

THE DUTCH APPROACH TO STALKING LAWS

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I. Introduction

¶1 The term stalking is a euphemism for the phenomenon in which a person with amorous and/or sexual motives incessantly follows and harasses another person. The assailant can use various means, such as sending flowers or wreaths, placing obituaries in newspapers, sending mail to the home or workplace of the victim, starting legal proceedings, writing letters, and making telephone calls. In some cases, the stalker's actions reach beyond psychic torture, as he or she resorts to threats of or actual physical violence. Many famous people have been the victims of stalking.¹ Although no definitive empirical study exists that measures the prevalence of stalking in America, the National Victim Center estimates that 200,000 people in the United States are victims of stalking and that 1 in 20 women are targets of stalking.² The media hype surrounding this phenomenon has grown to such proportions that many refer to stalking as *the most out-of-control crime of our time*.

¶2 History tells us, however, that stalking is not just a modern phenomenon. In Book 4, title 4, chapter 4 of the Institutes of Justinianus we find the following passage: "Iniuria committitur si quis matrem familias aut praetextatum praetextatamve adsectatus fuerit."³ This roughly translates into "being a nuisance by following a married woman or a boy or girl can lead to prosecution." Though the phenomenon of stalking has an ancient history, new technology has added some special dimensions. The cliché that new forms of technology offer new tools for criminal purposes applies particularly well to stalkers' use of the Internet.

¶3 The explosive growth of computers and the World Wide Web has contributed to the growth of a new variant of stalking: cyberstalking (commonly described as electronic pursuit, e-mail stalking, and Internet tormenting). It can foster a paranoid world of evil and intrusive activities on the Internet, unbounded by geographical, temporal, or other physical barriers. Though little research has been done on cyberstalking to date, there are some legal cases in which the Internet was used as a means of menacing communication.⁴ The simplest form of cyberstalking involves sending e-mail messages to scare, threaten, or torment the victim. On the internet, individuals are able to speak and

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¹ P. Dietz et. al., *Threatening and otherwise inappropriate letters to Hollywood celebrities*, 36 J. FORENSIC SCI. 185, 185-209 (1991).

² See "What is Stalking?" National Victim Center, 1995, available <<http://www.nvc.org/ddir/info43.htm>>.

³ MAXIMUS MASSINI, INTRODUCTIO IN GAI ET JUSTITIANI INSTITUTIONES ch. 4 (1990).

⁴ Gene Barton, *Taking a Byte Out of Crime: E-mail Harassment and the Inefficacy of Existing Law*, 70 WASH. L. REV. 465, 465-490 (1995). See also E.S. Ross, *E-mail Stalking: Is Adequate Legal Protection Available?*, 13 J. COMPUTER & INFO. L. 405, 405-432 (1995).

write without detection, allowing stalkers to escape responsibility for negligent or abusive postings.⁵

¶4 Stalking is difficult to conceptualize. First, stalking is a *collective* term for numerous activities that, when taken together, seriously disrupt the life of the victim. An important truth about stalking is that it consists of no single act, but a series of collective acts. For example, sending someone flowers is, by itself, clearly not stalking. But, if that person keeps sending flowers every week against the will of the receiver, the behavior may constitute stalking. The case of Archambeau illustrates this problem.⁶ Archambeau, a 32-year-old sign maker, and Jane, a schoolteacher, communicated via America Online and subsequently arranged to meet. Jane quickly became uneasy and frightened as Archambeau began to talk about marriage and having children together. After she made it clear that she had no romantic interest in him, he persisted in his pursuit with e-mail, telephone messages, and letters. Archambeau wrote, “I’ve been trying to court you, not stalk you. If you let me, I would be the best man, friend, lover you ever could have. You’ve turned my innocent and somewhat foolish love for you into something bad in your own mind.”⁷ After repeatedly asking Archambeau to stop sending her e-mail, Jane filed a lawsuit against Archambeau under Michigan’s anti-stalking statute.⁸ Because this case never came to a final decision, we are left to wonder whether and at what point the stalking ever began.

¶5 Because the acts of stalking are diverse and must be viewed collectively, it is difficult to formulate an accurate description of stalking. This difficulty suggests an explanation for the literature’s lack of consensus on a clinical definition of stalking.⁹ In this article I will try to provide a conceptual analysis of the term that more sharply defines stalking. I begin by summarizing existing clinical definitions to investigate the elements that constitute stalking. Legal definitions – which tend to be more difficult to operationalize and measure than clinical definitions¹⁰ – gain a great deal from such a conceptual analysis because a clearer definition leads to clearer elements that are constitutionally permissible.

¶6 A conceptual analysis demonstrates that the major flaw with the American legal definition of stalking is its requirement of an implicit or explicit threat that results in the victim’s reasonable fear for his or her safety. Consequently, most victims of stalking – who are not threatened – remain unprotected by these anti-stalking statutes. In contrast, the Dutch anti-stalking statute covers these victims by including the violation of one’s private life as an element of the crime. The Dutch regulation, by focusing on the disruption of someone’s life, enhances the ability of law enforcement and prosecutors to intervene and protect stalking victims at the earliest time, *before* threats occur.

¶7 Section 2 uses forensic research to discuss the three main definitional problems of stalking. Section 3 provides a conceptual analysis of stalking, which in turn leads to a new perspective on stalking. The American anti-stalking statutes and their shortcomings are discussed in section 4. The last section presents the Dutch approach as a remedy to the shortcomings of American stalking regulation.

⁵ See Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L. J. 1639, 1642 (1995).

⁶ Ross, *supra* note 4, at 406.

