

# CLOSING THE LOOPHOLE: VERMONT'S LEGISLATIVE RESPONSE TO STALKING

## INTRODUCTION: THE LOOPHOLE THEORY

The chance that a murdered Vermont woman was killed by her current or former partner is twice that of the national average.<sup>1</sup> On September 15, 1992 this statistic again became a gruesome reality when Brattleboro disc jockey Robert Sawyer murdered his ex-girlfriend Judith Fournier. According to reports, Sawyer had harassed Fournier since their July 1992 break-up.<sup>2</sup>

In July 1992, Sawyer was charged with assault and vandalism stemming from an incident outside Fournier's apartment. He was released on several conditions, one of which was that he stay away from Fournier.<sup>3</sup> Fournier was "so sure she would be killed she had picked out a cemetery plot," according to her new lover.<sup>4</sup> Sawyer's harassment escalated in the week before Fournier's death.<sup>5</sup> In 1992, under Vermont law, until Sawyer did *something* more than follow her from a distance, police could not prevent Sawyer from stalking Fournier. All Judith Fournier could do was wait.

On September 15, 1992 her wait was over. Sawyer parked outside Fournier's office, then followed Fournier and her new lover as they left her office. When Fournier pulled into a gas station to call the police for help, it was too late. Within seconds, Sawyer pulled up, got into the car and began stabbing Fournier. She died three hours later.<sup>6</sup>

It seems inherently unjust that the legal system was unable

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1. VERMONT SUPREME COURT & VERMONT BAR ASS'N, GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM 4 (1991) (finding that 64% of women murdered in Vermont were victims of their spouse, lover, ex-lover, or ex-spouse) [hereinafter GENDER BIAS]. Nationwide only 31% of all women killed are murdered by their former or current partners. See VERMONT NETWORK AGAINST DOMESTIC VIOLENCE, VERMONT NETWORK FACT SHEET ON VIOLENCE AGAINST WOMEN 1 [hereinafter FACT SHEET] (on file with author). The legal community generally refers to this violence between current and former partners as "domestic violence"; the medical profession more accurately calls it "intimate violence." See Antonia C. Novello, *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3132, 3132 (1992); see *infra* notes 30-31 and accompanying text.

2. *Murdered Reporter Feared an Attack*, VALLEY NEWS (Lebanon, N.H.), Sept. 16, 1992, at 1 [hereinafter *Murdered Reporter*].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 16.

to respond effectively to Fournier's request for help until Sawyer did something more concrete to make her well-founded fear a reality. Judith Fournier's experience as a stalking victim is not uncommon for two reasons. First, at least half the women who try to terminate abusive relationships are harassed or stalked.<sup>7</sup> A woman is often at the greatest risk of physical danger when she attempts to leave an abusive relationship because the abuser's quest for control escalates with the victim's efforts to separate.<sup>8</sup> An estimated ninety percent of women killed by their intimate partners have been stalked first.<sup>9</sup> These statistics, which reflect a phenomenon known as "separation assault,"<sup>10</sup> call into question a popular stereotype of stalkers as deranged, unpredictable strangers who randomly pick their targets.<sup>11</sup> Research suggests that nearly half of all stalking incidents involve former intimate relationships.<sup>12</sup>

Second, absent specific legislation targeting stalkers, these situations often fall outside the scope of existing legal remedies leaving victims unable to defend themselves.<sup>13</sup> Most people

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7. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64 (1991).

8. *Id.* at 65.

9. Melinda Beck, *Murderous Obsession*, NEWSWEEK, July 13, 1992, at 60, 61.

10. Mahoney, *supra* note 7, at 65. "Separation" is the stage in a battering relationship when a victim makes a conscious or subconscious decision to end the abuse and take back control of her life. *See id.* at 65-66. This is usually manifested by attempts to physically separate or terminate the relationship. *Id.* at 65. "Separation assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return." *Id.*

11. For example, after tennis star Monica Seles was attacked by a deranged fan, *People* magazine ran a cover story on stalkers emphasizing strangers who stalked celebrities. David Ellis et al., *Nowhere to Hide*, PEOPLE, May 17, 1993, at 62, 62-72; *see also* Kathleen G. McAnaney et al., Note, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 832-38 (1993) (discussing delusional stalkers, also known as erotomaniacs and borderline erotomaniacs).

12. McAnaney, *supra* note 11, at 839 (reporting Los Angeles Police Department estimate that 48% of its stalking cases involve former intimate partners); Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 995 (1993) (reporting that research on Los Angeles stalkers shows that only 17% are celebrity oriented).

13. KENNETH R. THOMAS, CONGRESSIONAL RESEARCH SERV., ANTI-STALKING STATUTES: BACKGROUND AND CONSTITUTIONAL ANALYSIS 1 (1992). In Vermont, prior to the recent passage of stalking legislation, when a stalking victim called for police assistance, police could only arrest a stalker if they had probable cause to believe that there had been: a violation of a restraining order, VT. STAT. ANN. tit. 13, § 1030 (Supp. 1993); a violation of a pre-trial release order, VT. R. CRIM. P. 3(a)(6); or, commission of a misdemeanor by a suspect, who, if not immediately arrested, would cause personal injury or damage to

would consider typical stalking behavior, such as waiting in a car or following from a distance, innocuous, perhaps threatening, yet still undeserving of criminal punishment.

Threats, even substantial ones, traditionally are not considered sufficient grounds for criminal sanction.<sup>14</sup> Consequently, stalking victims who look to law enforcement for protection are frustrated and do not receive protection.<sup>15</sup>

As evidenced by Fournier's murder, the lack of statutory authority leaves stalking victims vulnerable, and all too often, dead. Ironically, one of the primary goals of Vermont's Abuse Prevention Act and related legislation is to protect victims from further abuse and empower them to take back control of their lives.<sup>16</sup> Studies of women murdered by their ex-husbands or boyfriends indicate that ninety percent had called the police at least once, and half had called five times or more.<sup>17</sup> Thus, when battering victims reach out for legal protection and support, the system is unable to help. For victims of stranger stalking, inadequate protection undermines their confidence in law enforcement. Advocates for stronger domestic violence and anti-stalking legislation refer to the lack of statutory authority as a "loophole"<sup>18</sup> and have turned to their legislatures to close it.

California enacted the nation's first anti-stalking law after several Orange County women were killed by their former spouses or boyfriends.<sup>19</sup> Anti-stalking laws give police the authority to intervene on behalf of a woman who knows she is vulnerable to

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property, VT. R. CRIM. P. 3(a)(4).

14. *Nightline: Stalking* (ABC television broadcast, Sept. 3, 1992) Transcript # 2944, at 5 (Interview with Professor Jonathan Turley, George Washington University) [hereinafter *Nightline*]; THOMAS, *supra* note 13, at 2.

15. *Nightline*, *supra* note 14, at 5 (Interview with Anne Seymour, National Victim Center) ("[We] are tired of hearing from victims, who could do nothing, from law enforcement, whose hands were tied because they had no legal authority to prevent such crimes from occurring."). Many Vermonters remember the tragedy of Rose Alyce Thayer's daughter who was stalked for months by a stranger. See Constance L. Hays, *If that Man Is Following Her, Connecticut Is Going to Follow Him*, N.Y. TIMES, June 5, 1992, at B1, B5. Eventually, the stalker killed the little girl. *Id.* Police had told Rose Alyce Thayer that they could do nothing since the stalker was not acting illegally. Author's personal knowledge.

16. See VT. STAT. ANN. tit. 15, §§ 1101-1108 (1989 & Supp. 1993).

17. Guy, *supra* note 12, at 996.

18. Toni Locy, *Stalking Bill Signed by Weld*, BOSTON GLOBE, May 19, 1992, at 21.

19. Michael Connelly, *Ex-Boyfriend Jailed Under 'Stalking' Law*, L.A. TIMES, June 10, 1991, at C28; see CAL. PENAL CODE § 646.9 (West Supp. 1993).

a violent assault before an attack occurs.<sup>20</sup> Additionally, these laws provide stiffer criminal penalties, including mandatory jail time, if the defendant is also in violation of a restraining order, divorce decree, or terms of parole.<sup>21</sup>

Anti-stalking legislation has been praised for closing the loophole. In theory, it provides the statutory authority to arrest a stalker before the victim is physically harmed. It remains to be seen, however, whether anti-stalking laws are effective in preventing murders, let alone in deterring terroristic behavior.<sup>22</sup> Anti-stalking laws are difficult to invoke and often apply in only limited situations.<sup>23</sup> They also target a broad range of conduct which in other situations would be perfectly legal, often triggering constitutional concerns.<sup>24</sup> Finally, research suggests that certain kinds of stalkers are mentally disturbed or sociopathic,<sup>25</sup> bringing into question the deterrence value of these laws. Yet, these issues have not discouraged legislators.

More than forty states have enacted anti-stalking legislation in the last two years with little or no opposition.<sup>26</sup> The unprecedented adoption of anti-stalking laws across the country is a powerful political statement that stalking will not be tolerated. Less than a year after Judith Fournier's murder, Governor Howard Dean signed Vermont's anti-stalking bill into law.<sup>27</sup>

Given the discouraging rate of intimate murder in Vermont,

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20. Alexander Reid, *Woman Is Slain as Children Watch*, BOSTON GLOBE, May 26, 1992, at 1, 4 (discussing penalties under Massachusetts's stalking law); see, e.g., MASS. GEN. LAWS ANN. ch. 265, § 43(b) (West Supp. 1993).

21. See *infra* notes 225-32 and accompanying text (discussing penalties for stalking violations).

22. Matthew J. Gilligan, Note, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others*, 27 GA. L. REV. 285, 335-36 (1992).

23. Telephone Interview with Joyce Allegro, Assistant District Attorney, Santa Clara County, California (Oct. 23, 1992).

24. *Nightline*, *supra* note 14, at 5.

25. McAnaney, *supra* note 11, at 853-59.

26. Memorandum from Donna Hunzeker, National Conference of State Legislatures, "Stalking" Legislation Update (May 5, 1993) [hereinafter Leg. Update] (on file with author). In Vermont, the Coalition for Prevention of Violence Against Women proposed an anti-stalking law along with other laws to "crack down on violent crime against women." *Laws Backed to Protect Women*, VALLEY NEWS (Lebanon, N.H.), Jan. 16, 1993, at 6. Participants in the drafting of the legislation included the Attorney General's office, the State Sheriff's Association, the Governor's Commission on Women, the State's Attorney's office and the Vermont Network Against Domestic Violence and Sexual Assault. Author's personal knowledge.

27. See VT. STAT. ANN. tit. 13, §§ 1061-1063 (Supp. 1993).

the increasing violence among strangers, and the criticisms surrounding anti-stalking laws, it is important to put into perspective what Vermont's anti-stalking law can do to protect Vermonters from potentially violent stalkers.<sup>28</sup> The objective of this note is to assess Vermont's anti-stalking law and to evaluate the law's ability to improve legal protection for victims and to deter stalking. Since victims of intimate violence are the most likely victims of stalking, and because the dynamics of stalking are strikingly similar to the dynamics of intimate violence,<sup>29</sup> part I briefly reviews intimate violence. Part II defines and describes stalkers and stalking to help clarify the problem faced by the legislature and courts in fashioning an effective legal remedy. Part III explores Vermont's legal options in order to determine why stalking does not fit into the existing framework. This section focuses on Vermont's criminal laws and Vermont's principal civil remedy, an abuse prevention order. Part IV outlines the anti-stalking law, compares it to California's anti-stalking law, and analyzes whether Vermont's law is an effective response to stalking—whether it closes the loophole. Part V concludes with several recommendations to strengthen the Vermont law.

## I. INTIMATE VIOLENCE

### A. *The Dynamics of Intimate Violence*

Intimate abuse results in more injuries that require medical treatment than rape, automobile accidents, and muggings combined.<sup>30</sup> Intimate violence is the second most common cause

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28. "The bottom line is not to support a measure merely because it is politically correct to do so but, rather, to seek changes that are truly meaningful and effective protections for victims of crime." Janet T. Mills, *Maine Already Well Equipped to Deal with 'Stalkers'*, MORNING SENTINEL (Portland, Me.), Sept. 15, 1992 (arguing that existing laws, if strictly enforced, would provide sufficient protection). *But see infra* part III.

29. McAnaney, *supra* note 11, at 838-41; *see generally* Wayne E. Bradburn, Jr., Comment, *Stalking Statutes: An Ineffective Legislative Remedy for Rectifying Perceived Problems with Today's Injunction System*, 19 OHIO N.U. L. REV. 271 (1992).

30. W.R. Elsea et al., *Family and Other Intimate Assaults*, 264 JAMA 1243, 1244 (1990). The term "domestic," which implies marital status or a household relationship, is misleading. All abusive relationships between acquaintances, same sex couples, or even inter-family members are included in the clinical understanding of domestic violence. "Despite inadequate terminology, most people who work in domestic violence learn early in their work that [violent relationships are] not a problem defined by marital status or

of injury to women overall, and the leading cause of injury to women ages fifteen to forty-four.<sup>31</sup> An estimated three to four million American women are abused every year.<sup>32</sup> The annual medical cost of this violence may be between five and ten billion dollars.<sup>33</sup>

Vermont is not immune to the impact of intimate violence.<sup>34</sup> From 1978 to 1987, sixty-four percent of Vermont female homicide victims were killed by intimate partners.<sup>35</sup> In fiscal year 1992, half of Vermont's murders involved family violence and more than half of Vermont's female homicide victims were family violence related.<sup>36</sup> During fiscal year 1992, the sixteen programs of the Vermont Network Against Domestic Violence and Sexual Assault served 5726 women, 6971 children, and 112 men victimized in incidents of intimate violence, an increase of thirteen percent over fiscal year 1991.<sup>37</sup>

Victims of intimate violence suffer from short and long term physical and psychological consequences.<sup>38</sup> "Injuries range from

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living arrangement but by intimacy and aggression." Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 236 (1992). Sociodemographic data for battered women show that approximately 31% of victims are single and another 60% are married or living with their partners. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 156 (1984).

31. FACT SHEET, *supra* note 1, at 1. Since the overwhelming majority of intimate violence victims are women and the vast majority of abusers are men, this note will use the corresponding pronouns. Approximately 95% of the victims of battering are women. *Id.*; WALKER, *supra* note 30, at 129 (indicating that most abusers are male and approximately .6% are women). The use of these pronouns is not meant to preclude same sex relationships or to deny that women also batter and stalk men.

32. Nancy K. Sugg & Thomas Inui, *Primary Care Physicians' Response to Domestic Violence*, 267 JAMA 3157, 3157 (1992).

33. Harris Meyer, *The Billion-Dollar Epidemic; Experts Say Family Violence Could Be the "Number One Draw on the Domestic Economy"*, 35 AM. MED. NEWS, Jan. 6, 1992, at 7, available in WESTLAW, TI File 148.

34. See Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 277 n.37 (1985) ("[W]omen living in rural areas [are] as likely to be abused as inner-city women.").

