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INTRODUCTION

Stalking often brings to mind obsessive love:[1] the ex-boyfriend who will not let go or the fan whose admiration of a celebrity has gone too far. Others think of

* J.D., Northwestern University School of Law, 2014. I extend my sincere gratitude to Professor Audra Wilson for critiquing my note and to Professor Kathryn Abrams for inspiring my interest in feminist jurisprudence.

obsessive hate, like an ex-employee terrorizing his former boss. Common to these characterizations is the motif of control through fear. The ex-boyfriend tries to control the ex-girlfriend by coercing her through fear back into a relationship or at least preventing her from moving on unscathed. The fan tries to control the celebrity through fear by making her love or simply acknowledge him. The ex-employee tries to control the former boss through fear by making her share in his pain.

A dominance feminist is very familiar with this pattern of behavior when it includes a male-to-female gender dynamic. To a dominance feminist, female subordination is defined by a man's physical, sexual, and social control over a woman, whether it is through rape, sexual harassment, or sexual assault. Stalking comports well with the dominance theory of feminism because perpetrators often attempt to control a victim through social manipulation or the threat of physical or sexual coercion. A perpetrator's control of a victim through fear is compounded by the perpetrator's preexisting societal position of power, whereby the perpetrator is likely to regard his behavior as acceptable, and the victim is unlikely to recognize his behavior as unacceptable.

Before 1990, implicit threats and persistent pursuit alone never constituted a crime. Feminists had reason to celebrate when the first state stalking laws swept through the United States, giving women legal agency against their stalkers.[2] However, these laws represented only a partial victory.

This Note first will define dominance feminism and explain why stalking laws must remain a key concern for the feminist activist. It then will explain why stalking is a gendered crime and why the behavior of perpetrators and victims appropriately is analyzed from within the theoretical framework provided by dominance feminism.

This Note then will describe the myriad of ways in which states apply stalking laws. First, it will describe statutory language and statutory application that merits a dominance feminist's approval. Such language and application protects women from social, physical, and sexual subordination. For example, some states assess whether a victim's fear was reasonable through the perspective of the particular victim, allowing jurors, at least implicitly, to consider gender dynamics. Some states have refused to require an explicit threat in the conduct element of the crime, allowing a victim to seek relief when a perpetrator attempts to control her by evoking fear through vague words or loaded, non-violent actions. Some states have enumerated behaviors that may be implicitly

[1] A good definition of stalking is "a course of conduct directed at a specific person that would cause a reasonable person to feel fear." *Stalking Fact Sheet*, THE NATIONAL CENTER FOR VICTIMS OF CRIME, http://www.victimsofcrime.org/docs/src/stalking-fact-sheet_english.pdf (last updated Aug. 2012).

[2] I am restricting my argument to female victims for brevity and simplicity's sake.

threatening to a woman, making it more likely that a law enforcement officer or judge will recognize a conduct element to be satisfied through varied types of implicit threats.

This Note then will address the ways in which the dominance feminist's legislative victory fell short. Specifically, this Note will examine legislative constructions that limit effective responses to stalking. For example, some states require specific intent, prioritizing that the perpetrator not only knew but also intended for his conduct to be criminal. Some states classify stalking as only a misdemeanor, preventing law enforcement officers from arresting a stalking perpetrator unless the officers see the stalking conduct first-hand. Some states require an explicit threat or assault for the conduct element of the crime. Even more, some states require a threat to be "credible" to be actionable. Such stalking laws fail to protect stalking victims effectively. This Note will demonstrate that these laws are not written to prevent men from stalking women but instead, are written to prevent men from being convicted of stalking.

I. DOMINANCE FEMINISM

"Dominance feminism" is a feminist theory that rejects the approaches of equality feminism and difference feminism.[3] An equality feminist, or "traditional feminist," seeks a formal legal equality and equal access to traditionally male privileges for women.[4] A difference feminist seeks different legal treatment for women, so as to compensate for women's inequality.[5] To a difference feminist, male social dominance is the result of a long-standing inequality between the genders and not a conscious male effort.[6]

Dominance feminism, or Catharine A. MacKinnon's feminism, attributes women's inferior societal position to men's concerted effort to subordinate and control women.[7] Dominance feminism holds that men wield power over women

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[3] *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 32 (1987). "Dominance feminism" is attributed to Catharine A. MacKinnon and is sometimes referred to as "radical feminism."

[4] *See id.* at 32–34.

[5] *See* Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 9–10 (1992).

[6] *See* Susan H. Williams & David C. Williams, *A Feminist Theory of Malebashing*, 4 MICH. J. GENDER & L. 35, 113 (1996). Robin West, a difference feminist, "explicitly rejects the idea that patriarchy is simply a matter of men consciously exercising that autonomy to oppress women." *Id.*

[7] MacKinnon summarizes the dominance approach as follows:

> [O]n the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making

through social, sexual, and physical domination.[8] Physically, men control women by wielding the threat of violence,[9] or by practicing domestic abuse or other forms of battery.[10] Socially, men control women on a small scale by exerting patriarchal control over them or by objectifying them.[11] On a large scale, men control women by perpetuating a legal system that reinforces gender inequality and wage discrimination, keeping women financially and legally powerless.[12] Men dominate women sexually by wielding the threat of sexual violence over women[13] and by using cat-calls, sexual advances in the workplace, rape, and pimping, to name a few examples.[14] To a dominance feminist, these long-standing practices have resulted in systematic male dominance of any individual who is sexually feminine.[15]

Retrospective commentators, including professors Janet Halley and Kathryn Abrams, noticed a progression in dominance feminism ideology in the late 1990s from analyzing female sexual subordination,[16] to arguing for female agency through the law.[17] In the second wave of dominance feminism,[18] Catharine

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> no mistake about who was who. Comparatively speaking, men have been resting ever since. Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power.

MACKINNON, *supra* note 3, at 40.

[8] *See generally id.;* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983).

[9] *See* MACKINNON, *supra* note 3, at 92.

[10] *See id.*

[11] *See id.* at 48–50.

[12] *See id*.

[13] *See id.*; *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 149 (1989) ("All women live in sexual objectification the way fish live in water. Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse.").

[14] *See* MACKINNON, *supra* note 3, at 85.

[15] *See* MACKINNON, *supra* note 13, at 113 ("[S]exuality is the lynchpin of gender inequality.").

[16] *See, e.g.,* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 149 (1989) ("All women live in sexual objectification the way fish live in water. Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse.").

[17] Regarding rape, pornography, and sexual harassment, MacKinnon began arguing for a "feminist law" that produces "nondominant authority," or "the voice of silence." JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 49 (2008).

[18] This second wave of dominance feminism may be observed in the following rally cry from MacKinnon in *Toward a Feminist Theory of State*:

> The point of view of a total system emerges as particular only when confronted, in a way it cannot ignore, by a demand from another point of view. This is why epistemology must be controlled for ontological dominance to succeed. . . . When seemingly ontological conditions are challenged from the collective standpoint of a dissident reality, they become visible as epistemological.

MacKinnon, the mother of dominance feminism, argued for criminal laws that protect women, rather than laws written by male legislators sympathizing with the wrongfully accused.[19] Since then, much progress has been made in criminal laws of feminist interest. [20]

This Note takes the approach of both waves of dominance feminism. Specifically, this Note demonstrates that the behavior of stalking harms women systematically. Men who stalk women instill fear in their victims by wielding social, physical, and sexual power over them. This Note advocates against laws that unnecessarily protect a perpetrator's interest over a victim's because such laws codify subordination and endorse the behavior of overly persistent suitors.

II. DOMINANCE FEMINISM AS AN IDEOLOGICAL FRAME

Many commentators agree that there is still much progress to be made in stalking legislation.[21] Law enforcement agencies also recognize the need for the evolution of stalking laws; law enforcement agents have attested that they are currently ill-equipped to protect victims.[22] The perspective of the dominance feminist is an appropriate and necessary aid in the ongoing development of stalking laws.[23]

> Dominance suddenly appears no longer inevitable. When it loses its ground it loosens its grip.

