The Criminalization of Stalking in Canada:
The Role of the Moral Panic in the Passage of Section 264
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Abstract

This thesis examines the rationale behind Canada's passage of criminal harassment legislation. Officially, the government passed section 264 to protect Canadian women from repeated acts of harassment that escalated to physical violence in many cases. This thesis attributes the swift passage of section 264 to the stalking moral panic that emerged from the United States in the early 1990's and was reproduced in Canada not long before section 264 came to fruition. Due to the elusive nature of stalking behaviours, the government was unable to clearly define the behaviours it was trying to prohibit. The resulting legislation is overly broad and attempts to address too many kinds of behaviour. The legislation has failed to provide better protection for women and police, Crowns, and courts have experienced difficulty in enforcing the legislation. Ultimately, as is predictable with moral panic-type responses, section 264 has been ineffective in meeting its objectives.

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Chapter One: Introduction

Stalking is often described as "the crime of the nineties" for it was not until then that this kind of behaviour gained significant media attention and caused public concern. Although stalking was seen as an emerging social problem, it was not actually a new type of behaviour. It has been recognized as an aspect of male violence against women for a far longer period of time[1]. However it was largely in response to the surge of public attention in the late 80's and early 90's that the Canadian Government felt compelled to criminalize stalking.

In August 1993, Canada passed Bill C-126 and thereby amended its *Criminal Code* to include section 264, the specific criminal harassment provision. Officially, the main impetus for introducing these new provisions was to protect Canadian women from repeated harassment that could potentially escalate to physical violence, as well as to provide a more serious penalty for this conduct. With the threat of criminal prosecution and tougher penalties, the government hoped that perpetrators would be deterred from further harassment and/or attacks on their victims. The government emphasized the general public's increasing concern that the existing *Criminal Code* provisions were not adequately capturing what was deemed as unique harassing behaviour.[2] This paper will explore alternative explanations for Canada's swift legislative amendments. In particular, it will build upon the analysis of Rosemary Cairns Way who, in her article written shortly

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[1] Finch, Emily. (2001). *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution*. London: Cavendish at 27.

[2] Department of Justice Canada. (1999). *A Handbook for Police and Crown Prosecutors on Criminal Harassment*. Federal/Provincial/Territorial Working Group on Criminal Harassment for the Department of Justice Canada: Ottawa, Ontario at 23.

after the Canadian legislation was passed, characterized the stalking phenomenon and the legislative response to it as a form of "moral panic" triggered by the sensationalist media coverage that emerged from the United States and carried over into Canada not long before Bill C-126 was passed.[3]

Criticisms arose even in the initial discussions of the proposed legislation. These criticisms related to the exclusion of relevant groups during the drafting of the legislation, the haste with which the legislation was enacted and specific aspects of the legislation. Women's organizations were particularly frustrated by scant opportunities to participate meaningfully in discussions about the issue and to offer women-defined approaches as an alternative to new legislation. Ultimately, Bill C-126 was passed without support from national women's organizations who asserted that they were not given enough time to develop a position on the stalking issue. They characterize the swift passing of the legislation as merely a "knee-jerk" reaction that only addressed one aspect of violence against women.[4]

Women's organizations continue to question the creation and use of Canada's criminal harassment legislation as a viable tool. According to some feminist critiques, the core issue is not stalking but *violence against women*. In this context, stalking behaviour must be recognized as but one aspect of a pattern of violence that is "integrally linked to the systemic social, economic and political inequalities experienced daily by Canadian women".[5] It is felt that violence against women cannot be sufficiently addressed through

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[3] Cairns Way, Rosemary. (1994). The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism. *McGill Law Journal*, 39 (2), 379-400.

[4] Mullen, P., Pathé, M., & Purcell, R. (2000). *Stalkers and their Victims*. Cambridge: Cambridge University Press at 267.

[5] *Cairns Way, supra* note 3 at 381.

legislation that focuses on only one manifestation of a broader spectrum of violence against women. Other feminist critics propose that stalking be placed within the domestic violence paradigm.[6] The hope behind this proposal is that criminal harassment would be taken more seriously by the legal system if it was seen as an extension of an existing serious problem: domestic violence. The positive and negative implications of these viewpoints will be addressed in this paper.

The primary purpose of this thesis is to address the following key questions relating to both the passage of the legislation and its implementation that have continued to plague section 264 since its introduction. Was the government able to clarify what exactly the problem was that needed to be addressed or did they act too hastily in jumping in with a solution? Given the vagueness that characterizes the concept of criminal harassment, was the focus on this concept misplaced from the outset? Did the moral panic rising in the United States significantly contribute to Canada's swift legislative response? In terms of implementation, more questions have arisen. Is the legislation trying to address too many things? Is it a genuine response to male violence against women? Has section 264 been able to meet its objective of protecting women from repeated and often escalating harassment? Is it possible to measure its effectiveness thus far? Upon what criteria would such an assessment of effectiveness be made?

The starting point of this thesis will be an introduction to the concept of criminal harassment (or "stalking" as it is more commonly referred to in the literature), the common characteristics of the harasser and the victim, and the different forms that criminal harassment can take, with particular emphasis on its relationship to domestic

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[6] Bernstein, S.E. (1993). Living Under the Siege: Do Stalking Laws Protect Domestic Violence Victims? *Cardoza Law Review* 15, 525–567; Walker, Lenore E. *The Battered Woman*. (1979). New York: Harper &

violence. This background information leads to a discussion of why and how stalking became constructed as a new social problem that warranted criminalization and why existing provisions were considered incapable of dealing with this type of behaviour.

Chapter three will demonstrate how stalking was socially constructed as a pressing social problem by the media during the 1980's. The media's intense coverage of celebrity stalking shaped the problem within that context, even though the majority of stalking cases occur within former intimate relationships. The media coverage created a moral panic that prompted the general public and politicians to press for the hasty enactment of anti-stalking legislation. Then Chapter three will draw from the moral panic literature to provide a picture of how the moral panic was created and how it shaped the public's understanding about stalking.

Chapter four will then discuss the introduction of anti-stalking provisions in Canada. Particular focus will be given to the underlying motivations for new legislation, the mechanisms in place prior to section 264 and their capability to address stalking, key elements of section 264, and its major criticisms.