35. GENDER BIAS, *supra* note 1, at 4 (30 out of 47 female victims were murdered by their spouses, lovers, ex-spouses, or ex-lovers). During the same 10 year period, five women were alleged to have killed their male partners; two of the women were believed to have acted in self-defense and were not charged. *Id.*

36. JERI MARTINEZ, GOVERNOR'S COMM'N ON WOMEN, ANNUAL REPORT ON VERMONT'S DOMESTIC VIOLENCE PROGRAM 3 (1992) [hereinafter 1992 ANNUAL REPORT].

37. *Id.* at 5.

38. Council on Scientific Affairs, American Medical Association, *Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3184, 3184 (1992) [hereinafter *Violence Against Women*].

bruises, cuts, black eyes, concussions, broken bones, and miscarriages to permanent injuries such as damage to joints, partial loss of hearing or vision, and scars from burns, bites, or knife wounds.<sup>39</sup> The psychological trauma is equally devastating. "Reactions of shock, denial, withdrawal, confusion, psychological numbing, and fear are common."<sup>40</sup> The long term effects of abuse "include fear, anxiety, fatigue, sleeping and eating disturbances, intense startle reactions, and physical complaints."<sup>41</sup> "Perceptions of vulnerability, loss, and betrayal or hopelessness" are more severe for intimate violence victims than for victims of stranger assaults because of their relationship with the abuser.<sup>42</sup> Victims of intimate violence and stalking can exhibit symptoms consistent with Post-traumatic Stress Disorder.<sup>43</sup>

The essence of battering is control. Control is achieved through coercion, intimidation, manipulation, and ultimately, through physical violence.<sup>44</sup> Battering is a multi-faceted effort. Emotional, economic, and sexual abuse commonly co-exist with physical violence and are often precursors to the first violent contact.<sup>45</sup>

Battering is rarely an isolated occurrence. It recurs frequently and escalates in severity over time<sup>46</sup> and is, by its nature, unpredictable.<sup>47</sup> Lenore Walker, a leading authority on intimate

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39. *Id.* at 3186.

40. *Id.*

41. *Id.* These long term consequences are of particular relevance when understanding a victim's response to her batterer's stalking. See *infra* notes 293-99 and accompanying text (discussing Battered Woman's Syndrome defense).

42. *Violence Against Women*, *supra* note 38, at 3186.

43. McAnaney, *supra* note 11, at 851. Post-traumatic Stress Disorder "is reserved for individuals who have 'experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone, e.g., serious threat to one's life or physical integrity; serious threat or harm to one's children, spouse, or other close relatives.'" *Id.* (citation omitted).

44. "Men are violent and abusive toward women because this behavior allows them to establish and to maintain control within the relationships . . . [a]nd because no one has ever required them to stop." Lerman, *supra* note 30, at 220 (citation omitted).

45. Interview with Erica Levy, Court Advocate, Women's Information Services, in Lebanon, N.H. (Sept. 15, 1992); see also Richard M. Tolman & Gauri Bhosley, *The Outcome of Participation in a Shelter-Sponsored Program for Men Who Batter*, in *ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE* 113 (Dean D. Knudsen & JoAnn L. Miller eds., 1989) (discussing lasting harm of multi-faceted abuse).

46. WALKER, *supra* note 30, at 148.

47. LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 43 (1989) [hereinafter *TERRIFYING LOVE*].

violence, describes intimate violence as a cycle with three distinct phases: "the tension building phase; the acute battering incident; and the tranquil, loving (or at least nonviolent) phase that follows."<sup>48</sup> The length and intensity of each phase are unpredictable. During the tension building phase, relatively minor, physically abusive incidents occur; psychological warfare and controlled verbal abuse also may be a part of this phase.<sup>49</sup> Typically, women try to minimize the violence either by showing kind, nurturing behavior, or by avoiding the abuser.<sup>50</sup> This phase is emotionally stressful for both people and ultimately triggers the next phase: an acute battering incident.<sup>51</sup>

Many women are so frightened by the violence that they are scared to get help.<sup>52</sup> Additionally, many women convince themselves that things will get better or that they can cope.<sup>53</sup> This denial is reinforced by the batterer who atones for his behavior.<sup>54</sup> Thus, the final phase, the "honeymoon," begins again. During this phase the loving intensifies and serves to further bond the relationship.<sup>55</sup>

Despite the obvious physical and psychological harm caused by battering, the abuser is able to continue battering his partner because he does not fear legal or social consequences.<sup>56</sup> A batterer often believes he has the right to control his partner through the use of force.<sup>57</sup> Reinforcement of learned behavior may encourage this obsessive, dependent personality.<sup>58</sup> Impul-

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48. *Id.* at 42.

49. *Id.*

50. *Id.*

51. *Id.* at 43.

52. *See id.* at 43-45.

53. *Id.* at 47-50. Stalking victims respond similarly. For example, Betty, which is not her real name, was stalked by a former boyfriend and became so frightened of him that she obeyed his demands not to call police when he broke into her apartment. On another occasion, she gave into his request to see her one more time in the hopes that he would then leave her alone. *See generally* Betty, Redacted Transcript (discussing Betty's experience as a stalking victim) [hereinafter Betty] (on file with author).

54. TERRIFYING LOVE, *supra* note 47, at 47-50.

55. *Id.* at 44-45.

56. *See generally* Waits, *supra* note 34; Lerman, *supra* note 30.

57. Waits, *supra* note 34, at 286.

58. *Id.*

Descriptions of the [batterers] indicate that there were sufficient similarities to suggest a violence-prone personality which originates in childhood and becomes more severe as the men grow older. This is in contrast with other criminal patterns which reach a peak in young adulthood and become less



sive and easily frustrated, a batterer resorts to physical violence.<sup>59</sup> Like his victim, the batterer may deny his violence to himself and to others.<sup>60</sup> A batterer is not usually violent in other relationships. In fact, with people outside the family, he can be seen as the pillar of the community.<sup>61</sup>

Some batterers are more likely to kill than others.<sup>62</sup> Primary indicators of those likely to kill include: 1) batterer's sense of ownership of battered partner; 2) threats of homicide or suicide including threats to kill the partner, children, or himself; 3) fantasies of homicide or suicide; 4) obsessiveness about the partner or family; 5) depression; 6) possession of weapons (including arson); and 7) timing (sensitivity to separation).<sup>63</sup> When a desperate batterer believes he is about to lose his partner, or when he concludes that she is leaving him, he may decide to kill her.<sup>64</sup>

Statistics of partner-related homicides bear out these indicators.<sup>65</sup> Although most batterers are not antisocial or hopelessly ill, researchers suggest that a substantial portion of abusers do not respond to treatment, instead they find less overt means of maintaining control.<sup>66</sup> Experts also find that changes will not occur until the batterer takes responsibility for his

violent as men age.

WALKER, *supra* note 30, at 147. "Unreasonable sexual jealousy, intrusiveness, and an overwhelming need to control the women is another cluster of behaviors found uniformly" among batterers. *Id.* at 129. Batterers are often manipulative and are often described as having a Jekyll and Hyde personality. *Id.*

59. See Waits, *supra* note 34, at 287.

60. *Id.* at 289; WALKER, *supra* note 30, at 129. Studies indicate batterers *do* know what they are doing:

- 1) they often limit their beatings to places that will not show, like the stomach,
- 2) violent episodes occur almost exclusively in the home where they can get away with it and
- 3) although most violent incidents are justified by 'I just lost control', most batterers have limits beyond which they will not go—most stop short of killing their partners.

Waits, *supra* note 34, at 289 n.120 (citations omitted).

61. See Waits, *supra* note 34, at 287-88.

62. JERI MARTINEZ, VERMONT CRIMINAL JUSTICE TRAINING COUNSEL, DOMESTIC VIOLENCE RESPONSE TRAINING CURRICULUM app. 3, at A13 (1992) [hereinafter DVRTC].

63. *Id.* at A13-14.

64. *Id.* at A14.

65. See, e.g., WALKER, *supra* note 30, at 39; see also *supra* notes 35-37 and accompanying text.

66. See Tolman & Bhosley, *supra* note 45, at 121 (revealing that a substantial proportion of men who participated in counseling persisted in their aggressive behavior particularly through indirect aggression and psychological abuse).

battering.<sup>67</sup> Thus, without formal intervention, the cycle of violence will be endless and increasingly dangerous. Some suggest that punishment is necessary.<sup>68</sup> Others believe that terminating the relationship is the only way to halt the violence.<sup>69</sup>

### *B. Termination and Separation Assault*

[H]e would promise to never do it again. And she wanted to believe him . . . . When she wavered and it appeared his pleas and promises might not work, he would threaten to kill her if she refused to come home, threats which his past behavior gave her every reason to take seriously.<sup>70</sup>

Terminating the relationship is not simply a matter of recognizing that the abuse is *wrong* and then leaving the relationship. Termination is a complex emotional, psychological, and physical process.<sup>71</sup> It is not uncommon for a battered woman to make several attempts to leave before she finally succeeds.<sup>72</sup> Denial and self-blame are common obstacles that hinder her departure.<sup>73</sup> In some situations she may not want to end the relationship; she may just want the violence to end.<sup>74</sup> She may also be persuaded by his apologies that he will stop,<sup>75</sup> or she may

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67. See Waits, *supra* note 34, at 291.

68. Stephen B. Reed, Note, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 364-68 (1991) [hereinafter *Ozzie & Harriet*]; Waits, *supra* note 34, at 291.

69. TERRIFYING LOVE, *supra* note 47, at 46 ("[B]attering relationships rarely change for the better."); Interview with Judy Rex, Coordinator of the Vermont Network Against Domestic Violence and Sexual Assault, in Montpelier, Vt. (Oct. 21, 1992); Telephone Interview with Joan Zorza, Staff Attorney, National Center on Women and Family Law, New York, N.Y. (Oct. 9, 1992).

70. Mahoney, *supra* note 7, at 63 (quoting CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE 2 (1989)).

71. Mahoney, *supra* note 7, at 80-82.

72. *Id.* at 63.

73. Jessica L. Goldman, Note, *Arresting Wife Batterers: A Good Beginning to a Pervasive Problem*, 69 WASH. U. L.Q. 843, 844-45 (1991).

74. Interview with Levy, *supra* note 45 (noting that many women still love their partners despite the violence).

75. See TERRIFYING LOVE, *supra* note 47, at 44 (discussing the tranquil honeymoon phase).

focus on developing survival skills.<sup>76</sup> The threat of serious injury may also contribute to a woman's decision not to escape.<sup>77</sup> The battered woman forgoes the unpredictability of escape for more predictable coping strategies such as passivity, mental escape, or blocking.<sup>78</sup> Learned helplessness does not require the victim to be submissive.<sup>79</sup> Yet, assertive efforts to separate or to get help should not be construed as indicating that the woman is in control or will successfully terminate the relationship by herself.<sup>80</sup>

Although terminating the abusive relationship is a major advancement in ending the violence, women cannot be considered safe even after they leave their relationships.<sup>81</sup> First, more than half the women who attempt to leave violent relationships are harassed.<sup>82</sup> Some batterers harass and stalk their former partners for years.<sup>83</sup> Such tormenting perpetuates the control relationship by aggravating existing or past emotions and keeps the victims from feeling secure.<sup>84</sup>

Second, separation may be met with increased violence.<sup>85</sup> "The men in these situations almost always end up doing exactly

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76. WALKER, *supra* note 30, at 148.

77. Mahoney, *supra* note 7, at 63. In Walker's study 92% of the women surveyed "believed that the batterer could or would kill them and 87% of the women believed that if someone would die during a battering incident, it would be them." WALKER, *supra* note 30, at 39.

78. TERRIFYING LOVE, *supra* note 47, at 50-51. This coping mechanism is known as "learned helplessness." *Id.* at 50. "People suffering from learned helplessness are more likely to choose behavioral responses that will have the highest predictability of an effect within the known, or familiar, situation . . ." *Id.* They avoid the unknown. *Id.* at 50-51.

79. See Mahoney, *supra* note 7, at 40-42. Mahoney cautions against stereotyping battered women to avoid creating the impression that all battered women are incapable of fighting back or asking for help. *Id.*

80. Interview with Rex, *supra* note 69. The decision to leave must be a woman's own, but often she needs additional support such as temporary shelters or legal advocacy. *Id.* Learned helplessness may be reinforced by a lack of financial resources that frustrate a woman's efforts to leave. Mahoney, *supra* note 7, at 63. Many women stay because they have children and are financially dependent on the batterer. Goldman, *supra* note 73, at 846.

81. See WALKER, *supra* note 30, at 144.

82. Mahoney, *supra* note 7, at 64.

83. See, e.g., Laura Griffin, *Stalking Law Under Attack*, ST. PETERSBURG TIMES, Jan. 25, 1993, at 1B, 6B, available in LEXIS, News Library, STPETE File (Florida victim harassed by ex-husband for 16 years).

84. Terry Wilson, *Stalkers Are Driven by a Need to Control, Specialists Say*, CHI. TRIB., Feb. 23, 1992, § 6, at 4.

85. See McAnaney, *supra* note 11, at 841; see also *supra* notes 8-9 and accompanying text.

what they say they'll do, . . . [a]nd too often, they're saying, 'If you leave me, I will kill you and the kids,'" said David Adams, the director of Emerge, the country's first treatment program for men who abuse women.<sup>86</sup> Thus, stalking may coincide with the most dangerous time in an abusive relationship.

## II. STALKING: ANOTHER FORM OF INTIMATE VIOLENCE

### A. Stalking Defined

Stalking is essentially psychological warfare in the battle for control.<sup>87</sup> It is a pattern of multi-faceted conduct intentionally targeted at a specific person that terrorizes the victim.<sup>88</sup> It may not be a direct verbal or physical threat.<sup>89</sup> Rather, it is often an amalgamation of conduct—letters, phone calls, and lying in wait—rather than a single overt act. Stalking tactics include vandalism,<sup>90</sup> telephone harassment,<sup>91</sup> and verbal or physical threats.<sup>92</sup> The most common stalking behavior, and the most legally elusive, is following: "He followed me everywhere I went[,] . . . [i]f I went to work, he was outside work, if I left work, he followed me home, if I went to the grocery store, he'd be sitting on the brick wall outside when I got out."<sup>93</sup>

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86. Bob Hohler, *Court's Shield Can Draw a Bullet*, BOSTON GLOBE, Oct. 7, 1992, at 1, 26.

87. See Wilson, *supra* note 84, § 6, at 4.

88. This is the author's definition of stalking which was developed from conversations with victims and media reports.

89. See THOMAS, *supra* note 13, at 2.

90. *Murdered Reporter*, *supra* note 2, at 1 (Sawyer, who stalked Judith Fournier, had been charged with assault and vandalism two months prior to killing her.); Connelly, *supra* note 19, at C28 (stalker poured acid on victims car and slashed tires).

91. *Murdered Reporter*, *supra* note 2, at 1. Robert Sawyer reportedly would phone Fournier and hang up. *Id.* Betty changed her phone number three times to divert her stalker's constant phone calls. Even though her new numbers were unlisted, he figured out her number by systematically calling every possible combination of numbers until he reached her answering machine. Betty, *supra* note 53, at 23.

92. THOMAS, *supra* note 13, at 2-3; Hohler, *supra* note 86, at 26 (former abusive husbands threaten to kill estranged partners).