MACKINNON, *supra* note 14, at 239–40.

[19] *Id.*, at 239. *See also* Matthew A. Ritter, *The Penile Code: The Gendered Nature of the Language of Law*, 2 N.Y. CITY L. REV. 1 (1998) (providing another perspective on the gendered nature of law).

[20] HALLEY, *supra* note 17, at 20. As Janet Halley puts it, feminism "is running things" in laws of sexual harassment, pornography, child sexual abuse, prostitution, human trafficking, and rape. *Id.*

[21] *See, e.g.,* Nannette Diacovo, *California's Anti-Stalking Statute: Deterrent or False Sense of Security?*, 24 SW. U. L. REV. 389, 407, 416 (1995); Caroline Forell, *Making the Argument That Stalking Is Gendered*, 8 J. L. & SOC. CHALLENGES 52 (2006); B. Benjamin Haas, *The Formation and Viability of Anti-Stalking Laws*, 39 VILL. L. REV. 1387, 1413–15 (1994); Richard A. Lingg, *Stopping Stalkers: A Critical Examination of Anti-Stalking Statutes*, 67 ST. JOHN'S L. REV. 347, 354 (1993); Elizabeth A. Patton, *Stalking Laws: In Pursuit of a Remedy*, 25 RUTGERS L. J. 465, 485 (1994); Silvija A. Strikis, *Stopping Stalking*, 81 GEO. L. J. 2771, 2803 (1993); Kimberly A. Tolhurst, *A Search for Solutions: Evaluating the Latest Anti-Stalking Developments and the National Institute of Justice Model Stalking Code*, 1 WM. & MARY J. WOMEN & L. 269, 290–91 (1994); Neal Miller*, Stalking Laws and Implementation Practices: A National Review for Policymakers and Practitioners*, INSTITUTE FOR LAW AND JUSTICE, 108–10 http://browardsheriffsoffice.org/StalkingLawsFinalRpt.pdf (last visited Apr. 5, 2014).

[22] Miller, *supra* note 21, at 4.

[23] In *Split Decisions: How and Why to Take a Break from Feminism*, Janet Halley argues that feminism need not occupy the legislatures more than it already does. HALLEY, *supra* note 17, at 20. She argues that current feminists ought to set aside their ideological alignments for more holistic progress not constrained by a sort of tunnel-vision. *Id.* at 187. For example, she argues that

Dominance feminism views women's legal goals as unitarily defined by struggles of power. This conception is commonly criticized as unrealistic.[24] However, the legal fiction of a unitary stalking victim is a useful mechanism appropriately employed in the development of stalking laws. Criminal defendants continue to challenge the constitutionality of stalking statutes in state courts, arguing that the laws should be narrower and more specific.[25] Judges interpreting stalking laws must balance the legislative goal of protecting stalking victims against the constitutional goal of protecting a criminal defendant's guaranteed rights.[26] The analytical fiction of a unitary stalking victim makes it easier to envision and comprehend systematic causes of stalking behavior as well as systematic harms to victims. Furthermore, feminist critics of stalking statutes may find it useful to envision a unitary stalking victim when analyzing the application of a stalking law.

A. The Dominance Feminist Perspective in Action: Traditional Rape Law

Feminist critique can aid legislators in protecting stalking victims in much the same way that the dominance feminism perspective helped legislators to reform rape law.[27] Traditional rape law codified the male position of power by defining rape from the perspective of an alleged rape defendant falsely accused.[28] For one, its conduct elements required force or the threat of force by the

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a dominance feminist finds women's personal experiences and legal goals to be unitarily defined by a power hierarchy, which ignores that the female experience is dramatically varied. *Id.* at 50. I will reject these criticisms for present purposes, as stalking law is still in its developing stages and can benefit greatly from feminist critique.

[24] *Id*. at 50; JANA SAWICKI, DISCIPLINING FOUCAULT: FEMINISM, POWER, AND THE BODY 9 (1991) (referring to "a time when feminists of color were again challenging dominant feminist theories and organizations for failing to address their issues and experiences" and referring to dominance feminism as "[w]hite, middle-class feminism").

[25] Ashley N. B. Beagle, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457, 469 (2011) ("The majority of the constitutional challenges to anti-stalking statutes fall into two groups: challenges to the statutes as being overbroad and challenges to the statutes as being un-constitutionally vague.").

[26] *See* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 2 (1997).

[27] Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151, 179 (2010).

[28] Mary Ruffolo Rauch, *Rape—From a Woman's Perspective*, 82 ILL. B.J. 614, 616–17 (1994) ("As one commentator has put it, the law of rape does not take account of the different ways in which men and women understand force and consent. Instead it purports to apply neutral standards, standards that have consistently turned out to be male standards. . . . Modern judges employ the traditional male working definition of force—a fight—to determine whether a man forced a woman to submit to sex." (quoting Leslie J. Harris, *New Perspectives on the Law of Rape*, 66 TEX. L. REV. 905, 913–14 (1988) (reviewing SUSAN ESTRICH, REAL RAPE (1987))).

perpetrator.[29] Thus, prosecutors had difficulty proving force without evidence that the perpetrator used a weapon.[30] Second, even if the victim physically was forced into sex, prosecutors had to prove that she did not consent to the sex.[31] Lack of consent had to be demonstrated by the victim's physical resistance, and could not be demonstrated by the victim's attitudinal or expressive non-consent.[32] Further, under law, men could not rape their wives.[33] In fact, even non-married women encountered difficulty asserting that they resisted an acquaintance's rape.[34] As a result, traditional rape law was designed to ensure that even the most persistent man would not be convicted over a misunderstanding.[35]

Many of the problems with traditional rape law have been eliminated.[36] In the 1970s, feminists began to regard rape as a struggle of the female gender against man's social power and want of control.[37] Feminists argued that the power differential between men and women created several problems with regard to rape: the behavior of rape, the inefficacy of legal remediation, and the perpetuation of female subordination through fear.[38] Feminists were able to unite against this form of violence against women by realizing that a systemic problem, specifically, a gendered power differential, motivated their struggles.[39] Only then did the private problem of rape become a public one.[40] It is now time for dominance feminism to move stalking from the private sphere into the public forum.

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[29] *Id.* at 615.
[30] CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS, 35–36 (2005)
[31] Rauch, *supra* note 28, at 615.
[32] Rauch, *supra* note 28, 616–17.
[33] Jaye Sitton, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261 (1993).
[34] MACKINNON, *supra* note 30, at 35–36.
[35] Nicole Burkholder Walsh, *The Collusion of Consent, Force, and Mens Rea in Withdrawal of Consent Rape Cases: The Failure of* in Re John Z., 26 WHITTIER L. REV. 225, 257 (2004).
[36] For example, most jurisdictions made rape within marriage illegal, allowed lack of consent to be demonstrated by verbal refusal, eliminated the force requirement, criminalized all types of sexual penetration, and barred the admission of evidence of a victim's sexual history. Corey Rayburn, *To Catch A Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 443-44 (2006); *see also* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 984 (2008).
[37] Klein, *supra* note 36, at 984.
[38] *Id.*; David P. Bryden & Maren M. Grier, *The Search for Rapists' "Real" Motives*, 101 J. CRIM. L. & CRIMINOLOGY 171, 196 (2011).
[39] Crenshaw, *supra* note 27, at 179 ("By reframing experiences that had been regarded as fragmented and individualized into patterns of subordination that were reconceived as systemic and group-based, the concept of 'violence against women' came to fore as a social problem.").
[40] *Id.*

III. STALKING AS A GENDERED CRIME

Stalking is a gendered crime. Stalking suspects are significantly more likely to be male, and stalking victims are significantly more likely to be female.[41] Jurisprudentially, stalking lends itself well to a gendered power dynamic, whereby men use their societal position of power to intimidate and threaten women:

> Domestic violence is about control, power, and domination. While stalking may be perpetrated by strangers, acquaintances, or current or former intimate partners, stalking is most often committed against women in the domestic violence context. When victims of domestic violence leave their abusers, abusers often stalk victims in an effort to regain control.[42]

A stalking victim may be stalked by a former intimate partner, stranger, or acquaintance. In each case, dominance feminism provides an appropriate and adequate framework for analyzing the power dynamic as it exists between a stalker and his victim. This dynamic is one defined by male domination and female subordination.