⁷ Peter H. Lewis, *Persistent E-Mail: Electronic Stalking or Innocent Courtship?*, N.Y. Times, Sept. 16, 1994, at B18.

⁸ Jane’s lawsuit lacks validity because Michigan’s anti-stalking statute is unconstitutional and violates Archambeau’s Fourteenth Amendment right to due process of law. See Ross, *supra* note 4, at 414.

⁹ See D. Westrup, *Applying Functional Analysis to Stalking Behavior*, in THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES 267, 276 (J. Reid Meloy ed., 1998).

¹⁰ J.Reid Meloy, *The psychology of Stalking*, in THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES, *supra* note 9, at 2.

¶8 Freedom entails the right to protection from violation of one's personal privacy, no matter what the cause is: stalking, mobbing, domestic violence, etc. It is an important condition for the development of self-respect, self-expression, and self-confidence. In other words, it guarantees one's own autonomy. An atmosphere of safety is a necessary condition for one to develop an independent personality. Through psychical and bodily assault, this autonomy is endangered. That's why regulation is necessary. The challenge is to find a penalty that is effective. Most American anti-stalking regulations are not; the Dutch approach is a possible solution.

II. Problems with definitions of stalking

¶9 The lack of a clear definition of stalking results in little reliable data on the incidence or prevalence of this phenomenon. Meloy defines stalking as "the willful, malicious, and repeated following and harassing of another person that threatens his or her safety."¹¹ Contrary to Meloy's threat requirement Zona, Sharma and Lane define stalking as: "an abnormal or long term pattern of threat or harassment directed towards a specific individual."¹² In the *National Violence against Women Survey* stalking is defined as follows:

a course of conduct directed at a specific person that involves repeated visual or physical proximity, nonconsensual communication, or verbal, written or implied threats, or a combination thereof, that would cause a reasonable person fear.¹³

Research in *Pennsylvania* focused on the definition provided by the Pennsylvania stalking statute (PA Code Section 18: 2709 (rev. 1994)):

A person commits the crime of stalking when he engages in a course of conduct or repeatedly commits acts towards another person, including following the person without proper authority, under circumstances which demonstrate either of the following:

an intent to place the person in reasonable fear of bodily injury; or
an intent to cause substantial emotional distress to the person.¹⁴

This definition is broader than that of the *National Violence against Women Survey*. In a study conducted among college students at one university stalking had an even broader definition: "someone knowingly, and repeatedly following, harassing or threatening another person."¹⁵

¶10 Due to the differences in these definitions and the lack of a uniform operational definition, the percentage of victims identified in a population can diverge widely. For example, among college students, researchers found that 30% of females and 17% of males had been stalked. However, the *National Violence Against Women Survey* revealed that 1 out of every 12 American women (8.2 million) and one out of every 45 American men (2.0 million) have been stalked during their lifetime. This divergence reflects the stricter definition of stalking in the *National Violence Against Women Survey*. This stricter definition includes an element of a 'credible threat'—a requirement

¹¹ *Id.*

¹² Michael A. Zona et. al., *A Comparative Study of Erotomantic and Obsessional Subjects in a Forensic Sample*, 38 J. FORENSIC SCI. 894, 894 (1993).

¹³ Violence Against Women Grants Office, *Domestic Violence and Stalking. The Second Annual Report to Congress under the Violence Against Women Act*, U.S. Department of Justice (1997).

¹⁴ M.P. BREWSTER, NATIONAL INST. OF JUSTICE, AN EXPLORATION OF THE EXPERIENCES AND NEEDS OF FORMER INTIMATE STALKING VICTIMS (1997).

¹⁵ W.J. Fremouw, D. Westrup & J. Pennypacker, *Stalking on Campus: the Prevalence and Strategies for Coping with Stalking*, 42 J. CLINICAL SCI. 660, 666 (1997).

that the victim feel a high level of fear.¹⁶

¶11 An operational definition is necessary to alleviate some of the problems outlined above. With an operational definition, the different results in different studies might be more effectively compared. Effective comparison would provide a better framework for creating a proper legal definition of stalking—giving victims an effective recourse through the courts. An example of these definitional difficulties is the reference often made to “course of conduct” and “repeated” actions in the literature. “Course of conduct” refers to behavior that occurs over some period of time (i.e. a series of acts). This behavior consists of the same or a variety of acts over time, including *repeated* following, nonconsensual communication, harassing, and trespassing, or certain other forms of physical contact.¹⁷ However, the research does not indicate exactly what is meant by “some period of time” or by “repeated.” Could someone be a stalker if he has followed a woman only two times in a month? An operational definition should indicate how often a person has to be exposed to acts by a stalker to be considered stalking.

¶12 My proposal draws from the operational definition of *mobbing* by Leymann.¹⁸ I would suggest that the definition of stalking should require that a person be exposed to harassing acts carried out by another person for a period of at least six months with a frequency of at least two times a week. The “harassing acts” can be roughly divided into the following eight categories:

- 1) *Threat* (e.g. threatening letters, threats to the victim and/or family members and friends).
- 2) *Violence* (e.g. assault, deliberate collisions, or breaking windows).
- 3) *Telephone terrorization* (e.g. checking on the victim by phone, phoning at night).
- 4) *Orders/mail* (e.g. love letters, delivery of goods not ordered by the victim).
- 5) *Pursuit/checking* (e.g. pursuit of the victim outside, hanging around outside the house at night, searching through garbage).
- 6) *Slander* (e.g. false reports, gossip).
- 7) *Breaking into house/car*
- 8) *Stealing victim’s property*

¶13 Stalkers do not tend to concentrate on one specific act of stalking or category of stalking acts, but on a constellation of several acts.¹⁹ This constellation is a very important element of stalking and is emphasized in the definition provided by Darrah Westrup in “Applying Functional Analysis to Stalking Behavior.”²⁰ The separate acts may not be experienced by the victim as unwelcome and intrusive, but taken together the acts can constitute stalking and be unwelcome and intrusive.