Chapter five will discuss reports that have assessed the prevalence of criminal harassment in Canada and the effectiveness of section 264 as a response to it. The review will focus first on Gill and Brockman's 1996 review of section 264 since its passage.[7] This report focused primarily on charging and conviction rates, and sentencing patterns in determining how the legislation was being enforced by police, Crown, and courts. The

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Row.

[7] Gill, Richard & Brockman, Joan. (1996). *A Review of Section 264 (Criminal Harassment) of the Criminal Code of Canada [working document]*. Department of Justice Research, Statistics and Evaluation Directorate, Policy Sector: Ottawa, Ontario.

chapter will then look at Kong's 1996 report[8] and Hackett's 2000 report[9] both on behalf of the Canadian Centre for Justice Statistics (CCJS). These reports provided another review of charging and sentencing practices by police and the courts in criminal harassment cases. Fourth, this chapter will examine Pacey's 2002 study on behalf of The BC Institute Against Family Violence[10] that looks at Vancouver's metropolitan police officers and their responses to criminal harassment cases that involve a current or ex-intimate partner.

All of these reports will be assessed in terms of their ability to assess the prevalence of criminal harassment in Canada and to determine the overall effectiveness of section 264 and its enforcement by police and the criminal justice system. The significant problems encountered by researchers in being able to determine accurately the prevalence of criminal harassment and to assess the overall effectiveness of section 264 reinforce the critique that the criminal harassment problem was not clearly understood by the government prior to their invocation of a legislative solution. This lends further weight to the idea that moral panic significantly contributed to the passage of section 264.

Chapter six will look at other countries that have implemented similar anti-stalking legislation to Canada. The purpose of this Chapter is to show that problems associated with criminal harassment legislation are not unique to Canada. The genesis of these other nations' anti-stalking legislation is the same and the problems associated with it are the same.

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[8] Kong, Rebecca. (1996). *Criminal Harassment.* Canadian Centre for Justice Statistics, Statistics Canada, 20 (11), 1-13.

[9] Hackett, Karen. (2000). *Criminal Harassment.* Canadian Centre for Justice Statistics, Statistics Canada, 20 (11), 1-17.

Chapter seven will conclude this paper with some reflections on the Canadian experience with the passage and enforcement of its criminal harassment legislation. The media's focus on celebrity stalking and the moral panic response that emerged from the US caused a ripple effect in how stalking behaviour was interpreted and responded to by the Canadian public and federal government. The resulting legislation is a misguided and hasty solution to the very serious problem of domestic violence. The federal government will have to re-examine the stalking problem which must include significant participation from women, before determining the appropriate response.

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[10] Pacey, Katrina. (2002). *BC's Violence Against Women in Relationships Policy and Criminal Harassment: Police Perspectives and Use of Discretion in Investigations*. Vancouver, British Columbia: The BC Institute Against Family Violence.

Chapter Two: The Concept of Stalking

Definitional Dilemmas

To this day, a precise definition of what constitutes stalking behaviour does not exist. The capability of the term "stalking" to encompass a wide range of behaviours has made it virtually impossible for researchers and practitioners to capture the full concept within a single definition. As a result, definitions tend to be extremely general and vague and to a large extent unhelpful in identifying the conduct to be prohibited. "Stalking" has been defined in general as "a constellation of behaviours involving repeated and persistent attempts to impose on another person unwanted communication and/or contact while instilling fear and apprehension in the victim".[11]

Given the similar descriptions of the behaviour that have been put forward, there do not seem to be any significant definitional debates between researchers about what, in general terms, constitutes stalking:

> "Activities which on the surface are innocuous and commonplace but which, when constituting a course of conduct and with the necessary intent, form the basis of the criminal offence".[12]
>
> "When one person causes another a degree of fear or trepidation by behaviour which is on the surface innocent but which, when taken in context, assumes a more threatening significance".[13]
>
> "...an abnormal or long term pattern of threat or harassment directed toward a specific individual".[14]

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[11] *Mullen et al, supra* note 4 at 244.

[12] Swanwick, R.A. (1996). Stalkees Strike Back: The Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland. *University of Queensland Law Review*, 19 (1), 26-44 at 26.

[13] Goode, Matthew. (1995). Stalking: Crime of the Nineties? *Criminal Law Journal* 19 (1), 21-31 at 24.

[14] Meloy, J.R., and Gothard, S. (1995). Demographic and Clinical Comparison of Obsessional Followers and Offenders with Mental Disorders. *American Journal of Psychiatry* 152(2), 258-263 (as cited in Mullen, Pathé, & Purcell, 2000 at 6).

These definitions cover a wide range of behaviours that under some circumstances would amount to stalking but under different circumstances might be considered courting or otherwise positive behaviours. For example, persistent watching, following, sending letters or gifts or approaching another person can be considered stalking. Many stalking behaviours have the complicating factor of appearing harmless to the average person on the surface while being menacing and harmful to the victim. For example, a person sending another person a picture of a newborn baby seems innocuous to the average observer; however, if this conduct occurs annually on the date upon which the recipient terminated her pregnancy, the conduct is clearly intended to inflict suffering.[15] Conduct that appears harmless in the abstract will be recognized as objectionable when one considers the context in which the conduct is occurring.[16] This almost total dependence on context makes both definition and application exceedingly difficult.

On the other hand, some stalking behaviours are readily recognizable as criminal conduct. Actual cases of seriously criminal conduct that would constitute stalking have included smashing the victim's windshield seventeen times and slashing her tires forty-seven times during a three month period;[17] an arson attack on the victim's home,[18] the

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[15] This is an actual documented case in which the victim received a picture of a newborn baby on the same date for fourteen years. She believes that the person responsible is a man with whom she had a casual relationship that ended when she became pregnant whereupon she decided to terminate the pregnancy. *Finch, supra* note 1.

[16] *Ibid,* at 17.

[17] In this case, the stalker believed that his victim was the reincarnation of his lover who had burned at the stake for her adultery with him. He believed that they shared a "karmic link" and that they were bound together for all eternity. *Ibid.*

[18] *Ibid.*

burglarizing of the victim's home,[19] and hiding in the victim's home and conducting surveillance for months at a time.[20]

Given that stalking can range from the outwardly innocuous to the seriously criminal, it becomes virtually impossible to find a common denominator upon which to base a definition.[21] This is a significant problem with the anti-stalking legislation in Canada and abroad and is a central theme of this thesis. If virtually any kind of behaviour can potentially be construed as stalking, the primary issue becomes how narrowly or broadly the anti-stalking legislation should be drawn. Different problems are associated with the choice of either a limited or expansive approach. In light of the potentially extensive range of behaviours covered, consideration must also be given to whether or not it is possible, or even desirable, to try to capture these behaviours within a single provision. Such definitional dilemmas are central to concerns about whether or not legislation is an effective way to address criminal harassment.

