Safe and Sound at Last? Federalized Anti-Stalking Legislation in the United States and Canada

Keirsten L. Walsh

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I. Introduction

The term “stalking” typically brings to mind visions of the camouflaged hunter, crouched low, patiently and meticulously circling his animal prey, calculating his precise moment of attack. In November of 1991, Canadian Colin McGregor donned the camouflage and after a two month vigil, shot his wife with a crossbow.1 In 1992, a Virginia man spent six months circling and sizing up his prey until he attacked, shooting her, setting her on fire, and finally dumping her charred body into the creek that would be her home for the next eight months.2 Slowly but surely, the act of stalking is taking on a new form. What once was a term used primarily in reference to wild animals has now become commonplace in describing crimes against women3 across the globe.

As a general rule, the laws of a given country tend to be an accurate reflection of that country’s prevailing values and standards. Virtually unnoticed by lawmakers until the early 1990’s, stalking would seem to have been considered acceptable behavior in most countries until very recently. Stalking is a form of physical and psychological terrorism that is a far cry from a new concept. What is new is the fact that federal governments are finally promulgating laws that more accurately reflect changing societal attitudes toward women and victims in general.4 With the passage of the Crime

1. When Women are Hunted; Ottawa Should Make Sure Anti-Stalking Law Works, MONTREAL GAZETTE, Sept. 18, 1994, at B2 [hereinafter When Women are Hunted].
3. While it is certainly not unheard of for a woman to stalk a man, the vast majority of stalkers are men. Therefore, the perspective of this Comment focuses on the male stalker and the female victim. See also Anne McGillivray, Intimate Violence and Manly Men, 9-SPG CAN. J. L. & SOC’Y 233 (1994).
Bill in August of 1994, the United States Congress acknowledged for the first time what countless women have known for centuries; violence against women must be stopped, and the existing remedies are, in an alarming number of cases, ineffective toward achieving that goal.

Incorporated into the Crime Bill is the Violence Against Women Act of 1994, which provides an unprecedented 1.6 billion dollars to combat gender-based violence. The Act designates gender-based violence as a civil rights violation and attempts to categorize crimes against women on the same level as crimes motivated by religious or racial biases. Likewise, Canada has taken notice of the magnitude of such violent acts toward women and has consequently given many such crimes a federal venue with the June, 1993 passage of Bill C-126, An Act to Amend the Criminal Code and the Young Offender's Act.

While giving state and federal recognition to certain acts of violence against women is certainly a valiant gesture, an analysis of the anti-stalking laws ultimately developed to combat such behavior reveals that the legislation might more appropriately be considered as the leftover bones thrown to a starving dog. It was not until the highly publicized 1989 slaying of television star Rebecca Schaeffer that law-makers even sat up and took notice of such antisocial behavior. Within a scant four year period thereafter, every state in the United States and the District of Columbia had enacted some form of protective measures designed to guard against stalking behavior. Influenced by such rapid passage rates in the United States, the Canadian government federalized the crime of stalking before the ink was dry on legislation in this country. This expediency has left many critics wary of the

12. See infra note 70.
effectiveness of such measures. "There is a huge hole in the legal system of this country [and abroad] that allows stalkers to imprison their victims with psychological terror and all too often rob them of life as a final step. That hole must be closed."  

Part II of this Comment will examine the history of stalking behavior in general. Next, part III discusses the development of anti-stalking laws. Part IV then provides a textual analysis of both the proposals for, and the resultant federal legislation criminalizing stalking in the United States. Part V examines the mechanics of Canada’s federal legislation criminalizing stalking. Finally, part VI concludes with the hypothesis that the crime of stalking will never fully be deterred until society recognizes and acknowledges the magnitude of the problem.

II. History of Stalking Behavior

A. Defining the Crime

Because an accurate and all-encompassing legal definition of the crime of "stalking" has yet to be developed, victims continue to suffer and perpetrators continue to walk away with little more than a slap on the wrist.  

Webster’s Dictionary defines stalking as an act of "pursuing quarry or prey stealthy."  

Attempting to criminalize such behavior, Congress in 1993, proffered a more comprehensive definition; "[t]he willful, malicious, and repeated following or harassing by an individual who makes a threat with the intent to place another individual in imminent fear of death or serious bodily injury."  

Similarly, the Canadian House of Commons in 1993, elaborated even further and criminalized "[r]epeatedly following from place to place the other person or anyone known to them; repeatedly communicating with either directly or indirectly, the other person or anyone known to them; besetting or watching the dwelling-house or place where the other person, or
anyone known to the them, resides, works, carries on business, or happens to be; or engaging in threatening conduct directed at the other person or any member of their family." 17 Perhaps the most accurate definition however, comes not from the law-makers, but rather from the victims themselves. Stalking is "[a] nightmare which I am unable to stop." 18

B. The Victims

Stalking is a crime frequently associated with high profile celebrities. 19 Its victims however, are not limited to those who grace the pages of popular magazines, or who shine on the big and small screens. 20 In fact, statistics now reveal that celebrity stalking comprises a mere seventeen percent of all reported stalking cases. 21 Stalking victims come from every walk of life, from every state in the nation, and from countries all over the globe. In fact, one reason for the rapid passage rates of anti-stalking legislation in this country might be attributed to a U.S. News and World Report article announcing that the number of threats to United States

18. Phillip Turl, Stalking is a Public Problem, 144 NEW L.J. 632 (1994) (commentary from a stalking victim in Canada).
19. Celebrities such as Rebecca Schaeffer, David Letterman, Jodie Foster, and most recently Madonna have been victims of stalkers. See Diane Werts, The Fan Mail Dilemma; To Answer or To Ignore, That is the Question, L.A. TIMES, Jan. 21, 1996, at 36. Stars know that fan mail usually represents the personal efforts of people who feel strongly enough to take the time to sit down and say “thanks” for their show-biz performances. Id. However, they are also aware that their admirers know a great deal more about them, than vice versa. Realizing that “hate mail” is probably harmless venting, most celebrities refuse to respond to negative mail, believing that any personal communication at all can encourage further angry behavior. Id. “Entertainment Tonight” co-host Mary Hart states that “[b]ecause of stalkings like the persistent David Letterman fan and especially the fan who killed . . . Rebecca Schaeffer in 1989, everybody says don’t respond to fan mail . . . You can’t respond as freely because of those weirdos out there.” Id. Jason Priestly of television’s “Beverly Hills 90210” says, “We all worry about it, it’s safer to have a service. Once you start writing letters yourself—you never know.” Id. Television star Jennifer Aniston of the wildly popular sitcom “Friends” says, “I have a friend who does it.” Werts, supra at 36.
21. Id.
Members of Congress rose from 394 to 566 in the mere four year period between 1987 and 1991.22

Disproportionately targeted by male stalkers, women are six times more likely than men to be victimized during their lifetime.23 Statistics detailing the extent of violence against women are alarmingly high in countries across the globe. According to FBI statistics, acts of domestic violence occur at least once every fifteen seconds in the United States,24 and 4,000 women die annually as a result.25 The 1990 statistics revealed that thirty percent of murdered women were killed by their husbands or boyfriends.26 One source estimates an overwhelming 200,000 individuals are currently engaged in stalking behavior.27