Westrup proposes the following definition of stalking:

One or more of a constellation of behaviors that (a) are directed repeatedly toward a specific individual (“the target”), (b) are experienced by the target as unwelcome and intrusive, and (c) are reported to trigger fear or concern in the target.

In addition to the lack of an operational definition, most definitions of stalking have three problems: motive, perspective, and mode.

¹⁶ PATRICIA GODEKE TJADEN & NANCY THOENNES, STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, 18 (1998).

¹⁷ Kathleen G. McAnaney et. al., *From Imprudence to Crime: Anti-stalking Laws*, 68 NOTRE DAME L. REV. 819, 894-895 (1993).

¹⁸ H. LEYMAN, *MOBBING PSYCHOTERROR AM ARBEITSPLATZ UND WIE MAN SICH DAGEGEN WEHREN KANN* (1993).

¹⁹ Westrup, *supra* note 9, at 276-77.

²⁰ *Id.*

A. Motive

¶14 In the above definitions, motive is missing. However, in our examples of stalking, the abusive behavior is grounded in amorous and/or sexual motives, or in motives strongly related to this, whether or not an actual relationship exists or has ever existed between stalker and victim.²¹ An accurate conception of a stalker's motive necessitates a broader class of possible stalking victims. For example, a person who helps a victim of stalking and is, in turn, stalked is also a victim. This broader class of victims applies as well to a person who has escaped a clinging friendship or family relationship in which the person had to submit themselves to the power of another. According to Spitzberg and Cupach, this affective motive is at the root of stalking. They define stalking as "an extreme and obsessive form of relational intrusion."²² Spitzberg and Cupach define obsessive relational intrusion as the "repeated and unwanted pursuit and invasion of one's sense of physical or symbolic privacy by an acquaintance desiring and/or presuming an intimate relationship."²³

¶15 However, requiring the stalker to be an acquaintance of the victim is too strong, since we can easily imagine cases in which the stalker is unknown to the victim, e.g., the erotomaniac stalking cases described below. In an often-used typology of stalkers, we find that love and/or sexuality play an important role in the motivation of the stalker. Two types of stalkers are distinguished: the psychopathic (or simple obsessional) stalker and the psychotic (or love obsessional) stalker.²⁴ The psychopathic stalker suffers from a personality defect.²⁵ Nonetheless, he is completely aware of the bothersome nature of his behavior. In many cases the psychopathic stalker is the former partner of the victim who has often displayed unpredictable and violent behavior during the relationship and has not accepted the break-up of the relationship. Victims of this kind of stalker try to extract themselves from the situation and in response they are terrorized by their ex-partner.²⁶ The means used vary from telephone harassment, placing orders for articles in the name of the victim, arson, deliberate causing of accidents, and even murder.²⁷

¶16 In contrast, a psychotic stalker is not aware of his behavior. He suffers from a mental disorder, like schizophrenia or paranoia, and imagines that the victim - a neighbor, a social worker, a doctor, a celebrity, or a stranger - is his partner.²⁸ To make the victim aware of his presence he pulls strange stunts, which can be relatively innocent (like writing hundreds of love letters to the victim) or less so (like breaking into the victim's house). The stalker may behave aggressively toward the victim.²⁹ The so-called erotomaniac stalkers belong to the second class (usually female) and believe

²¹ See also S. FORWARD & C. BUCK, *OBSESSIVE LOVE* (1991).

²² B.H. Spitzberg & W.R. Cupach, *Obsessive Relational Intrusions: Victimization and Coping*, Paper Presented at the International Society for the Study of Personal Relationships (1996).

²³ *Id.*

²⁴ See Zona et. al., *supra* note 12, at 894-903; K.K. Kienlan et. al., *A Comparative Study of Psychotic and Nonpsychotic Stalking*, 25 J. A.M. ACAD. PSYCHIATRY L. 316, 317-334 (1997).

²⁵ M. Main, *Introduction to the Special Section on Attachment and Psychopathology: Overview of the Field of Attachment*, 64 J. CONSULTING & CLINICAL PSYCHOL. 237, 237-243 (1996).

²⁶ H. Wallace & K. Kelty, *Stalking and Restraining Orders: A Legal and Psychological Perspective*, 18 J. CRIME & JUST. 99, 99-111 (1992).

²⁷ Tjaden & Thoennes, *supra* note 16, at 9.

²⁸ G. Skoler, *The Archetypes and Psychodynamics of Stalking*, in *THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES*, *supra* note 9, at 97.

²⁹ O. Kernberg, *Aggression in Personality Disorders and Perversions* 21 (1984).

that the object of desire is in love with them. Examples of this are fanatic fans of sports heroes, singers, and other media stars.³⁰

¶17 Adding amorous and/or sexual motives to the definition of stalking is essential in separating stalking from other forms of mental assault, such as mobbing (pestering someone at work), domestic violence, and conflicts with neighbors.

B. Perspective

¶18 There are three ways to perceive stalking. We can see it as:

- 1) Objectively observable,
- 2) Intended by the stalker, or
- 3) Experienced as such by the victim.

