *supra* note 119 and accompanying text.

155. MODEL STALKING CODE commentary at 46 (Classification as a Felony).

or intimidation statutes.¹⁵⁶ Maryland Delegate Chris Van Hollen, Jr., who is disappointed that his state's stalking statute permits only a misdemeanor classification of stalking, believes that the creation of a felony classification signals the gravity of a crime.¹⁵⁷ Van Hollen asserted that making stalking a felony rather than a misdemeanor is important because one does not want to put stalking on the same level as jaywalking.¹⁵⁸ Due to prison overcrowding and other pressures, many states may be reluctant to heed this advice.¹⁵⁹ One solution would be to provide for a stalking misdemeanor for non-violent first time offenders against whom no restraining order is in place. The emphasis would then be placed on a statute's felony stalking provision, which could be used to varying degrees in other situations.

VI. CONCLUSION

With the passage of time and the development of more case law in the area of stalking, it will be easier to more effectively evaluate existing stalking laws and to determine what changes should be made.¹⁶⁰ For now, states should compare their stalking statutes with the National Institute of Justice Model Stalking Code. States with problematic "threat" language should consider adopting Virginia's "threat or conduct" language and abandoning the "credible threat" language, as the Model Stalking Code suggests.¹⁶¹ For all states, the Model Stalking Code's use of the

156. *Id.* For a good example, see the Maine harassment statute, ME. REV. STAT. ANN. tit. 17-A, § 506-A (West 1964 & Supp. 1993), which was used for some time in Maine as a substitute for a stalking law. The Maine harassment statute reads in pertinent part: "1. A person is guilty of harassment if, without reasonable cause, he engages in any course of conduct with the intent to harass, torment, or threaten another person, after having been forbidden to do so by any sheriff, deputy sheriff, constable, police officer or notary public." *Id.*

157. Telephone interview with Chris Van Hollen, Jr., Maryland Delegate (Mar. 17, 1994).

158. *Id.*

159. See Mark Silva, *Prison Overcrowding Forces Early Release of Inmates*, MIAMI HERALD, Jan. 31, 1993, at 4M.

160. At this time, a relatively small amount of case law exists in the area of stalking. The case law that does exist largely involves void-for-vagueness challenges. In August 1994 the Supreme Court of Massachusetts found the Massachusetts stalking law, MASS. GEN. L. ch. 265, § 43 (1958 & Supp. 1994), to be unconstitutionally vague on its face. *Commonwealth v. Kwiatkowski*, 418 Mass. 543 (1994). Section 43(d), defining "harass," was held to be unconstitutionally vague because it could have been interpreted as requiring repeatedly harassing a victim through more than one pattern of conduct, when in fact only one pattern of conduct need be established. *Id.* The court held that, in the future, the definition was to be interpreted as not requiring repeated conduct. *Id.*

161. MODEL STALKING CODE commentary at 45 (Credible Threat).

"knows or should know" standard, accompanied by a requirement of purposeful conduct, is worth considering when developing an intent standard. This approach or a variant thereof may prove helpful in removing the difficulties surrounding the word "intent."¹⁶²

Finally, all states should consider adding special provisions which states such as Colorado, Massachusetts, and New Jersey have created: educational requirements for law enforcement officers and the judiciary on stalking and gender issues and victim assistance and notification programs.¹⁶³ Provisions such as these could save lives. Because ninety percent of all women who are killed by their husbands or boyfriends are stalked prior to their deaths,¹⁶⁴ it is clear that with an effective stalking law, the criminal justice system would have a chance to prevent many needless deaths.¹⁶⁵ Until recently, this opportunity and countless lives were wasted.

With the development of stalking laws across the nation and the guidance of the Model Stalking Law, progress can be made. The criminal justice system can work to better protect the many lives that are endangered as a result of stalking each year—all 200,000 of them.

162. See *supra* part III.B.2.

163. See *supra* notes 121-31 and accompanying text.

164. *Antistalking Proposals: Hearing on Combating [sic] Stalking and Family Violence Before the Senate Comm. on the Judiciary*, 103rd Cong., 1st Sess. 10 (1993) (statement of Sen. William S. Cohen).

165. *Id.* (statement of Sen. Joseph R. Biden, Chairman).