

Domestic Violence & Stalking: A Comment on the Model Anti-Stalking Code Proposed by the National Institute of Justice



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Domestic Violence & Stalking

Statistics, Overall Context

Researchers predict that one in twenty adults will be stalked during his or her lifetime. They also state that there are approximately 200,000 stalkers in the US. Many stalking situations culminate in the death or serious injury of the victim. While anti-stalking statutes are aimed at protecting both sexes, experts believe that the majority of stalking cases involve men stalking women. This pattern of men stalking women occurs both in the domestic context and between strangers. Thus, stalking needs to be addressed as a form of violence against women.

While the best-publicized stalking cases involve celebrities being stalked by "crazed fans", it is estimated that seventy to eighty percent of stalking cases occur in a domestic context, while only ten to twenty percent involve strangers. (Some cases also involve workplace harassment; note that these may include men who wanted to date a co-worker, but were rebuffed.) Stalking in a domestic relationship typically occurs after the woman has attempted to sever the relationship; the man responds, "If I can't have you, no one will."

This is an obvious example of separation assault; this term was coined in an attempt to describe domestic violence from a different viewpoint. Instead of the cliched question, "Why didn't she leave?", the concept of separation assault invites us to notice that in many, or most, domestic violence incidents, the woman *has* left. However, instead of accepting that the relationship is over, the batterer continues his pattern of trying to exert power and control over her. His actions may include harassment, stalking, violating restraining or custody/visitation orders, threats, violence, sexual assault, or homicide. Thus, leaving not only does not guarantee the woman's safety, it may well increase the danger she is in. Furthermore, the level of danger is higher in domestic violence stalking cases than in other stalking cases; often the batterer/stalker is lethal.

One of the issues in the stalking area is the controversy around stalkers and "mental illness". Many policy-makers have treated stalkers as "crazy". While this may be a useful analysis in some cases, in general it merely serves to reinforce inaccurate stereotypes about people who have been in the mental health system being seen as more dangerous than average, "sane" abusers. Perpetrators of domestic violence stalking generally are not suffering from any type of psychological disorder, just as most batterers do not fit profiles of people with mental illness.

Origin and current status of stalking laws

As domestic violence and stalking began to be discussed more publically in the late 1980's and early 1990's, many people recognized that the existing laws were not solving the problem of stalking. Some states had statutes criminalizing harassment, terroristic threats, or other stalking-type behavior, but in many states, typical stalking behavior was not even criminalized until very recently.

The first state to enact a stalking statute was California. Popular myth has attributed the motivation for this statute to be the stalking/homicide of Rebecca Schaeffer, a TV actress, by a male "crazed" fan. However, the statute actually has its roots in domestic violence. "Municipal Court Judge John Watson of Orange County initiated the development and passage of California's stalking law because of his frustration over the law's inability to protect four Orange County women who were killed despite the issuance of restraining orders against their assailants. Judge

Watson found that restraining orders, safety bonds, and misdemeanor charges were all inadequate means to protect women who knew in advance that their lives were at risk." He approached Senator Edward Royce, who introduced a successful bill in 1990, SB 2184, which created Ca. Penal Code Section 646.9, stalking.

Since 1990, stalking statutes have spread rapidly to almost all the states. As of today, only two states appear to have no stalking statutes. Not only are states passing such laws, they are also amending stalking laws on a frequent basis. Most of the amendments either clarify the definition of stalking, or increase the penalties.

Case law on stalking

Even though virtually all US jurisdictions have stalking statutes, these statutes appear to be utilized to very different extents in different states. Therefore, some states have developed large bodies of case law in this area (e.g. Florida), while others have no or very few appellate cases.

As would be expected, a very high percentage of stalking cases at the appellate level are domestic violence cases. In one national Westlaw search using the query "stalking statute", 11 out of the 20 cases, or 55%, involved domestic violence. In another 7 cases from the list of 20, it was unclear what the relationship was between the parties, since no facts were given. If all of these cases involved domestic violence, the total would be 90%. The remaining two cases involved a male stranger stalking a female school-bus driver, and a man stalking his female neighbor.

In another national Westlaw search using the query "stalking", 270 cases were found. Analysis of the first 10% of these (i.e. the 27 most recent cases) found 8 domestic violence cases (approximately 30% of the total), many where the facts were not given or clear enough to determine the relationship, and 5 in which male strangers stalked females.

A large body of the appellate case law deals with constitutional challenges to stalking statutes. Courts are generally upholding the statutes, but occasionally finding them unconstitutional.

Law review articles, model anti-stalking code proposed therein

There is also a large body of law review articles on stalking. A national search in Westlaw using the query "stalking w/13 crim!" yielded 63 articles. Some of these focus on domestic violence issues, and others focus on constitutional issues.