The first perspective is unsuitable because stalking is a phenomenon that is hard to objectively determine. Unlike speed, there is no instrument with which stalking can be objectively measured. We could reach a certain level of inter-subjectivity by allowing several people to give their judgment about a situation. However, stalking is often hidden from outsiders.³¹ The second perspective only works if the stalker has the intent to stalk. If the victim does not experience the acts of stalking as such then the stalker has no power over the victim and we cannot speak of the components “in a disruptive fashion” and “against their will.” Moreover, it is questionable whether stalkers - even if aware of their behavior (i.e. the psychotic stalker) - will admit their intention to stalk. From a pragmatic viewpoint it would seem better to opt for the third perspective. The negative consequences of stalking (stress, fear, reduced work capacity, isolation, etc.) occur when the victim experiences the suspected intentions of the stalker. If we want to counter the consequences of stalking, then we must embrace the subjective perspective, which will nevertheless need to be objectivized. Not every claim to stalking can be honored. The supposed victim can, for example, be lying or even stalking herself. The criterion must be whether it is probable, given the character of the victim and the circumstances she is in, that the acts she experiences constitute harassment.

C. Mode

¶19 In most definitions, and especially in the definitions of the anti-stalking statutes, the perpetrator has to evoke fear in the victim that she or her next of kin can expect physical violence or death.³² These definitions require that the perpetrator make a credible threat of violence against the victim (or against the victim’s immediate family) or trigger fear or concern in the target. This requirement overlooks that a typical element of stalking is psychic. Stalking often consists of repetitive harassment and/or irritation of the victim in order to psychically strike at the victim.³³ The focus of

³⁰ This is also known as De Clerambault Syndrome, a recognized psychotic condition. In Gregory Leong, *De Clerambault Syndrome (Erotomania) in the Criminal Justice System: Another Look at this Recurring Problem*, 39 J. FORENSIC SCI. 378, 378-385 (1994), a research study on erotomania was done. This study included five cases of erotomania, including the demographic characteristics of the patients, and their dangerousness.

³¹ D.M. Hall, *The Victims of Stalking*, in THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES, *supra* note 9, at 113-137.

³² See MODEL STALKING CODE (1993); STALKING PREVENTION AND VICTIM PROTECTION ACT (1999); and CAL. PENAL CODE § 646.9 (a) (1990).

³³ In England, Wells suggests interpreting “bodily harm” in such a way that it also contains psychic damage. She states that a body includes organs, a nervous system, and a brain. See C. Wells, *Stalking: The Criminal Law*

the above definitions has to be shifted from the stalker's intention to inflict physical harm to the acts of the stalker that, in turn, can (objectively or according to a reasonable person) inflict emotional or physical harm. For example, Archambeau (see introduction) can be a stalker according to the subjective experience of the victim Jane, but not according to the definitions given above. It is clear that Archambeau's is a case of stalking, though the stalker did not intend to trigger fear or concern in the victim, nor did he threaten her. Furthermore, since stalking is often a "crime of deeds" rather than a "crime of words," the requirement of credible threat has often prevented stalkers from being prosecuted.³⁴ Findings from the survey of Tjaden and Thoennes show "that stalkers often do not threaten their victims verbally or in writing but instead engage in a course of conduct, which taken in context, would cause a reasonable person to feel fearful."³⁵ Despite being very frightened or fearing bodily harm or death, less than half of the stalking victims identified by the survey were directly threatened by their stalkers.³⁶ This finding supports the view of many stalking experts that language which requires an actual verbal or written threat should be eliminated from all definitions, since the expression of explicit threats is not the constitutive element of stalking; it is only a facet.³⁷

III. A conceptual analysis of stalking

¶20 On the basis of the aforementioned definitions it is possible to correct some of the definitional shortcomings. I propose that stalking is a form of mental assault, in which the perpetrator repeatedly, unwantedly, and disruptively breaks into the life-world of the victim, with whom he has no relationship (or no longer has), with motives that are directly or indirectly traceable to the affective sphere. Moreover, the separated acts that make up the intrusion cannot by themselves cause the mental abuse, but do taken together (cumulative effect). This definition consists of six parts, which will be briefly dealt with in consecutive order:

1. *repeated* indicates it is not a single action, but a series of action that are carried out with some regularity during a certain period;
2. *unwanted* means that the victim does not appreciate these actions and moreover that he/she has made this clear to the perpetrator (verbally, in writing, or through body language);
3. *disruptive* not only means that the victim finds the actions emotionally burdensome and detrimental (subjective element), but also that a reasonable person would experience the same thing in a similar situation (objective element);
4. *breaking into the life-world of another* indicates that the perpetrator is violating the personal life sphere of the victim, i.e. the most intimate part of his/her life. The life-world is defined as the physical, mental, and emotional space that everybody needs to be and develop as a person.³⁸ It should be noted that in this description of mental assault, the intention of the perpetrator is irrelevant: even if he is not aware of the disruptiveness of his actions, the perpetrator can still be guilty of psychic terror if the victim finds these actions as undesirable and disruptive to his or her social world and any normal person would do so in the same circumstances;
5. *with whom he does not have a romantic relationship (or no longer has)* and

Response, 7 CRIM. L. REV. 466 (1997).

³⁴ Tjaden & Thoennes, *supra* note 16, at 18.

³⁵ *Id.*

³⁶ *Id.* at 9.

³⁷ See also K.R. Thomas, *How to Stop the Stalker: State Anti-Stalking Laws*, 29 CRIM. L. BULL. 120, 124-136 (1992).

³⁸ Cf. B. WALDENFELS, IN DEN NETZEN DER LEBENSWELT, chs. 1-2 (1985).