This chapter will lay the groundwork for later chapters by discussing the primary foci of the existing stalking literature: the most common forms of stalking behaviours, typologies of stalking, and the nature of stalker-victim relationships. This discussion will provide a more in-depth look at the concept of stalking and in so doing will further highlight the difficulties associated with how it should be defined.

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[19] In a UK case, Anthony Burstow was twice convicted and imprisoned for burglarizing his victim's home. *Ibid.*

[20] In this Australian case, the stalker secretly lived in the ventilation system of the home over several months time while continuing to send letters and other paraphernalia to the victim. It was only when he was accidentally discovered in a closet by the victim's mother that the family came to realize he was actually living in the home. *Ibid.*

[21] *Ibid,* at 11.

Stalking Behaviours

Despite the huge range of behaviours included within the term stalking, researchers have been able to determine common attributes of stalking behaviours. These attributes include violating the victim's privacy, potentially inducing fear or apprehension in the victim, and showing the stalker's unwavering persistence.

The most common forms of stalking are: watching, telephoning or contacting the victim in some way; loitering near, watching, approaching, and/or entering the person's workplace, residence or places he/she visits; interfering with the person's personal property; threatening to harm the person or his/her family, friends or pets; leaving, giving, or distributing offensive material directly to the person or to others about the person.[22] Some stalking cases involve more bizarre or extreme conduct such as leaving dead animals on the victim's car windshield, giving the victim hundreds of pairs of scissors, or attempting to assassinate a public figure to gain the victim's attention.[23]

Some stalkers involve other people or agencies in their attempts to communicate with, contact or follow their victim. This conduct is referred to as "stalking by proxy". Usually these accomplices are unsuspecting participants while others have been given the impression that the real victim of the stalking is the stalker. In these scenarios, the stalker typically hires a private detective, orders or cancels goods and services to the victim, recruits friends and family (to keep abreast of the victim's activities and/or to further

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[22] Ogilvie, Emma. (2000). Stalking: Legislative, Policing And Prosecution Patterns in Australia. *Research and Public Policy Series* No. 34, Canberra, Australia: Australian Institute of Criminology at xiii.

[23] The attempted assassination of a public figure is one of the most extreme examples of behaviour that has escalated way beyond the most common forms of stalking. The attempted assassination of President Reagan by John Hinkley to impress actress Jodie Foster is an example of this extreme behaviour. *Finch, supra* note 1 at 10-11, 104.

harass the victim), manipulates the criminal justice system,[24] or uses electronic mediums to harass the victim.[25]

With the more recent explosion of Internet use, cyber-stalking has emerged as a common form of harassment. Cyber-stalking is described as the use of the Internet and/or electronic mail or other electronic communication devices by an individual to harass another person.[26] As with other forms of stalking, cyber-stalking involves persistent behaviours that instill apprehension and fear in the victim.[27] The stalker typically engages in e-mail stalking (direct communication via e-mail), computer stalking (unauthorized control of another person's computer), and/or Internet stalking (global communication through use of the Internet).[28] Research to date concurs that, like other forms of stalking, the full nature and extent of the cyber-stalking problem are difficult to quantify.[29] To

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[24] There have been documented cases in which the stalker files protection orders against the victim in order to force the victim to maintain contact by having to appear in court. This serves as a control mechanism for the stalker as well.

[25] *Mullen et al, supra* note 4 at 173; Gill, Richard & Watson, Kelly. (Forthcoming in 2004). *Review of Recent Literature on Criminal Harassment.* Ottawa, Ontario: Department of Justice. There have been reported cases in which stalkers have created websites that were devoted to their victims. In one US case, the stalker set up a website about his victim, a former high school classmate that blatantly detailed how, when and why he intended to kill her. The stalker carried out the murder unbeknownst to the victim that she was even being stalked. It was not until after the girl's murder, that police discovered the stalker's detailed website and his explicit description of how and when the murder would take place.

[26] *Ogilvie, supra* note 22 at 2; Kowalski, Melanie. (2002). *Cyber-Crime: Issues, Data Sources, and Feasibility of Collecting Police-Reported Statistics.* Ottawa, Ontario: Statistics Canada at 6; *Gill and Watson, supra* note 25 at 17; Reno, The Honorable Janet. (1999). *1999 Report on Cyberstalking: A New Challenge for Law Enforcement and Industry.* Washington, D.C.: U.S. Department of Justice: Attorney General's Office at 2.

[27] *Ogilvie, supra* note 22 at 2, *Reno, supra* note 38 at 3-4.

[28] *Ogilvie, supra* note 22 at 2; *Kowalski, supra* note 26 at 6; 29-4; *Gill and Watson, supra* note 25 at 17; Ellison, Louise and Akdeniz, Yaman. Cyber-stalking: The Regulation of Harassment on the Internet. (1998). *Criminal Law Review.* Special Edition: Crime, Criminal Justice and the Internet at 2-3.

[29] *Reno, supra* note 26 at 6.

date, there is no comprehensive, nationwide data on the extent of cyber-stalking in Canada or elsewhere.

The dynamics of cyber-stalking raise some of the same enforcement issues as other forms of stalking, namely, whether or not the creation of targeted legislation can effectively harness cyber-stalkers and protect victims. It has not been settled whether or not Internet-based technologies have created entirely new types of stalking crimes that may require new legislative responses, or have simply provided new expressions for traditional stalking crimes that can be addressed through current legislative strategies.[30]

Classifications of Victims and of Stalkers

Several classifications of stalking victims have been put forth by researchers. Typologies of stalking are usually based upon the characteristics of the victim, the stalker-victim relationship, the psychological characteristics of the stalker, the stalker's motivation, or a combination of these variables.[31] Victim profiles are typically based on the following categories: professional contacts, workplace contacts, strangers, casual acquaintances and friends, intimates, and celebrities.