United States Secretary of Health and Human Services, Donna E. Shalala describes domestic terrorism as “almost as common as giving birth.”28 This inequality between the sexes and the alarming rate at which women are brutalized is not unique to the United States. Statistics in Canada likewise provide “horrifying evidence of the brutal face of this inequality.”29 Canada’s proposed House Rule 840, entitled “A Bill To Establish A National Program To Reduce the Incidence of Stalking,” reports that nearly thirty percent of all female murders are attributed to domestic violence, stalking behavior included therein.30

C. The Crime

Stalking is not a new problem. It is an old problem encompassing behavior that has been criminalized in various ways since the 17th century.31 In its most basic sense, the crime involves one

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25. Id.
27. Poling, supra note 11.
28. Shalala, supra note 4, at G1.
31. English caselaw dating back to 1722 indicates that Parliament imposed the death penalty for crimes such as sending threatening letters to another.
person's obsessive behavior toward another. The stalker's actions may be motivated by either an intense affection for, or in stark contrast, an extreme dislike of the victim. Stalking behavior may be overtly irrational and violent, and thus easily recognizable, or it may be predicated upon benign acts that in another context, might be considered flattering or even welcome.

A single unifying concept permeates crimes of intimate violence: Control. The psychological and physical terrorism intertwined with stalking behavior depends upon the existence of unequal control between victim and offender, with the offender standing in a position of absolute control. Therefore, stalking is properly recognized as a crime of control, all too often with murder as the ultimate demonstration.

D. An Early Case Analysis

The act of stalking has been recognized by English criminal law since 1722. Perhaps one of the earliest cases involving stalking behavior was the case of Queen v. Dunn. Between 1722 and 1759, Parliament made the act of sending demand, and non-demand letters that threatened bodily harm or arson, a capital offense punishable by death. In Queen v. Dunn, a case of first impression, the Queen's Bench laid a solid foundation for what would become the focal point of today's treatment of the crime of stalking.

That court was faced with an offender who repeatedly sent letters to, followed, and threatened a young woman for almost a full year. Considering available remedies, the court recognized the propriety of granting a “surety of the peace,” “wherever a

33. Id.
34. See McGillivray, supra note 3.
36. Queen v. Dunn, 12 AD&E 939 (1840).
37. Id. at 939.
38. “Demand letters” were letters demanding something, usually either property or money, in exchange for the sender not imposing his will upon the recipient.
39. “Nondemand letters” were letters threatening a certain behavior upon the recipient without a demand that the recipient perform any certain task.
40. 9 Geo. 1, ch. 22, 1722; 27 Geo. 2, ch. 15, 1754.
41. Dunn, 12 AD&E at 939.
person had just cause to fear that another will ... do him a corporal hurt, as by killing, or beating him, or that he will procure others to do him such mischief." Furthermore, the Queen's Bench recognized that the justice is bound to grant a surety of the peace "upon the party's giving him satisfaction upon oath that he is actually under such fear; and that he has just cause to be so, by reason of the other's having threatened to beat him, or lain in wait for that purpose." At the time Queen v. Dunn was decided, the law required that an actual threat be made to the victim; mere apprehension on the victim's part was insufficient to warrant official intervention. Specifically, the victim must have been the object of an "act of violence" and must have had reason to believe further violence would follow. Additionally, the behavior must have been of the kind that would "breach the peace." In Dunn, the accused was found guilty and a surety of the peace was granted to the requester. In reaching that guilty verdict, the court focused on one letter in particular written by the accused that stated, "If you refuse this request (to meet with me), you will, when it is too late, repent a course, the consequences of which will sooner or later fall on you or your family." Thus, in focusing on this statement, the court also acknowledged the validity of nonverbal threats.

In Dunn, the court recognized that threats may arise from conduct as well as by word of mouth, emphasizing that "looks, gestures, and conduct have the ability to express threats with equal force." If the conduct complained of "tends to a breach of the peace," the magistrate was not required to wait for an actual breach, as his duty was in preventing breaches from occurring altogether, "wisely foreseeing and repressing the beginnings thereof." The court however, cannot claim the first conviction for stalking behavior as it was forced to release Dunn because of an administrative error, "most reluctantly, considering how seriously the happiness and comfort of the prosecutrix may be placed in hazard by the prisoner's perseverance on a technicality."
articles of the peace charging Dunn had omitted essential terms asserting that the plaintiff was threatened by the accused’s behavior.

The primary goal of the early English law, which is similar to the philosophy of present anti-stalking legislation, was prevention.\textsuperscript{49} However, today’s legislation differs in one very important aspect. Today’s anti-stalking laws recognize stalking behavior as the crime itself and not merely a prelude to another crime.

Recognized worldwide\textsuperscript{50} under such aliases as “intimidation,” “harassment,” “besetting or watching,” and “lying in wait,” this behavior has recently attracted global attention and has emerged at the forefront of legislative activity in both the United States and Canada.\textsuperscript{51}

III. The Development of Anti-Stalking Legislation

The development of anti-stalking laws worldwide arose primarily in response to a deficiency in the criminal justice system. Existing remedies proved insufficient to protect victims and deter offenders from engaging in stalking behaviors.\textsuperscript{52} For example, obtaining a protective order or restraining order is often a prerequisite to pursuing a case against a stalker.\textsuperscript{53} However, these orders have no teeth to penalize the perpetrators until after they are violated. In other words, protective orders can do nothing to protect the victim until the harm which they are designed to protect against has already occurred. Furthermore, these orders are often difficult to obtain,\textsuperscript{54} wrought with delays,\textsuperscript{55} have detrimental

\textsuperscript{50} “It’s like living in a war-zone. You’re under constant siege from an invisible enemy who is keeping tabs on you . . . .” Melissa Sweet, Stalkers’ Victims Tell Story: Our Lives Are Hell, U. NEWS SERV.: Austl., Aug. 26, 1994. “Until he rapes or kills me, the police can’t do anything. When I’m a statistic of some kind, then they’ll put every man they have on it.” U. NEWS SERV.: U.S.
\textsuperscript{51} Canada has federalized this legislation in Bill C-126, An Act to Amend the Criminal Code and the Young Offenders Act. R.S.C., C-126, § 264(1)(2) (1993) (Can.).
\textsuperscript{52} NATIONAL VICTIM CENTER, 66 STALKING AND THE LAW (1995).
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} The burden ultimately falls upon the victim to prove facts which justify the order. Victims many times do not have the financial means necessary to retain an attorney to obtain such an order. They may not have adequately stable mental states with which to pursue such orders, and victims many times are too intimidated to even begin proceedings and file for such orders.
\textsuperscript{55} Beck, supra note 2, at 61. When Patricia Kastle was shot by her former husband, police found a restraining order against him in her purse.
enforcement problems, and the penalties for their violation are often insufficient to actually deter offenders.

Prior to the enactment of such anti-stalking laws, the only recourse for combatting stalking behaviors was to use related laws such as laws criminalizing loitering, trespassing, and harassment that are not intended to, nor capable of, encompassing the nuances of the matter of stalking. The characteristic which distinguishes stalking as a unique crime, is that stalking behavior involves a series of discrete, individual acts, each one building upon the next. Although these discrete acts, standing alone, may be considered innocent behaviors, they assume a threatening character when viewed in the aggregate. And while the existing related laws may prohibit some behavior also classified as stalking, these laws do not address the fundamental element of the crime which is the repetitive behavior.