6. *with motives that are traceable to the libidinous sphere.* These two components give the distinction between stalking and other forms of mental assault, such as mobbing (pestering someone at work), domestic violence, and conflicts with neighbors. The mental assault is grounded in amorous and/or sexual motives, or in motives strongly related to this where there is no relationship between stalker and victim.

This definition takes into account the three problems of definition discussed above, motive, perspective, and mode. The motive must be traceable to the libidinous sphere so as to preclude mobbing, domestic assault, etc. The mode (the element of “threat” or “fear”) does not occur in the definition, since this is only a possible facet of stalking. The constitutive element of stalking is “breaking into the life-world of another.” And the perspective in the definition is that the acts of the stalker are experienced as such by the victim.

¶21 According to this definition, the Archambeau case is clearly a case of stalking. Archambeau breaks repeatedly into the life-world of Jane, against her will and in a disruptive way. His motive is grounded in the libidinous sphere, and they have no relationship. The advantage of this definition is that it makes no use of the requirements of threat and intent. These requirements can be found in almost all American anti-stalking statutes, with the result that American regulation covers only a fraction of stalking cases.

IV. American Legislation

¶22 A legislator who wants to penalize stalking must confront the problem of definition. A clear description is required to avoid having a law declared unconstitutional on the grounds of vagueness and overbreadth. Citizens need to be able to determine exactly what behavior is punishable by law. Stalking is hard to define because it consists of a constellation of acts, and the acts separately need not constitute a felony (or even a misdemeanor), but the combination of these acts is necessary to constitute the stalking offence. Instead of discussing all delict descriptions of the separate states of the U.S., I shall limit myself to the anti-stalking code of California, since this description has served as the main inspiration for the legislation in other states.³⁹ The legislative history of the California statute demonstrates the enormous difficulty in drafting effective anti-stalking legislation.⁴⁰ Furthermore, this description is known as “one of the nation’s most complete and well-drafted stalking laws.”⁴¹

¶23 California was the first state in the U.S. to enact an anti-stalking law.⁴² The direct cause was the stalking and subsequent murder of “My sister Sam” actress Rebecca Schaeffer in 1989 and the 1990 murders of four Orange County women who reported stalking behavior by their attackers and obtained restraining orders.⁴³ Schaeffer’s stalker, Richard Bardo, sent her various disjointed letters containing no threat of violence. Ironically enough he hit upon the idea of approaching her

³⁹ M.K. Boychuk, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769, 774 (1994).

⁴⁰ See Tatia Jordan, *The Efficacy of the California Stalking Law: Surveying its Evolution, Extracting Insights from Domestic Violence Cases*, 6 HASTINGS WOMEN’S L. J. 363, 369 (1995); R. Saunders, *The Legal Perspective on Stalking*, in THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES, *supra* note 9, at 25-49.

⁴¹ M.K. Boychuk, *supra* note 39, at 775.

⁴² CAL. PENAL CODE § 646.9 (1991).

⁴³ Miles Corwin, *When the Law Can’t Protect*, L.A. TIMES, May 8, 1993, at 1A. See also Tatia Jordan, *supra* note 40, at 367. Another ‘celebrity stalking’ case that had focussed public attention took place in 1982 when actress Theresa Saldana was stabbed by a stalker.

personally when he read about the story of another stalker who had tried to kill the actress Theresa Saldana. Bardo hired a detective to find out Schaeffer's home address and shot her dead when she opened her front door. During that same year there were five other incidents of murder that had begun with stalking. These murders sparked political interest, leading eventually to the first anti-stalking law in 1990. Since legislators were entering into new territory, the law was drawn up rather hastily. Consequently, the legislature has amended the law several times since 1990.⁴⁴ In 1998 the following delict description was (provisionally) agreed on in California:

Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of his or her safety, or the safety of his or her immediately family, is guilty of the crime stalking.⁴⁵

According to this description, the stalker must evoke fear in any reasonable person that he/she or his/her next of kin are in danger of *physical violence* or of *being killed*.⁴⁶ Again, these laws miss completely that stalking can be the continual harassing of another person with *psychic* results.⁴⁷

¶24 In some states this problem was detected and, as a result, the statutes better meet our ideas of what stalking is. Here reference is made to a *credible* threat. A "credible threat" is defined as:

a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically transmitted statements and conduct made with the intent to place the person that is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. It is not necessary to prove that the defendant has the intent to actually carry out the threat.⁴⁸

According to Boychuk in "Are Stalking Laws Unconstitutionally Vague or Overbroad?" such a *threat requirement* is important with an eye to the Constitution's vagueness doctrine. "Because it helps to remove innocent and constitutionally protected activity from the scope of the statute, a threat requirement might salvage an otherwise vague or overbroad law."⁴⁹

¶25 The *vagueness doctrine* in the United States is based on the *due process* guarantees of the Fifth and Fourteenth Amendment. A court must consider two factors when examining a statute for vagueness: (1) whether the statute either requires or forbids the doing of an act in undefined terms such that persons of common intelligence must necessarily guess at its meaning and differ as to its application; and (2) whether the statute adequately guards against arbitrary and discriminatory enforcement.⁵⁰ However, the actions of a stalker may or may not be accompanied by a credible threat of violence. Less than half of the victims are threatened by their stalkers.⁵¹ For this reason, Tjaden and Thoennes state "that credible threat requirements should be eliminated from anti-stalking statutes."⁵² This shows the complexity of adequate stalking legislation. On the one hand, a threat requirement is necessary to avoid vagueness. On the other hand, a threat requirement covers

⁴⁴ Civil libertarians have expressed concern about the haste with which anti-stalking legislation has been passed and perceived vagueness (known as the void-for-vagueness doctrine and overbreadth of language). See Jordan, *supra* note 40, at 369.