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[30] *Ogilvie, supra* note 22 at 1; *Gill and Watson, supra* note 25 at 20. While some traditional legislative strategies could be applicable in addressing cyber-stalking, new and innovative legislative, technical, and investigative measures may prove necessary especially with the global reach of computer-related criminal activity. Offenders can commit crimes in one country that will affect another person in a different country. Cyber-stalking poses additional challenges for the detection, investigation and prosecution of offenders in that it magnifies the definitional issues associated with stalking, as well as presents unique challenges for law enforcement. Emerson, R.M. and Ferris, K.O. (1998). On Being Stalked. *Social Problems*, 45 (3), 289-315. This thesis does not address cyber-stalking as a specific issue or further interrogate the particular problems it raises.

[31] *Gill and Watson, supra* note 25 at 1.

Zona et al[32] divided victims into two categories, "prior relationship" or "no prior relationship." The prior relationship category was further subdivided into "acquaintance", "customer", "neighbour", "professional relationship", "dating" and "sexual intimates". Meloy & Gothard[33] categorized victims as either "stranger" or "former sexual intimate". Harmon et al[34] were more specific, classifying the victim's prior relationship as "personal", "professional", "employment", "media", "acquaintance", "none" or "unknown". Meloy[35] simplified the categories by placing victims into three broad, mutually exclusive groups: "prior sexual intimates", "prior acquaintances" and "strangers". Fremouw[36] went on to further divide the "prior relationship" category into "friend", "casual date", "serious date" and "stranger". Emerson et al,[37] introduced the terms "unacquainted stalking", "pseudo-acquainted stalking" (victim is a public figure), and "semi-acquainted stalking" (some contact between victim and stalker in the past like co-workers). Over the course of these studies, the ongoing re-categorization of victim profiles has significantly fleshed out understanding of the range and diversity of potential victims and of victim-stalker relationships.

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[32] Zona, M.A., K.K. Sharma, and Lane J. (April, 1993). Comparative Study of Erotomanic and Obsessional Subjects in a Forensic Sample. *Journal of Forensic Sciences* 38(4), 894–903 (as cited in Mullen, Pathé, & Purcell, 2000 at 38).

[33] *Meloy and Gothard, supra* note 14 at 45.

[34] Harmon, R., Rosner, R. and Owens, H. (1995). Sex and Violence in a Forensic Population of Obsessional Harassers. *Psychology, Public Policy and Law* 4 (1.2), 236-249 (as cited in Mullen, Pathé & Purcell, 2000 at 48).

[35] *Meloy and Gothard, supra* note 14 at 45.

[36] Fremouw, W., Westrup, D. and Pennypacker, J. (1997). Stalking on Campus: The Prevalence and Strategies for Coping with Stalking. *Journal of Forensic Sciences*, 42 (4), 666–69 (as cited in Mullen, Pathé, & Purcell, 2000 at 41).

[37] *Emerson and Ferris, supra* note 30 at 45.

In 1999, Mullen et al proposed a classification of stalkers that primarily related to the stalker's predominant motivation and the context in which the stalking emerged. The categories of stalkers proposed included the rejected, the intimacy seekers, the resentful, the predatory and the incompetent. The purpose of this typology was to try to capture the function of the behaviour for the stalker. Mullen et al[38] wanted to better understand the stalkers' purposes in pursuing a particular course of action and what needs and desires they were satisfying as a result.

The most commonly identified forms of harassment discussed by the literature include: simple obsessional, erotomanic, love obsessional, borderline obsessional and sociopathic.[39] These categories encompass the relationship between the victim and the stalker, the psychology of the stalker and the victim profile.

Simple obsessional is the most common basis for stalking. The predominant stalker-victim profile in this category involves a prior intimate relationship (current or former spouses or current or former partners),[40] although this category can also include workplace contacts, professional relationships, neighbours, and casual acquaintances. The victim is predominantly female and the stalker is predominantly male.[41] Stalking by a

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[38] Mullen, P., Pathé, M., Purcell, R. and Stuart, G. (1999). Study of Stalkers. *American Journal of Psychiatry* 156 (8), 244-249.

[39] *Ibid; Ogilvie, supra* note 22 at xii; *Gill and Brockman, supra* note 7 at 3; *Gill and Watson, supra* note 25 at 1.

[40] Current or former same-sex partners are included in this category although most research to date relates to heterosexual relationships.

[41] Johnson, Holly. (1996). *Dangerous Domains: Violence Against Women in Canada*. Toronto, Ontario: Nelson Canada; Pathé, Michele and Mullen, Paul. (1997). The Impact of Stalkers on their Victims. *British Journal Psychiatry*, 170:12-7; Tjaden, P., and Thoennes, N. (1998). *Stalking in America: Findings from the National Violence Against Women Survey.* Washington, D.C.: U.S. Department of Justice; Kamphuis, Jan H., and Emmelkamp, Paul M.G. (2001). Traumatic Distress Among Support-Seeking Female Victims of Stalking. *The American Journal of Psychiatry*. 158 (5), 795-798.

former intimate partner involves the same intimidation and control techniques found in a domestic violence situation.[42] This is precisely one of the primary problems identified in this paper: domestic violence being rendered invisible by collapsing it into the concept of stalking.

In cases involving workplace contacts, professional relationships, neighbours and casual acquaintances, the stalking is motivated by resentment, perceived discrimination or infatuation. In these cases, it does not make a difference if the perpetrator inaccurately perceives being wronged or was actually wronged by the victim. Health care providers, lawyers and teachers can be especially vulnerable to stalking from those seeking intimacy, the socially incompetent or resentful clients.[43] These professionals are in positions of power that create an unbalanced relationship with those seeking their help. Sometimes a person in such a position of power can abuse it and leave people feeling helpless in response. In some cases, a stalker's resentfulness towards one of these professionals may be justified, even though their subsequent actions are not.

The many different kinds of stalker-victim profiles that are included in the simple obsessional category raise the issue of whether or not they are sufficiently alike to be placed together. This category is mainly comprised of harassment in former intimate relationships as opposed to forms of harassment where the parties are less connected to each other. Perhaps lesser forms of harassment should be classified separately based on their lack of commonality and generally lower level of seriousness.