93. Sarah Strohmeier, *Authorities in Two States Plan Anti-Stalking Laws*, VALLEY NEWS (Lebanon, N.H.), Nov. 23, 1992, at 1, 7. Donna, a mother of two, had left her abusive boyfriend and obtained a restraining order to prevent him from terrorizing her. *Id.* Donna's story is not atypical. See Hays, *supra* note 15, at B1, B5 (describing Connecticut and Vermont victims who were followed); see also *Morning Edition: Anti-Stalking Laws Considered by Virginia* (National Public Radio, March 10, 1992) available in LEXIS, News Library, NPR File (victim followed for more than three years).

To an outsider, or to the reasonable person, stalking behavior such as waiting in a car<sup>94</sup> or standing on a public street corner<sup>95</sup> may not be threatening. Leaving a rose on a doorstep every day for eighteen months may appear to be a romantic, albeit an annoying gesture.<sup>96</sup> Some stalkers use more disturbing methods such as taping bullets to the victim's car window, pouring weed killer on the victim's lawn, slashing the victim's tires,<sup>97</sup> or leaving the victim obscene telephone messages.<sup>98</sup>

### B. Stalkers Defined

There is little formal research on stalkers.<sup>99</sup> Stalkers tend to be former intimate partners or acquaintances,<sup>100</sup> but can also

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[hereinafter *Morning Edition*].

94. See *supra* notes 2-6 and accompanying text (Robert Sawyer waited in his car while he stalked his former partner, Judith Fournier).

95. Telephone Interview with Nancy, Vermont Stalking Victim (Jan. 13, 1993). Nancy was watched day and night for several weeks by her stalker from a public sidewalk near her home. *Id.*

96. See Betty, *supra* note 53, at 4-5. Betty's stalker left a rose on her doorstep every day for almost two years.

It was getting worse and worse. When I would go to the dentist, flowers would be delivered, when I would go to the beauty shop, flowers would be delivered, when I would go to the doctor there would be a rose on my car and always, always the rose on my door every morning when I left for work . . . [W]hen I got home there were flowers stuck between my doornob [sic] and jam. I asked him repeatedly to stop and he would not listen.

*Id.* at 4. Betty's stalker wanted her to renew their relationship. Rebuked, he escalated his efforts. He terrorized Betty with threats of suicide, rape, and murder. He also vandalized her apartment, maintained constant surveillance, and harassed her with telephone calls. After being released from a hospital following a suicide attempt, he started leaving roses on her doorstep again. Despite a restraining order to stay away, Betty's stalker held her hostage in her own apartment and assaulted her. Finally, he was arrested for kidnapping. When Betty heard he was being released on bail, she fled her home state. She has not returned, and communicates with her lawyer by phone. *Id.* at 7, 23, 31.

97. Patricia Davis, *New Stalking Law Flushing the Crime into the Open in Va.*, WASH. POST, Jan. 24, 1993, at B1, B4.

98. Max Albright, *Tired of 'Not Living at All'*, HOUSTON CHRON., Dec. 13, 1992, at 3, available in LEXIS, News Library, HCHRN File.

99. Guy, *supra* note 12, at 995; McAnaney, *supra* note 11, at 832-43 (discussing the profiles of stalkers, primarily erotomaniacs and borderline erotomaniacs).

100. See THOMAS, *supra* note 13, at 2; California State Senator Edward Royce, *Convictions Under the 1991 Stalking Law* (July 6, 1992) (unpublished legislative commentary, on file with author) (of the six convictions under California's stalking law, five of the defendants were ex-boyfriends and one was a husband).

be strangers.<sup>101</sup> Celebrity stalkers are usually strangers.<sup>102</sup> Beyond the stalker's relationship to the victim, the other major distinguishing characteristic between types of stalkers is their motivation to stalk.

With the possible exception of the sociopathic stalker,<sup>103</sup> stalkers are motivated by romantic obsession or revenge.<sup>104</sup> The "romantic" stalker disguises his need for control as a romantic obsession.<sup>105</sup> "[These] stalkers [may] suffer from erotomania, in which they imagine the other person is in love with them and wants to be pursued."<sup>106</sup> Often estranged partners follow their ex-girlfriends or wives because they want to reconcile; they believe following them will demonstrate how much they care.<sup>107</sup> A romantic stalker's constant efforts to win the victim over may start out as harmless badgering. Over time, however, this initially non-violent obsession is likely to intensify and become violent.<sup>108</sup> Although strangers may fall into this category, batterers do not.

In contrast, the "revenge" stalker is motivated by rejection by

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101. See, e.g., Hays, *supra* note 15, at B5 (Vermont youth stalked by stranger); Griffin, *supra* note 83, at 1B (victim stalked by stranger since high school).

102. See, e.g., Ellis, *supra* note 11, at 63 (Senator's wife and soap opera star stalked by strangers).

103. McAnaney, *supra* note 11, at 842 (Sociopathic stalkers are distinct because "they do not appear to be seeking to initiate or maintain an interpersonal relationship.").

104. *But see Morning Edition*, *supra* note 93 (discussing three types of stalkers: stranger/celebrity, romantic, and revenge-oriented stalkers); McAnaney, *supra* note 11, at 832-43 (describing four types of stalkers: erotomaniacs, borderline erotomaniacs, former intimate partners, and sociopaths). It is this author's opinion, however, that regardless of the clinical classification of a stalker, a stalker is motivated in general terms by either romantic fantasy or revenge. As McAnaney notes, most stalkers, except sociopaths, try to "initiate or maintain an interpersonal relationship with their victim." McAnaney, *supra* note 11, at 842. Batterers or revenge stalkers are arguably trying to maintain their control relationship over the victim. The romantic stalker is also striving for a less destructive bond. Understanding, at least in general terms, a stalker's basic motivation can be helpful in evaluating the appropriateness of criminal or civil responses to stalking.

105. See, e.g., John W. Anderson, *Virginia Targets Stalkers*, WASH. POST, Feb. 10, 1992, at D1 (Regina Butkowsky's stalker begged her to date him before he shot her).

106. Wilson, *supra* note 84, § 6, at 4; see also McAnaney, *supra* note 11, at 832-38 (discussing the clinical characteristics of erotomania and borderline erotomania).

107. Telephone Interview with Allegro, *supra* note 23 ("[H]e wants to protect her, make sure that she is not seeing someone else, or he just wants her to know how much he needs her."); see, e.g., Betty, *supra* note 53, at 18 (Defendant testified at his restraining order hearing that the only thing he was guilty of was loving her.).

108. See generally McAnaney, *supra* note 11, at 843-50; see also Davis, *supra* note 97, at B4 (Some law enforcement officials insist "[t]here's no way for anyone . . . to determine which of the individuals who become obsessed will become violent.").

the victim or by another person for whom the victim is the unfortunate surrogate.<sup>109</sup> Thus, the revenge stalker appears to be motivated by malice. The revenge stalker is usually a spurned lover<sup>110</sup> or an abandoned spouse<sup>111</sup> whose behavior pattern closely resembles that of the batterer.<sup>112</sup> Many revenge stalkers are also batterers.<sup>113</sup> The revenge stalker's objective is to control the victim through fear and manipulation. He uses a variety of intimidating tactics to terrorize the victim, often knowing that his acts will go unnoticed or unpunished by the police.<sup>114</sup>

Whether romantically or maliciously motivated, if a stalker's initial efforts are unsuccessful, he may escalate his harassment.<sup>115</sup> Too often his tactics turn violent and lethal. The once romanticized notion that "I can't live without you" takes on a new and horrific meaning in stalking situations. Such statements reflect the stalker's willingness to take his life, the victim's life, or both.<sup>116</sup> These threats should be taken very seriously. Whether a stranger, acquaintance, or former intimate partner is motivated

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109. See McAnaney, *supra* note 11, at 842-43 (discussing sociopathic stalkers whose victims are surrogates for others). McAnaney suggests that Ted Bundy, the infamous serial killer, began to stalk and abduct his victims after experiencing rejection by a woman. *Id.* at 843.

110. The 1987 film, *Fatal Attraction*, portrayed a spurned lover's efforts to frighten her ex-lover into reestablishing their brief relationship. Although the typical roles were reversed, the cyclical nature of the female's manipulative behavior was consistent with that of a stalker. When the stalker came to believe that a reconciliation was no longer possible, she attempted to take her life, then tried to take her lover's life, and even his wife's life. *FATAL ATTRACTION* (Warner Bros. 1987).

111. See, e.g., Lorri Wilson, *Finding Weapon Easy Step for Man Who Killed Wife*, SACRAMENTO UNION, Jan. 26, 1990, at 3, 22 [hereinafter *Finding Weapon*]. Kathy Thomas was killed by her ex-husband in 1990 when he burst into her office with a 12 gauge shot gun and began shooting. "He was distraught over the break-up of their eight year marriage." *Id.* Friends said that "Thomas had threatened to harm his wife if she did not give their marriage another try." *Id.*

112. See *supra* notes 44-61 and accompanying text; see also McAnaney, *supra* note 11, 839-41 (discussing characteristics of former intimate partners).

113. See *supra* notes 7-12 and accompanying text; see, e.g., Locy, *supra* note 18, at 21; Reid, *supra* note 20, at 4; Strohmeyer, *supra* note 93, at 7.

114. See *supra* notes 87-98 and accompanying text (discussing stalking techniques).

115. See Anderson, *supra* note 105, at D1, D5 (after Regina Butkowski refused to date Pernell Jefferson, he became increasingly violent and eventually kidnapped and killed the Virginia woman).

116. See Lenore E. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 325 (1992) [hereinafter *Self-Defense*]; see, e.g., Patricia Nealon, *Terrors of Stalking Relived*, BOSTON GLOBE, June 7, 1992, at 1, 18 (four Massachusetts men implicated in domestic murders subsequently killed themselves).

by romantic obsession, revenge, or sociopathy, all stalkers have the potential to kill their victims.<sup>117</sup>

### C. Impact on Victims

Stalking victims, especially those who have had prior abusive relationships, believe their stalkers will cause severe bodily harm or even kill them.<sup>118</sup> Minimal contact with a former abusive partner may trigger substantial emotional distress. Batterer-stalkers who know their victims often use familiar gestures to provoke a particular response or fear.<sup>119</sup> Stalkers who harass strangers may also repeatedly use a specific behavior to cultivate fear and control. Therefore, regardless of actual or threatened physical harm, a stalker's behavior can cause substantial emotional harm.<sup>120</sup> Some victims live in "a constant state of siege" unable to regain confidence or lead normal lives.<sup>121</sup>

## III. ALTERNATIVE LEGISLATION

Vermont's conventional criminal and civil laws leave stalking victims unprotected and without recourse for two reasons. First, conventional construction of criminal and civil laws is too narrow to fit the unusual circumstances of stalking. This is the loophole theory. Second, the lack of understanding about the nature of

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117. See, e.g., Hays, *supra* note 15, at B5 (stranger stalks and kills Vermont youth); Anderson, *supra* note 105, at D1 (Virginia woman killed by acquaintance stalker after she refused to date him); Wilson, *supra* note 84, § 6, at 4 (revenge stalker kills wife after his efforts to keep her from filing for divorce fail).

118. Cf. WALKER, *supra* note 30, at 39 (92% of domestic abuse victims believe they could or would be killed); see also *Murdered Reporter*, *supra* note 2, at 1 (Fournier was so sure she was going to be killed by her stalker, she picked out a cemetery plot).

119. See *Self-Defense*, *supra* note 116, at 324; see also Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 137 (1991) (describing use of nonverbal cues in the context of intimate violence).

120. See McAnaney, *supra* note 11, at 850-53. "[O]ne study showed that women who received anonymous, obscene, or threatening telephone calls exhibited more anxiety than those who had been victims of serious physical assaults and thefts." Guy, *supra* note 12, at 966 (quoting Linda M. Gunderson, Comment, *Criminal Penalties for Harassment*, 9 PAC. L.J. 217, 219 (1978)).

121. Gilligan, *supra* note 22, at 322. For example, Betty fled her home and communicates with her lawyer by phone because she is afraid of being contacted by her former stalker. Betty, *supra* note 53, at 30. Although her stalker had been arrested and she had relocated to a new state, Betty attempted suicide. Author's personal knowledge.



stalking sabotages Vermont's efforts to protect victims. This is a more complex social and legislative challenge which reflects the systemic bias against understanding intimate violence. Together, these two problems result in a loosely coordinated justice system that discourages its own use and leaves stalking victims unprotected. To show how these problems frustrate both legal relief and deterrence efforts, this section explores a Vermont stalking victim's civil and criminal options. The following summary is not meant to be a comprehensive analysis of all the available criminal and civil statutes, but rather, a demonstration of why, absent comprehensive stalking legislation, stalking victims are unprotected and stalkers are undeterred. Its purpose is to identify the need for an anti-stalking law and the issues such legislation must address.

### A. Criminal Sanctions

Criminal laws are not drafted to address the complex and recurring issues of violent relationships, let alone stalking.<sup>122</sup> Conventional construction of criminal statutes such as assault, disorderly conduct, unlawful trespass, harassment,<sup>123</sup> and terroristic threats<sup>124</sup> narrows their applicability to stalking. Criminal law has traditionally focused on isolated and overt acts. This treats criminal harm as a specific one-time event and emphasizes resulting physical harm, which in stalking scenarios is inappropriate. Additionally, procedures, such as pre-trial release guidelines, reflect systemic priorities that favor

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122. See Mahoney, *supra* note 7, at 71-75.

123. Vermont does not have a harassment statute. Harassment is usually a misdemeanor offense criminalizing overt acts which are intended to annoy, alarm, or harass an individual, rather than the public in general. See, e.g., CONN. GEN. STAT. ANN. § 53a-183 (West Supp. 1993); Gilligan, *supra* note 22, at 297-99 (comparing anti-stalking laws and harassment statutes). Vermont has a misdemeanor telephone harassment statute proscribing threatening or harassing phone calls. VT. STAT. ANN. tit. 13, § 1027 (1974). However, it is rarely invoked. Interview with Gary Kessler, Deputy State's Attorney, in Montpelier, Vt. (Nov. 19, 1992). In the context of stalking, proscribing telephone harassment only limits the numerous tactics a stalker can employ to torment his victim. See *supra* notes 90-98 and accompanying text.

124. Vermont does not have a terrorist threat statute. The crime of terroristic threatening is a misdemeanor and requires the accused to make a direct and specific threat to commit a crime which will cause death or serious bodily injury. See, e.g., CAL. PENAL CODE § 422 (West Supp. 1993). Much of the language used in anti-stalking statutes is drawn from the terrorist threat statutes. See McAnaney, *supra* note 11, at 886-87 (comparing terroristic threat statutes to stalking laws).

defendants' rights and judicial efficiency rather than victims' safety or privacy. Consequently, it is no surprise that stalking is not covered under conventional criminal statutes.