⁴⁵ CAL. PENAL CODE § 646.9 (a) (1998).

⁴⁶ *Id.*

⁴⁷ Tjaden & Thoennes, *supra* note 16, at 18.

⁴⁸ CAL. PENAL CODE § 646.9 (g) (1998).

⁴⁹ Boychuk, *supra* note 39, at 778. See also Silvija A. Strikis, *Stopping Stalking*, 81 GEO. L. J. 2771, 2810 (1993).

⁵⁰ Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

⁵¹ Brewster, *supra* note 14, at 40.

⁵² Tjaden & Thoennes, *supra* note 16, at 18.

less than half of the cases, meaning that more than half of the victims are not protected by legislation.

¶26 Another shortcoming of most American States' stalking statutes is that it is unclear what legislators mean by "harassment." Since the word "harassment" has many interpretations, it is vulnerable to a vagueness claim.⁵³ Most states follow California by providing a further specification of the delict description of stalking as "following or harassing." Harassment is defined as follows:

a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.⁵⁴

In *State v. Sandersen* the court of appeals of the State of Oregon interpreted the term "harassment" in a manner comparable to the meaning in the California anti-stalking legislation.⁵⁵ The case dealt with a law that made anti-social behavior punishable. The court did not find that the statute provided a sufficient basis for the distinction between anti-social behavior and socially tolerated behavior. As an example the court cited the fact that some people always are late for appointments. This is a form of behavior that hinders, alarms, or bothers others without any legitimate purpose, but it is not necessarily anti-social. This comparison could also be applied to the anti-stalking law were it not for the fact that most states (in imitation of California) have included a *threat requirement* and a *requirement of intent* as distinctive criteria.⁵⁶ In 1996 the Californian anti-stalking law was altered because it contained a requirement that a stalker must actually intend to carry out his threat. Critics stated that this requirement failed to recognize assailants who wished to destroy the lives of their victims, but did not intend to harm the victim physically.⁵⁷ In addition, such a requirement has consequences for the powers of the police and prosecution. A threat requirement only allows the police to take steps at the last moment and makes it difficult for the prosecutor to prove that the assailant had the intention to actually carry out a threat. How can we prove beyond reasonable doubt that the assailant was not just trying to scare the victim witless, but actually planning to kill her? In the 1996 statutory definition, the specific intention did not disappear but was redefined to cover more: "with the intent to place that person in reasonable fear of his or her safety."⁵⁸ However, the stalker is still required to have an intention. But the law overlooks erotomaniac assailants, who mostly have no intention of frightening their victims. In the Archambeau case, for example, Archambeau had no intention to place Jane in reasonable fear of her safety, and so would not have been guilty of stalking. It is this result that this paper opposes. The intent requirement should be eliminated from the anti-stalking statutes.

¶27 In the previous section I defined stalking as a form of mental assault, in which the perpetrator repeatedly and disruptively breaks into the life-world of the victim, with whom he has no relationship (or no longer has), with motives that are directly or indirectly traceable to the libidinous sphere. In this definition a threat requirement and an intent requirement, in contrast to many anti-stalking statutes, are left out. These statutes wrestle with the difficulty of clearly describing stalking in

⁵³ Boychuk, *supra* note 39, at 781-782.

⁵⁴ CAL. PENAL CODE § 646.9 (e) (1998).

⁵⁵ Boychuk, *supra* note 39, at 787.

⁵⁶ Strikis, *supra* note 49, at 2782.

⁵⁷ See e.g., National Institute of Justice, *Domestic Violence, Stalking, and Anti-stalking Legislation, An Annual Report to Congress under the Violence Against Women Act*, U.S. Department of Justice (1996).

⁵⁸ CAL. PENAL CODE § 646.9 (a) (1998).

legal terms that pass the vagueness test, since most critiques of anti-stalking legislation have focused on the constitutionality of the statutes.⁵⁹ Many of the American statutes have been challenged on constitutional grounds⁶⁰ and most are struck down because of hasty enactment and poor drafting.⁶¹ A voided statute protects fewer victims than even a poorly written Constitutional one.⁶² Therefore, most lawyers state that the above requirements of threat and intent are necessary.⁶³ Courts have examined the particular statutory language carefully to determine whether it is narrowly drafted to provide a citizen with ascertainable standards of conduct and to determine whether it proscribes only activity that is not constitutionally protected.⁶⁴ In California, the anti-stalking law has been constitutionally upheld in five different cases.⁶⁵ However, in all these cases there was mention of explicit threats by the stalker or extreme behavior of the stalker (e.g., one stalker had firebombed his ex-wife's house).⁶⁶

¶28 The repeated unwelcome entry into the life-world of another person is the most important facet of stalking. Stalking is a form of psychic or mental assault that does not necessarily include any kind of threat or any kind of intent. Ironically, California's anti-stalking statute would not have protected the actress Schaeffer if it had been in effect at the time of the fatal attack. Schaeffer was not aware of the threats being made against her by her stalker. There was no "credible threat," rendering the statute in her case inapplicable.

⁵⁹ Kenneth R. Thomas, Congressional Research Service, *Antistalking Statutes: Background and Constitutional Analysis* 1, 1992. See also Jordan, *supra* note 23, at 369; C. Carmody, *Deadly Mistakes*, 80 A.B.A. J. 68, 68-71 (1994); R.A. Guy, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 991-1029 (1993); R.N. Miller, "Stalk Talk": A First Look at Anti-Stalking Legislation, 50 WASH. & LEE L. REV. 303, 303-339 (1993); B. Montesino, *I'll Be Watching You: Strengthening the Effectiveness and Enforceability of State Anti-Stalking Statutes*, 13 LOY. L.A. ENT. L. REV. 545, 545-586 (1993); J. A. Hueter, *Lifesaving Legislation: But Will the Washington Stalking Law Survive Constitutional Scrutiny*, 72 WASH. L. REV. 213, 213-240 (1997).