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[42] *Walker, supra* note 6; Meloy, J. Reid (Ed.) (1998). The Psychology of Stalking. In J.R. Meloy (Ed.) *The Psychology of Stalking: Clinical and Forensic Perspectives* (pp. 2-24). San Diego, California: Academic Press, Incorporated.

[43] *Mullen et al, supra* note 4 at 48-50.

The erotomanic stalker is delusional and believes that the victim (who may or may not be aware of the stalker's existence) is in love with him or her. This kind of stalker is often described as socially incompetent, morbidly infatuated, and/or resentful. The victims of this form of stalking usually have some sort of celebrity status. Often they are involved in radio, television or film but they can also be a politician, royalty, sports figure or other prominent public personality. It is not uncommon for a celebrity to be the target of more than one stalker at any given time.[44]

The love obsessional stalker tends to show an intense infatuation with the object of their unwanted attentions but usually acknowledges that the relationship is not reciprocated. The majority of love obsessionals are male, and like erotomanics, are fascinated with media figures, usually targeting young females.

In borderline obsessional cases, the perpetrator has an intense and unstable attachment to an unrequited love without the erotomanic delusion of mutual love.[45] Unlike the love obsessional stalker, the borderline obsessional has a history of actual emotional engagement with the victim. The emotional connection that is established between the stalker and victim has not developed into a more tangible relationship like those found in the simple obsessional category.

Sociopathic stalkers include serial murderers and sex offenders whose goal, unlike most other categories, is not necessarily to form an interpersonal relationship with the victim. The sociopath will instead create an ideal victim profile and then target

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[44] *Ibid,* at 66.

[45] *Gill and Watson, supra* note 25 at 1.

individuals who possess the desired characteristics.[46] Like most of the stalker categories, this stalker is almost exclusively male while the victim is predominantly female. The victim is subject to a wide range of sexually abusive behaviours that can include obscene phone calls, sexually explicit e-mails, surveillance, and inappropriate touching that can escalate to rape and murder.[47] Rape and murder go way beyond abusive and stalking behaviours which indicates a problem with including this category within the concept of stalking.

To date, there is no generally accepted approach to classifying stalkers. The typologies and groupings that have been advanced thus far are the product of the particular experiences being studied and the theories developed in that context. Mullen et al[48] suggest that the best classification of stalkers is the one that serves a researcher's needs most appropriately. As more is learned about the concept of stalking, differing constructions, typologies and classifications will continue to emerge.[49]

Studies regarding the effects of stalking on its victims have also been slowly emerging. Most of the research has been conducted over the past 10-15 years and is primarily limited to the demographic characteristics of stalkers and victims, resulting psychological and social effects on victims, and subsequent coping strategies. Although further empirical research into the psychological and social consequences of stalking is needed, existing studies concur that victims experience psychological, social and/or

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[46] *Mullen et al, supra* note 4 at 52-53.

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid,* at 78.

occupational consequences as a result of their stalking ordeal.[50] Victims typically report feeling vulnerable, powerless, fearing for their personal safety, and heightened anxieties (such as panic attacks, hyper-vigilance, jumpiness and shakiness). Many victims also suffer from chronic sleep disorders, depression and suicidal thoughts. Respondents participating in victim surveys reported feeling introverted, aggressive, cautious, paranoid, and/or easily frightened.[51] At this time, no long-term studies on the effects of stalking have been conducted, although Kamphuis and Emmelkamp,[52] Westrup et al,[53] and Pathé and Mullen[54] report that the range of emotional symptoms commonly experienced by stalking victims is consistent with the symptoms of post-traumatic stress disorder (PTSD).[55]

It is common for stalking victims to feel compelled to make changes to their social patterns and lifestyles. They tend to avoid places frequented by their stalker, enhance home security measures (such as alarms and motion detector exterior lighting), and alter their usual driving routes. Many victims will abstain from social engagements

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[50] *Pathé and Mullen, supra* note 41; *Gill and Watson, supra* note 25; Violence Against Women Grants Office. (July 1998). *Stalking and Domestic Violence: The Third Annual Report to Congress under the Violence Against Women Act.* Washington, D.C.: U.S. Department of Justice; Westrup D, Fremouw W.J., Thompson R.N., and Lewis S.F. (1999). The Psychological Impact of Stalking On Female Undergraduates. *The Journal of Forensic Sciences.* 44 (3), 554-557; *Mullen et al, supra* note 4; Budd, Tracey, and Mattinson, Joanna. (2000). *The Extent and Nature of Stalking: Findings from the 1998 British Crime Survey.* Home Office Research Study 210. Development and Statistics Directorate, Communications Development Unit. London: Home Office.

[51] *Pathé and Mullen, supra* note 41 (as cited in Mullen et al, 2000 at 60); *Gill and Watson, supra* note 25 at 22.

[52] *Ibid.*

[53] *Westrup et al, supra* note 50.

[54] *Pathé and Mullen, supra* note 41.

[55] *Gill and Watson, supra* note 25 at 21.

thus isolating themselves from friends, family and co-workers.[56] Studies conducted by Budd and Mattinson[57] and Hall[58] reported several respondents moving to another residence, changing or abandoning professions, changing their surnames, and/or altering their physical appearance. Although little research about the occupational effects of stalking has been conducted, preliminary work by Pathé and Mullen,[59] the US National Violence Against Women (NVAW) survey,[60] and Abrams and Robinson[61] report that victims attribute their poor work attendance and low productivity to their stalking experiences.

The current categorizations of stalkers and their victims form the basis from which future studies and theories about stalking will continue to develop. However, there is a concern that, in the absence of a concrete definition of stalking behaviour, research in this area could potentially go in any number of different and contradictory directions. The concept can include such a wide variety of conduct that it may prove impossible for researchers to agree on what is at the core of stalking, which then makes it difficult, if not impossible, to agree on preventive strategies or appropriate criminal law responses.

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[56] *Mullen et al, supra* note 4 at 60; *Gill and Watson, supra* note 25 at 22.

[57] *Budd and Mattinson, supra* note 50.

[58] *Mullen et al, supra* note 4 at 53.

[59] Pathé and Mullen, supra note 41.

[60] *Violence Against Women Grants Office, supra* note 50.

[61] Abrams, K.M. and Robinson, G.E. (2002). Occupational Effects of Stalking. *The Canadian Journal of Psychiatry* 47 (5); *Gill and Watson, supra* note 25 at 22.