A. Former Intimate Partners

Consider an ex-boyfriend that follows, harasses, and threatens his ex-girlfriend after she breaks up with him. He engages in this particular course of conduct because he may want her back, he may want something from her, or he may feel humiliated. His behavior originates from a desire to reaffirm the social position of power to which he is accustomed in the relationship.[43] He tries to re-

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[41] Black, Basile, et al., NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTERS FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 30, 33(2010), *available at* http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf; Klein, Salomon, et al., A STATEWIDE STUDY OF STALKING AND ITS CRIMINAL JUSTICE RESPONSE, 19, 39, *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228354.pdf.

[42] U.S. DEPT. OF JUSTICE, STALKING AND DOMESTIC VIOLENCE, REPORT TO CONGRESS, vii. (2001).

[43] Davis, K. E., Swan, S. C., & Gambone, L. J., *Why Doesn't He Just Leave Me Alone? Persistent Pursuit: A Critical Review of Theories and Evidence*, 66 SEX ROLES 328 (2010). Davis introduces three theories to explain the behavior of stalking—(1) coercive control theory, (2) relational goal pursuit, and (3) attachment theory—arguing that gender differences in rates of intimate partner violence and persistent unwanted pursuit are best explained by coercive control theory. Coercive control, as defined by this author, is "a pattern of attempted control over all aspects of a partner's life, including relationships with family and friends, money, food, transportation, coming and going, and sexuality." *Id.* at 329. A motivation of coercive control, the author explained, is "maintain[ing] the desired relationship of male dominance." *Id.* at 331. The author theorized that relationships characterized by coercive control will often transition into stalking and persistent

subordinate his ex-girlfriend through emotional manipulation and implicit or explicit threats of physical or sexual harm.[44] He capitalizes on his social power to choose actions that are threatening to the woman.[45] He is, relative to other stalkers, unlikely to be thwarted by police involvement.[46]

For example, in one all-too-common real world scenario, a defendant and victim had a child together.[47] After the victim ended her relationship with the defendant, the defendant surveilled the victim and invaded, stole from, and vandalized her home.[48] He ignored a restraining order and law enforcement's attempts at intervention.[49] One day, the defendant called the victim and told her "that she had '24 hours to allow him to see his daughter, or he'll kill [the victim].'"[50] In another case in which the defendant had children with the victim, the defendant continued to contact the victim for years after their relationship terminated.[51] The defendant would "call the victim at all hours of the night, accuse her of ruining his life, and tell her that she 'better not be seeing anyone' or '[b]etter not have a man around the kids.'"[52] He also threatened to kill the victim "because he loved her."[53] In both instances, the defendant demanded something from the victim, threatened the victim, and attempted to emotionally manipulate her in order to force her to give him what he wanted. Both instances demonstrate persistent male domination.

B. Strangers And Acquaintances

Sometimes a stalking perpetrator is a male stranger or acquaintance that is in pursuit of requited love or sexual relations. In these cases, the stalker feels that his victim should appreciate the fact that she has been chosen as his mate.[54] Like

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pursuit upon termination. *Id.* at 329. The author reached this conclusion because there is considerable overlap between coercive control and stalking. *Id.* at 331. *See also* STARK, E., COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5 (2009) (supporting that a common stalking goal is coercive control).

[44] *See* Davis *et al.*, *supra* note 43, at 330.

[45] *Id.*

[46] *Id.*

[47] People v. Curtis, 354 Ill. App. 3d 312, 315 (2004).

[48] *Id.* at 314–15.

[49] *Id.*

[50] *Id.*

[51] Johnson v. State, 721 N.E.2d 327, 330 (Ind. Ct. App. 1999).

[52] *Id.*

[53] *Id.*

[54] One author theorized that traditional views of courtship not only shaped a male stalker's sense of empowerment but also provided a platform for a stalker to perceive his behavior as normal. Jennifer Langhinrichsen-Rohling, *Gender and Stalking*, 66 SEX ROLES 418, 420 (2012). She noted that "women were more likely than men to describe stalking as 'repeated telephone calls by a man after a woman has asked to be left alone.'" *Id.* She theorized that men may frequently stalk women

former intimate partners, strangers and acquaintances will capitalize on their social power to threaten, harass, and otherwise emotionally manipulate the victim.[55]

In one case, the defendant, a stranger to the victim, approached her on Valentine's Day with a bouquet of flowers.[56] The victim initially refused the flowers but eventually took them before walking away.[57] Later that month, the defendant found her at a coffee shop and asked her to dinner.[58] She refused and told the defendant that she had a boyfriend.[59] The defendant responded by presenting her a heart-shaped box of chocolates and a portrait he had drawn of her.[60] At that point, the victim made it clear that his contact was unwanted and left.[61] The defendant continued to follow the victim closely for five weeks. He followed her to her dormitory, her school, and her neighborhood, forcing the victim to change her living patterns and seek refuge at a friend's home.[62] The defendant's course of conduct likely was grounded in a desire to eradicate the victim's ability to decide whether she wanted to date or have sex with him.

Interviews of stalking victims reveal that their stalkers have at least partially succeeded in gaining control over them.[63] Victims often feel controlled by their stalkers. One interviewee said being stalked was "like living in prison."[64] Another stalking victim described the fear that controlled her life, saying "imagine walking

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in this manner because "men may believe they are expected to make repeated requests for intimacy prior to achieving success on the dating front." *Id.* Thus, the multiple phone calls that constituted nothing less than actions perpetrated by a stalker, were in the eyes of the perpetrator, nothing more than a socially acceptable form of persistent pursuit of a shy maid.

[55] One author summarized the perspective of several judges in Canada as follows: "stalking is an attempt to gain or reinforce traditional forms of male power against women." Diane Crocker, *Criminalizing Harassment and the Transformative Potential of Law*, 20 CJWL/RFD 87, 102 (2008). For example, one judge commented that a male stalking perpetrator felt "empowered to overcome (or to deny) any act of independence she might choose to pursue." *Id.*

[56] People v. Stuart, 100 N.Y.2d 412, 414 (2003).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 415. In another case involving a stranger stalking a woman, the defendant had access to the victim's apartment keys because he worked for the property manager. Despres v. Hampsey, 162 N.H. 398, 400 (2011). The defendant would frequently enter her apartment unexpectedly, and make sexual advances toward her. *Id.* In one encounter outside her apartment, the defendant "'made comments on how he wished he would have caught [her] in less clothes and then proceeded to kiss [her] in [her] right ear,' slam his body into hers, and tell her he wanted to have sexual intercourse with her." *Id.*

[63] *See* NEAL MILLER, INSTITUTE FOR LAW AND JUSTICE, STALKING LAWS AND IMPLEMENTATION PRACTICES: A NATIONAL REVIEW FOR POLICYMAKERS AND PRACTITIONERS 28–33 (2001).