For example, an attempt to attack stalking behavior by claiming a violation of a loitering statute would likely be unsuccessful because loitering statutes emphasize only the general nuisance that a person presents to his surroundings. Likewise, an attempt to attack stalking behavior under harassment statutes will likely be unsuccessful because harassment statutes criminalize threats made to the victim either in person, in writing, or over the telephone. Harassment statutes cannot effectively prohibit stalking as they do nothing to address the act of “following,” a key behavior pattern of stalkers. Statutes prohibiting the crime of lying in wait are

56. Orders are enforceable only after a violation occurs. Oftentimes the violation is itself a violent act, thus the order serves no purpose at all. And in some cases, officers are unable to serve orders because the location of the offender is unascertainable.

57. Most violations of civil protective orders are misdemeanors which carry only light sentences or small fines.

58. Related laws that have been used to encompass this behavior include harassment laws, menacing laws, loitering laws, trespassing laws, intimidation laws, and laws penalizing the conduct of lying in wait.


60. Innocent behaviors include such activities as sending bouquets of flowers, telephoning, making flattering comments, and sending love letters.

61. McAnaney, supra note 59.

62. Id. at 891.

63. The word “loiter” in anti-loitering statutes means to be dilatory, to stand idly around, to linger, delay, or wander about; or to remain, abide, or tarry in a public place.

64. MODEL CODE, supra note 32, at 37.

65. Mareva Brown, State Anti-Stalking Law Shadows Lovers Who Won't Let Go, SACRAMENTO BEE, Nov. 29, 1992, at A1. (Following the victim is a common
similarly ineffective in providing recourse for stalking. Lying in wait is comprised of a concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. Actual stalking behavior, while sometimes an element of this crime, is characteristically absent. Therefore, these related laws do nothing to address repeat offenses against the same victim, nor do they enforce stricter penalties for the crime of “aggravated stalking” as do the specific anti-stalking laws. Because these related laws do not criminalize stalking, legislation designed to combat the specific acts of stalking behavior was created.

In 1990, California became the first state in the United States to enact anti-stalking legislation. Since then, every state and the District of Columbia has followed California’s lead by developing similar protective measures against this behavior. The unprecedented speed with which states passed anti-stalking legislation did not go unnoticed by the Canadian government. In fact, the passage of anti-stalking legislation by individual states served as a

element of stalking behavior.

67. Id.
68. McAnaney, supra note 59.
70. ALA. CODE §§ 13a-6-90 to 13a-6-94; ALASKA STAT. §§ 11.41 260-270; ARK. STAT. ANN. §§ 5-71-229(a), (b)&(c), 5-13-301, 5-71-208 & 209; ARIZ. REV. STAT. ANN. (SB 1216); CAL. PENAL CODE § 646.9; COLO. REV. STAT. ANN. § 18-9-111; DEL. CODE ANN. § 1312(a); FLA. STAT. § 784.048; GA. CODE ANN. § 16-5-90-92; HAW. REV. STAT. § 711-1106.5; IDAHO CODE § 18-7905; ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to -7.4; IND. CODE ANN. § 35-45-10-1 to -5; IOWA CODE ANN. § 708.11; KAN. STAT. ANN. § 21-3438; KY. REV. STAT. ANN. § 508.130-150; LA. REV. STAT. ANN. § 14:40.2; MD. ANN. CODE art. 27, § 121B; MASS. ANN. LAWS ch. 265, § 43; MICH COMP. LAWS ANN. §§ 750.411(h) & (i); MINN. STAT. ANN. § 609.749; MISS. CODE ANN. § 97-3-107; MO. ANN. STAT. § 565.225; MONT. CODE ANN. § 45-5-220; NEB. REV. STAT. § 28-311.03; NEV. REV. STAT. § 200.575; N.H. REV. STAT. ANN. § 933:3-a; N.J. STAT. ANN. § 2C:12-10; N.M. STAT. ANN. § 30-3A-3; N.C. GEN. STAT. § 14-277.3; N.D. CENT. CODE § 12.1-17-07.1; OHIO REV. CODE ANN. §§ 2903.211-215; OKLA. STAT. ANN. tit. 21, § 1173; OR. REV. STAT. § 163.732; 18 PA. CONST. STAT. ANN. § 2709; R.I. GEN. LAWS § 11-59-1; S.C. CODE ANN. § 16-3-1070; S.D. CODIFIED LAWS ANN. §§ 22-19a-1 to -6; TENN. CODE ANN. § 39-17-315; TEX. CODE CRIM. PROC. ANN. art. 56.11; UTAH CODE ANN. §§ 76-5-106.5; VT. STAT. ANN. tit. 13, § 1061; VA. CODE ANN. §§ 18.2-60.3; WASH. REV. CODE ANN. § 9A.46.110; W.VA. CODE § 61-2-9a; WIS. STAT. ANN. § 940.32; WYO. STAT. §§ 1-1-126, 6-2-506, 7-3-506-511; D.C. CODE ANN. § 22-504.
71. The crime was thrust into the global limelight in the wake of the 1989 murder of television actress Rebecca Schaeffer, and reports of a fan’s persistent harassment of late night talk show host David Letterman.
catalyst for the passage of the first federal Canadian anti-stalking laws.\textsuperscript{72}

While all fifty states in the United States have criminalized stalking, they have done so by enacting fifty different laws.\textsuperscript{73} Therefore, in the United States prior to the recent passage of the federal Violence Against Women Act, behavior that may have been characterized and punished as stalking in one state, may not have been recognized as such in another, thereby giving offenders geographic leeway with which to terrorize their victims. The Canadian government, however, quite ironically\textsuperscript{74} realized the importance of a uniform federal measure to criminalize this behavior.\textsuperscript{75} Therefore, in Canada offenders do not have what in essence amounted to the ability that United States citizens had to avoid the law, because the crime of stalking is given blanket coverage there.

Canada has enacted federal anti-stalking legislation in Bill C-126, An Act to Amend the Criminal Code and the Young Offenders Act.\textsuperscript{76} Until 1994, the United States remained dependent upon individual state legislation to combat the crime. While it is still early to see the effects of the federal prohibition of stalking in the United States, this country has taken a substantial step toward curbing such behavior. The anti-stalking legislation in both the United States and Canada reflects today's changing societal attitudes toward violence against women and provides increased protection for women through preventive action. The primary goal of anti-stalking legislation is to stop the current patterns of harassment and to deter future harm before it has the chance to


\textsuperscript{73} See supra note 70.

\textsuperscript{74} Ironically, because the Canadian government took notice of the crime of stalking only after the prompting from such rapid passage rates of anti-stalking legislation in the United States.

\textsuperscript{75} The Canadian federal legislation is found in section 264 of the Canadian Criminal Code. R.S.C. c. C-126 (1993).

\textsuperscript{76} Id.
escalate to fatal levels. The dilemma facing the law-makers however, is how to separate potentially dangerous stalking behavior from harmless, everyday behavior, as methods of stalking can vary drastically from one stalker to the next. The effectiveness of the Canadian legislation however, has recently fallen under attack. Whether the measures in the United States will be effective remains to be seen.