Policy Responses to the Research

Researchers have posed several ways in which to define the concept of stalking.[62] It has been suggested that stalking be placed within the domestic violence paradigm; that it be placed on a continuum of violence against women; or be kept very generalized to ensure that it captures a very broad range of behaviours. Each approach has its own set of problems that will be addressed shortly.

Some researchers advocate that stalking is most frequently a component of domestic violence and should therefore be understood and addressed within this context. Stalking behaviours typically emerge in domestic violence situations when the woman is trying to escape from an abusive relationship. The pattern of post-separation violence often mirrors the violence experienced in the home. The ex-partner is unable to accept the separation and often resorts to intimidation to regain his self-esteem. The ex-partner typically feels that if he cannot reconcile with his former partner, no one else will be allowed to establish a relationship with her. It is at this stage, that stalking behaviours are manifested.[63]

It is argued that if stalking is seen as an extension of the domestic violence paradigm, lawmakers, policymakers, and the courts may be more likely to seriously confront the issue of stalking.[64] Currently, many police officers are reluctant to lay charges under anti-stalking legislation in these kinds of cases. If stalking was more clearly understood as an extension of domestic violence, officers may be more apt to

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[62] *Bernstein, supra* note 6; *Johnson, supra* note 41; *Cairns Way, supra* note 3; *Walker, supra* note 6.

[63] Pearce, Amanda and Easteal, Patricia. (1999). The 'Domestic' in Stalking: Policing domestic stalking in the Australian Capital Territory. *Alternative Law Journal*, 24 (4), 165-174 at 165.

[64] *Bernstein, supra* note 6 at 559.

respond. This propensity to not lay charges was uncovered recently in a 2002 study by the BC Institute Against Family Violence.[65] The purpose of the study was to determine Vancouver's current police practices in response to a victim who is being criminally harassed by a current or ex-intimate partner. Even though a pro-arrest policy was in place with respect to perpetrators of domestic violence, the majority of respondents, Vancouver police officers, were reluctant to view criminal harassment as constituting a pattern of domestic violence. Instead, police respondents looked at the behaviour as an isolated incident, rendering it much less threatening and/or harmful.[66]

In Australia, several studies revealed a persistence of ambivalent attitudes and inconsistent police responses to domestic violence situations. Such attitudes have continued with the introduction of anti-stalking provisions. One survey found that the majority of officers would not elect to use the anti-stalking legislation when confronted with stalking behaviour within the domestic violence context. The main explanation offered by officers was an acknowledged lack of understanding about the dynamics of domestic violence and of the psychology of the former intimate stalker. This led officers to treat stalking within the domestic context as warranting less serious intervention.[67] Lack of education about domestic violence seemed to be integral to whether or not an officer elected to use anti-stalking provisions.

One concern about narrowing the stalking focus to the domestic violence paradigm is the implications this would have for other stalking behaviours. If such a focus suggests that stalking does not go beyond the scope of the domestic violence

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[65] *Pacey, supra* note 10 at 21.

[66] *Ibid.*

paradigm, how are the other forms of harassment, identified by researchers, to be addressed? Might this mean that these other forms are ignored or trivialized?

An alternative perspective considers stalking to be a part of a wider spectrum of violence against women behaviours that include: battering, sexual assault, threats of violence and intimidation. It is argued that when the concept of stalking is stripped down to its basic elements, it is primarily about one individual controlling another. Stalking is viewed as a form of psychological and/or physical terrorism that thrives upon the unequal power between men and women. Stalking is therefore seen as indistinguishable from other forms of violence against women.[68]

Placing stalking on a continuum of violence against women is a broader approach than the domestic violence paradigm; however, it still excludes identified forms of stalking behaviours such as neighbour disputes or celebrity stalking. Perhaps the point of exclusion is because these forms of stalking behaviour are quite different from those to be placed on the continuum and the effect of putting them altogether is to mischaracterize them all. The primary differences are the type of targets of the behaviour (neighbour or celebrity versus the average woman), and the dynamics of the relationship (acquaintance or stranger versus intimate). The effect of this exclusion is perhaps to keep the focus on violence against women and avoid diluting the core definition of criminal harassment.

The third perspective views the concept of stalking within a wider context that includes violence against women as well as the broader range of behaviours. The purpose of this would be to ensure that the many other forms of behaviour that have defined stalking thus far are included, such as watching, phoning, and following. However once

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[67] *Pearce and Easteal, supra* note 63.

stalking is placed within a wider context, the effect is to soften the seriousness of women's experiences of violence. The legislation's purpose and focus are diluted.

Conclusion

Although the research to date has provided common attributes of stalking behaviours, there is still no generally accepted approach to classifying stalkers and their behaviour. The research outlined in this Chapter reinforces the notion that the concept of stalking is all encompassing and that a concrete definition remains elusive. Even the policy responses to the research do not follow one certain path. It has been suggested that the legislation be narrow, broad, placed within the context of domestic violence, placed on a continuum of violence against women and/or placed within a wider context that includes all kinds of stalking behaviours. We are left with an abundance of questions. The key questions relate to: what is at the core of stalking and how should that be articulated? Is it possible or even desirable to capture stalking within a single provision? The research has illustrated significant definitional dilemmas surrounding the concept of stalking. This concern will be seen to be more pressing and concrete in the following chapters as this thesis examines whether or not legislation is an effective way to address stalking behaviour.

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[68] *Cairns Way, supra* note 3 at 382.

Chapter Three: The Social Construction and Criminalization of Stalking

Rosemary Cairns Way has identified the anti-stalking initiative in Canada as fitting the profile of what some criminology scholars have described as the inducement of "moral panic". This chapter draws upon the work of Cairns Way, as well as the earlier moral panic literature to explain why and how stalking was constructed as a new social problem that warranted criminalization and why existing provisions were considered incapable of adequately dealing with this type of behaviour.[69] An examination of the primary motivations behind criminalizing stalking leads to the argument that anti-stalking legislation is both a constituent of and a response to that constructed moral panic. Cairns Way's prediction that the anti-stalking legislation that was the product of moral panic would make little material difference in women's lives will be addressed in later chapters.[70]

The Concept of Moral Panic

Subjects of moral panics over the years have included youth culture, mugging, club culture, girl gangs, AIDS, and stalking.[71] The concept of moral panic was pioneered by Stanley Cohen in his book *Folk Devils and Moral Panics*. According to Cohen, a folk devil is a person or group of people who are portrayed in folklore or the media as

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[69] Sohn, Ellen. (1994). Antistalking Statutes: Do They Actually Protect Victims? *Criminal Law Bulletin*. 39(3) at 206.