[64] *Id.* at 28.

around . . . for months after months after months and [the fear] never leaving."[65] A survey of stalking victims reveals that victims significantly altered their lives by curtailing social activities, decreasing work or school attendance, relocating residences, and changing workplaces or schools, among other things.[66]

IV. STALKING LAWS AND DOMINANCE FEMINISM

A. *Stalking Laws As A Victory For Dominance Feminism*

American states first promulgated stalking laws in the early 1990s. For the first time, states recognized that a man's persistent and overly aggressive pursuit of a woman could rob her of her will.[67] This normative assertion was consistent with theories underpinning dominance feminism.[68]

California enacted the nation's first stalking law in 1990.[69] The impetus for the writing of the stalking law was a letter from Orange County Municipal Court Judge John M. Watson to California State Senator Ed Royce. In the letter, Judge Watson expressed his frustration with his inability to protect four women who were harassed and then killed by former intimate partners.[70] California's terroristic threat statute was a legal mechanism that, in theory, could be used to prosecute stalkers. However, the statute was impracticable "because of the burden of proving immediacy of conduct."[71] While commonly employed, restraining orders also were a highly ineffective remedy for stalking. As described above, a stalker generally refuses to recognize boundaries and is typically persistent, stubborn, and controlling. Stalkers were thus unlikely to be deterred by protective

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[65] *Id.* at 28-29. A third stalking victim indicated that the stalker exerted social control over her, isolating her from her social circle, as her "family supported the stalker's efforts since their religious beliefs favored the sanctity of marriage." *Id.* at 29.
[66] *Id.* at 31.
[67] *See* Crocker, *supra* note 55, at 88 (stalking law "criminalized behaviors that were previously not unlawful and are indeed socially sanctioned, instituted, encouraged, and reinforced by Western courtship mores and ideals of romance.").
[68] *Id.*
[69] Diacovo, *supra* note 21, at 390.
[70] Major Joanne P.T. Eldridge, *Stalking and the Military: A Proposal to Add an Anti-Stalking Provision to Article 134, Uniform Code of Military Justice*, 165 MIL. L. REV. 116, 122 (2000) ("The 1989 murder of young actress Rebecca Schaeffer by a male stalker drew attention to the crime of stalking in California. Although typically cited as the impetus for the California law, the Schaeffer murder was not the sole basis for the statute. The domestic violence murders of four women by the men against whom they had protective orders are at the heart of the nation's first anti-stalking law. California Municipal Court Judge John M. Watson initiated the stalking legislation in response to the failure of existing laws to protect women from their domestic abusers, despite restraining orders and pending misdemeanor charges.").
[71] Diacovo, *supra* note 21, at 406.

orders.[72] Other legal mechanisms were also futile.[73] According to Judge Watson, a new legal remedy was necessary.[74]

Under the California stalking law implemented in 1990, stalkers were forbidden from "willfully, maliciously, and repeatedly follow[ing] or harass[ing] another person who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury." [75] Although this statute was overly-narrow,[76] its implementation was a momentous victory for dominance feminists. In the years following, every state followed California in enacting stalking statutes.[77]

Some states expressed an intention to follow the California model.[78] Illinois legislators discussed multiple examples of stalking including instances in which former intimate partners stalked and attacked women despite the existence of restraining orders.[79] The legislators pointed out that law enforcement officials could not act under existing Illinois laws until the victims were actually injured.[80] Thus, the Illinois legislature's goal in promulgating the anti-stalking law was to uphold "society's interest in protecting persons from fear and harassment."[81]

The Wisconsin legislature also championed women's interests in enacting its statute. A Wisconsin court noted that the legislature followed the nationwide impetus beginning "in the early 1990's in response to several high-profile

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[72] Diacovo, *supra* note 21, at 405-06.
[73] California's felony trespass statute was impractical, because "the statute ha[d] too many restrictions, making arrests more difficult." *Id.* at 402. California's telephone threat statute "only aid[ed] those victims who can identify the stalker." *Id.* at 406. Last, civil assault law failed to protect victims not in imminent fear. *Id.*
[74] *See* Eldridge, *supra* note 70, at 122.
[75] CRIMES—STALKING, 1990 CAL. LEGIS. SERV. 1527.
[76] The original California statute required a "credible threat." *Id.* Such a burden greatly restricts the types of conduct that may constitute stalking. *See* NEAL MILLER, INSTITUTE FOR LAW AND JUSTICE, STALKING LAWS AND IMPLEMENTATION PRACTICES: A NATIONAL REVIEW FOR POLICYMAKERS AND PRACTITIONERS 28-33 (2001).
[77] Jennifer L. Bradfield, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN'S L. J. 229, 249 (1998).
[78] *See, e.g.,* Assem. Judiciary, Law and Pub. Safety Comm. Statement, N.J. S. 256-L, at Ch. 209 (1992) ("This bill is modeled on a California statute enacted in September, 1990.");*see also* People v. Holt, 271 Ill. App. 3d 1016, 1021 (1995), *citing* 87th Ill.Gen.Assem., S. Transcript, May 21, 1992, at 61 (statements of Sen. Adeline Geo-Karis); 87th Ill.Gen.Assem., S. Transcript, June 22, 1992, at 66 (statements of Sen. Carl Hawkinson); 87th Ill.Gen.Assem., H. Transcript, May 20, 1992, at 69, 71-72 (statements of Rep. Thomas Homer).
[79] Gregory W. O'Reilly, *Illinois' Stalking Statute: Taking Unsteady Aim at Preventing Attacks*, 26 J. MARSHALL L. REV. 821, 835 (1993).
[80] *See Holt*, 271 Ill. App. 3d at 1021.
[81] O'Reilly *supra* note 79, at 835.

murders of women who had previously been stalked by their killers."[82] California, Illinois, and Wisconsin illustrate the state legislatures' realization that stalking laws must protect women from stalkers before physical harm is done.

B. Courts Should Use The Subjective-Objective Approach When Evaluating The Reasonableness of a Victim's Fear

After these laws were implemented, courts began to opine on how to test whether a victim's fear evoked from stalking was reasonable. Some courts enacted an objective standard that is satisfied upon determination that a reasonable person in circumstances similar to the victim's would experience a certain threshold of fear.[83] Other courts enacted a "subjective-objective" standard that is influenced by the aforementioned determination as well as consideration of the victim's personal experience and subjective fear.[84]

Connecticut is one jurisdiction using the subjective-objective approach.[85] Under the Connecticut statute a victim must "reasonably fear for [her] physical safety."[86] As one court explains:

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[82] State v. Warbelton, 759 N.W.2d 557, 565-66 (Wis. 2009). In Florida, a court articulated women's interest in stalking laws. The Florida court cited the Harvard Women's Law Journal in using women's interests to hold that prosecutor's evidence was sufficient to support a stalking conviction:

> The seriousness of the crime of stalking cannot be overstated. The National Violence Against Women Survey, the first national survey conducted on the issue of stalking, found that over eight million women, approximately one in every twelve, have been stalked at some point in their lives.

Huch v. Marrs, 858 So. 2d 1202, 1204 (Fla. Dist. Ct. App. 2003) (citing Joseph C. Mershman, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation,* 24 HARV. WOMEN'S L. J. 255, 258 (2001)). The court thereby "commend[ed]" the trial court for "recognizing the seriousness of the [defendant's] actions." *Id.* This attitude parallels the dominance feminist's prioritization of female agency, and refusal to romanticize persistent pursuit or any other behaviors that subordinate women.

[83] *See, e.g.,* People v. Brown, 742 N.Y.S.2d 480, 482 (Co. Ct. 2002); State v. Ferebee, 137 N.C. App. 710, 717 (2000) (."[W]e encourage the trial courts to instruct the jury as to the definition of 'reasonable fear' to ensure that an objective standard, based on what frightens an ordinary, prudent person under the same or similar circumstances, is applied rather than a subjective standard which focuses on the individual victim's fears and apprehensions."); United States v. Smith, 685 A.2d 380, 386 (D.C. 1996).

[84] *See, e.g.,* State v. Arthurs, A.2d 568, 572 (Conn. App. Ct. 2010); Ploeger v. State, 189 S.W.3d 799, 813 (Tex. Ct. App. 2006).

[85] *Arthurs*, A.2d at 572. Texas also follows the subjective-objective approach. One Texas appellate court reasoned that the requirement that the victim must be placed in the fear of bodily injury of death "is viewed from the victim's perspective." *Ploeger*, 189 S.W.3d at 813.