One of the most interesting and useful articles for domestic violence advocates is by Susan L. Bernstein, because it examines the key aspects of a model anti-stalking code which would be necessary to assist victims of domestic violence in particular. The six essential components of the model code she proposes include the following:

1. Implied threats must be included in the definition of stalking.
2. Strong penalties must be provided for.
3. The domestic violence context must be taken into account in determining whether behavior was threatening or not.
4. A reasonable woman standard should be substituted for a reasonable person standard in determining whether behavior was threatening or not.

5. A broad definition of harassment (i.e. including non-consensual contact) must be included.
6. Computerized informational tracking systems shall be established to record complaints of domestic violence and violations of protective orders.

Of course, different state statutes are written with different definitions of stalking, different penalties, and different enforcement mechanisms. However, policy-makers would do well to consider Bernstein's recommendations in evaluating the effectiveness of their state statutes for protecting domestic violence victims.

National Institute of Justice Project to Develop Model Anti-Stalking Code for States

Limitations of Report from Domestic Violence Perspective

In response to the great and sudden interest in state stalking codes, the National Institute of Justice (NIJ) created a project to develop a model anti-stalking code for states, releasing their final report in October 1993. Interestingly enough, the report does not refer to the NIJ's history of involvement with this issue, which included the development of a model harassment code over 10 years ago.

Unfortunately, the resource group which developed this model code included no domestic violence advocates. Presumably this accounts for the fact that domestic violence, rather than being seen as a central issue in the development of the model code, is relegated to tangential status.

Domestic violence is rarely mentioned in the report, and when it is it may be in a footnote. See, e.g., footnote 83, pages 38 - 39, which touches briefly on the overlap between domestic violence and stalking, and reports without comment on law enforcement attitudes that domestic violence stalking incidents aren't worth much attention: "... While 77 percent of responding jurisdictions in Australia and Great Britain reported investigating stalking-type incidents, *none considered stalking a major problem* . High-profile cases were rare in the responding countries, and *most agencies consider stalking primarily a domestic violence problem. Typical victims are women of any age escaping abusive relationships with dominant males* , they reported... Stalker's methods did not seem to vary from those used by American stalkers, and the course of events seemed to escalate from unwanted contacts to following and face-to-face threats..." (emphasis added) The message appears to be that a crime in which the primary victims are battered women is not "a major problem."

Domestic violence is hardly mentioned again until page 92, where one paragraph acknowledges the usefulness of drawing upon criminal justice personnel's experience with domestic violence in formulating strategies against stalking. However, the report then lays out a research agenda which downplays the body of applicable domestic violence research which has already been conducted. The report calls for research on stalkers (i.e. their behaviors, motivations, demographics, histories), stalking as a crime (i.e. its prevalence and response by the criminal justice system), and the usefulness of restraining orders in stopping stalking (i.e. how well the victim, defendant, and criminal justice personnel understand how to enforce them). Given that the overwhelming majority of stalking cases are domestic violence cases, we can already answer many of these questions.

In the discussion on sentencing, the report does not mention batterer's counseling even once in its three-page discussion of evaluation, treatment, and mental illness, or in the principal recommendations where counseling is mentioned. This is unfortunate, since there is a growing body of literature on the efficacy of batterer's counseling which would be applicable to the 70-80% of stalking cases involving domestic violence, and since there are also studies showing that most therapists are woefully untrained and uninformed in the area of domestic violence.

The timing of NIJ's model code report was also unfortunate. The research was done before any appellate cases on stalking had been published, before the volume of commentators in law review articles, and when very few states had amended their statutes. The model code was based on two surveys sent to police departments around the country and to four other English-speaking countries, telephone interviews with prosecutors and defense attorneys, and analyzing the various state statutes on stalking and related issues. It is unfortunate that the NIJ report was not seen as Part I of a two-part process, since it is necessary have an in-depth assessment of how the statutes are actually working in order to evaluate the NIJ's proposed model code.

Analysis of utility of model code proposed by NIJ for battered women

Benefits of Model Code

But even with all the above limitations, the NIJ Report has a great deal of useful information and policy recommendations which could help battered women and their children.

For example, the Report's principal recommendations for a model stalking code include the following, all of which could be helpful to domestic violence victims:

- a continuum of charges, including felony status
- option of incarceration
- orders to stay away from victim
- counseling
- victim notification before stalker released
- early intervention
- systems put in place so that civil and criminal judges know what the other courts are doing with the same case
- a research agenda
- a multidisciplinary approach

In Chapter Two of the Report, the proposed model code is discussed in detail. Probably the most beneficial statement is the following: "Of utmost importance is a state's decision to require the criminal justice system and related disciplines to take stalking incidents seriously."