### 1. Construction

The statute that comes closest to addressing stalking is simple assault. A person is guilty of simple assault if he "attempts by physical menace to put another in fear of imminent serious bodily injury."<sup>125</sup> Many stalking victims believe their stalker will kill them. However, construction of Vermont's assault statute is too narrow to cover a stalker's threatening behavior. "[A]ssault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present. Although physical contact is not an essential element, violence, threatened or offered, is."<sup>126</sup> The Vermont Supreme Court's interpretation of assault raises two concerns. First, it requires immediacy and threat of physical contact, both of which are usually not present in stalking situations.<sup>127</sup> Second, these requirements do not address the victim's belief that she is being threatened and disregard the culpable nature of the stalker's psychological violence.

To sustain a charge of assault under Vermont's statute, "there must be some power to do bodily harm, either actual or apparent" because the "threat of an immediate battery resulting in apprehension, even when intended only as a bluff, is so likely to result in a breach of the peace."<sup>128</sup> Using this objective standard, stalking by following a victim from a car or watching a victim from a distance does not amount to criminal assault. The present apparent ability to inflict violence is difficult to demonstrate if the

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125. VT. STAT. ANN. tit. 13, § 1023(a)(3) (1974). Aggravated assault involves a higher degree of culpability and requires attempted or actual causation of bodily injury with a deadly weapon. *Id.* § 1024(a)(2); *State v. Bolio*, 3 Vt. L. Wk. 277, 277, 617 A.2d 885, 886 (1992).

126. *State v. Murphy*, 128 Vt. 288, 291, 262 A.2d 456, 459 (1970).

127. The law's concern with imminence is explained by the criminal justice system's goal of punishing unlawful acts rather than unlawful thoughts. The closer the nexus between the thought and the act the more confident the criminal justice system can be that it is punishing a culpable person.

128. *State v. Riley*, 141 Vt. 29, 32-33, 442 A.2d 1297, 1298-99 (1982). Clarifying the burden of proof, the court noted that the jury would have to determine whether there was sufficient evidence to show that a reasonable person could feel apprehension, not whether the victim actually experienced fear. *See id.* at 33, 442 A.2d at 1299.

stalker is standing 100 yards away.

Construction of Vermont's assault statute also focuses on one particular act or set of simultaneous circumstances. Consequently, evidence of a stalker's prior conduct, which might otherwise substantiate the element of urgency or fear, most likely would not be admissible.<sup>129</sup> The requirement of immediacy of physical harm confuses the source of the injury in stalking situations. The damage is predominantly caused by psychological violence. Psychological warfare is one of the most powerful weapons in a stalker's arsenal. For a victim of intimate abuse, who is stalked by a former partner, stalking reminds them of the tension-building phase; there is no doubt in a survivor's mind that the batterer/stalker has the present apparent ability to cause harm. Thus, for a survivor, the threat of physical harm created by a stalker is imminent and the emotional distress is substantial. For a victim of stranger stalking, the unknown can be equally frightening. Until there is a physical threat or attempt to harm, there cannot be assault. By waiting until then, the law allows severe emotional harm.

Another statute which may be used to prosecute intimate violence offenders and stalkers is disorderly conduct, popularly known as breach of the peace.<sup>130</sup> Misdemeanor disorderly conduct criminalizes violent or threatening behavior that intentionally causes a public inconvenience or recklessly creates such a risk.<sup>131</sup> Although the statute does not require the criminal behavior to be on public property, the offensive conduct generally involves obstruction or disruption of the public peace.<sup>132</sup> "The public peace is that . . . which every person feels under protection of law; and a breach of peace is an invasion of the protection

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129. Cf. *State v. Barcomb*, 136 Vt. 141, 141-42, 385 A.2d 1089, 1089 (1978) (in prosecution for simple assault, evidence of defendant's prior conduct is not admissible).

130. VT. STAT. ANN. tit. 13, § 1026 (1974).

A person who, with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof: (1) Engages in fighting or in violent, tumultuous or threatening behavior; or (2) Makes unreasonable noise; or (3) In a public place uses abusive or obscene language; or (4) Without lawful authority, disturbs any lawful assembly or meeting of persons; or (5) Obstructs vehicular or pedestrian traffic, shall be imprisoned for not more than 60 days or fined not more than \$500.00 or both.

*Id.*

131. *Id.*

132. See *State v. Sanderson*, 123 Vt. 214, 216, 185 A.2d 730, 731 (1962).

which the law thus affords."<sup>133</sup>

Stalking victims face two obstacles in bringing disorderly conduct charges. First, stalking may not constitute a public inconvenience because stalking is usually targeted at a specific person, not the public in general. Stalkers, however, frequently harass their victims at work which places co-workers at risk.<sup>134</sup> Second, an obstruction must be "a physical obstruction, a result of the body or objects and not of minds or words."<sup>135</sup> Seemingly innocuous behavior such as lying in wait or following would most likely fail to establish such an obstruction.

Arguably, a more accurate interpretation of stalking would constitute a breach of the peace. Stalking is tantamount to imprisoning the victim. Stalking victims often feel trapped and are afraid to leave their homes because of the constant threatening surveillance. Victims are not at liberty to come and go as they please. Victims limit their time in public places. They curtail trips outside the home, even to work, in order to avoid contact with the stalker.<sup>136</sup> Moreover, stalking victims are deprived of "that sense of security and tranquility . . . which every person feels under the protection of the law."<sup>137</sup> In this sense, stalking victims are physically obstructed.

Since stalkers often trespass on private property in order to leave their victims messages, or to get a closer look, Vermont's unlawful trespass statute offers another alternative avenue of prosecution.<sup>138</sup> The procedures for pursuing criminal trespass charges require the victim to provide notice to the offending trespasser that he is not allowed on her property.<sup>139</sup> If the trespasser violates the property owner's request, he may be arrested. Penalties for misdemeanor trespassing are minimal,

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133. *Id.*

134. See *Finding Weapon*, *supra* note 111, at 3 (stalker burst into wife's office and started shooting).

135. *State v. Arbeitman*, 131 Vt. 596, 602, 313 A.2d 17, 21 (1973) (construing VT. STAT. ANN. tit. 13, § 1026(5)).

136. See *Griffin*, *supra* note 83, at 1B (victim could go nowhere alone, not even in broad daylight); *Morning Edition*, *supra* note 93 (victim felt trapped in home and was under constant surveillance when in public).

137. *Sanderson*, 123 Vt. at 216, 185 A.2d at 731.

138. VT. STAT. ANN. tit. 13, § 3705 (1974 & Supp. 1993).

139. *Id.* § 3705(a)(1)-(2). This may include notice by a law enforcement officer instead of by the property owner. *Id.* § 3705(a)(1).

usually amounting to a slap on the wrist.<sup>140</sup> Even if enforcing trespass laws deterred stalkers from trespassing, such statutes merely interrupt the multi-faceted behavior. Stalkers will find an alternative vantage point. For example, after being served with written notice to stay off the victim's property, one Vermont stalker moved his relentless surveillance to a public street corner across from the victim's home and then to the local grocery store.<sup>141</sup>

## 2. Enforcement

Police are unable to provide immediate help for stalking victims because they cannot arrest a stalking suspect without probable cause for a specific crime.<sup>142</sup> Prior to the enactment of Vermont's anti-stalking legislation, police had to fit stalking into one of Vermont's criminal statutes. If the stalker's behavior fell within the statutory definition of a particular crime there also had to be sufficient evidence to support making an arrest.<sup>143</sup> These two elements are very difficult to satisfy in stalking situations.

If the victim is *fortunate* enough to have an overtly violent stalker, the police can arrest the stalker. But this remedy provides only temporary protection. Prior to trial, "[a] judicial officer may, as a condition of release, order that a defendant not harass or cause to be harassed a victim or potential witness."<sup>144</sup> However, the current construction of Vermont's pre-trial release statutes poses a substantial obstacle to ensuring the safety of

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140. *Id.* § 3705(c) (Supp. 1993) (up to a \$500 fine or one year in prison, or both).

141. Telephone Interview with Nancy, *supra* note 95. Nancy was encouraged to bring criminal trespass charges against her stalker because she did not qualify for a temporary restraining order. See *infra* notes 175-76 and accompanying text (discussing limited scope of restraining order).

142. VT. R. CRIM. P. 3(a).

143. VT. R. CRIM. P. 3(a)(4).

144. VT. STAT. ANN. tit. 13, § 7554(a)(3) (Supp. 1993). Recent history of actual violence may be considered by the judicial officer as bearing on the character and mental condition of the accused. *Id.* § 7554(b). The statute allows for judicial discretion in crafting release conditions and suggests that the decision include consideration of the public's safety. The bail guidelines allow judges to "[i]mpose any other condition found reasonably necessary to protect the public, except that a physically restrictive condition may only be imposed in extraordinary circumstances." *Id.* § 7554(a)(2)(C). Under Vermont's statute pertaining to conditions of pre-trial release, a defendant can be held without bail if she or he poses a threat to the public. *Id.* § 7554(a)(2). Pre-trial release restrictions may also consider the likelihood the defendant will attend future court appearances. *Id.* § 7554(a)(1).

stalking victim.<sup>145</sup>

The Vermont Supreme Court has circumscribed the usefulness of the pre-trial release guidelines as a protective tool.<sup>146</sup> The Court has refused to find the extraordinary circumstances which would warrant physically restrictive release conditions even where a defendant had a history of assault and abusive behavior toward the complaining witness and "was not able to leave her alone."<sup>147</sup> In *State v. Fales*, the Vermont Supreme Court explained the systemic priorities in determining the plaintiff's right to bail:

The defendant's verbal and physical battering behavior toward his wife may be characterized as severe, calculating, continuing, and uncontrollable. He threatened to kill her during the course of the episode . . . . Defendant has battered women in the past. The threats to the well-being of the victim here, however real and proximate to her, are too remote and attenuated from the integrity of the criminal proceedings to dictate so sweeping a response as denial of the right to bail.<sup>148</sup>

The *Fales* court's reason for allowing pre-trial release was, in part, based on speculation that denial of bail would become the rule, not the exception. "Whenever there is a victim of crime remaining alive, an inference may be made that the victim's well-being is in jeopardy and pressure brought to influence [the victim's] testimony or the outcome of the case."<sup>149</sup>

In the context of intimate violence, the majority of stalking situations, this rationale is dangerously flawed in theory and in

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145. Under the Vermont Constitution, a person cannot be held without bail unless the offense she or he is charged with is punishable with a life sentence or death. VT. CONST. ch. II, § 40.

146. *State v. Wood*, 157 Vt. 286, 289, 597 A.2d 312, 313 (1991) (noting that the purpose of bail is to assure attendance in court).

147. *State v. Sauve*, 4 Vt. L. Wk. 89, 90, 621 A.2d 1296, 1298 (1993) (citing VT. STAT. ANN. tit. 13, § 7554(a)(2)(C) (Supp. 1992)) (reversing the trial court's denial of bail).

148. *State v. Fales*, 157 Vt. 652, 653, 599 A.2d 1046, 1047 (1992) (mem.) (defendant was arrested for simple assault); see also *Sauve*, 4 Vt. L. Wk. at 90-92, 621 A.2d at 1298-1301 (discussing rationale).

149. *Fales*, 157 Vt. at 653, 599 A.2d at 1047.

practice.<sup>150</sup> This approach to evaluating eligibility for bail treats criminal conduct as an isolated historic event, despite evidence that the abusive behavior is ongoing. This policy has cost several Vermonters their lives. In 1990, Cynthia Thow was beaten unconscious and then driven into a tree by her ex-boyfriend after he had been released on bail.<sup>151</sup> Judith Fournier was killed by her ex-boyfriend while he was in violation of his release conditions.<sup>152</sup> Gerald Waterman, a Coventry resident, killed himself after killing his former wife Diane Young. Waterman committed the murder-suicide after being released on bail pending charges of an aggravated sexual assault and violation of a restraining order.<sup>153</sup>

If an objective of arrest is to protect victims, the fact that most abusers will be released within a few hours of their arrests is hardly comforting.<sup>154</sup> Fortunately, many people are deterred both by arrest and the threat of incarceration.<sup>155</sup> Arguably, some people are undeterrable,<sup>156</sup> but that is no excuse not to enforce the law to the fullest extent possible.

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150. See 1992 ANNUAL REPORT, *supra* note 36, at 15-16 (citing Judge Hudson's opinion calling for the Vermont judiciary to rethink its stance on constitutionally appropriate circumstances to deny bail, especially in light of the victim's constitutional rights and the frequency with which defendant's ignore conditions of release).

151. DVRTC, *supra* note 62, at I-12; Telephone Interview with Jeri Martinez, Project Director, Family Violence Law Enforcement Training Project (Oct. 23, 1992). Shortly after Thow's death, the Vermont legislature made the violation of a restraining order a crime. *Id.*; see also VT. STAT. ANN. tit. 13, § 1030 (Supp. 1993). A constitutional bail amendment was also proposed to expand bail guidelines to afford greater protection to victims. Proposal 7, 61st Leg. Biennial, Vermont Senate (1991) (The bail amendment to the Vermont Constitution, chapter I, section 40, was passed by the Vermont House and Senate. The proposal must be passed by the 62d Biennial legislature, and then survive a public referendum.).

152. *Murdered Reporter*, *supra* note 2, at 1.

153. Michael Maynard, *Coventry Man Kills Ex-Wife, Shoots Himself*, RUTLAND HERALD, Oct. 26, 1992, at 1.

154. See Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 176 (1990).

155. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 65-72 (1992).

156. McAnaney, *supra* note 11, at 906.

### 3. Systemic Bias

Stalking victims face additional difficulties in gaining protection under Vermont's criminal justice system. The Gender Bias Task Force found that attitudes of some judges, attorneys, and court personnel presented women with obstacles to effective utilization of the process.<sup>157</sup> The Task Force also reported blatant discrimination in that domestic cases were treated differently than cases involving strangers.<sup>158</sup> Prosecutors were reluctant to prosecute domestic assault cases and frequently did not take them as seriously as assaults by strangers.<sup>159</sup>

Surrounding circumstances often encourage prosecutors to drop cases or expedite them on lesser charges.<sup>160</sup> Witnesses may be reluctant to testify because they want to maintain their relationship with the defendant or because they are afraid of retaliation.<sup>161</sup> Budget, time, and resource constraints also persuade prosecutors to drop charges.<sup>162</sup> If no serious effort is made to prosecute the accused, arresting a stalker becomes a formality with questionable deterrence value. Although some state's attorneys are more aggressive in prosecuting intimate violence cases, not one Vermont county has a formal policy of not dropping intimate violence cases.<sup>163</sup> Infrequent prosecution sends a message that the law will not punish stalkers, and

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157. GENDER BIAS, *supra* note 1, at 6-13.

158. *Id.* at 10 n.13.

159. *Id.* A victims' advocate told the Task Force:

there were two recent cases in our county involving victims who had their jaws broken . . . . But in the case of the male victim, the charge was brought as an aggravated assault and the charge of the female victim was brought as a simple assault. When I questioned several state's attorneys in our office, the response was, "well, you know, this woman was with a man . . . it was a boyfriend/girlfriend situation."

*Id.* at 18.

160. Litsky, *supra* note 154, at 167; GENDER BIAS, *supra* note 1, at 18-19; Waits, *supra* note 34, at 321-23.

161. Interview with Kessler, *supra* note 123; Asmus, *supra* note 119, at 130; Goldman, *supra* note 73, at 856.

162. Eleanor Lyon & Patricia G. Mace, *Family Violence and the Courts*, in ABUSED AND BATTERED, *supra* note 45, at 167, 172-73.