> [t]he standard to be applied in determining the reasonableness of the victim's fear in the context of the crime of stalking is a subjective-objective one . . . . As to the subjective test, the situation and the facts must be evaluated from the perspective of the victim, i.e., did she in fact fear for her physical safety? . . . If so, that fear must be objectively reasonable, i.e., a reasonable person under the existing circumstances would fear for his or her physical safety.[87]

The subjective test requires the jury to consider the emotions and perspective of the victim in deciding whether her fear was reasonable. Thus, the jury may consider the following factors: the victim's gender; the perpetrator's gender; the socially dominating or threatening qualities of the perpetrator; the perpetrator's position of social, sexual, or physical power; and the perpetrator's propensity to use force. In jurisdictions that employ a subjective-objective approach, attorneys are able to: 1) question witnesses about the victim's gender and its effects on her fear; and 2) discuss these effects in closing argument.[88] The jury then may evaluate the perpetrator's actions and whether they reasonably evoke fear.

As Oregon courts opined on the reasonable fear test, one commentator, Caroline Forell, wrote an amicus brief urging the court to adopt a subjective-objective approach. She argued that fact-finders must consider a victim's and perpetrator's genders when evaluating an alleged stalking incident.[89] She used the words of the Oregon legislature to demonstrate that the legislature's intent was to "protect women who are the bulk of the stalking victims."[90] Thus, she said, "it logically follows that the legislature likely intended its unique 'in the victim's situation' language to include consideration of the victim's gender."[91] Forell composed this argument in defense of the Oregon Appellate Court's use of "the fact that petitioner is a 22-year-old woman" as evidence that a victim's fear was reasonable.[92] The issue never reached the Oregon Supreme Court.[93] Were the

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[86] The current Connecticut stalking statute requires that the defendant's conduct "would cause a reasonable person to fear for such person's physical safety or the physical safety of a third person." CONN. GEN. STAT. ANN. § 53a-181d. The version that was mandatory authority during *Arthurs* required that the defendant "cause[d] such other person to reasonably fear for his physical safety." CONN. GEN. STAT. ANN. § 53a-181d, effective until September 30, 2012.

[87] *Arthurs*, 997 A.2d., at 572 (citations omitted). *See also* State v. Culmo, 642 A.2d 90, 99 (1993) ("The jury must view the situation from the perspective of the [victim] . . . . [H]owever . . . the [victim's] belief ultimately must be found to be reasonable."(citations omitted) (internal quotation marks omitted)).

[88] These tactics still are subject to evidentiary rules, including hearsay and foundation rules.

[89] Forell, *supra* note 21.

[90] *Id.* at 83.

[91] *Id.*at 52.

[92] *Id.* at 52; Bryant v. Walker, 78 P.3d 148, 151 (Or. App. 2003).

court to adopt the commentator's approach, state's attorneys could employ a feminist perspective at trial.

Taking it one step further, Jennifer L. Bradfield argues that the objective prong of the subjective-objective test should be severed. She denounces the requirement that a victim's fear be reasonable.[94] She argues that "[w]hile a 'reasonable person' standard may be necessary to protect stalking defendants from unreasonable charges, it may present an obstacle to convicting a defendant whose behavior is experienced as threatening and whose intent to cause fear is otherwise criminal under the statute."[95] Under Bradfield's approach, a jury would only have to find that the victim in fact experienced fear, and not that the fear was reasonable.

While this entirely subjective approach accounts for the dominance feminist's interests, there are some drawbacks. Allowing any real, experienced fear to meet the statute's threshold fails to put a potential perpetrator on notice. Arguably, the credible threat,[96] and specific intent requirements,[97] could effectively put a stalker on notice. However, these alternatives overly burden law enforcement and disfavor stalking victims.[98] A reasonable fear requirement helps a stalking statute meet the constitutional notice requirement and most fairly balances the victim's interests against the need to protect an alleged defendant's rights.[99] Thus, the subjective-objective approach to the reasonable fear requirement, as opposed to the entirely objective or entirely subjective approaches, best accounts for victims' interests.

C. Legislatures Should Not Require An Explicit Threat Or Assault In A Statute's Conduct Element

In order for the conduct element to be met, several states still require an explicit threat or assault *in addition* to other instances of conduct, such as following or unwanted contact.[100] In requiring an explicit threat or assault,

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[93] Forell, *supra* note 21, at 56.
[94] Bradfield, *supra* note 77, at 250.
[95] *Id.*
[96] *See, e.g.*, State v. Rucker, 987 P.2d 1080 (1999).
[97] *See, e.g.*, State v. Dario, 665 N.E.2d 759 (Ohio Ct. App. 1995); State v. Saunders, 695 A.2d 722 (N.J. Super. Ct. App. Div. 1997), *cert. denied*, 700 A.2d 881 (N.J. 1997).
[98] *See infra* subpart IV(D)-(E).
[99] *See, e.g.*, State v. Culmo, 642 A.2d 90, 97 (1993); State v. Cardell, 723 A.2d 111, 115 (N.J. Super. Ct. App. Div. 1999); United States v. Smith, 685 A.2d 380 (D.C. Cir.1996), *cert. denied*, 522 U.S. 856 (1997); Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996).
[100] Illinois requires an explicit threat or assault. People v. Zamudio, 689 N.E. 2d. 258, 258 (Ill. App. Ct. 1997). Arkansas requires an explicit threat for a felony stalking conviction. ARK. CODE ANN. § 5-71-229. Only a misdemeanor conviction may be achieved if the perpetrator's threat was implicit. *Id.* Massachusetts requires for conviction "a threat with the intent to place the person in

stalking statutes provide no more protection than assault or criminal threat statutes already did. Furthermore, these requirements demonstrate a rejection of the notion that persistent pursuit can be a harm in and of itself, negating the advance made through the statute's enactment.

1. Assault

In order for stalking to be actionable under the Illinois statute, a perpetrator must follow or surveil a victim twice *and* (1) "transmit a threat of immediate or future bodily harm, sexual assault, confinement or restraint . . . towards that person or a family member of that person," or (2) place the victim in "reasonable apprehension of immediate or future bodily harm."[101] One court held that this conduct requirement prevents "arbitrary and discriminatory enforcement based on subjective standards."[102] This court mandated that the State must meet "its burden of proof for assault" because "the ['following'] described in this statute requires the State to plead and prove beyond a reasonable doubt that the following was a part of a conduct that placed the victim in reasonable apprehension of receiving a battery, and so was without lawful justification."[103]

This interpretation would not allow for the conviction of someone who followed and contacted his victim repeatedly without consent if the State is unable to meet the criminal burden of proof for assault.[104] Under Illinois law, mere words may constitute criminal assault only if some other condition indicating, for

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imminent fear of death or bodily injury," and lists the methods of communication by which a perpetrator may deliver the threat, making it apparent that the threat must be communicated. MASS. GEN. LAWS ANN. ch. 265, § 43.

[101] Ch. 38 ILL. COMP. STAT.720 § 5/12-7.3 (2013) ("A person commits stalking when he or she, knowingly and without lawful justification, on at least 2 separate occasions follows another person or places the person under surveillance or any combination thereof and: (1) at any time transmits a threat of immediate or future bodily harm, sexual assault, confinement or restraint and the threat is directed towards that person or a family member of that person; or (2) places that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement or restraint to or of that person or a family member of that person.").

[102] *Zamudio*, 689 N.E. 2d at 258.

[103] *Id.* Connecticut courts have declined to require an assault for a stalking conviction, stating

> The defendant also maintains that there was insufficient evidence that the victim's fear was reasonable because he never physically assaulted or injured the victim. The defendant's claim is both distressing in its suggestion that physical violence is a precondition of reasonable fear . . . and meritless.

State v. Russell, 922 A.2d 191, 206 (Conn. App. Ct. 2007). *See also* State v. Arthurs, 997 A.2d 568, 572 (Conn. App. Ct. 2010).