IV. A Textual Analysis of Proposed and Current Legislation in the United States

A. Recognizing the Problem

The phenomenon of stalking and the movement to provide protection to its victims has gained much attention since California first criminalized the behavior in 1990. The legislation protects against the "willful, malicious, and repeated following or harassing of another."

The United States Congress also recognized the magnitude of the stalking problem and the immediacy with which the states were responding. Thus, in 1992, Congress passed legislation directing the National Institute of Justice (NIJ), the Justice Department’s research branch, to develop a constitutionally sound anti-stalking law to serve as model legislation for the states. Specifically, the act mandated that:

The Attorney General, acting through the Director of the National Institute of Justice, shall: 1) evaluate existing and proposed anti-stalking legislation in the States; 2) develop model anti-stalking legislation that is constitutional and enforceable; 3) prepare and disseminate to State authorities the findings made as a result of such evaluation; and 4) report to the Congress the findings and the need or appropriateness of further action by the Federal Government by September 30, 1993.

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77. See generally Poling, supra note 11.
78. Id.
81. See supra note 70.
83. Id.
The model code published along with the NIJ study recognized that the purpose of anti-stalking legislation should be to eliminate perpetrator behaviors that disrupt normal life for the victim, and to prevent such behaviors from escalating into violence. Therefore, the model code encouraged legislators (1) to make stalking a felony offense; (2) to establish penalties that reflect the seriousness of the crime; and (3) to provide criminal justice officials with the authority and legal tools to arrest, prosecute, and deter stalkers. Additionally, the model code required prosecutors to prove (1) a course of conduct directed at a specific person; (2) that would cause a reasonable person fear; and (3) from an offender who had knowledge or should have had knowledge that the victim would be in fear because of the behavior.

The urgent need for comprehensive federal legislation was evidenced by the deminimis one year time limit that Congress placed on the NIJ to develop such a model. The need for federal legislation was further evidenced by the unfavorable judicial and public reaction to the outcome of every case in which an offender goes unpunished because of a technicality.

The expansive criminalization of stalking in the United States was nothing short of commendable as an advocacy of women's rights. However, that no federal legislation had been enacted only motivated activists to lobby harder. Fortunately their efforts paid off with the passage of the Violence Against Women Act.

B. The Inadequacy of State Legislation Alone

The inadequacy of state legislation to deal with this crime was evidenced by the inconsistent range of behaviors that were

84. STALKING: LEGISLATIVE OVERVIEW, supra note 69.
85. MODEL CODE, supra note 32.
87. "Until federal anti-stalking legislation is passed, I feel that I cannot rest. Out of our endless nightmare, I hope to see some good result . . . . Maybe, just maybe, by coming forward and putting a face on the victimization of stalking, I can, in some small measure, help to bring us all relief from within the legal system. But I need your help. I am only one voice, and I need a chorus of voices loud enough to be heard throughout the halls of Congress. So I will conclude and leave with you this one request. At your convenience, would you all please send a postcard to your U.S. senators, asking for support of federal anti-stalking legislation? God forbid, but one day your own life may depend upon it." Krueger, supra note 13, at 903.
considered "stalking" in various states.\textsuperscript{88} Some states require the existence of both a "credible threat"\textsuperscript{89} and the additional appearance that the stalker intends to and has the actual ability to carry out that threat.\textsuperscript{90} Other states specify a course of conduct in which the stalker "knowingly, purposefully, and repeatedly" engages in a series of actions directed toward a specific person, and which serve no legitimate purpose and "alarms, annoys, and causes a reasonable person to suffer fear and emotional distress."\textsuperscript{91}

For example, California criminalizes "repeated following or harassing that would cause, and actually does cause, a reasonable person to suffer substantial emotional distress."\textsuperscript{92} Illinois on the other hand, criminalizes activity involving "at least two separate occasions of following or placing under surveillance another person," and includes no requirement of fear on the victim's part whatsoever.\textsuperscript{93} Maryland criminalizes "the approach or pursuit of another,"\textsuperscript{94} whereas Vermont's statute outlaws "following or lying in wait or harassing," and specifically includes acts which are "verbal, written, threats, vandalism, or unconsented to physical contact."\textsuperscript{95} Finally, Pennsylvania criminalizes "acts done without proper authority."\textsuperscript{96}

Because of this lack of uniformity in defining the crime, some behavior that would have properly been categorized as stalking in one state may have been deemed completely innocent in another. In many cases, this ambiguity actually allowed offenders to "slip through the cracks" of justice, by permitting the judicial system to vindicate only the rights of those stalking victims who fell prey to behavior criminalized in that particular state. Persons who engaged in behavior that would be characterized as stalking suffered no

\textsuperscript{88} Cf. H.R. 840, 103d Cong., 1st Sess. (1993). A Bill To Establish A National Program To Reduce the Incidence of Stalking. Subsection 4 states, "State criminal statutes often do not apply to stalking, and more than fifty percent of the States have failed to enact legislation that includes stalking." This is interpreted to mean that the "more than fifty percent of States" have not specified "stalking" as the crime under criminal statutes.

\textsuperscript{89} A credible threat is usually defined as a verbal or written threat of violence made against a person by the perpetrator.

\textsuperscript{90} \textit{Stalking and the Law}, \textit{supra} note 52.

\textsuperscript{91} \textit{Ibid.}

\textsuperscript{92} \textit{Cal. Penal Code} § 646.9 (1994).

\textsuperscript{93} \textit{Ill. Ann. Stat.} ch. 720, para. 5/12-7.3 to -7.4.

\textsuperscript{94} \textit{Md. Ann Code} art. 27, § 121B.


\textsuperscript{96} \textit{18 Pa. Cons. Stat.} § 2709.
legal consequences when that behavior was not statutorily criminalized.

C. A Synthesis of Existing Federal Proposals

Prior to the enactment of federal legislation in the United States, Congress had introduced proposals in the House which would make inter-state stalking a federal crime. House Rule 740, the "Federal Anti-Stalker Act," defined the crime of stalking and established penalties upon conviction. House Rule 840, the "National Stalker Reduction Act," provided guidelines for implementing programs promoting awareness of stalking and penalties for non-compliance. House Rule 1461, the "Federal Stalking Prevention Act," provided guidelines for penalizing subsequent offenses. These proposals, along with the extensive research compiled by the National Institute of Justice, left the United States government with no excuse for not enacting a federal blanket protective legislation. "We would like to see as many women covered as possible. No one should be out there unprotected," asserted Ruth Jones, staff attorney with the NOW Legal and Educational Fund. "What the federal legislation will do is put a blanket over the entire country that will fill in all the gaps, so the victims of stalkers will not have to suffer anymore." Under the proposed federal statute, the FBI could be called in if victims crossed state lines in an attempt to escape their harasser, or if the stalker harassed the victim from another state.

These proposals and the NIJ model code provided more than ample research from which to draft efficient, effective, and comprehensive federal legislation criminalizing stalking behaviors in the United States. The proposals shared five main elements to consider in criminalizing stalking behaviors.

1. Defining the Crime. — The first element defined the behavior criminalized by the legislation. Unlike the proposed

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100. Ruth Jones, Staff Attorney with the NOW Legal and Educational Fund.
legislation from the House of Representatives, the model code did not list specific types of actions that could be construed as "stalking behavior." Some courts have ruled that statutes including specific lists should be read as exhaustive. Therefore, the model code minimized the potential for an ingenuous stalker to avoid the law, by prohibiting stalkers from engaging in a "course of conduct" that would cause a reasonable person fear. "Course of conduct" was defined as repeatedly maintaining a visual or physical proximity to a person, or repeatedly conveying verbal or written threats implied by conduct, or a combination thereof, directed at or towards a person.