163. Interview with Kessler, *supra* note 123. No-drop policies have been instituted in cities like Quincy, Massachusetts as a way to reinforce the city's commitment to punishing abuse. Anita Diamant, *How the Quincy District Court Protects Battered Women*, BOSTON GLOBE, Oct. 11, 1992, (Magazine), at 59.



discourages police from making arrests.<sup>164</sup> Even if the state is successful in getting a conviction, a defendant may not serve any time.<sup>165</sup>

Penalties for domestic offenses are minimal. This is due in part to legislative reluctance to impose jail terms for such crimes and in part to the justice system's reluctance to view abusive husbands and boyfriends as *real* criminals.<sup>166</sup> Often these men are the only sources of financial support in their households.<sup>167</sup> They may have jobs which would be jeopardized by a jail term. Consequently, "punishment often seems an inappropriate remedy."<sup>168</sup> In addition, overcrowding in jails discourages incarceration.<sup>169</sup> As a result, the criminal justice system reinforces a victim's fear that the law is impotent and the offender is in control.<sup>170</sup>

### B. Civil Remedies: Abuse Prevention Orders

For victims who want to avoid the criminal process, but want to take some action,<sup>171</sup> an abuse prevention order ("APO") is an option. An APO—also known as a civil restraining order or a temporary restraining order—is a court order which can require the defendant to stop abusing the plaintiff and interfering with the plaintiff's personal liberty.<sup>172</sup> A temporary order affords

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164. Lerman, *supra* note 30, at 221. While the legislature can mandate that police get tougher on batterers, it is unlikely without prosecutorial support that the police would continue to arrest. *Id.*

165. Waits, *supra* note 34, at 327-28.

166. *Id.*; Litsky, *supra* note 154, at 170.

167. See Natalie L. Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 282 (1987).

168. *Id.* Forcing batterers to do time is seen as just making a bad situation worse. *Id.*

169. Interview with Kessler, *supra* note 123 (imposing stricter sentences on batterers will place a burden on Vermont's already overcrowded correctional facilities).

170. See, e.g., Diamant, *supra* note 163, at 59. "The abuser will behave as the law allows, not as it commands." Ozzie and Harriet, *supra* note 68, at 366 (citation omitted).

171. Tort-based remedies such as intentional infliction of emotional distress are unrealistic because they do nothing to halt the behavior. Additionally, civil litigation often takes years to resolve. See McAnaney, *supra* note 11, at 875-81 (discussing civil remedies).

172. VT. STAT. ANN. tit. 15, §§ 1101-1109 (1989 & Supp. 1993). Emergency relief is available ex parte, but the respondent may contest the order within 10 days. *Id.* § 1104. The principle tool for relief created by the Abuse Protection Act was the Abuse Prevention Order. From 1980 to 1990, with few exceptions, Vermont's response to domestic violence has been limited to changing and strengthening the restraining order program. DVRTC,

protection for up to ten days and a permanent order provides protection for up to a year.<sup>173</sup> Unfortunately for stalking victims, abuse prevention orders are more effective in theory than in practice. Like criminal statutes, problems of statutory construction, enforcement and systemic bias limit the effectiveness of civil remedies.

### 1. Construction

Under Vermont's Abuse Prevention Act, a plaintiff may request an order that defendant refrain from abusing the plaintiff and from interfering with her personal liberty.<sup>174</sup> A stalking victim may not qualify for an APO. A victim cannot qualify for a restraining order unless she has had an intimate relationship with, has or does live with, or is related to, the defendant.<sup>175</sup> Consequently, victims stalked by strangers or even non-intimate acquaintances are ineligible for relief under the Act.<sup>176</sup>

The Abuse Prevention Act's definition of "abuse," which emphasizes physical harm, also limits the Act's applicability to stalking. Abuse includes "attempting to cause or causing physical harm; . . . [and] placing another in fear of imminent serious physical harm."<sup>177</sup> The statute does not require a showing of physical injury to prove abuse, but it does require evidence of

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*supra* note 62, at I-9 to I-10.

173. VT. STAT. ANN. tit. 15, §§ 1103(b), 1104(b) (1989).

174. *Id.* § 1104; DVRTC, *supra* note 62, at II-13 (discussing criminal violation of a domestic abuse order). State-wide law enforcement training interprets liberty to mean "[t]he power to do as one pleases; freedom from physical restraint; freedom from arbitrary or despotic control; the positive enjoyment of various social, political, or economic rights and privileges." *Id.* at II-18.

175. VT. STAT. ANN. tit. 15, § 1101(2) (Supp. 1993). Plaintiffs are eligible for relief from abuse if the defendant is a household or family member or someone with whom the plaintiff has had an intimate relationship. This includes same sex couples. *Id.* Prior to the Abuse Prevention Act, married people could obtain a restraining order only if they also filed for divorce. Under the new legislation, married or divorced victims of intimate violence could petition for a restraining order without filing for divorce. DVRTC, *supra* note 62, at I-9.

176. See Telephone Interview with Nancy, *supra* note 95. Nancy, a professional, was stalked by a former patient. Although she tried to convince the judge that her therapist-patient relationship should qualify under the act, her request for an APO was denied. The judge recommended pursuing criminal trespass charges. See *supra* notes 138-41 and accompanying text.

177. VT. STAT. ANN. tit. 15, § 1101(1) (1989 & Supp. 1993).

imminent physical harm to substantiate the fear.<sup>178</sup> Stalking victims must show a nexus between the pattern of offensive behavior and the ability to inflict serious physical harm. Absent either evidence of prior physical abuse or a specific threat to make physical contact, a stalking victim may not be able persuade the judge to issue a restraining order.

Most stalking victims would probably seek emergency relief orders which require an additional showing of "immediate danger of further abuse."<sup>179</sup> If the victim/plaintiff has previously been granted an APO for the same defendant, such documentation may provide the necessary showing of potential future abuse. An expired APO, however, may be insufficient to establish the element of imminence. A victim may have to wait until the stalker's behavior has escalated from mere following or lying in wait to more overt aggressive actions before the element of imminent danger is satisfied. As evidenced by Judith Fournier's death, this wait may prove fatal. In stalking cases involving strangers or acquaintances, because there has only been mental abuse, not physical abuse, the likelihood of demonstrating further physical abuse is minimal.

In the context of both stalking and intimate violence, this definitional emphasis on physical harm is ironic and self-defeating. Although the Abuse Prevention Act was specifically enacted to address intimate violence, its definitions do not reflect the understanding that intimate abuse is a multi-faceted effort.<sup>180</sup> These narrow definitions are even more frustrating when the statutory responses to child and elder abuse, which specifically encompass emotional maltreatment and psychological harm, are considered.<sup>181</sup> Thus, it appears the Vermont legislature has refused to adopt appropriate definitions of intimate abuse.

Stalking victims whose APO requests are denied have limited

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178. *Id.*

179. *Id.* § 1104(a)(1).

180. See VT. R. CIV. P. 80(m) (Reporter's notes) (discussing interpretation of the term abuse under the Abuse Prevention Act). *But see supra* notes 44-51 and accompanying text (discussing the dynamics of intimate violence).

181. See VT. STAT. ANN. tit. 33, § 4912 (1991 & Supp. 1993) (Under the Child Abuse Prevention Act, the definition of abuse includes impairment of mental health; the definition of harm includes emotional maltreatment.); VT. STAT. ANN. tit. 33, § 6902 (1991 & Supp. 1993) (Under the Elderly Abuse Prevention Act, the definition of abuse includes mental maltreatment and psychological abuse.).

legal alternatives.<sup>182</sup> Although the victim has a statutory right to an appeal,<sup>183</sup> this is not a practical option. A stalking victim who believes she is in grave danger does not have the time, let alone the money or legal support, that an appeal requires. Her options are limited. If her county has a crisis shelter or safe home network, she may be able to find temporary safety.<sup>184</sup> Without hope of legal protection, many stalking victims go underground or relocate, abandoning their homes, their jobs, and their friends.<sup>185</sup> This result is one of the most egregious consequences of the legal system's inadequate response to stalking.

## 2. Enforcement

Complaints about ineffective APOs abound in Vermont and are a nationwide problem.<sup>186</sup> Many victims do not even bother applying for relief orders because they believe court orders are unenforceable. Enforcement problems stem from loosely drafted restraining orders, ill-advised plaintiffs, and incredulous defendants.

Despite the legislative authority to "tailor their orders to the facts at hand,"<sup>187</sup> judges are reluctant to draft the orders strictly.<sup>188</sup> Restrictive options, such as requiring the defendant to stay at least 100 yards from the plaintiff, depend on the plaintiff asking for such relief.<sup>189</sup> Often victims have no idea

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182. See VT. STAT. ANN. tit. 15, § 1104 (1989 & Supp. 1993) (specifically giving plaintiffs the right to ask a judge for reasons why an order has been denied).

183. *Id.* § 1109. The complete dearth of case law regarding appeals from the denial of an APO evidences the ineffectiveness of this legislative gesture.

184. Stays in safe homes are usually limited to one or two days. Shelters also offer short term temporary housing up to a week. Availability is limited due to over-crowding and demand. 1992 ANNUAL REPORT, *supra* note 36, at 11.

185. See, e.g., Betty, *supra* note 53, at 30-31 (victim fled her state so that her stalker would not find her).

186. Interview with Rex, *supra* note 69.

187. VT. R. FAM. P. 9 (Reporter's notes). A plaintiff may request: (1) an order that defendant refrain from abusing the plaintiff and from interfering with her personal liberty; (2) an order that defendant immediately vacate the household, and that plaintiff be awarded sole possession of a residence; (3) an award of temporary custody of a minor. VT. STAT. ANN. tit. 15, § 1103 (1989). The revised abuse prevention orders forms were purposefully left blank to ensure that trial judges consider a full range of restrictions on the defendant. VT. R. FAM. P. 9 (Reporter's notes).

188. Interview with Levy, *supra* note 45 (indicating that judges are concerned with restricting defendants' personal liberty).

189. *Id.*

what types of relief they are entitled to request.<sup>190</sup> This is a source of much confusion and frustration for many women. Without specific instructions, such as ordering the defendant to stay 100 feet from the plaintiff, or to refrain from any telephone or mail contact, police have a difficult time enforcing these orders.<sup>191</sup> Unless the defendant is violating the specified restrictions, police have no probable cause to intervene.<sup>192</sup> Additionally, APOs are traditionally limited to protecting the victim in her home or at work, not in public places.<sup>193</sup>

Stalkers, like abusers, usually find ways around the orders.<sup>194</sup> Although some defendants are deterred by a court order, others are keenly aware of the legal and practical limits of an APO.<sup>195</sup> Many stalkers choose simply to ignore the orders.<sup>196</sup> Finally, many victims do not pursue the one year final order and allow the temporary order to lapse. Reconciliation, fear of retaliation, and lack of confidence in the order's

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190. Victims who are trying to separate from an abusive relationship may not anticipate the complications from separation such as who will be able to live in the house, and will be able to see the children. The legislature explicitly made these requests available to make the APO a meaningful alternative to running away or staying with the abuser. VT. STAT. ANN. tit. 15, § 1103(a) (1989).

191. See VT. R. FAM. P. 9(f)(3) (Reporter's notes) ("Some law enforcement officers have hesitated or refused to enforce orders which they believe were invalidated by the plaintiff by allegedly inviting the defendant to visit the plaintiff's premises.").

192. VT. STAT. ANN. tit. 15, § 1104(d) (Supp. 1993) (making violation of a restraining order a crime). Under companion legislation, a violation of an APO is a criminal offense. VT. STAT. ANN. tit. 13, § 1030 (Supp. 1993). Section 1030 allows police to arrest a suspect for probable cause of a violation of a restraining order and should help provide better protection for stalking victims in public places. Violation of § 1030 is a misdemeanor punishable by a one year jail term, a \$5000 fine, or both. *Id.* Conviction of a second offense is a felony subject to up to three years in prison, a fine of not more than \$25,000, or both. *Id.* Both title 13, § 1030 and title 15, § 1104 were introduced after Cynthia Thow's death. Telephone Interview with Martinez, *supra* note 151.

193. See Betty, *supra* note 53, at 18-19 (stalker contested restraining order because it restricted his access to public places); Telephone Interview with Nancy, *supra* note 95 (stalker relocated his surveillance location to a public street after being served notice for trespass).

194. Connelly, *supra* note 19, at C28, ("[L]aw enforcement authorities were powerless to protect the victims because of difficulties in proving violations . . .").

195. Interview with Levy, *supra* note 45; see Betty, *supra* note 53, at 18-19.

196. See Griffin, *supra* note 83, at 1B, 6B; see also Wilson, *supra* note 84, § 6, at 4. Defendants' failures to comply are often facilitated by inconsistent police efforts. Since Vermont does not track domestic violence calls or follow-up contacts, it is impossible to determine how much discretion police actually exercise in the field when determining whether to arrest, counsel, or ignore an alleged violation. Telephone Interview with Martinez, *supra* note 151.

ability to offer protection are common reasons for this decision.<sup>197</sup>

### 3. Systemic Bias

The lack of understanding and the attitudes of people in the legal system frustrate women's attempts to use the courts.<sup>198</sup> Unfortunately, most judges' lack of familiarity with the cycle of intimate violence makes them unable to put what they see and hear into an appropriate context.<sup>199</sup> Conventional modes of analysis obstruct a more appropriate understanding of the terrifying situation.<sup>200</sup> Additionally, judges are just as susceptible to damaging myths and stereotypes as society at large.<sup>201</sup> It is often hard for judges to get past requiring evidence of physical harm, despite the fact that this evidence is technically

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197. Interview with Levy, *supra* note 45.

198. GENDER BIAS, *supra* note 1, at 5-6, 10 n.13.

199. *Cf.* GENDER BIAS, *supra* note 1, at 8. The lack of understanding also prejudices batterers. Several attorneys, both male and female, indicated in their comments to the survey that judges are too quick to perceive male respondents in intimate violence cases as probable abusers. *See id.* at 13. Particularly at the emergency stage, some attorneys feel that judges are granting petitions based on weak or stale evidence. *Id.*

200. *See* Mahoney, *supra* note 7, at 71-93. A Vermont woman attempting to leave an abusive relationship left her husband several times over a two year period and lost custody of her nine year old daughter. GENDER BIAS, *supra* note 1, at 16. The husband's prevailing argument was that his wife was an unstable parent since she "left him so many times in the past two years and stayed with different people, including men." *Id.* The fact that the husband had several affairs during this period was not seriously questioned or discussed by either party at the hearing. "This woman was shocked that her attorneys and the judge did not have a better understanding of batterer relationships." *Id.*

201. *See* Waits, *supra* note 34, at 327-28; *see also* Mahoney, *supra* note 7, at 75-76; *see generally* GENDER BIAS, *supra* note 1, at 143-47. For example, an abused wife appealed to the Vermont Supreme Court over her award of damages and property distribution resulting from divorce proceeding. Her request for damages was based on evidence of severe battering. The trial court awarded \$25,000, reasoning that:

The marital misdeeds that have been attributed to [the husband], most of them, we don't believe. We do recognize that there was a certain amount of misbehavior; that there may be these temper tantrums and items of misbehavior, but the strangling with the hands and violence and threats that were described by [the wife] have been blown way out of proportion as evidenced by the fact that she stayed throughout the four years of marriage.