[104] This would bar conviction, because neither the first nor the second prong of the conduct element would be satisfied. *See* 720 ILL. COMP. STAT. 5/12-7.3 (2013).

example, intent or imminency is present.[105] Male stalkers who follow women disregard female autonomy. Such a course of conduct may lead a woman to conclude that the stalker soon will disregard her physical or sexual autonomy but may not necessarily lead a woman to conclude that the stalker will do so imminently. Furthermore, this construction of the statute conflicts with the legislature's intent, which was to create a statute "fundamentally different from other offenses," such as assault or battery.[106]

[105] People v. Floyd, 278 Ill. App. 3d 568, 571 (1996) (holding, in the context of a criminal conviction, that "[s]ome action or condition must accompany those words before there is a violation of the [assault] statute," such as the assailant's presence with a weapon); Contreras v. Suncast Corp., 129 F. Supp. 2d 1173, 1182 (N.D. Ill. 2001) (holding, in the context of a civil suit, that mere words only may constitute assault if evidence of intent or imminency is present).

[106] People v. Bailey, 167 Ill. 2d 210, 237 (1995). A court in Florida rejected requiring assault for a stalking conviction because:

> if the purpose of the statute was to criminalize conduct falling short of assault and battery . . . it follows that actual assaults and batteries are not within the ambit of this statute. This is logical because assaults and batteries are condemned by other statutes . . . "[s]talking is a series of actions that, when taken individually, may be perfectly legal."

St. Fort v. State, 943 So. 2d 314, 316 (Fla. Dist. Ct. App. 2006). *See also* Curry v. State, 811 So.2d 736 (Fla. Dist. Ct. App. 2002) (holding that requiring assault in the conduct element is interpreting the statute too narrowly); Huch v. Marrs, 858 So. 2d 1202, 1204 (Fla. Dist. Ct. App. 2003).

2. Explicit Threat

Although Illinois' statute does not define the term "threat,"[107] Illinois case law requires that a threat "have a reasonable tendency to create apprehension that its originator will act according to its tenor."[108] This language implies that the threat must be communicated and therefore explicit, so that its "tenor" is apparent.[109] The explicit threat requirement ignores the reality that men are often innately threatening to women.[110] Bradfield noted that requiring an explicit threat along with other instances of conduct, allows "[a] stalker [to] engage in conduct that he knows will terrify his victim and which he intends to be a threat, such as repeatedly watching and following her, but without an *explicit* threat, his conduct remains lawful."[111]

Furthermore, an explicit threat requirement causes stalking laws to overlap with terroristic or criminal threat laws,[112] thus invoking double indemnity.[113] In one instance, an Illinois trial court convicted a defendant of harassment and cyberstalking, but the judgment was reversed in the appellate court in order to comply with Illinois' "one-act, one-crime" rule.[114]

3. Alternatives to Requiring an Explicit Threat or Assault

Some states substitute an explicit threat requirement for other requirements.[115] One possible substitution is a reasonable fear requirement, a

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[107] 720 ILL. COMP. STAT. 5/12-7.3.
[108] *Id.*
[109] Illinois courts have found a "threat" when a defendant mailed a victim death threats, but not when the conduct was grabbing the victim's arms on two separate occasions. People v. Peterson, 715 N.E.2d 1221, 1227 (Ill. App. Ct. 1999).

[110] MACKINNON, *supra* note 3, at 149 (discussing men's means of social control over women).
[111] Bradfield, *supra* note 77, at 249.
[112] Explicit threats are often already condemned by terroristic threat statutes. *See, e.g.,* 18 PA. CONS. STAT. ANN. § 2706 (West 2002); MINN. STAT. ANN. § 609.713 (West 2013); TEX. PENAL. CODE ANN. § 22.07 (West 2003).
[113] *See*, *e.g.*, Moses v. State, 39 S.W. 3d 459, 463 (Ark. Ct. App. 2001); Humphreys v. State, 281 P.3d 1183 (Nev. 2009) (unpublished disposition).
[114] People v. Sucic, 928 N.E.2d 1231, 1245 (Ill. App. Ct. 2010). A court of appeals in Arkansas faced a similar problem regarding double jeopardy when the trial court convicted a defendant of both stalking and terroristic threats. *Moses*, 39 S.W.3d. at 463. However, the Arkansas stalking statute does not require an explicit threat, so the appellate court was able to affirm the conviction on both counts because there was sufficient evidence to uphold a stalking conviction without the explicit threat. *Id.* (".[T]he elements of the crime of stalking in the first degree were sufficiently established and proved in this case without resort to the threat that resulted in the municipal court conviction for terroristic threatening . . . .").
[115] Miller, *supra* note 21, at 9 n.18. According to this article, another substitution that legislators will use is the requirement that the perpetrator specifically intended to place the victim in fear. *Id.*

requirement that has been held to put stalkers on notice.[116] If offered a choice between requiring an explicit threat or assault or a determination that a victim's fear was reasonable, the determination that the victim's fear was reasonable is preferable. This determination allows for the possibility that a stalker will be prosecuted before delivering a criminal threat,[117] or for confronting the victim with a weapon.[118] This comports with the original legislative purpose of protecting stalking victims from attacks.[119]

Georgia employs a reasonable fear requirement in lieu of an explicit threat requirement.[120] In choosing to bypass an explicit threat requirement, the Georgia legislature "provide[d] a constitutional threshold between behavior that is annoying and behavior that is criminal."[121] In application, a defendant was convicted of stalking despite the fact that he had not "directly" threatened the victim because the stalker caused the victim "[q]uite a bit of concern" about his safety and the safety of his family by repeatedly telephoning him from 11:00 pm to 4:00 am.[122]

Another alternative is a conduct element that lists several specific stalking-type behaviors. One commentator argued that a non-exhaustive list of stalking

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[116] *See, e.g* State v. Culmo*,* 642 A.2d 90, 97 (1993); State v. Cardell, 723 A.2d 111, 115 (N.J. Super. Ct. App. Div. 1999); United States v. Smith, 685 A.2d 380 (D.C. Cir.1996), *cert. denied*, 522 U.S. 856 (1997); Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996).

[117] *See supra* subpart IV(C). Ohio employs a reasonable fear requirement in lieu of an explicit threat requirement. Miller, *supra* note 21*,* at 9 n.18. *See also* Dayton v. Davis, 735 N.E.2d 939, 942 (Ohio Ct. App. 1999); OHIO REV. CODE ANN. § 2903.211(A)(1) (2003) ("No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person."). In *State v. Smith*, the defendant followed the plaintiff on three different occasions. On each occasion, he pulled his vehicle alongside the plaintiff and stared at her. State v. Smith, 709 N.E. 2d 1245 (Ohio Ct. App. 1998). On the third occasion, the defendant said, "you're fucking dead" and "I am going to teach you." *Id.* When the defendant appealed, arguing that this conduct did not meet the statutory definition of "pattern of conduct," the Ohio Appellate court affirmed the stalking conviction, reasoning that "explicit threats are not necessary" because "[the Ohio stalking statute] requires a *belief* on the part of one person that another will cause the person physical harm or mental distress." *Id.* at 1250 (emphasis in original).

[118] *See* People v. Floyd, 278 Ill. App. 3d 568, 571 (1996); Contreras v. Suncast Corp., 129 F. Supp. 2d 1173, 1182 (N.D. Ill. 2001).

[119] *See supra* subpart IV(A).

[120] *See* Krepps v. State, 687 S.E.2d 608, 609 (Ga. Ct. App. 2009); GA. CODE ANN. § 15-5-90(a) (2012) ("For the purposes of this article, the term 'harassing and intimidating' means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person's safety or the safety of a member of his or her immediate family, by establishing a pattern of harassing and intimidating behavior, and which serves no legitimate purpose.").

[121] Peggy Ochandarena, *Crimes Against the Person: Prohibit Stalking of an Intended Victim*, 10 GA. ST. U. L. REV. 95, 99 (1993).