Proposed House Rules 740 and 840 both included lists of specific behaviors categorized as stalking. According to these proposals, "repeatedly following or harassing another person" should be considered stalking. House Rule 740 additionally provided that one harasses a person if:

a) one knowingly engages in a course of conduct directed specifically at that person; b) that conduct seriously alarms, annoys, or harasses that person but serves no legitimate purpose; and c) the course of conduct is such as would cause a reasonable person to suffer substantial emotional distress and does in fact cause substantial emotional distress to the person against whom it is directed . . . The term "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 . . .

The legislation most likely was drafted to criminalize a specific set of behaviors in an effort to avoid constitutional challenges under both the overbreadth and vagueness doctrines.

However, the "course of conduct" criminalized by the NIJ model code was essentially the same as the "acts" criminalized under the proposed federal legislation. The proposals acknowledged that stalkers could easily skirt the law by acting in a manner which avoided the behaviors criminalized in their respective states.

101. H.R. 740, supra note 97; H.R. 1461, supra note 97; H.R. 840, supra note 97.
103. MODEL CODE, supra note 32.
104. Id.
105. See supra note 97.
106. The overbreadth and vagueness doctrines are beyond the scope of this Comment.
2. The Credible Threat Requirement.— The second element defined an offender's actions which constitute stalking. Proposed House Rule 740 included in the definition of stalking, "whoever makes a credible threat with the intent to place that person in reasonable fear of the death or serious bodily injury of that person or a member of that person's immediate family." However, House Rule 740 defined "credible threat" to mean a threat made with the apparent ability to carry it out so as to cause the person who is the target, a reasonable fear for his or her safety, and thereby encompassed that category of threats implied by conduct. On the other hand, the model code did not use the language "credible threat" when defining the behavior directed toward the victim. In order to prohibit behavior in the form of threats implied by conduct, the model code purposely omitted this language for fear it would be construed as requiring an actual verbal or written threat. Finally, because courts have long recognized that threatening behavior can take many forms including behavioral conduct, a comprehensive federal law recognizing an offender's conduct as potentially threatening behavior is readily achievable as evidenced by the two proposals.

3. Stalking as a Felony Offense.— Third, the model code emphasized creating a stalking felony to address the more serious, persistent, and obsessive behavior that causes a victim to fear bodily injury or death, as opposed to behavior resulting in mere annoyance or inconvenience. Existing state anti-stalking laws generally fit into three different categories based upon penalties: (1) those that make stalking a misdemeanor; (2) those that make a first offense of stalking a misdemeanor and subsequent offenses felonies; and (3) those that make stalking a felony.

107. MODEL CODE, supra note 32.
108. Id.
109. Id.
110. For example, the daily act of sending a dozen roses to a person whom one passes every morning in the hallway, or the ritual act of driving by a person's home every morning at a certain time could rise to the level of threats implied by conduct.
111. MODEL CODE, supra note 32.
112. See Dunn, 12 AD&E 939.
113. MODEL CODE, supra note 32.
114. In other words, behavior that would not cause a person to fear for his or her safety; behavior that one considers "pestering" or "bothersome," but not cause for genuine alarm.
115. STALKING AND THE LAW, supra note 52.
The penalty in the majority of states for first time offenders was a minor monetary fine and possible imprisonment for a period of no more than one year.\textsuperscript{116} The model code recognized that a stalking defendant’s behavior is often characterized by a series of increasingly serious acts and that by establishing a continuum of charges, law enforcement officials would be able to intervene at various stages.\textsuperscript{117} For example, existing harassment or intimidation statutes could be used to address frequent and bothersome, but non-threatening behaviors, while the felony stalking statute would allow law enforcement officials to intervene in situations that may pose an imminent and serious danger to a potential victim.

Likewise, the proposed federal legislation mandated several different punishments upon conviction. House Rule 1461 imposed a monetary fine, or imprisonment for up to five years, or both. It also allowed the United States Sentencing Commission to provide a longer prison sentence for subsequent offenses while a protective order is in effect governing the defendant’s behavior toward the victim of the offense.\textsuperscript{118} House Rule 740 imposed a monetary fine, or imprisonment for not longer than one year, or both in the case of a first conviction. This proposal imposed a monetary fine, or imprisonment for not more than three years, or both if the defendant had violated a court order prohibiting the behavior, or if the offense was a subsequent conviction for a crime against the same victim.\textsuperscript{119} Both proposals therefore recognized the importance of providing increased penalties for repeat offenders, and were synonymous in their efforts to promote prevention through earlier intervention.

4. The Requisite Level of Fear Induced in the Victim.— The fourth element, that of fear induced in the victim, was a subject of controversy for drafters of anti-stalking legislation.\textsuperscript{120} Stalking statutes criminalize what otherwise would be legitimate behavior based solely on the fact that the behavior induces fear, thus the level of fear induced in a stalking victim is a crucial element of the stalking offense.

The model code required fear of bodily injury or death, which went beyond the proposed House legislation requiring “substantial

\textsuperscript{116} MODEL CODE, supra note 32.
\textsuperscript{117} Id.
\textsuperscript{118} H.R. 1461, supra note 97.
\textsuperscript{119} H.R. 740, supra note 97.
\textsuperscript{120} See MODEL CODE, supra note 32.
emotional distress” and “a reasonable fear for one’s safety” set forth in House Rule 740, but mirrored the fear requirement of House Rule 1461 of “bodily injury or death.” Currently, twenty-eight states include a reasonable fear of death and/or bodily injury to prosecute under an anti-stalking law. Nineteen states require a fear for personal safety, and four states omit completely the requisite level of fear needed to prosecute.

The proposals were not as disparate as they may have initially seemed. They all require evaluation in light of the perceptions of a reasonable person. The “reasonable fear for one’s safety” standard would criminalize a broader range of behaviors than a statute requiring a fear of “bodily injury or death,” however, the fact that the judgment is made from this particular perspective recognizes the intent that truly threatening behavior not go unnoticed.

5. The Requisite Intent of the Accused.— The final element of the anti-stalking legislation addressed the requisite intent of the accused. The model code tackled the final element of “intent” by requiring that the defendant engage purposefully in activity that would cause a reasonable person fear. The model code also required that the stalker be aware that the person toward whom that conduct is directed will be placed in reasonable fear. In other words, as long as the stalker knows, or should know that his actions cause fear, he can be prosecuted for stalking.