[70] *Cairns Way, supra* note 3 at 383.

[71] Thompson, Kenneth. *Moral Panics*. (1998). London & New York: Routledge.

outsiders and deviant, and who are blamed for crimes or other sorts of social problems. Cohen describes a moral panic as essentially a semi-spontaneous or media-generated mass movement based on the perception that some individual or group, usually a minority group or sub-culture, is dangerously deviant and is a menace to society. This individual or group is thus transformed by the media and/or public perception into the folk devil Cohen describes.

Cohen examined the Mods and Rockers[72] phenomenon in 1960's Britain and the public response to them as an emerging moral panic. He attributed the general public's perception of Mods and Rockers as a deviant and delinquent youth culture to the mass media's unfavourable portrayal of them. Building upon this negative perception, the media marshalled society to decry Mods and Rockers as a serious threat to the social fabric. That is, the media instigated a moral panic over what was a fairly innocuous and limited form of youthful rebellion.

The events that sparked a moral panic about British youth and became the focus of Cohen's study occurred on a holiday weekend in 1964. Groups of young people (who described themselves as Mods and Rockers) were hanging around a small, seaside community. They were bored and irritated after being refused service by the local restaurants. Scuffles ensued, some youths roared up and down the street on their scooters and motorbikes, a few beach huts sustained damage, a window was broken, and someone fired a starting pistol. Although this hardly constituted a riot, the media's reaction to these

[72] The Mods and Rockers were two British youth movements in the early 1960's. The Rockers had a macho biker gang image and wore black leather jackets. In contrast, the Mods wore colourful clothing and drove scooters. They were generally considered cleaner and more sophisticated than the Rockers.

incidents was extreme. *The Daily Telegraph* headline read "Day of Terror by Scooter Groups", while *The Daily Mirror* reported "Wild Ones Invade Seaside – 97 Arrests".[73]

According to Cohen, the media engages in exaggeration and distortion, primarily involving sensational and misleading headlines and melodramatic vocabulary that perpetuate stereotypes and create symbols and associations. Through this process, a word becomes symbolic of a certain status, objects are associated with the symbolic word, and the objects themselves then become symbolic of the status. In the case of the Mods and Rockers, the word "Mod" or "Rocker" became symbolic of a delinquent or deviant status, objects such as their hairstyles and clothing symbolized the word, and these objects came to symbolize their deviant and delinquent status.

This process of ascription and reduction provides the basis for the media to manipulate public response. According to Cohen, the essential components of a moral panic are: an event (neither remarkable or extraordinary in nature), its labelling and presentation by the media as a threat to societal values and interests, followed by the mobilization of people in positions of power (the government among others), and solutions to the problem (such as implementing legislation or stiffer sentencing measures). In Cohen's words, the moral panic concept is:

> "A condition...that emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; ... sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight...the moral barricades are manned by...right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved...; the condition then disappears, submerges or deteriorates".[74]

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[73] Burns, Hayley. (April, 2000). *What Are 'Moral Panics'?* Retrieved June, 2004, from Web site: http://www.aber.ac.uk/media/Students/hrb9701.html.

Stuart Hall et al in *Policing the Crisis: Mugging, the State and Law and Order*,[75] used Cohen's moral panic analysis to explore the response to 'mugging' in early 1970's Britain and to further research the selective portrayal of crime in the mass media and how it shapes public definitions of the crime problem. Hall et al described the mugging phenomenon as easily fitting into the process described by Cohen.

Even before mugging cases were reported in Britain, the Sunday Times forewarned the public about this new phenomenon that had emerged from the United States. *The Times* reported on crimes in Harlem, New York that were given the mugging label. The crime involved a person or small group of people being attacked and robbed. The perpetrators were described as working-class, black, unemployed, menacing youths from the inner city. Soon after, the British press covered the sudden increase in the reporting of criminal behaviour, called 'mugging' in Britain. The behaviour was presented by the media as a new and rapidly growing phenomenon even though the behaviour was not new only its label was. At that time, mugging was not separately defined as a crime in the UK although it could be classified under existing crimes such as robbery or assault with the intent to rob.

Once incidents of mugging were reported in Britain, media coverage was intense which prompted a significant increase in the number of police officers patrolling Brixton, a black, working class area in London that was regarded by the press as a hotbed for muggings. In turn, there was a substantial increase in the number of arrests of young,

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[74] Cohen, Stanley. *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*. (2002). 3rd Edition: Routledge at 9.

[75] Hall, S., Critcher, C., Jefferson, T., Clarke, J. and Roberts, B. (1978). *Policing the Crisis: Mugging, the State and Law and Order*. New York: Macmillan Press.

black, working-class men that perpetuated the media's notion that a mugging crisis did exist.

The new crime label was endorsed and supported by official statistics that were used to present a distorted picture of the rapid growth of this new crime. It was reported that over the course of four years, there was a 129 percent increase in mugging. Distorted statistics can be attributed to the fact that once a new label has been given that expands the ambit of a pre-existing behaviour, then a number of old offences will inevitably fall under this new heading, thus creating the impression of rapid growth.[76] Hall et al disputed the inflated mugging statistics by pointing out that mugging had previously fallen into other categories of crime (robbery or assault) because it was not legally recognized as a crime on its own. By comparing a variety of statistics, Hall et al found that the annual increase in mugging cases was closer to 14 percent.

The concept of exaggerated statistics as central to the inducement of moral panic was re-emphasized by Kenneth Thompson in his book *Moral Panics*. Thompson contends that the threat or danger is considered more substantial than is warranted when realistically appraised. Exaggerated statistics are a primary indicator of such disproportionality. For a variety of reasons, the media singles out a social problem that is no more dangerous than other social problems, suggesting that current conditions pose a severe threat when they are actually no worse than at other times.[77]

Once the media has publicly disseminated sensationalized distortions about a new social problem, the perceived threat to the public and existing social order is amplified.