Blair v. Blair, 154 Vt. 201, 203-04, 575 A.2d 191, 192-93 (1990) (quoting trial court opinion). Justice Morse, writing for a unanimous Vermont Supreme Court, reversed the trial court and criticized the decision. "The [trial] court's remark about staying in the relationship marked by violence manifests the 'popular misconception . . . that women who remain in battering relationships are free to leave their abusers at any time.'" *Id.* at 204, 575 A.2d at 193.

unnecessary to the issuance of abuse prevention relief.<sup>202</sup> In stalking situations, the lack of either physical contact or specific threats of physical harm is the primary reason the conduct goes unpunished.

Vermont judges also feel inundated with domestic cases<sup>203</sup> and tend to take them less seriously than other controversies.<sup>204</sup> Thus, domestic cases commonly receive inadequate attention.<sup>205</sup> In sum, the civil relief that was created specifically to protect and empower women often perpetuates their victimization. Since the majority of stalking victims are battered women, stalking victims face the same prejudicial hurdles as intimate violence victims in obtaining protection through the civil process.

### C. Conclusion

Vermont's criminal and civil alternatives to an anti-stalking law do not provide adequate protection for stalking victims. But the problem is not simply a legislative loophole. First, the laws are often not applicable to stalking scenarios because conventional construction emphasizes single overt acts and physical harm. This limits the law's ability to respond to potentially dangerous situations. Second, a lack of understanding about abusive relationships results in crippled prosecutions and flawed judicial enforcement. Finally, both victims and offenders frustrate the

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202. See *supra* note 178 and accompanying text.

203. See GENDER BIAS, *supra* note 1, at 7.

[Judges are] so impatient about listening to [domestic violence cases] it's almost like they've heard this already . . . . In an abuse case, when you're seeking a final order [which determines custody of children, child support, the home, and other matters for one year], you'll get maybe fifteen minutes, maybe half an hour. . . . [Yet] these cases are no . . . different than a lot of criminal cases that a lot of . . . court time will be allotted to.

*Id.*

204. *Id.* at 8-10.

In a case where the judge had dismissed the prosecution of a violation of an abuse order for lack of probable cause, the judge stated on the record: "[T]his court has better things to do than handle this type of case." In a case where a female victim suffered broken bones, the judge was reported to have commented in chambers: "It's only a domestic case."

*Id.* In addition, "two judges 'agreed' (one 'strongly') that family violence is usually less serious than violence between strangers." *Id.* at 10 n.13.

205. *Id.* at 7. One of the common consequences of gender bias in the courts is the lack of time allowed for a full and fair hearing. *Id.* One female attorney heard a judge state: "I think it's inaccurate to say that judges spend little time on these cases. I spend no time on those cases." *Id.*

legal system. All of these loopholes make it almost impossible for the legal system to intervene in a timely and effective manner.

#### IV. VERMONT'S ANTI-STALKING LAW

An effective anti-stalking statute must successfully target elusive stalking behavior in both theory and practice. Therefore, unlike conventional criminal or civil statutes, it must adapt its focus and definitions to fit the underlying nature of stalking. The statute must also provide accessible and practical protection and deter the abusive behavior. This section explores Vermont's anti-stalking law to determine whether the new law meets these objectives. This evaluation will first review the purpose, scope, definitions, elements, and penalties of Vermont's anti-stalking law. Where appropriate, it will compare Vermont's anti-stalking statute to California's anti-stalking law, which has served as a model for other states. Finally, it will consider whether Vermont's law effectively closes the loopholes.

##### *A. An Overview of Vermont's Anti-Stalking Law*

Vermont's anti-stalking law creates the crime of stalking.<sup>206</sup>

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206. VT. STAT. ANN. tit. 13, §§ 1061-1063 (Supp. 1993). Vermont's anti-stalking law reads:

§ 1061. Definitions

As used in this chapter,

(1) "Stalk" means to engage in a course of conduct which consists of following or lying in wait or harassing, and

(A) serves no legitimate purpose; and

(B) causes the person to fear for his or her physical safety or causes the person substantial emotional distress.

(2) "Course of conduct" means a pattern of conduct composed of two or more 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."

(3) "Following" means maintaining over a period of time a visual or physical proximity to another person in such manner as would cause a reasonable person to have a fear of unlawful sexual conduct, unlawful restraint, bodily injury, or death.

(4) "Harassing" means a course of conduct directed at a specific person which would cause a reasonable person to fear unlawful sexual conduct, unlawful restraint, bodily injury, or death, including but not limited to verbal threats, written threats, vandalism, or unconsented to physical contact.

(5) "Lying in wait" means hiding or being concealed for the purpose of attacking or harming another person.

§ 1062. Stalking



It was drafted in response to the inability of Vermont's existing legislation to protect victims from the inevitable attacks of stalkers.<sup>207</sup> Its primary purpose is to provide the statutory authority to arrest and prosecute people whose evasive, threatening behavior falls outside the scope of existing laws.<sup>208</sup>

Vermont's anti-stalking law covers *any person* who is stalked.<sup>209</sup> Thus, a victim who was ineligible for an APO because she was taunted by a stranger or acquaintance is protected by the new law.<sup>210</sup> The frequent and conspicuous use of the terms *person*, *another person*, or *specific person* demonstrates that the statute was meant to protect individuals.<sup>211</sup>

Stalking is a specific intent crime.<sup>212</sup> The stalker must purposefully or knowingly engage in at least one of the following courses of conduct: following, harassing, or lying in wait.<sup>213</sup> The stalker must also purposefully and knowingly cause the person to fear for her physical safety or cause substantial emotional distress.<sup>214</sup>

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Any person who intentionally stalks another person shall be imprisoned not more than two years or fined not more than \$5,000.00, or both.

§ 1063. Aggravated Stalking

(a) A person commits the crime of aggravated stalking if the person intentionally stalks another person; and

(1) such conduct violates a court order that prohibits stalking and is in effect at the time of the offense; or

(2) has been previously convicted of stalking or aggravated stalking; or

(3) has been previously convicted of an offense an element of which involves an act of violence against the same person; or

(4) the person being stalked is under the age of 16 years.

(b) A person who commits the crime of aggravated stalking shall be imprisoned not more than five years or be fined not more than \$25,000.00, or both.

(c) Conduct constituting the offense of aggravated stalking shall be considered a violent act for the purposes of determining bail.

*Id.*

207. *Laws Backed to Protect Women*, *supra* note 26, at 6.

208. Interview with Rex, *supra* note 69. As Coordinator of the Vermont Network Against Domestic Violence and Sexual Assault, Rex was a key participant in drafting the proposed stalking law. Author's personal knowledge.

209. See VT. STAT. ANN. tit. 13, §§ 1062-1063.

210. See *supra* notes 175-76 and accompanying text.

211. See VT. STAT. ANN. tit. 13, § 1061(1)(b), (2). However, this does not foreclose the possibility of using the anti-stalking law in situations where group violence escalates to dangerous levels and individuals specifically target other individuals. Interview with Philip Cykon, Vermont Assistant Attorney General, in Montpelier, Vt. (Sept. 21, 1993).

212. VT. STAT. ANN. tit. 13, §§ 1061-1063.

213. See *id.* § 1061.

214. See *id.* §§ 1061(1)(B), 1062-1063.

Stalking is defined as a "course of conduct" which is a pattern of two or more acts.<sup>215</sup> According to the definition, this conduct or pattern must demonstrate a "continuity of purpose" linking together two or more acts.<sup>216</sup> Unlike California's law, Vermont's definition of stalking conduct is not limited to following or harassing.<sup>217</sup> It incorporates lying in wait, and leaves the proscribed conduct open-ended.<sup>218</sup> Yet, this definition is not so broad as to embrace all conduct.

Conduct that is merely annoying or disruptive is not covered. The behavior must implicate actual physical harm. The definitions of following and harassing require a fear of physical harm.<sup>219</sup> The definition of lying in wait contemplates a physical attack.<sup>220</sup> Also, harassing conduct is only violative if it is directed at a specific person.<sup>221</sup> The law excludes conduct that has a

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215. *Id.* § 1061(1), (2).

216. *Id.*

217. See generally CAL. PENAL CODE § 646.9 (West Supp. 1993). For purposes of comparison, the California stalking law provides:

(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 of death or great bodily injury . . . is guilty of the crime of stalking.

....

(e) For the purposes of this section, "harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes the person, and which serves no legitimate purpose. 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."

(f) For the purposes of this section, "a credible threat" means a 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 his or her safety. . . . The threat must be against the life of, or a threat to cause great bodily injury to, a person . . . .

*Id.*

218. The word "consists" should be construed as "includes, but not limited to." Telephone Interview with Philip Cykon, Vermont Assistant Attorney General, Montpelier, Vt. (Jan. 9, 1993).

219. VT. STAT. ANN. tit. 13, § 1061(3)-(4).

220. See *id.* § 1061(3).

221. *Id.* § 1061(4).

legitimate purpose<sup>222</sup> or is constitutionally protected.<sup>223</sup> Finally, the course of conduct must cause the victim to fear for her physical safety or cause her substantial emotional distress.<sup>224</sup>

Stalking is a misdemeanor.<sup>225</sup> The maximum penalty, two years or \$5000, or both, is considerably higher than that for simple assault which is only one year or \$1000 or both.<sup>226</sup> Stalking is elevated to felony status if the stalker has already been convicted of stalking, stalks in violation of a court order, or has been previously convicted of "acts of violence" against the same victim.<sup>227</sup> Stalking a person under sixteen years of age also elevates the conduct to felonious stalking.<sup>228</sup> Felony stalking carries a five year term, a \$25,000 fine, or both.<sup>229</sup> These penalties are considerably stricter than those imposed for simple assault or violation of an abuse prevention order.<sup>230</sup> Felony stalking also constitutes a violent act for the purpose of determining bail.<sup>231</sup> There is, however, no mandatory or minimum sentence for either stalking offense.<sup>232</sup>

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222. *Id.* § 1061(1)(A). For example, a private investigator may have a legitimate purpose in surveillance. Many states specifically exclude private investigators from the coverage of stalking statutes. See McAnaney, *supra* note 11, at 893.

223. VT. STAT. ANN. tit. 13, § 1061(2).

224. *Id.* § 1061(1)(B). An earlier version of the bill substituted the term "reasonable person" for "the person." This last minute recommendation was incorporated into the bill on the floor of the House just prior its third and final reading. JOURNAL OF THE HOUSE OF THE STATE OF VERMONT, 1993 BIENNIAL 679. Although approved by the House, this change obviously did not survive the conference committee. See VT. STAT. ANN. tit. 13, § 1061(1)(B) ("causes the person to fear for his or her physical safety" (emphasis added)).

225. VT. STAT. ANN. tit. 13, § 1062.

226. *Id.* § 1023(b).

227. *Id.* § 1063(a)(1)-(3).

228. *Id.* § 1063(a)(4).

229. *Id.* § 1063(b).

230. Compare VT. STAT. ANN. tit. 13, §§ 1061-1063 (imposing maximum penalties of two years or \$5000, or both, for stalking and five years or \$25,000, or both, for aggravated stalking) with Vt. Stat. Ann. tit. 13, § 1023(b) (imposing maximum penalty of one year or \$1000 for simple assault) and VT. STAT. ANN. tit. 13, § 1030 (imposing maximum penalty for misdemeanor violation of a restraining order of one year or \$5000, or both).

231. VT. STAT. ANN. tit. 13, § 1063(c). If the constitutional bail amendment is passed by public referendum, the provision of § 1063 will provide the statutory authority to withhold bail for some violent aggravated stalking offenders. Telephone Interview with Cykon, *supra* note 218.

232. VT. STAT. ANN. tit. 13, §§ 1062, 1063(b). Massachusetts provides for a mandatory jail term for a second or subsequent offense and explicitly prohibits the reduction of the mandatory jail term if convicted. MASS. GEN. LAWS ANN. ch. 265, § 43(b) (West Supp. 1993).

### B. Does It Close the Loophole?

The purpose of Vermont's anti-stalking law is to protect victims by providing the statutory authority to arrest and prosecute stalkers. The law makes substantial progress. As the following analysis suggests, however, additional legislative direction is necessary to ensure effective enforcement and prosecution.

#### 1. Construction

Defining stalking in terms of a course of conduct recognizes that it is the pattern of behavior that is threatening, not a specific act. This formulation alleviates the frustration associated with conventional construction of criminal laws which focus on single events or isolated acts.<sup>233</sup> Leaving the scope of proscribed conduct open-ended allows the law to fit the behavior, rather than recreating the old problem of trying to squeeze stalking behavior into the law.<sup>234</sup> Since stalking, like battering, is a multi-faceted effort, this approach is the most appropriate. Recognizing stalking as a series of acts also validates the concept of separation assault by linking the terroristic behavior to prior abuse.<sup>235</sup> Finally, using following, harassing, and lying in wait as necessary, but not exclusive components of stalking,<sup>236</sup> recognizes that such courses of conduct are common stalking techniques, and that seemingly innocent acts can cause lasting harm.

Although Vermont's definition of stalking refrains from using language such as present apparent ability or imminent harm, it still emphasizes conduct which implicates physical harm.<sup>237</sup> This definitional void may trump the legislature's attempt to criminalize stalking behavior. Moreover, the definition of stalking conduct employs the objective reasonable person standard when

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233. See McAnaney, *supra* note 11, at 882-91.

234. *Id.* at 907 (noting that enumerating all the covered behaviors constrains courts and limits applicability).

235. Mahoney, *supra* note 7, at 75. Recognizing abuse as a continuing occurrence rather than isolated episodes of violence expands the relevance of past attacks on the woman and helps substantiate the danger of death or bodily harm. *Id.* at 75, 83-84.

236. See VT. STAT. ANN. tit. 13, § 1061(2)-(5) (Supp. 1993); see also McAnaney, *supra* note 11, at 890.

237. See *supra* note 219 and accompanying text. Both following and harassing, by definition, require evidence of potential physical harm.

evaluating the reasonableness of the fear.<sup>238</sup>

Imposing a reasonable person standard helps prevent arbitrary and, as some commentators believe, unconstitutional application of the law.<sup>239</sup> For purposes of protecting stalking victims, this objective standard may be counterproductive. Stalkers have been able to avoid prosecution for so many years because their behavior is not objectively viewed as threatening. Using an objective standard obscures the victim's experience, particularly a previously battered woman's experience.<sup>240</sup> The California legislature viewed the issue of reasonableness in terms of whether or not the victim responded reasonably, not whether another reasonable individual who was not the victim would have feared for her safety.<sup>241</sup>

Since a stalker's objective often is to control the victim through cultivating fear, rather than making direct or specific threats of physical harm, the actual situations to which the law can be applied successfully are limited. For example, Nancy's stalker appeared either on a street corner across from her house or in her local grocery store.<sup>242</sup> He never made any threatening gestures, never spoke to her, and always maintained a moderate distance from her.<sup>243</sup> A reasonable juror could conclude that it was unreasonable to fear physical harm from such following.