[122] *Krepps*, 687 S.E.2d at 609.

behaviors would broaden the perspective of law enforcement officers as to when victims need protection.[123]

> Such a list would not only place stalkers on notice as to what types of behavior are prohibited, thereby eliminating any vagueness or overbreadth concerns, it would also assist law enforcement officers, prosecutors, and judges who might be unfamiliar with stalking and who, without the aid of a specific list, might conclude that certain acts fall outside his or her state's anti-stalking statute.[124]

New Jersey uses this approach and lists specific illegal conduct, such as "repeatedly maintaining a visual or physical proximity to a person" or "written threats or threats implied by conduct."[125]

D. Legislatures Should Not Require That A Threat Be Credible

Some states require an alleged perpetrator to have the apparent ability to carry out his threat.[126] Such a requirement is superfluous, particularly if a statute requires a victim's fear to be reasonable.[127] Under a reasonable fear standard, a perpetrator is liable for stalking if he causes the victim to reasonably fear that he will carry out his threats. Thus, the requirement that a threat be credible, i.e. that the perpetrator has the apparent ability to carry out his threat, is repetitive.

The credible threat requirement is not only superfluous but is also overly burdensome. If a statute defines a "credible threat" as one made with the apparent ability to cause bodily harm or death, it creates a heightened standard of proof that precludes most victims from seeking relief under that law.[128] An explicit threat or assault may be needed to satisfy the requirement,[129]which as mentioned above, is

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[123] Bradfield, *supra* note 77, at 248.
[124] *Id.* Another commentator, Elizabeth Patton, agrees that listing possible stalking behaviors which may constitute a threat "at least [makes these behaviors] unchallengeable." Elizabeth A. Patton, *Stalking Laws: In Pursuit of A Remedy*, 25 RUTGERS L. J. 465, 504 (1994).
[125] N.J. STAT. ANN. § 2C:12-10.
[126] West Virginia is one such state. *See* W. VA. CODE ANN. § 61-2-9a(f)(2). Further, for felony convictions, some states require a credible threat in the absence of a restraining order violation or repeated offense. *See, e.g.,* MICH. COMP. LAWS ANN. § 750.411i; FLA. STAT. ANN. § 784.048.
[127] Bradfield, *supra* note 77, at 249-50.
[128] Conduct such as "following" would not satisfy the requirement. Diacovo, *supra* note 21, at 408.
[129] *See* Patton, *supra* note 124, at 485 ("[C]redible threat language fails to address the problem of conditional or implied threats.").

already prohibited under terroristic threat and assault laws.[130] A survey of law enforcement officers verifies that, for some officers, the credible threat requirement can lead to "significant problems."[131]

West Virginia employs a credible threat requirement and thereby imposes a *de facto* explicit threat or assault requirement. The West Virginia statute demands "a threat of bodily injury made with the apparent ability to carry out the threat."[132] An early version of California's statute had a similar barrier. The definition of "credible threat," mandated that "[the] threat must be against the life of, or a threat to cause great bodily injury to, a person . . . ."[133] The current version of California's statute fixes this problem by including "threat[s] implied by a pattern of conduct" in the definition of "credible threat."[134] A California court has found "threat[s] implied by a pattern of conduct" to include implicitly threatening actions such as following.[135]

Despite the revisions, the California definition is still problematic. For a threat to be "credible" it must be made with "the apparent ability to carry out the threat."[136] Practically, when a threat is implicitly communicated, it may be impossible to determine if a stalker has an apparent ability to carry out the threat. If a stalker were to threaten his victim through following and unwanted contact, a fact-finder may be unable to ascertain what the stalker is threatening. A fact-finder may encounter even more difficulty in determining if the stalker had an apparent ability to carry out the threat. All that is apparent when a stalker implicitly threatens his victim is that he plans to control and possibly somehow injure the victim.

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[130] *See supra* note 112.
[131] Miller, *supra* note 63, at 40, 49 ("Stranger stalking generally occurs over a long period of time before credible threat can be shown.").
[132] W. VA. CODE ANN. § 61-2-9a(f)(2) ("'Credible threat' means a threat of bodily injury made with the apparent ability to carry out the threat and with the result that a reasonable person would believe that the threat could be carried out").
[133] People v. Carron, 37 Cal. App. 4th 1230, 1235 (1995) (" '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. Great bodily injury means a significant or substantial physical injury.").
[134] *See* CAL. PENAL CODE § 646.9, defining a "credible threat" as one which is "made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family."
[135] *See, e.g.*, People v. Uecker, 172 Cal. App. 4th 583, 594 (2009) (holding that there existed evidence sufficient to support a finding that a threat was credible when the threat involved following and implicitly threatening actions.).
[136] CAL. PENAL CODE § 646.9.

E. Legislatures Should Not Require Specific Intent

A specific intent requirement thwarts the prosecution of a stalker who knows that his conduct causes the victim fear, but does not want it to cause her fear.[137] The Louisiana stalking statute imposes a specific intent requirement.[138] In one instance, a Louisiana appellate court reversed a stalking conviction, finding that the evidence was insufficient to infer specific intent to place a victim in fear of death or bodily injury.[139]

> The Defendant did not verbally threaten Suzanne; the only words he said to her were "Hey Baby." When Suzanne stopped at her home and exited her vehicle to get her brother, the Defendant did not stop but passed Suzanne's home and turned around. Although the Defendant followed Suzanne and Jeff Duhon at a very close distance, he did not ram or hit Suzanne's vehicle. When Suzanne turned behind the fish market in an attempt to lose the Defendant, he did not pursue her behind the building but waited for her to come around the building. Further, when the Defendant confronted Ms. Duhon he shouted profanity but made no threatening moves or actions.[140]

The court could only uphold the conviction if the defendant intended to create the victim's fear. That burden of proof is extremely difficult to meet using circumstantial evidence.[141]

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[137] *See, e.g.*, N.M. STAT. ANN. § 30-3A-3 (requiring that a stalking defendant "intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint of the individual or another individual"); LA. REV. STAT. ANN. § 14:40.2 (defining "pattern of conduct" as "a series of acts over a period of time, however short, evidencing an intent to inflict a continuity of emotional distress upon the person"). *See also* Miller, *supra* note 63, at n.15 ("Laws in 29 states and the District of Columbia provide a specific intent requirement. These states include Alabama, Arkansas, California, Connecticut, District of Columbia, Florida, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming…In a few of these jurisdictions, the specific intent requirement is limited to 'aggravated' or serious stalking, while simple stalking has only a general intent to commit the acts that constituted stalking.").

[138] LA. REV. STAT. ANN. § 14:40.2.

[139] State v. Rico, 741 So. 2d 774, 776-77 (La. Ct. App. 3d Cir. 1999).

[140] *Id.* at 777.

[141] *See, e.g., id.* In California, for example, when specific intent is an essential element to a crime, the jury must be instructed that circumstantial evidence only may prove specific intent if "the circumstances were not only consistent with the hypothesis of guilt, but inconsistent with any other rational conclusion." People v. Gomez, 223 Cal. App. 2d 572, 574 (1963).

The specific intent requirement contradicts the intent behind the adoption of stalking statutes nationwide: that of protecting victims.[142] Rather, the requirement shields would-be perpetrators from overzealous prosecution.[143] Such an effect runs counter to the goals of dominance feminism.

Many criminal laws have no specific intent requirement.[144] Furthermore, stalking statutes put would-be perpetrators on notice in a variety of ways.[145] Thus, the specific intent requirement is both overly-burdensome and unnecessary.[146]

F. Legislatures Should Classify Stalking As A Felony

Classifying stalking as a misdemeanor rather than as a felony fails to recognize stalking as an imminently dangerous crime. Police officers generally cannot arrest a perpetrator of a misdemeanor without a warrant unless that perpetrator committed the misdemeanor in the police officers' presence.[147] Therefore, in states where stalking is only a misdemeanor, a victim will need a protective order before the police will be able to appropriately respond by arresting a stalking perpetrator without prior stalking convictions.