House Rule 1461 was similar to the model code in requiring that the defendant “wilfully and knowingly” engage in such behavior “with the intent to place that person in fear.” However, House Rule 740’s requirement of “wilful and malicious behavior” differed from both the model code and House Rule 1461. House Rule 740 did not require that the defendant know his behavior is placing the victim in fear. However, these two standards were also not as disparate as they may have initially seemed. That the element of knowledge necessarily must have been incorporated into the element of maliciousness, was evidenced by the fact that for

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121. NATIONAL VICTIM CENTER, supra note 102.
122. Id.
123. Id.
124. Id.
125. Restraining and protection orders are sufficient to put the defendant on notice that his actions are causing fear to the victim.
one to be malicious, one must know his behavior is harmful to his victim.\textsuperscript{126}

A synthesis of the two current bodies of research the model code and the proposed House legislation, it was hoped, would produce a single, solid, effective federal measure in the United States to provide uniform blanket coverage to all victims of stalking. In the fall of 1994, that hope was realized when Congress passed the Crime Bill\textsuperscript{127} including the Violence Against Women provision.\textsuperscript{128} That provision makes it a federal crime to cross a state line "with the intent to injure, harass, or intimidate that person's spouse or intimate partner," or to cause a spouse or intimate partner to cross a state line by "force, coercion, duress, or fraud," which then results in bodily injury to that person.\textsuperscript{129} Even more powerful is the provision that makes a federal crime out of crossing a state line intending to violate any "portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury."\textsuperscript{130}

This upsurge of attention focused on criminalizing stalking behavior in the United States sparked the interest of countries worldwide,\textsuperscript{131} influencing them to examine their own existing protective measures regarding stalking crimes. Canada soon emerged as a leader in federalizing this crime.

V. Analysis of the Canadian Legislation Criminalizing Stalking

A. Canada's Federal Legislation

Bill C-126, entitled "An Act to Amend the Criminal Code and the Young Offenders Act" was passed by the Canadian House of Commons on June 10, 1993,\textsuperscript{132} and criminalizes stalking in Canada. The bill is codified in section 264 of the Canadian Criminal

\textsuperscript{126} \textsc{MerrimWebster's Collegiate Dictionary, supra note 15, defines "malicious" as "arising from malice." The dictionary defines "malice" as an "intent to commit an unlawful act or cause harm without legal justification; the desire to see another experience pain, injury, or distress." Therefore, malicious behavior necessarily includes an intent to cause the other fear.}

\textsuperscript{127} \textsc{See supra note 5.}

\textsuperscript{128} \textsc{See supra note 6.}

\textsuperscript{129} \textsc{Id.}

\textsuperscript{130} \textsc{Id.}

\textsuperscript{131} Other countries with operative anti-stalking laws include Australia, New Zealand, and Great Britain.

\textsuperscript{132} \textsc{See supra note 9.}
FEDERALIZED ANTI-STALKING LEGISLATION

Code and creates the new offense of "criminal harassment," generally referred to by politicians and the media as "stalking." The Manitoba Court of Appeals along with the Supreme Court of Canada recognizes that the offense created by section 264(1)(a) is complete when a threat is made:


134. Regina v. Clemente, 86 C.C.C. 3d 398, (Manitoba Ct. of Appeal), Dec. 8, 1993. The accused was charged with uttering threats to cause death or serious bodily harm in violation of section 264.1(1)(a) of the Criminal Code. The accused, who had fallen on financially hard times and was receiving social assistance, was informed his file was being transferred back to his prior social worker with whom he did not get along. Over several days, he made a number of statements to his then caseworker indicating that he would "take a shot gun to 704 Broadway [the address of the prior caseworker] and he would blow up the place." He stated that if he had to see her again, "terrible things would happen ... that he would strangle her." The accused was arrested after his then caseworker reported her concerns to the Manitoba police. After the police read him his Charter rights and the standard police caution, he replied, "Yes, I know. Before this is over, somebody will have to die. I’m not saying anyone. It could be me." Later, the accused made an official statement denying any threats to kill his caseworker. The trial judge convicted the accused after finding that the message given to his current caseworker was given with the clear intention that should his file be transferred to his prior caseworker, death or serious bodily harm would befall the new social worker. The accused appealed this ruling, arguing that the trial judge had not made the necessary finding that the accused had the requisite intent which would justify conviction under section 264.1 of the Criminal Code. Dismissing the appeal, the court asserted that:

To constitute the offense . . . there must be an intent to intimidate and instill fear in the victim . . . . The threats . . . were not a spontaneous blurt ing out of angry words because of frustration . . . . The accused had made threatening comments over a number of days, culminating with the threats which constituted the offense. It was implicit in the trial judge’s finding that the accused’s utterances were intended to coerce his caseworker into a course of conduct by fear and intimidation. There was no requirement that the threats instilled fear in the proposed victim. The offense was made out whether or not the victim knew of the violence that had been threatened against her.

Clemente v. The Queen, 91 C.C.C. 3d 1 (Supreme Ct. of Canada) July 14, 1994. The Court of Appeal proceeded on the basis that the words must be uttered with the intent to intimidate or instill fear. The majority concluded that the words uttered by the appellant, when viewed objectively in the context in which they were spoken, would indeed convey a threat of serious bodily harm to the reasonable person. Specifically, the Court stated that:

Clearly the words spoken by the appellant were intended to convey to Ms. Mizak [the prior social worker] that he intended to kill her or cause her serious bodily harm. Clearly the words disturbed and intimidated Ms. Denneh y [the current social worker] and would have had the same effect on Ms. Mizak if they had been repeated to her.

Id.
A threat is a tool of intimidation which is designed to instill a sense of fear in its recipient. The aim and purpose of this offense is to protect against fear and intimidation. Whether the threatener intends to carry out the threat is irrelevant. It is the element of fear instilled in the victim by the issuer of the threat at which the criminal sanction is aimed.\textsuperscript{135}

Specifically, section 264 criminalizes:

a) repeatedly following from place to place the other person or anyone known to them; b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or d) engaging in threatening conduct directed at the other person or any member of their family.\textsuperscript{136}

Bill C-126 emerged amidst the rapid passage of United States legislation criminalizing stalking behaviors, and in the aftermath of a 1992 study published by Statistics Canada reporting that forty-eight percent of adult female homicide victims had been killed by their current or former spouses.\textsuperscript{137} Then Minister of Justice Pierre Blais declared the objective of Bill C-126 was “to reinforce the provisions of the Criminal Code that deal with . . . violence against women in general.”\textsuperscript{138} Minister of Justice Blais also noted with alarm the growing number of reported cases of women being stalked by men with whom they had been involved and from whom they were currently trying to escape.\textsuperscript{139} The Minister of Justice noted that insufficient recourse existed for women who were

\textsuperscript{135} Id.
\textsuperscript{136} R.S.C. C-126, § 264 (1993).
\textsuperscript{137} CANADIAN CENTER FOR JUSTICE STATISTICS, 12 JURISTAT, GENDER DIFFERENCES AMONG VIOLENT CRIME VICTIMS, Cat, 85-002.
\textsuperscript{138} House of Commons Debates, May 6, 1993, at 19015.
\textsuperscript{139} Id. The following “disturbing patterns” have emerged and become typical of a stalking scenario:

1) The accused were male, victims were female; 2) the accused and the victim had a prior relationship; 3) in most instances the relationships were ended by the victim; 4) the accused generally maintained a belief in the viability of the relationship; 5) the accused were obsessed with maintaining contact, jealous of their victim’s new relationships, and prevented their victims from carrying on with their lives; 6) all victims feared for their lives and those of their children.

(Taken from the Manitoba Dep’t of Justice, Brief for Presentation to the Legislative Committee of the House of Commons on Bill C-126, May 1993).
victimized. Thus, enactment of the Canadian anti-stalking legislation, like those laws enacted in the United States, was urged along by a public outcry regarding the inadequacies of existing law to deal with such crime.