Significantly, Vermont does not require the stalker to convey a specific credible threat.<sup>244</sup> A credible threat generally must cause "a reasonable person to fear for his life or physical safety."<sup>245</sup> In many states, it must also be made with intent and present apparent ability to carry out the threat.<sup>246</sup> Although this requirement is seen as ensuring constitutional sound-

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238. See VT. STAT. ANN. tit. 13, § 1061(3)-(4) (Supp. 1993).

239. Gilligan, *supra* note 22, at 320.

240. *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1499, 1580-81 (1993) [hereinafter *Developments in Domestic Violence*]; see also *Self-Defense*, *supra* note 116, at 323-24.

241. Royce, *supra* note 100, at 1.

242. Telephone Interview with Nancy, *supra* note 95.

243. *Id.*

244. See CAL. PENAL CODE § 646.9(a), (f) (West Supp. 1993). Many other states, following California's lead, require the additional element of a credible threat. Gilligan, *supra* note 22, at 321-22.

245. Gilligan, *supra* note 22, at 322.

246. *Id.*

ness,<sup>247</sup> it severely narrows the statute's applicability.<sup>248</sup> Often the stalker lacks the present apparent ability to cause physical harm because he is outside the victim's house, ten yards away in a car, or at the other end of a telephone line. In states requiring a credible threat, victims and police are faced with the same problem they faced under a conventional assault analysis: substantiating a specific threat of serious or imminent bodily harm. As a result, their anti-stalking laws often do not apply to the very circumstances they are meant to cover.<sup>249</sup>

Vermont's law does not include several limiting terms which plague effective enforcement of other anti-stalking laws or alternative criminal statutes. Vermont does not include the term "malicious" in its definition of stalking.<sup>250</sup> Stalking behavior may not be interpreted or intended to be malicious, especially in situations where a stalker is motivated by a romantic obsession.<sup>251</sup> The terms immediate, imminent, and serious bodily harm, are also conspicuously omitted from the causal element. Instead, Vermont's legislature used the terms substantial emotional distress and physical safety to define the resulting harm. This new language is a departure from the conventional language used in both Vermont's Abuse Prevention Act and its simple assault statute. Such a formalization appears to recognize the psychological damage of stalking.<sup>252</sup>

Physical safety and substantial emotional distress are undefined, thereby leaving courts with little direction in determining the appropriate meaning. Arguably, other provisions within the stalking statute or existing common law interpretations of these terms would still result in a construction emphasizing physical harm, not psychological trauma. Since the definitions of following, harassing, and lying in wait must implicate physical harm in some way, the term physical safety is essentially a

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247. Guy, *supra* note 12, at 1014-16.

248. *See id.* at 1006; Gilligan, *supra* note 22, at 322-23.

249. Some California prosecutors have had difficulty bringing charges against stalkers because of the credible threat requirement. Consequently, the prosecutors must resort to conventional criminal statutes. Telephone Interview with Allegro, *supra* note 23.

250. *But see* CAL. PENAL CODE § 646.9(a).

251. McAnaney, *supra* note 11, at 907; Telephone Interview with Allegro, *supra* note 23.

252. The Abuse Prevention Act requires evidence of imminent serious bodily injury. VT. STAT. ANN. tit. 15, § 1104(a)(1), (3) (1989). Simple assault requires imminent serious bodily injury. VT. STAT. ANN. tit. 13, § 1023(a)(3) (1974).

synonym for physical harm.<sup>253</sup>

On the other hand, substantial emotional distress was intended to encompass the non-physical injuries caused by stalking.<sup>254</sup> In the criminal context, there is no statutory or common law standard with which to define or determine substantial emotional distress. Given the importance of this causal element in criminalizing stalking and the concern for inappropriate application of the law, the victim's mere assertion that she suffered substantial emotional distress may not suffice to prove causation. Under Vermont's common law tort standard, substantial emotional distress requires a showing of physical harm or a reasonable fear of immediate physical injury.<sup>255</sup>

## 2. Enforcement

The idea that criminalizing stalking behavior will provide the criminal justice system with the statutory authority to effectively protect victims, in other words, to close the loophole, is misguided unless the legislature also provides police, prosecutors, and judges with the authority to enforce the law.

Vermont's anti-stalking law provides police with the statutory authority to make a warrantless arrest if it is based on probable cause to believe that a person violated the statute's provisions.<sup>256</sup> Police, however, will still have difficulty determining whether a particular situation evidences probable cause and will be required to exercise discretion.<sup>257</sup> First, the victim or witnesses must be able to substantiate prior incidents and link them

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253. See VT. STAT. ANN. tit. 13, § 1061(3)-(5).

254. Telephone Interview with Cykon, *supra* note 218. Stalking may cause emotional harm without physically threatening the victim. Guy, *supra* note 12, at 1006.

255. *Fitzgerald v. Congleton*, 155 Vt. 283, 583 A.2d 595 (1990). "Absent physical contact, one may recover for negligently caused emotional distress only when the distress is 'accompanied by substantial bodily injury or sickness.' Accordingly, one must show some physical effect of any claimed emotional injury—some bodily hurt—in order to prevail." *Id.* at 292, 583 A.2d at 600 (citation omitted). The court explained that "[b]y this statement, we do not necessarily foreclose the possibility of allowing for emotional distress damages absent physical manifestations under special circumstances where the nature of the tortious act guarantees the genuineness of the claim." *Id.* at 292 n.7, 583 A.2d at 600 n.7.

256. VT. R. CRIM. P. 3(a)(4), (6).

257. Gera-Lind Kolarik, *Stalking Laws Proliferate*, 78 A.B.A. J. 35, 36 (1992). "It doesn't give police more power in making judgment calls on who is a stalker or not, but it does allow us to bring an alleged stalker into the station to see if there is enough evidence for charges instead of doing nothing." *Id.*

together.<sup>258</sup> An objective determination of whether the conduct amounts to following or harassing, implicating physical harm, must be made.<sup>259</sup> Next, the victim must actually suffer from emotional distress or fear of physical harm. Verifying connected acts, using a reasonable person standard, and substantiating the actual harm all serve to reduce the possibility that police will arrest potentially innocent individuals based on the accusations of a hypersensitive person or a vindictive partner.<sup>260</sup> In many situations, the reasonable fear and the causal relationship may not be difficult to accurately assess. In the context of separation assault, however, the reasonable unbattered person may view the victim's response as exaggerated or unfounded.<sup>261</sup> Thus, police should "seek additional, reliable information to corroborate the complaint" especially if an abusive relationship is involved.<sup>262</sup> Police should also receive training regarding the dynamics of separation assault to aid them in evaluating explosive scenarios.

The ability to arrest a stalker provides victims with short-term and immediate protection. This is a major advancement. But stalkers, like batterers, will most likely be released on bail enabling them to seek out their target yet again. Leniency in pre-trial release dilutes enforcement and deterrence efforts.<sup>263</sup> As a violent act subject to the proposed constitutional bail amendment, felony stalking would provide the statutory authority to apply stricter release conditions for offenders, including withholding bail.<sup>264</sup> If passed, this will offer greater protection in severe circumstances.

Vermont's legislation raises false hopes because of the inherent difficulty of prosecuting stalkers. The same problems that plague prosecution of intimate cases, such as reluctant witnesses and systemic bias, will also impede stalking prosecu-

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258. See Gilligan, *supra* note 22, at 326-27 (verifying a pattern helps to objectify the behavior).

259. See VT. STAT. ANN. tit. 13, § 1061(3)-(4) (Supp. 1993) (requiring the conduct to cause a reasonable person to fear physical harm).

260. Cf. Gilligan, *supra* note 22, at 326.

261. See *supra* notes 71-86 and accompanying text.

262. Gilligan, *supra* note 22, at 327.

263. See *supra* notes 150-56 and accompanying text (discussing need for bail reform); *Nightline*, *supra* note 14, at 4.

264. Telephone Interview with Cykon, *supra* note 218 (discussing systemic violence).



tions.<sup>265</sup> The burden of proof that must be satisfied by the state is the same as any crime—beyond a reasonable doubt. This standard is substantially higher than that required to obtain an APO.<sup>266</sup> The difficulty of satisfying the high standard may discourage prosecutors from bringing stalking charges.

Proving that a course of conduct has a continuity of purpose broadens the scope of relevant conduct beyond the most recent overt act.<sup>267</sup> By assembling a portrait of the victim's entire stalking experience, prosecutors can provide factfinders with a more accurate reflection of the traumatizing behavior. To gather evidence sufficient to prove a pattern, victims should document their stalkers' conduct by taping phone messages or asking neighbors and friends to confirm sightings.<sup>268</sup>

The state must prove that the defendant intended to stalk the victim.<sup>269</sup> In the context of determining the specific intent to threaten under Vermont's telephone harassment statute, the Vermont Supreme Court in *State v. Wilcox* concluded that a defendant's mental state could be inferred from actions, conduct, or words.<sup>270</sup> Since stalking is also a specific intent statute which criminalizes threatening behavior, it should be possible to infer the intent to stalk "from circumstances rather than shown by direct proof."<sup>271</sup> Thus, it is essential for the prosecutor to contextualize the victim's experience and weave the repeated acts

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265. See *supra* notes 157-70 and accompanying text. Stalking victims are reluctant to testify for fear of retaliation or confrontation. Telephone Interview with Allegro, *supra* note 23.

266. VT. STAT. ANN. tit. 15, § 1104(b) (1989) (plaintiff has the burden of proving abuse by a preponderance of the evidence). California courts and prosecutors have found this frustrating, particularly in establishing the element of credible threat in the context of romantic stalkers and erotomaniacs. Telephone Interview with Allegro, *supra* note 23.

267. This approach contrasts with proving criminal assault which isolates a particular incident. See VT. STAT. ANN. tit. 13, § 1023(a) (1974). It is unclear how broadly courts will define relevant acts. For example, where intimate violence has occurred, previous conduct or the relationship may not necessarily be probative of the stalking pattern in question. Only those overt acts or incidents which the prosecutor is able to thread together in a pattern will be relevant. See VT. STAT. ANN. tit. 13, § 1061(2) (Supp. 1993).

268. Telephone Interview with Allegro, *supra* note 23.

269. See VT. STAT. ANN. tit. 13, §§ 1062-1063 (Supp. 1993).

270. *State v. Wilcox*, 4 Vt. L. Wk. 132, 133, 628 A.2d 924, 926 (1993). The court overturned a conviction under Vermont's rarely used telephone harassment statute. *Id.* (construing VT. STAT. ANN. tit. 13, § 1027(a) (1974)). The statute prohibits telephoning another and threatening to inflict injury or physical harm to the person if done with "intent to terrify, intimidate, threaten, harass or annoy." VT. STAT. ANN. tit. 13, § 1027(a) (1974).

271. *Wilcox*, 4 Vt. L. Wk. at 133, 628 A.2d at 926.

together. Evidence of a prior abusive relationship should be introduced to demonstrate continuity of purpose and intent to cause fear of physical harm. Romantic stalkers who initially intend to observe their obsession from afar may be more difficult to prosecute even under this definition of intent.<sup>272</sup>

The prosecutor's most difficult task may be proving that the fear caused by the course of conduct was reasonable. Stalking requires the conduct in question to be such that a reasonable person would fear unlawful contact and injury.<sup>273</sup> Using an objective standard, in many circumstances, will exclude the very behavior that the legislature intended to reach and leaves one of the loopholes open that the legislature could have closed.<sup>274</sup>

Finally, the prosecutor must establish that the threatening behavior actually caused a fear of physical safety or substantial emotional distress. As a result, victims will usually have to testify.<sup>275</sup> Victims, however, may be reluctant to testify for fear of retaliation.

If convicted under Vermont's anti-stalking law, a stalker faces strong penalties that, if imposed, would protect the victim.<sup>276</sup> Strict sentencing also serves retributive and deterrent punishment goals by demonstrating to stalkers that their behavior is unlawful and will be punished.<sup>277</sup> Erotomaniacs or mentally disturbed stalkers, however, may not benefit from deterrence.<sup>278</sup>

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272. *Id.* (citing *Cadwell v. State*, 337 A.2d 476, 484 (Md. Ct. Spec. App. 1975) (reversing conviction and entering judgment of acquittal based on impossibility of finding specific intent beyond a reasonable doubt)); *see also* Gilligan, *supra* note 22, at 319-20 (discussing the difficulty of proving intent). Proving intent does not require prosecutors to show that the stalker actually contemplated generating fear, but rather, by the stalker's outward manifestations—course of conduct—that a factfinder could conclude that such a course of conduct would undoubtedly result in the victim's fear. Gilligan, *supra* note 22, at 319-20.

273. *See* VT. STAT. ANN. tit. 13, § 1061(3)-(4) (Supp. 1993).

274. Gilligan, *supra* note 22, at 322-24; *see, e.g., supra* note 128 and accompanying text (discussing inapplicability of criminal statutes to stalking scenarios due to objective standards).

275. Telephone Interview with Allegro, *supra* note 23. A current APO against a defendant should be persuasive evidence that the victim feared serious physical harm, and should substantiate past abuse, since the order could not have been issued without a judicial determination that abuse existed and harm was imminent. *See supra* notes 177-78 and accompanying text (discussing need to demonstrate abuse and imminent physical harm).

276. Of California's six cases, all offenders who were convicted have served or will serve time. Royce, *supra* note 100 (discussing legislative update of anti-stalking law).

277. *See* Waits, *supra* note 34, at 300-01.

278. McAnaney, *supra* note 11, at 906.

Instead, incapacitation and treatment may be the only solutions.<sup>279</sup>

### 3. Opponents of Anti-Stalking Legislation

Anti-stalking legislation is criticized for imposing criminal sanctions before there has been an overt act of violence.<sup>280</sup> This criticism is ironic because anti-stalking laws are meant to encourage intervention before the stalker becomes violent. This criticism emphasizes the traditional notion that criminal sanctions should only be imposed in response to overt acts or physical violence. Moreover, it ignores the substantial emotional harm and disruption of personal liberty that results from the terroristic conduct.<sup>281</sup>

Anti-stalking legislation is criticized as being unconstitutionally overbroad and void for vagueness.<sup>282</sup> The Vermont Supreme Court's recent decision in *State v. Wilcox*, however, indicates that specific intent crimes which prohibit conduct are not necessarily violative of the First Amendment and are not necessarily unconstitutionally overbroad.<sup>283</sup> Other commentators believe that requiring the conduct to be directed at a specific person and to cause reasonable fear adequately addresses overbreadth concerns.<sup>284</sup> Additionally, requiring specific intent is viewed as ensuring survival on a vagueness challenge.<sup>285</sup> Furthermore, constitutionally protected behavior is specifically excluded from stalking's scope.<sup>286</sup> Although the constitutionality of Vermont's anti-stalking law deserves a thorough analysis, a preliminary assessment indicates that it should survive both constitutional challenges.