⁶⁰ See, e.g., *People v. McClelland*, 49 Cal. Rptr. 2d 587 (Ct. App. 1996); *State v. Culmo*, 642 A.2d 90 (Conn. Super. Ct. 1993); *Bouters v. State*, 659 So. 2d 235 (Fla. 1995); *Johnson v. State*, 449 S.E.2d 94 (Ga. 1994); *People v. Bailey*, 657 N.E.2d 953 (Ill. 1995); *Johnson v. State*, 648 N.E.2d 666 (Ind. Ct. App. 1995); *People v. White*, 536 N.W.2d 876 (Mich. Ct. App. 1995); *State v. Martel*, 902 P.2d 14 (Mont. 1995); *Commonwealth v. Schierscher*, 668 A. 2d 164 (Pa. Super. Ct. 1995); *State v. Fonseca*, 670 A.2d 1237 (R.I. 1996); *State v. McGill*, 536 N.W.2d 89 (S.D. 1995); *Woolfolk v. Commonwealth*, 447 S.E.2d 530 (Va. Ct. App. 1994); *Vit v. State*, 909 P.2d 953 (Wyo. 1996); *State v. Lee*, 917 P.2d 159 (Wash. Ct. App. 1995); *State v. Bryan*, 910 P.2d 212, 214 (Kan. 1996).

⁶¹ R. Cairns Way, *The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism*, 39 MCGILL L. J. 380, 380-381 (1994).

⁶² See Hueter, *supra* note 59, at 214.

⁶³ See Boychuk, *supra* note 39, at 781.

⁶⁴ Many authors have proposed or have given recommendations for a model anti-stalking statute. All these proposals include a threat and intent requirement. See, e.g. Strikis, *supra* note 26, at 2783. She proposes the following legislation:

Section 1. Stalking

Any person is guilty of the crime stalking who: willfully, maliciously, or recklessly follows another person; or harasses another person; and makes a credible threat with the intent of placing that person in reasonable fear of death; sexual assault; or great bodily injury to that person, any member of that person's family, or anyone with whom that person has a sexual or intimate relationship.

⁶⁵ *People v. Heilman*, 30 Cal. Rptr. 2d 650 (Ct. App. 1994); *McClelland*, 49 Cal. Rptr. 2d at 587; *People v. Tran*, 54 Cal. Rptr. 2d 650 (Ct. App. 1996); *People v. Falck*, 60 Cal. Rptr. 2d 624 (Ct. App. 1997); *People v. Halgren*, 61 Cal. Rptr. 2d 176 (Ct. App. 1996).

⁶⁶ See R. Saunders, *The Legal Perspective on Stalking*, in *THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES*, *supra* note 6, at 26.

V. The Dutch approach

¶29 In the proposed anti-stalking regulation of the Dutch penal code, which will go into effect in 2001, stalking is defined as “the willful, unlawful, systematic violation of a person’s private life with the intention of forcing someone to do, not to do, or to tolerate something or to frighten him or her.”⁶⁷ The companion explanatory memorandum makes it clear that stalking is viewed as psychical assault with malice aforethought against the physical and psychical integrity of the victim. This better fits our notion of stalking (see section 3) than the Californian law. Punishability becomes different because it is not limited to an act in which one fears for one’s safety, but also if one is forced to do, not to do, or to tolerate something. In fact this has to be the stalker’s intent, albeit objectively determined: a reasonable person should know that this behavior violates someone’s private life. The most important distinction between the American delict descriptions and the Dutch bill is that the core concept in the foreign delict descriptions is “harassment” (or terms like “annoying,” “following,” etc.), while in the Dutch bill it is “violation of a person’s private life.” The Dutch protection of privacy draws on Article 10 of the Dutch constitution: “Everyone has a right to the respect of his/her private life subject to and under the limitations of the law.” and Article 8 of the European Convention on Human Rights (ECRM): “Everyone has the right to respect for his private and family life, his home and his correspondence.” This definition better fits our understanding of stalking and avoids the problem of vagueness by omitting the term “harassment.”⁶⁸

¶30 Private life is a difficult concept to define, since any further definition of stalking is lacking, both in the Dutch law as well as in the ECRM. Especially in the ECRM, the rights cannot be clearly distinguished from each other. This is true particularly for the right to respect private life, on the one hand, and the other three rights belonging to the private sphere, on the other hand.⁶⁹ In fact, a clear delimitation is not necessary, since a complaint concerning violation of the private sphere can be based on the article as a whole. Thus, it was held by the Commission in the case of a stepmother:

It is here not necessary to decide whether, in the absence of any legal relationship, the ties between the applicant and the child amounted to ‘family life’ (...) Bearing in mind that the applicant has cared for the child for many years and is deeply attached to him, the separation ordered by the court undoubtedly affects the ‘private life’.⁷⁰

¶31 In Resolution 428 (1970) of the Parliamentary Assembly of the Council of Europe, which contains the Declaration concerning the Mass Media and Human Rights, private life consists essentially in the right to live one’s own life with a minimum of interference. It concerns: “family and home life, psychical and moral integrity, honor and reputation, avoidance of being placed in false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially.”⁷¹ Two kinds of private life are encapsulated in this view: *relational* privacy and *informational* privacy.⁷² The former entails the right to selective contact and the latter to selective

⁶⁷ DUTCH PENAL CODE § 285b.