The useful elements of the proposed code include a broad definition of prohibited acts; allowing "implied threats", as opposed to "credible threats", to be sufficient; the use of increasingly serious penalties to deal with increasingly serious acts, and encompassing misdemeanor and felony sanctions; and the broad definition of intent: "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." The drafters made a similar comment in regard to the fear element: "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... a jury must determine that the victim's fear was reasonable *under the circumstances*." (emphasis added) This language may open the door to the introduction of evidence regarding the stalker's past threats toward the same victim, and to expert testimony on stalking generally, which will probably be beneficial to victims.

Similarly, Chapter Three's sentencing provisions are also generally useful for battered women. The overall goals include protecting the victim, allowing law enforcement to intervene when appropriate, sanctions, and treatment for those defendants who can be helped.

The requirement of victim notification, and accompanying acknowledgements that some stalkers may be more dangerous when released from prison, and that stalking behavior often escalates into violence as time passes are very important for battered women. So are the enhanced penalties for restraining order violations, use of a weapon, minor victims, or prior offenses toward the same or another victim. All of these are typical of domestic violence cases. The no-contact orders upon release are likewise key for protecting battering victims. The advantages and disadvantages of requiring convicted stalkers to wear electronic bracelets are discussed sensitively.

Chapter Four, on pre-trial release, also contains recommendations which are generally good for battered women whose batterers stalk them. These include taking danger to the public into account, considering eliminating release on one's own recognizance, recommended factors for courts to consider in each case, possible conditions of release, including no-contact orders, victim's right participate in bail hearings, victim notification of pre-trial release and copies of release orders to the victim.

Chapter Five's strategies for implementation are also generally helpful for battered women. The emphasis on a multidisciplinary approach underlines the need for all societal systems to work together to end this problem. The recommendations about the response of the criminal justice system are good as well, including training, better police policies and procedures, strengthening restraining order enforcement, providing judges with full criminal and restraining order histories of the defendant at every stage of the case, and the need to keep DMV and voter records of stalking victims confidential.

The NIJ's proposed model code generally complies with the model code recommended by Susan Bernstein, which was discussed above. The NIJ code includes "threats implied by conduct", and uses the history between the parties as a context in determining the nature of the threats. While the NIJ code does not mandate using computerized informational tracking systems, the larger NIJ Report recommends these, and also recommends the imposition of increasingly stronger penalties, including felonies. Though Bernstein's recommendation that harassment include "unconsented conduct" is not addressed directly in the NIJ code, it appears that the NIJ drafters intended to encompass such conduct. Thus, the only key element listed by Bernstein which is not addressed by the NIJ Report is the reasonable woman standard.

Flaws of Model Code

On the other hand, the code has some flaws. First, threats toward the victim's family are limited to those directed at her "immediate family", which is defined very narrowly. It would be better

to encompass the extended family, both because stalkers do not so limit their behavior, and because many ethnic groups in the US have a much broader definition of family than the nuclear version. Coverage should be provided if the stalker is threatening the victim's aunt, uncle, grandparents, grandchildren, cousins, godparents, godchildren, in-laws, etc.

Second, "[t]he model code language does not apply if the victim fears sexual assault but does not fear bodily injury." The drafters discuss the risk of contracting AIDS or being injured for resisting, and state that states may want to include fear of sexual assault in their statutes. However, the idea that sexual assault is not bodily injury in and of itself is ludicrous, and any historical distinction between these two types of injuries should not be maintained.

Third, the drafters propose that states allow for either restitution to the victim, or civil causes of action. It is unclear why victims should not have access to both remedies, since they are not interchangeable: restitution is ordered by the criminal court, and covers only out of pocket expenses, while tort suits are under the control of the victim, and also allow for awards for pain and suffering and punitive damages in addition to compensatory damages.

Effectiveness of anti-stalking codes in general for battered women

We last turn to the question of the effectiveness of anti-stalking codes in general for battered women. On the one hand, such codes can be useful. They serve as an acknowledgement that stalking behavior is wrong, and should be criminalized. They contribute to societal awareness that stalking is often part of the overall pattern of domestic violence. They may be an additional charge which prosecutors can use. In some cases, stalking laws can stop the cycle before more violence occurs by criminalizing behavior which otherwise would be non-actionable. On the other hand, there are many limitations to the efficacy of stalking laws in preventing abuse and violence. In some jurisdictions, stalking laws are the latest fad: they represent feathers in the caps of legislators and criminal justice system personnel, without attempting to solve the underlying problems of men's violence toward women generally and domestic violence in particular. Secondly, there appears to be a belief in some locations that stalking statutes will be a panacea, that if the legislators can merely write the magic combination of words, they will be able to stop this offense. Such viewpoints fail to take the big picture into account -- i.e. without fundamental attitude changes on the parts of law enforcement, prosecutors, judges, juries, media, therapists, and the general public, the same old attitudes about domestic violence will attach to stalking cases and result in inaction, undercharging, light sentences, and ineffective orders.