Those opposed to anti-stalking laws also argue that existing

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279. *Id.*

280. See *Nightline*, *supra* note 14, at 5.

281. Guy, *supra* note 12, at 1012.

282. Gilligan, *supra* note 22, at 306-12 (discussing overbreadth concerns); *id.* at 312-20 (discussing constitutional vagueness).

283. *State v. Wilcox*, 4 Vt. L. Wk. 132, 133, 628 A.2d 924, 925-26 (1993).

284. Gilligan, *supra* note 22, at 309-12.

285. *Id.* at 318. Requiring intent provides adequate warning to potential violators and establishes clear guidelines for officials. *Id.*

286. See VT. STAT. ANN. tit. 13, § 1061(2) (Supp. 1993).

penalties are sufficient.<sup>287</sup> Stricter enforcement of restraining orders, "tailored" abuse orders, and pre-trial release conditions would help protect a victim and improve deterrence. This is inadequate, however, since victims stalked by strangers or acquaintances are still unprotected under both the criminal and civil systems. Furthermore, without alternative construction of the more generic criminal offenses, such as assault and disorderly conduct, existing statutes have already proven to be ineffective in providing protection or deterrence.

#### 4. Conclusion

Assuming Vermont's anti-stalking law will survive constitutional challenges, its benefits surpass the criticisms. It has the capability of improving legal protection for all stalking victims. It provides victims of intimate violence with another protective option. If the constitutional bail amendment is passed, stricter conditions of release will provide additional protection. It circumscribes threatening behavior not previously covered by Vermont laws and enables police to act before violence occurs. The law recognizes that stalking, even without physical contact, is *still* harmful. Criminalizing the intimidating behavior sends a message to stalkers, particularly batterer/stalkers, that their abusive behavior will not be tolerated. Finally, it supports a stalking victim's rights to privacy and personal security by recognizing that substantial emotional distress is caused by stalking.

#### VI. RECOMMENDATIONS

The legislature's greatest challenge is ensuring that the law will be as meaningful in practice as it is in theory. The law's effectiveness will depend on additional clarification of its terms, appropriate construction, and adequate enforcement. The following recommendations are made with these goals in mind.

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287. See *Nightline*, *supra* note 14, at 6 ("[T]he creation of a new offense, . . . is not necessarily the route to go. We do have a law. It's called a restraining order."); Mills, *supra* note 28.

### A. Legislative Amendments

The legislature should incorporate a statement of purpose and revise or clarify the definitions of some critical terms to ensure appropriate application and judicial construction.<sup>288</sup> A statement of purpose would provide an overall policy directive. It allows lawmakers the opportunity to present their view of the problem and to describe the conduct they intend to target. The statement should recognize that: 1) intimate violence is a serious and often lethal problem in Vermont; 2) victims of intimate violence are most often victims of stalking; 3) victims of stalking by strangers are often without any legal redress; 4) stalking behavior has historically escaped legal sanctions; 5) stalking can cause serious psychological trauma; 6) stalking violates a victim's rights to privacy and personal security; and 7) Vermont intends to halt this behavior before it escalates into violence.<sup>289</sup>

Second, a reasonable woman standard should replace the reasonable person standard in the definitions of following and harassing. An objective standard forecloses existing criminal sanctions and frustrates women's attempts to get meaningful legal protection. Without expressly providing for the reasonable woman standard, courts will apply the objective standard.<sup>290</sup>

The dilemma of the reasonable person standard versus the reasonable woman standard has long been a controversial issue in sexual harassment litigation.<sup>291</sup> The leading opinion in support of a reasonable woman standard, *Ellison v. Brady*, is instructive on this issue.<sup>292</sup>

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288. See *State v. Wilcox*, 4 Vt. L. Wk. 132, 133, 628 A.2d 924, 926 (1993) ("The overriding objective of statutory construction is to declare the intent of the Legislature.").

289. New Hampshire's anti-stalking law includes the following in its statement of purpose: "The purpose of this act is to eliminate behavior which disrupts normal life for the victim of stalking and to prevent such behavior from escalating into violence." N.H. REV. STAT. ANN. § 173:1 (Supp. 1993).

290. *Wilcox*, 4 Vt. L. Wk. at 133, 628 A.2d at 926 ("Where the meaning of the statute is plain on its face, the statute must be enforced according to its express terms.").

291. Reasonable woman and reasonable battered woman standards have also been advanced in the context of criminal self-defense claims. See *Self-Defense*, *supra* note 116, at 323; *Developments in Domestic Violence*, *supra* note 240, at 1580-81. Civil sexual harassment claims, however, are more analogous to stalking scenarios. In both, the issue is whether the abusive conduct of the defendant is substantial enough to warrant legal sanctions. Also, both focus on similarly menacing conduct.

292. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). *Ellison*, an IRS employee, was stalked by a co-worker who repeatedly harassed her after she refused to date him. *Id.* at 873-74.

[W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. . . . If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass . . . .

. . . A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. . . .

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.<sup>293</sup>

Using a reasonable woman standard provides a more meaningful opportunity for the state to prosecute stalkers and protect victims. It remedies the shortcomings of alternative criminal statutes and recognizes that the majority of stalking victims are women. The standard also provides sufficient direction with which to limit the factfinder's discretion.

At the very least, a hybrid standard using a subjective analysis should be used. This approach requires the factfinder to put himself into the victim's shoes.<sup>294</sup> For example, if the course

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293. *Id.* at 878-79 (citations omitted).

294. The hybrid test combines subjective and objective analysis: "it must consider the [victim's] perspective in its evaluation of what a 'reasonable person' would do under similar circumstances." *Developments in Domestic Violence*, *supra* note 240, at 1580; *see, e.g.*, CAL. PENAL CODE § 646.9(f) (West Supp. 1993). California's credible threat element provides that the person who is the target of the stalking reasonably fear for his or her safety. California's legislature viewed the issue of reasonableness in terms of whether or not the victim responded reasonably, not whether another reasonable individual, who was not the victim, would also have feared for his or her safety. *See* CAL. PENAL CODE § 646.9(f).

of conduct involved a woman and innocuous stalking conduct, such as following from a distance, an objective standard would be more likely to challenge the reasonableness of the victim's fear. A subjective standard would be more likely to validate the victim's perception.

Without allowing for a reasonable woman standard, or at least a more subjective standard, the legislation will not be given effective construction. The primary reason stalking has gone unpunished in Vermont is because the average reasonable person does not view a stalker's conduct as sufficiently harmful. The revenge stalker can manipulate and terrorize his former partner by using familiar verbal and non-verbal messages.<sup>295</sup> The romantic and stranger stalkers also intentionally use innocuous behavior to avoid legal consequences and enhance their control. The burden of proof, beyond a reasonable doubt, should help allay fears that a more subjective analysis will facilitate erroneous charges or convictions. Even under a hybrid standard, it would still be difficult for a battered woman's perceptions to be understood as reasonable.<sup>296</sup>

Legislative consideration should be given to stalking cases involving previously battered women. Specifically, the Vermont legislature should provide the courts with the option of using a reasonable battered woman's standard and battered woman's syndrome evidence.

In Vermont, admissibility of the battered woman's syndrome through expert testimony is a matter of judicial discretion.<sup>297</sup> As evidenced by legislation in other states, such evidentiary issues may be decided by the legislature rather than be left to the courts.<sup>298</sup> A battered woman's standard contextualizes the pattern of behavior and provides an opportunity to expose the underlying intent to control and intimidate the victim.<sup>299</sup>

Expert testimony regarding the dynamics of intimate violence and battered woman's syndrome will be vital in helping the

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295. Asmus, *supra* note 119, at 137.

296. *Self-Defense*, *supra* note 116, at 323. Additionally, the choice of a particular reasonableness standard influences the admissibility of past battering incidents and the type of jury instruction given. *Developments in Domestic Violence*, *supra* note 240, at 1580 n.41.

297. VT. R. EVID. 702. Expert testimony is admissible if it will help a trier of fact understand the issue. *Id.*

298. *Developments in Domestic Violence*, *supra* note 240, at 1585-86.

299. *Id.* at 1534-35.

factfinder understand the issue of stalking in the context of separation assault.<sup>300</sup> The dynamics of intimate abuse are not common knowledge and are easily misunderstood without careful explanation. Unfounded stereotypes may also prejudice both the victim and the defendant. Expert testimony can help explain why the course of conduct might have been frightening or how such behavior could have caused substantial emotional distress.<sup>301</sup>

Battered woman's syndrome has evolved as a viable evidentiary tool in self-defense cases but is rarely used outside this context.<sup>302</sup> There is no reason why evidence of a stalking victim's abused past should be limited to self-defense.<sup>303</sup> The dynamics of abuse are equally helpful in establishing the reasonableness of the battered woman's fear of her stalker as they are in helping to understand why the battered woman kills in self-defense.

Next, the definitions for physical safety and substantial emotional distress should be clarified. The legislature's word choice reflects its desire to stay away from the troublesome and limited language used in the abuse prevention statute.<sup>304</sup> But the distinction between physical safety and physical harm is less than apparent. The term substantial emotional distress also lacks adequate explanation. The Elderly and Disabled Adult Act and the Child Abuse Prevention Act recognize that abusive behavior impacts a victim's mental and physical health.<sup>305</sup> Given the nature of stalking, there is no reason why Vermont's anti-stalking

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300. See VT. R. EVID. 702. Expert testimony regarding stalking pathology, as it becomes available, should be admissible to help understand the stalker's mental state and motivations.

301. Telephone Interview with Allegro, *supra* note 23. California's evidentiary rules provide for introduction of evidence or expert testimony on the battered woman's syndrome in domestic violence related cases. *Id.* The introduction of evidence and expert testimony on the battered woman's syndrome has been instrumental in supporting the credible threat element in California's stalking law. *Id.*

302. *Developments in Domestic Violence*, *supra* note 240, at 1581-85 (discussing the use of expert testimony regarding battered woman's syndrome in self-defense cases); see also *State v. Kelly*, 478 A.2d 364 (N.J. 1984) (discussing the reasons for allowing battered woman's syndrome testimony to substantiate reasonableness of defendant's fears).

303. See Mahoney, *supra* note 7, at 35, 43.

304. Telephone Interview with Cykon, *supra* note 218.

305. Compare VT. STAT. ANN. tit. 15, § 1101(a) (1989 & Supp. 1993) (abuse requires fear of serious imminent bodily injury) with VT. STAT. ANN. tit. 33, § 4912(7) (Supp. 1993) ("[e]motional maltreatment' means a pattern of malicious behavior which results in impaired psychological growth and development" of a child) and VT. STAT. ANN. tit. 33, § 6902(1) (1991 & Supp. 1993) (abuse means mental or physical injury).



statute should not also incorporate psychological harm in the definition of physical safety. Including psychological harm more accurately reflects the nature and impact of stalking. It recognizes that victims of stalking can suffer lasting psychological injuries.

The definition of substantial emotional distress should be clarified and should not require actual fear of imminent physical harm. Instead, it should emphasize the psychological trauma of stalking. Substantial emotional distress should be defined as mental suffering or trauma which results from an injury to the person.<sup>306</sup> This interpretation serves two purposes. First, it recognizes that stalkers, like batterers, attempt to control their victims through mental abuse. A stalker, particularly a batterer, may not intend to inflict immediate physical harm, but rather intend to cause a fear of physical harm in order to coerce a particular response, such as returning home<sup>307</sup> or dropping charges.<sup>308</sup> Second, it recognizes that stalking violates and disrupts an individual's sense of security, privacy, and autonomy.

### *B. Law Enforcement*

Statutory language and direction are not enough. An effective protective effort requires education and training for all arms of Vermont's legal system. The cooperation of the legislature, law enforcement, and judiciary is imperative to achieve positive results.

Training is necessary to help police identify and to distinguish stalking from constitutionally protected or benign conduct. Existing intimate violence police training should be supplemented with information on how to identify and cope with stalking. Judges, state's attorneys, and court workers should be required to take intimate violence training. The battered woman's experience has been, for the most part, obscured in the courtroom because of a lack of understanding. Curriculums should begin with a basic overview of intimate violence and instruction on the dynamics of separation. This training should enable attorneys to make more

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306. *Fitzgerald v. Congleton*, 155 Vt. 283, 291, 583 A.2d 595, 600 (1990) ("An injury . . . which affects the sensibilities is equally an injury to the person as an injury to the body would be." (quoting *Reed v. Real Detective Pub. Co.*, 162 P.2d 133, 139 (Ariz. 1945))).

307. See *supra* notes 70-86 and accompanying text (discussing separation assault).

308. Asmus, *supra* note 119, at 136.

informed determinations in forming case strategies and to cope with practical frustrations such as witness reluctance. Judges should be able to make more appropriate decisions regarding pre-trial releases, jury instructions, and evidentiary determinations.

The constitutional bail amendment allowing for stricter release conditions should be passed. Without stricter pre-trial release conditions or a threat of jail time, the legislation is handicapped from both protection and deterrence standpoints. If a stalker is merely arraigned and released with no enforceable provisions, the victim is in the same situation she was before her stalker was arrested. If a stalker is sufficiently restricted or serves time for a conviction, the law protects the victim and reinforces deterrence and incapacitation goals.<sup>309</sup>

### C. Public Awareness

Public awareness is necessary to increase Vermonters' understanding of the new law. Victims must be aware that there is help. Offenders need to know that this behavior will no longer be tolerated. An awareness effort will also help explain the law's limitations and applications. Vermont's Network Against Domestic Violence and Sexual Assault, which has relationships with local victims' assistance and outreach organizations, provides a readily accessible means to reach potential victims and offenders. Broadening the scope of an awareness campaign by using mass media will not only get the message to potential victims and offenders, but also send an appropriate message to Vermonters that the state will protect its residents and that this behavior will be punished. Of course, the most positive reinforcement of legislative intent is actual enforcement.

### CONCLUSION

A Vermont woman should not have to wait for her stalker's hands to be around her neck before law enforcement can intervene. Vermont's anti-stalking law will only be able to protect victims if the legal community appreciates why stalking was never covered in the first place. If the inadequacies of the

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309. See *supra* notes 276-79 and accompanying text.

existing system have taught us anything, it is that the dynamics of stalking and intimate violence do not fit within conventional legal paradigms. Vermont's anti-stalking law is a significant step in the right direction. However, the law emphasizes physical harm and uses an objective standard. Therefore, it fails to avoid the same loopholes of existing statutes. Legislative revisions are necessary.

For the anti-stalking law to be effective, Vermont's legal system must be committed to an integrated approach of educational training, enforcement, and outreach. The legislature must guide law enforcement and the judiciary by clarifying the legislative intent and some of the statute's key definitional terms. Explicitly providing a reasonable woman standard for assessing the reasonableness of the victims' fear is critical. Providing definitions of physical harm and substantial emotional distress that reinforce the victims' experience will target harmful stalking behavior more accurately. Allowing the introduction of expert testimony on intimate violence will improve the state's efforts to successfully prosecute offenders. Educational training on the dynamics of intimate abuse and stalking should be a top priority. With a better understanding of abusive behavior the law can be more responsive to victims and more directed in its deterrence efforts. Finally, public outreach will rebuild the confidence of Vermonters who have been frustrated by the system or frightened by recent deadly events.

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