⁶⁸ Boychuk, *supra* note 39, at 781.

⁶⁹ See P. VAN DIJK & G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 489 (third edition, Kluwer Law International 1998).

⁷⁰ See X v. Switzerland, App. No. 8257/78, 13 Eur. Comm’n H.R. Dec. & Rep. 248, 252 (1979). See also X & Y v. Switzerland, App. Nos. 7289/75 & 7349/76, 1977 Y.B. Eur. Conv. on H.R. 372, 408-410 (Eur. Comm’n on H.R.).

⁷¹ Council of Europe, Cons. Ass., Twenty-First Ordinary Session (Third Part), Texts Adopted (1970).

⁷² J. Nouwt & H.A.C.M. Vorselaars, *Privacy in Cyberspace*, in EMERGING ELECTRONIC HIGHWAYS: NEW

disclosure. In this piece we will restrict ourselves to relational privacy, which is the point at issue here. The Dutch legislature has considered - according to the Council of Europe- the following regarding one's private life:

- The home, certain forms of communication (such as telephone calls, letters, and confidential conversations held outside the home), some customs, types of behavior and contacts, memberships, as well as certain aspects of family life.
- And bodily and mental integrity.⁷³

¶32 In spite of this interpretation, what exactly pertains to the relational sphere in private life is not precisely defined. The Dutch legislature stated that it may have given a global approach to the term "private life," but that the term has sufficient basis to serve as a directly applicable constitutional right.⁷⁴ The fact that the term can be expressed in many areas and in many different appearances does not detract from it, nor the fact that there is a margin in which the term still has to grow and take shape. In the jurisprudence of the European Court of Human Rights efforts have been made to lend substance to the term. The point of departure is that "[t]he right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfillment of his personality."⁷⁵ In extension of this the Court has expressly recognized that private life "covers the psychical and moral integrity of the person, including his or her sexual life,"⁷⁶ that "private life must also comprise to a certain degree the right to establish and develop relationships with other human beings,"⁷⁷ and that "home may extend to a professional person's office."⁷⁸ In the jurisprudence of the European Court of Human Rights, the term stalking is adequately fleshed out to survive constitutional challenges on vagueness and overbreadth grounds. Particularly, in the jurisprudence of the Dutch civil law the term "private life" is thoroughly examined, since in Dutch civil law violations of private life are regarded as torts according to article 6:162 of the Dutch civil code.⁷⁹ Therefore the "universal" phrase "violation of one's private life" is suitable for entry into the Penal Code, especially in view of the meaning of this term that precisely describes the constitutive element of stalking: violation of one's private life.

¶33 There is one major problem with the Dutch proposed bill; the bill reaches more broadly than the legislature intended. Just as with American regulation, the delict description covers not only stalking, but also other forms of mental assault, such as the battery of women, mobbing, conflicts with neighbors, and domestic violence. The absence of an element describing the assailant's motive explains this problem. As mentioned in section 3, the mental assault in stalking cases is grounded in affective motives. However, from a perspective of equality, I believe that it is positive that the

CHALLENGES FOR POLITICS AND LAW 107-108 (V. Bekkers, et al., eds. 1996)

⁷³ Explanatory Memorandum (Memorie van Toelichting), at 8.

⁷⁴ *Id.*

⁷⁵ *Brüggemann and Scheuten v. Federal Republic of Germany*, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, 115-116 (1981).

⁷⁶ *X & Y v. the Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 11, § 23 (1985).

⁷⁷ *Niemietz v. Germany* 251-B Eur. Ct. H.R. (ser. A) at 33, § 29 (1993)

⁷⁸ *Id.* See also *Marckx v. Belgium* 31 Eur. Ct. H.R. (ser. A) (1979); *Schönenberger & Durmaz v. Switzerland*, 137 Eur. Ct. H.R. (ser. A) (1988); *Chappell v. United Kingdom*, 152 Eur. Ct. H.R. (ser. A) (1989); *Huvig v. France*, 176-B Eur. Ct. H.R. (ser. A) (1990); *Campbell v. United Kingdom*, 233 Eur. Ct. H.R. (ser. A) (1992); *A v. France*, 277-B Eur. Ct. H.R. (ser. A) (1993); *Guerra and Others v. Italy*, February 19, 1998, Reports of Judgments and Decisions 1998-I.

⁷⁹ See, e.g., KG (Summary Proceedings) November 1 1984, 336; KG September 10 1987, 425, KG January 12 1990, 91; KG September 5 1990, 107; KG November 13 1996, 385.

proposed bill has such a reach: the law should protect victims of other forms of mental assault too. From empirical research of Leymann in Sweden, it appears that almost 4% of all employees are victims of a severe form of mobbing.⁸⁰

¶34 An effective regulation of stalking is necessary to protect us from the violation of our privacy. Stalking restricts a victim's freedom mentally, emotionally, and physically. Unfortunately, American anti-stalking statutes fail to protect this freedom adequately. Perhaps the approach embodied by my proposed definition and the Dutch bill are solutions.

⁸⁰ See generally MOBBING AND VICTIMIZATION, (D. Zapf & H. Leymann eds., 1999). "Mobbing (bullying or harassment) is a severe form of social stress at work, which includes minor social conflicts such as socially isolating a person, rumors, or giving somebody a bad name, but also massive conflicts like giving someone no work or work below or above one's qualification, threats to kick somebody out of the firm or threats of physical violence." Id.