Furthermore, classifying stalking as a misdemeanor rather than as a felony limits the usefulness of the stalking statute, as police officers and prosecutors are likely to seek remedy through other laws.[148] In such a situation, law enforcement officers typically charge the perpetrator with "the constituent elements of stalking," such as terroristic threats.[149]

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[142] *See supra* subpart IV(A).

[143] For more general arguments that criminal law tends to protect perpetrators, s*ee* MACKINNON, *supra* note 14, at 239. [CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 239 (1989)]; *See also* Matthew A. Ritter, *The Penile Code: The Gendered Nature of the Language of Law*, 2 N.Y. City L. Rev. 1, 28 (1998).

[144] *See* Anne S. Connolly, *VI. Criminal Law A. the Court of Appeals Properly Rules Carjacking A General Intent Crime*, 59 MD. L. REV. 908, 912 (2000) (acknowledging that many states have general intent crimes).

[145] Stalking statutes can include the requirement that a victim's fear be reasonable, the requirement that the conduct be repeated and willful, the credible threat requirement, and the specification of particular acts being criminalized.

[146] *See* State v. Cardell, 723 A.2d 111, 114-15 (N.J. Super. Ct. App. Div. 2000) (holding that the amendment that changed the New Jersey stalking statute from a specific intent crime to a general intent crime did not significantly increase the scope of the statute's coverage, such that the new statute was not void for vagueness or overbreadth).

[147] *See, e.g.*, 15 OR. OP. ATT'Y GEN. 211 (1931); KYPRAC–CRP, § 18:105. Authority of officer to arrest—Misdemeanor, 8 KY. PRAC. CRIM. PRAC. & PROC. § 18:105 (2011-2012).

[148] "Such laws lead prosecutors to ignore the stalking law in favor of lesser charges that will result in a jail sentence" and demand fewer resources. Miller, *supra* note 63, at 51, 108.

[149] *See id.* at 49. (Describing that, in their survey of law enforcement officers nationwide, "especially notable was one prosecutor's comment that his state's stalking law required a considerable degree of proof but provided only a misdemeanor penalty for stalking. This disparity between effort and reward meant that his office would rather charge the constituent elements of

A study of domestic violence complaints in Colorado Springs, Colorado from April to September 1998 revealed that "only one of the 285 complaints alleging stalking facts resulted in the filing of a stalking charge. Instead, police typically filed charges of harassment or violation of a protective order."[150] This practice contravenes the common state legislative goal of providing law enforcement with a new and enhanced ability to protect stalking victims and ignores that stalking itself presents an imminent danger to victims.[151]

Protective orders are an inadequate alternative to effective stalking laws, because they present the danger of a stalker's retaliation.[152] Further, they are widely unenforced.[153] Law enforcement officers arrest only twenty percent of protective order violators.[154] In one instance, a victim called to report a stalker's violation of her protective order, and "the police responded by telling her that they were too busy and that if the perpetrator was not hurting her they could not intervene."[155]

The process of getting a protective order may itself be harmful to a stalking victim. To get a protective order, the victim often is required to appear before a court in the presence of her stalker.[156] This requirement ignores that women may be intimidated by their stalkers and may be too traumatized to testify effectively

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stalking, including protection order violations, where the aggregate sentencing would far exceed that available under the stalking law, yet the case would be far easier to prove.").

[150] *Id.* at 53.

[151] *See supra* subpart IV(A). *See also* Model Stalking Code, http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf ("Seventy-six percent of [female murder] victims and 85 percent of attempted [female murder] victims had been stalked by their intimate partners in the year prior to their murders.").

[152] Bradfield, *supra* note 77, at 237 n.41.

[153] *Id.*at 237.

[154] *See* Julie Miles Walker, *Anti-Stalking Legislation: Does it Protect the Victim Without Violating the Rights of the Accused?*, 71 DENV. U. L. REV. 273, 279 (1993).

[155] Bradfield, *supra* note 77, at 266 n.44, citing People v. Gams, 60 Cal. Rptr. 2d 423, 424 (Cal. Ct. App. 1997).

[156] *See, e.g.*, ALASKA COURT SYSTEM, HOW TO REPRESENT YOURSELF IN ALASKA'S DOMESTIC VIOLENCE PROTECTIVE ORDER PROCESS (2011), http://courts.alaska.gov/forms/pub-22.pdf ("The petitioner must appear at the hearing for the long-term order or else the petition is dismissed."); VIRGINIA DEPARTMENT OF CRIMINAL JUSTICE SERVICES VICTIMS SERVICES SECTION, PROTECTIVE ORDERS: A GUIDE FOR VICTIMS OF STALKING OR SERIOUS BODILY INJURY IN VIRGINIA (Sept. 2004), http://www.dcjs.virginia.gov/victims/documents/poStalking.pdf ("[The victim] must attend the Protective Order hearing, which is usually scheduled at the time of your initial Preliminary Protective Order hearing."); VIRGINIA DEPARTMENT OF CRIMINAL JUSTICE SERVICES VICTIMS SERVICES SECTION, PROTECTIVE ORDERS IN VIRGINIA: A GUIDE FOR VICTIMS (June 2012), http://www.dcjs.virginia.gov/victims/ documents/protectiveordersguide.pdf ("In order to obtain this [two year protective order], you must attend the final Protective Order hearing, which is scheduled at the time of your [preliminary protective order] hearing.").

in their presence.[157] Furthermore, victims may feel uncomfortable exerting control (through the state) over their stalkers.[158]

States should classify stalking as a felony. Otherwise, law enforcement officers will be reluctant or unable to adequately protect stalking victims.

CONCLUSION

MacKinnon, as a hero of the rape law reform movement, spoke out against the unjust outcomes of rape cases in an endeavor to reform rape laws nationwide.[159] For example, MacKinnon spoke out against the deterrent effect of ineffective laws on women choosing whether or not to report a rape;[160] she decried the painful process that rape victims had to endure in reporting rape or testifying, likening this process to a second raping;[161] she condemned the repetitive rape requirements of force and consent;[162] and she condemned a woman's difficulty in alleging that she was raped by an acquaintance.[163] Through publications and speeches, MacKinnon incited public outrage at the current state of rape law and motivated political action.[164]

A stalking law reform movement now is needed. Although stalking laws have progressed significantly in recent decades, substantial progress still is necessary. Legislators must reconsider their state's stalking statute if any of the following limitations exists: (1) the requirement of explicit threats or assaults; (2) the requirement that a threat be credible; (3) the requirement of specific intent with regard to issuing a threat or causing fear; and (4) the classification of stalking as a misdemeanor. Feminists must decry these ineffective laws and condemn women's difficulty in alleging stalking and evoking a response from police. Feminists also must remind the public that stalking is a deeply harmful and imminently dangerous crime. Just as dominance feminism made the problem of rape public, it is time for dominance feminism to make the problem of stalking public.

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[157] *See* Julie Saffren, *Professional Responsibility in Civil Domestic Violence Matters*, 24 HASTINGS WOMEN'S L. J. 3, 17 (2013) (summarizing the "trauma-informed" perspective of domestic violence victims at restraining order hearings).

[158] *See id.* at 15 ("Victims may be particularly reluctant to testify in criminal court and may be under intense pressure from the defendant or family members to request the District Attorney drops the charges or to recant their allegations.").

[159] *See* Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 443 (2006).

[160] Rayburn, *supra* note 159, at 478.

[161] *Id*; Catharine A. MacKinnon, *Rape: On Coercion and Consent*, TOWARD A FEMINIST THEORY OF THE STATE 171, 180 (1989).

[162] *Id.* at 173.

[163] *Id.* at 176.

[164] *See* Dorothy Roberts, Lecture, April 2012; Klein, *supra* note 53, at 984.