In order to be effective, stalking statutes must be one piece of a much larger coordinated community response. Key pieces of such a response would include in-depth training and written policies addressing domestic violence and stalking, and would be an integral part of the criminal justice system, health care system, educational system, and other social systems. The training and policies would state that domestic violence is wrong, criminal, and not tolerated. An additional key piece of the response would involve cooperation between all the different parts of the above systems, such as protocols for cooperation, regular interdisciplinary or inter-agency meetings, and death review teams, reflecting the reality that everyone has to work together if we will ever be able to stop domestic violence.

But even with a true coordinated community response, anti-stalking laws are still a limited tool in preventing domestic violence. Even with severe sanctions, some stalkers, like some batterers, will not stop or will repeat this behavior with other victims when released from jail. And some victims may still be reluctant to cooperate with prosecution because protections they are offered by the criminal justice system are inadequate to prevent retaliation. They may also feel sorry for the stalker, love him, want him to get counseling, etc., or they may be forced to deal with him for years to come because they have children in common. It is notable that many state stalking statutes do not cover situations where the former spouse/stalker has visitation rights. This is a major problem for battered women, whose batterers often escalate the violence after separation and transfer their attempts to control the woman to the custody/visitation arena.

In conclusion, anti-stalking laws are a step in the right direction, but in and of themselves will not solve the problems of battered women or other stalking victims.

Appendices

Appendix A: Selected Appellate Stalking Cases

(note: WL = Westlaw)

(listed in reverse chronological order)

Domestic Violence

City of Cleveland v. Walters (OH, 1994) 1994 WL 568300 (unpublished)

State v. David (MT, 1994) 1994 WL 501301 (unpublished)

State v. Farrow (WI, 1994) 1994 WL 326767 (unpublished)

Hatfield v. Anderson (MN, 1994) 1994 WL 510172

Woolfolk v. Com. (VA, 1994) 447 SE2d 530

Com. v. Kwiatkowski (MA, 1994) 637 NE2d 854, 63 USLW 2163

Ferris v. Clark (CT, 1994) 1994 WL 386063

People v. Heilman (CA, 1994) 25 CA4th 391, 30 CalRptr2d 422

People v. Krawiec (IL, 1994) 634 NE2d 1173

State v. Hlavaty (MO, 1994) 871 SW2d 600

Pallas v. State (FL, 1994) 636 So2d 1358

People v. Payton (NY, 1994) 612 NYS2d 815

State v. Johnson (FL, 1994) 1994 WL 583948 (unpublished)

Morton v. State (Ala., 1994) 1994 WL 529354 (unpublished)

Moore v. State (GA, 1993) 429 SE2d 340

Harvard v. State (FL, 1982) 414 So2d 1032

Non-Domestic Violence Cases in Which Men Stalked Women or Girls

In re McGaughey (MN, 1994) 1994 WL 534849 (unpublished)

People v. Brown (CA, 1994) 33 CalRptr2d 678, 28 CA4th 591

State v. Wasmire (OH, 1994) 1994 WL 476462 (unpublished)

City of Maumee v. Schoen (OH, 1994) 1994 WL 374198 (unpublished)

State of Tenn. v. Douglas (TN, 1994) 1994 WL 369734 (unpublished)

State v. Culmo (CT, 1993) 642 A2d 90

Appendix B: Selected Law Review Articles on Stalking and Domestic Violence

(in alphabetical order by author)

Bernstein, Susan L., "Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?," 15 Cardozo L. Rev. 525 (Oct. 93).

Dept. of Justice, "Dateline Justice," 3 No. 12 Dept of Justice Alert 12 (Oct. 93).

Developments in the Law: Legal Responses to Domestic Violence, "New State and Federal Responses to Domestic Violence," 106 Harv. L. Rev. 1528 (May 93).

Haggard, Thomas R., "The South Carolina Anti-Stalking Statute: A Study in Bad Drafting," 5-APR So. Carolina Law Rev. 13 (Mar/Apr 94).

Miller, Jennifer L., "Review of Selected 1993 California Legislation: Crimes: Stalking," 25 Pac. L. J. 595 (Jan 94).

Mills, Frank C., III, "Annual Survey of Georgia Law 6/1/92-5/31/93: Criminal Law," 45 Mercer L. Rev. 135 (Fall 93).

Phipps, Melissa Perrell, "North Carolina's New Anti-Stalking Law: Constitutionally Sound, But is it Really a Deterrent?," 71 N. C. L. Rev. 1933 (Sept. 93).

Salame, Laurie, "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 (Spring 93).

Wickens, James C., "Michigan's New Anti-Stalking Laws: Good Intentions Gone Awry," 1994 Det. C. L. Rev. 157 (Spring 94).

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