B. Inadequacies of Prior Legislation

Prior to Bill C-126's enactment, Canada, like the United States, relied on related offenses to criminalize stalking behavior. The laws most often used included ones criminalizing indecent,玲harassing,玲and threatening phone calls,玲and sending threatening letters.玲Canada's “anti-intimidation” statute in section 423 of the Criminal Code玲was the one most frequently used to encompass these behaviors. Section 423 of the Criminal Code defines intimidation generally as:

using violence or threats of violence against someone or their spouse or children; or intimidating someone by threats that violence will be done to them or their relations; or persistently following someone about; or watching where they live or work for the purpose of compelling them not to do anything they

141. Id. § 372(3).
142. Id. § 373(1).
143. Id.

1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing, a) uses violence or threats of violence to that person or his spouse or children, or injures his property; b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or a relative of his, or that the property of any of them will be damaged; c) persistently follows that person about from place to place; d) hides any tools, clothes or other property owned or used by that person, or deprives him of them or hinders him in the use of them; e) with one or more other persons, follows that person, in a disorderly manner, on a highway; f) besets or watches the dwelling-house or place where that resides, works, carries on business or happens to be, or; g) blocks or obstructs a highway, is guilty of an offense punishable on summary conviction.

2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.
have a lawful right to do, or compelling them to do anything that they have a lawful right not to do.\textsuperscript{145}

Section 423 had come under attack as inadequate to encompass the crime of stalking for two basic reasons.\textsuperscript{146} First, it had often been called "too complicated" and therefore it had become "too hard to prove the existence of the offense."\textsuperscript{147} Second, and most important, was that to be convicted under this section, the accused must not only have had to do one of the acts described, but he must also have had to do it for the purpose of intimidation — an element which was often difficult to prove.\textsuperscript{148}

By defining stalking behavior under the Criminal Code, police have a duty to interrupt and perhaps permanently stop a pattern of repeated acts of harassment which often escalate into overt violence.\textsuperscript{149} Police have an effective tool with which to perform their duty because Bill C-126 provides a more comprehensive attack on stalkers, punishing repeated following, communication, watching, and threatening conduct.\textsuperscript{150} Thus the expansive sweep of the new legislation encompasses all of the above behaviors and more.

C. \textit{Response to the Federal Legislation Criminalizing Stalking Behavior}

In its proposed form, Bill C-126 was initially met with a warm reception.\textsuperscript{151} However, media and public response quickly took on a suspicious tone, questioning the motivation for, and the sincerity of the Canadian government's haste to pass the bill into law.\textsuperscript{152} Women's groups voiced the loudest objections to the bill, enraged that they had not been consulted prior to its tabling.\textsuperscript{153}

\textsuperscript{145} Background Document: \textit{Amendments to the Criminal Code Respecting Family Violence, Child Abuse, and Violence Against Women}, Dep't of Justice, Ottawa Canada, K1A OH8.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{150} \textit{See supra} note 9.
\textsuperscript{151} House of Commons Debates, May 6, 1993, at 19015.
\textsuperscript{153} \textit{See also} Dep't of Justice Canada, \textit{Background Document: Amendments To the Criminal Code Respecting Family Violence, Child Abuse and Violence Against Women,} June, 1993.
considering that its main objective was to provide greater protection for women. Acknowledging these concerns, the Department of Justice scheduled a one day Stalking Information Exchange Meeting in attempts to develop an inclusive federal proposal criminalizing stalking. The more than twenty women's organizations in attendance were unanimous in their opinions that the development of a comprehensive stalking law would require much more “meaningful consultation” than the allotted one day discussion. Minister Blais responded by stating that because of the current law's inadequacy, it would be “irresponsible not to proceed as quickly as possible.”

Substantively, the bill was attacked on grounds that: (1) the “mens rea” requirement (i.e. proof of the accused's specific intent); and (2) the “reasonableness” requirement (i.e. that the victim's fear of safety be a reasonable one) would place the victim's perceptions, rather than the conduct of the accused on trial. In response to these concerns, the government brought forth amendments that were adopted in committee. The intent requirement was modified in order to substitute “knowing or reckless” harassment for “intentional” harassment. Although the requirement of “reasonable fear” remained, the phrase “in all the circumstances” was added in order to mandate examining that fear from the victim's perspective. Even with these amendments, concerns (mainly voiced by women's organizations) persist regarding the true effectiveness of this legislation in preventing such stalking behavior.

As recently as June 9, 1994, the Federal-Provincial/Territorial Ministers Responsible for the Status of Women emphasized the need to recognize that women subject to violence have rights to just, timely, and effective remedies for the harm they have suffered. Concerns over the current legislation persist as The Ministers also urge Federal Minister of Justice Allan Rock to

154. Way, supra note 35.
155. Id.
156. Id.
157. Way, supra note 35. (“This exposes women to cross examination on the nature of their fear and on its objective reasonableness. Experience with sexual assault has demonstrated that courts have great difficulty in both understanding and characterizing women's perceptions.”).
158. Id.
159. Id.
161. Id.
strengthen existing legislation to better protect victims under the anti-stalking laws.\textsuperscript{162} Regardless of these valid concerns, it was hoped that because Canada has federalized its legislation, Canada could provide a broader sweep and a more effective tool for criminalizing stalking behavior and for punishing stalking offenders than did the United States with its patchwork, inconsistent state-by-state approach to solving the problem. The United States has since risen to the challenge however, and has promulgated a federal proscription against stalking.

Canada's efforts have recently come under fire as inadequate and ineffective. While the efforts of the United States are only now testing the waters, they too are likely to fall under attack until society as a whole recognizes stalking for the pervasive and illusive crime that it is, and effective and all-encompassing legislation is passed to thwart its reign.

VI. Societal Recognition as a Prerequisite to the Success of Federal Anti-Stalking Legislation

Canada’s legislation is a product of Parliament’s recognition that “the act of threatening permits a person uttering the threat to use intimidation in order to achieve his or her objects.”\textsuperscript{163} A prerequisite of section 264 of the Canadian Criminal Code is that the offender knowingly convey the threat. Whether or not an intent to bring that threat to fruition exists is irrelevant, as the sanction is aimed at the element of fear instilled in the victim.\textsuperscript{164} The intent to intimidate the victim is what makes a threat a crime. Idle threats and words blurted out in the heat of frustration or anger are therefore excluded from punishment under this provision of the Code.\textsuperscript{165}

Likewise, the United States articulates this requirement by penalizing any person who “travels across a state line with the intent to engage in conduct that violates the portion of a protection order that involves protection against credible threats of violence . . .”\textsuperscript{166} Thus, this requirement guarantees that it is the offender's intent, rather than the definition of conduct engaged in, that triggers the applicability of the statute.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Clemente, supra note 134.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} See supra note 6.
\item \textsuperscript{167} Id.
\end{itemize}
The lack of a uniform requirement among the states regarding the accused’s intent, left victims in the United States at the mercy of their individual state’s legislation for relief. If no intent requirement is included, victims are forced to rely upon the definition of the conduct engaged in in order to gain relief. Unfortunately, this often places the victim’s perceptions regarding that behavior on trial and shifts focus away from the accused. While the federal legislation is a substantial step toward unity, unless the perpetrators cross state lines, victims are still left with only the recourse provided by their individual state.

The Canadian legislation posits the question: Did the offender intend the other party to be frightened? The answer is found upon examination of the words or behavior alleged to have been threatening. The decision as to whether or not the act constitutes the type of threat criminalized by the statute is an issue of law and not of fact. However, whether the act actually does constitute a threat and instills fear, is a question of fact for the jury to determine based on the overall aggregate of circumstances.

The recognized concern of Parliament, synonymous with that of Congress, was not in criminalizing the use of threatening words per se, but rather in criminalizing the use of threatening words as an instrument of fear. The cornerstone upon which stalking laws exist in both the United States and Canada is in the recognition that “threatening offenses seek to protect against fear and intimidation. They also serve a preventive function, criminalizing conduct

168. Clemente, supra note 134.
169. This was true even of the statute preceding Canada’s federal anti-stalking (i.e. criminal harassment) law which read:
   Every one commits an offense who, in any manner, knowingly utters, conveys or causes any person to receive a threat: a) to cause death or serious bodily harm to any person; b) to burn, destroy or damage real or personal property; or c) to kill, poison or injure an animal or bird that is the property of any person.
In the case of Regina v. McCraw, 66 C.C.C. 3d 517 (1991), the accused was charged with threatening to cause serious bodily harm contrary to section 264.1 of the Criminal Code. He had written anonymous letters to three women on a cheerleading squad, graphically detailing various sexual acts which he wished to perform with them, and culminating in a threat of rape. All three women testified that the letters frightened them to the extent that they no longer felt safe when they were alone. The trial judge ultimately acquitted the accused by asserting, “the tenor of the letters while immature and disgusting, reveals more of an adoring fantasy than a threat to cause serious bodily harm.” The Ontario Court of Appeals and the Supreme Court of Canada corrected the trial judge’s mistaken grant of an acquittal, but only because they believed the words used by the accused did indeed convey a threat contrary to the Criminal Code.
170. Id.
before tangible harm is done. The value protected by threatening offenses is the liberty of action: The freedom of choice and of action should not be curtailed."\textsuperscript{171} The ultimate effect of this interpretation then, criminalizes not the expression of a thought, but the use of such an expression as an instrument of fear. "The actus reas of the offense is the uttering of threats of death or serious bodily harm. The mens rea is that there is a threat made with the intent of instilling fear in the other."\textsuperscript{172} This is true of legislation aimed at curbing stalking in both the United States and Canada.

Unfortunately, Canadian legislation that began with such an optimistic future has quickly come under fire as ineffective and "not working in the way Parliament intended it should."\textsuperscript{173} Problems are primarily attributed to two factors; the readiness of prosecutors to accept plea bargains, and the unwillingness of judges to impose jail terms on convicted stalkers.\textsuperscript{174}

Current Justice Minister Allan Rock has recognized that all too often the crime of stalking is considered a minor matter deserving little if any attention. The impetus for Rock's contemplated changes to Section 264 of the Criminal Code is primarily attributed to a Manitoba case involving the murder of a young woman who had been stalked for weeks by a male nurse who had been compiling a diary of her daily movements.\textsuperscript{175} The perpetrator shot and killed her while she stood at a crowded Winnipeg bus stop waiting for her ride.\textsuperscript{176} The Crown was unable to convict the perpetrator of first-degree murder and was forced to proceed on a lesser charge only because it was unable to prove the murder was planned and deliberate.\textsuperscript{177}

The contemplated modifications to the existing Criminal Code include an increased penalty above the current maximum of five years for a stalker who violates a protective court order, and automatically forcing convicted stalkers to surrender any firearms and firearm licenses in their possession, and making it automatic

\textsuperscript{172} Clemente v. The Queen, 91 R.S.C. 3d. 1 (1994).
\textsuperscript{174} \textit{Id.}
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.}. 

for a stalker who ultimately kills his victim to be found guilty of first degree murder with no parole eligibility for twenty-five years. 178 An additional proposed amendment strongly advocated for by victims of stalking, is a mandatory minimum sentence upon a conviction for stalking. 179 Many claim the “ridiculously short” sentences usurp any deterrent effect of a conviction under the anti-stalking law. 180 More important, critics of the existing legislation see an even more fundamental flaw and view the light sentences as a reflection of the way the judicial system views violence against women; often a bank robber gets a heavier sentence than a perpetrator of intimate violence. 181

Noticeably absent from the penalties provided for under the United States federal legislation criminalizing stalking is a minimum sentence for the convicted stalker. 182 Until society in any country accepts this domestic terrorism for what it really is, and until lawmakers can approach the dilemma through the eyes of a victim, adequate remedies will always be just out of reach.

VII. Conclusion

Credit must be given to those nations that even attempt to tackle one of the most controversial issues in criminal law today. Canada and the United States are two examples of countries that have taken such a stab. 183 Canada federalized its anti-stalking legislation in 1993 under the heading of “criminal harassment.” Victims in Canada now have a nationwide recourse against repeated threats of violence, as well as against repeated attempts

178. Id.
179. When Women are Hunted, supra note 1, at B2.
180. Id. “It’s like telling the stalker he has done something wrong, but will not get a sentence that takes into account how serious the crime is. That ends up short-circuiting and trivializing the Criminal Code’s message on stalking.”
181. Id.
182. The penalties include the following:
   “A person who violates this section shall be . . . imprisoned
   (1) for life or any term of years, if death of the
   offender’s spouse or intimate partner results;
   (2) for not more than 20 years if permanent disfigurement or life
   threatening bodily injury to the offender’s spouse or intimate partner
   results;
   (3) for not more than 10 years, if serious bodily injury to the
   offender’s spouse or intimate partner results or if the offender uses a
   dangerous weapon during the offense; . . .
   (5) for not more than 5 years, in any other case.”
of communication, or following, or harassing behavior; behavior that has surged to the forefront of society as a precursor to violence and even death.

Such recourse finally exists in the United States. This country's concern was evidenced by the swift enactment of state legislation, by acts mandating national evaluation of existing laws, and by requiring proposals for new and improved legislation.

Canada provides an invaluable research tool from which the United States can visualize the operation of federal legislation criminalizing stalking.\textsuperscript{184} The Canadian legislation that actually materialized from activity in the United States is the ideal model with which to foresee and avoid similar criticisms of federal legislation in the United States.

Anti-stalking laws recognize that harassing acts are more than simply annoying, they are criminal. Having recognized the crime, legislators must now recognize its magnitude and its saturation of our society in order to draft adequate measures of protection. The federal government was right to allow acts of domestic terrorism to be resolved within its courthouse walls, however lawmakers now need to ensure those resolutions are working. This country, along with every other country that considers itself "civilized" must sit up and respect the notion that "the common law expands with reason, living and growing in response to the needs of the community and the development of the needs of the nation."\textsuperscript{185}

\textit{Keirsten L. Walsh}

\begin{footnotes}
\item[184.] There is a trend now involving an increasing number of complaints regarding "electronic stalking" (i.e. stalking by E-mail on computers). E-mail is a private message from one computer user to another. Whether or not this behavior will be encompassed and criminalized under an anti-stalking law remains to be seen, but will most certainly be at the forefront of the judicial docket in the months to come.
\item[185.] McAnaney, \textit{supra} note 59.
\end{footnotes}