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[76] During the new wave of 'muggings', then Home Secretary Robert Carr, remarked on the conventional nature of the crime. He found it very difficult to differentiate the act of 'mugging' from the old traditional crime of 'a seaman getting rolled'. *Ibid,* 726-727.

Government, police and courts will in turn feel compelled to respond through action to eliminate the perceived threat. In the case of mugging, the response urged by the public was the development of punitive measures in the forms of police mugging squads and harsher sentencing.

Cohen and Hall et al demonstrate how new but fairly harmless behaviours or previously tolerated behaviours can be sensationalized into a new, threatening condition that demands immediate and dramatic attention. They clearly outline the pieces that come together to create a moral panic: a distinct, deviant population is identified and targeted; there is the presence of an 'innocent' or 'helpless' victim population; a serious threat exists to established societal norms, values, or traditional lifestyles; and brave and virtuous heroes emerge (often in the guise of government officials) to disarm the problem and restore peace.

The Stalking Moral Panic

The stalking phenomenon fits easily into the moral panic analysis. Like mugging, stalking was not a new crime, only its label was. However, as Cairns Way points out, the public was bombarded with media coverage that sent the message that stalking was relatively new, was on the rise, and that celebrities were especially vulnerable.[78] Many of the behaviours that typified stalking, were already present in cases of male violence against women, particularly in domestic violence situations. Countless women have endured similar behaviours within their intimate relationships or after separating from their partners. Information contained in reports discussed later in this Chapter, discloses

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[77] *Thompson, supra* note 71 at 9-10.

that many women who were killed by their husbands were stalked prior to their murders. This kind of behaviour existed long before the media recognized it as a social problem and labelled it stalking and before the general public then perceived stalking as a major threat. The media only became interested once celebrities became the target of stalking behaviour. Celebrity targets provided ample opportunity to sensationalize stalking and keep it in the public eye once the public became taken up with it. Cairns Way illustrates how the stages of Cohen's moral panic theory relate to the three phases of the stalking initiative in Canada, specifically, the media's role in defining and sensationalizing the threatening behaviour, the politicization of the issue, and the legislative process leading up to the passage of section 264. These three distinct phases will be examined in the following Chapter.

Second, like the Mods and Rockers and mugging situations, the target of the threatening behaviour during the stalking moral panic was a key determinant of public reaction. In all three cases, high profile groups were involved which meant that the issue garnered more attention from the media, the public and the government.[79] The Mods and Rockers fiasco occurred in a quaint middle to upper class seaside town, an idyllic setting signifying peace and tranquillity. The mugging that triggered the initial media coverage occurred in 1972, when an elderly widower was stabbed to death near the subway station as he was returning home from the theatre. The apparent motive was robbery. The press described the incident as "a mugging gone wrong", a word most often used in an American context to describe a robbery. The use of the new word 'mugging' also seemed

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[78] *Cairns Way, supra* note 3 at 385.

[79] *Ibid.*

to herald the coming of a new crime as the *Daily Mirror's* headline indicated: "As Crimes of Violence Escalate, a Word Common In the United States Enters the British Headlines: Mugging. To our Police, it's a frightening new strain of crime".[80]

Similarly, stalking gained significant national and international attention when it was directed at celebrities. Cairns Way partly attributes this attention to the higher social status of many of the stalking victims.[81] It is highly unlikely that any media attention would have been given to these events had they occurred in a low-income neighbourhood, where the behaviour was directed at minorities, immigrants, or other marginalized groups. In the case of stalking, this was made crystal clear by the inattention to stalking behaviours directed toward former female partners. As this Chapter will later discuss, media reports and research articles chronicling stalking within the context of domestic abuse did not prompt a moral panic response. Domestic violence cases did not possess the same "allure" and "excitement" that the public, through media coverage, came to associate with celebrities and stalking. In his article, "The Media Construction of Stalking Stereotypes"[82] Spitzberg, who describes the early beginnings of stalking coverage as "celebriphilic", contends that to this day, any episode of stalking of any prominent celebrity is more likely to gain significant media attention than stalking among non-celebrities unless it involved a more serious crime like kidnapping or murder.[83]

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[80] *Hall et al, supra* note 75 at 725.

[81] *Cairns Way, supra* note 3 at 385.

[82] Spitzberg, Brian H. (2002). "The Media Construction of Stalking Stereotypes". *Journal of Criminal Justice and Popular Culture*, 9 (3), 128-149.

[83] *Ibid,* at 134.

Third, all three cases share similar characterizations of deviance with respect to the perpetrators. The Mods and Rockers dressed in vibrant colours and black leather that were considered outrageous for the time. They drove scooters and motorbikes that were not generally driven by everyone. In the case of the 'mugging panic' of 1970's Britain, many of the muggers were stereotyped as low-income black or minority youths. In the case of celebrity stalking, the media focused on the male perpetrators and their menial jobs, lack of education, social isolationism, and/or mental health issues. Of even more importance is how these deviant characterizations feed into and facilitate the moral panic. The media portrays the perpetrators to the public as unsympathetic misfits. These perpetrators are easy to target and to turn the public against, possibly because they are already groups that people fear or are uncomfortable with or with whom they cannot identify. The public relies heavily on news accounts to inform them about the level of dangerousness different groups pose to them.

The media presented the Mods and Rockers as youths who were out of control and part of deviant sub-cultures. With respect to mugging, the images evoked by the press were of young hoodlums from inner city slums preying on innocent citizens. The public was also given the impression by the media that this kind of behaviour originated in the US and had since spread to Britain. This media account implied that mugging had never been experienced before in Britain. Predictably, given this situation, there was a subsequent spike in the number of mugging cases in Britain that led to a heightened sense of urgency on the part of the public and government, fuelled by media reports, and inaccurate statistics, to contain and punish this new crime. Their response measures,

mugging squads, and harsh sentencing practices were disproportionate to the actual threat.[84]

The same kind of urgency was felt with respect to stalking cases. Early media imagery of stalking was that of "a cunning stranger who has targeted an innocent victim for prey".[85] The behaviour was repeatedly described by the media as threatening, violent, and culturally deviant that, when coupled with the idea that this was a new kind of behaviour, served to further amplify the public's feelings of vulnerability. These deviant characterizations are reminiscent of the more extreme stalker profiles discussed in the last chapter: erotomanic, love obsessional, borderline obsessional and sociopathic. All of these categories have elements of the deviant behaviour described by the media that ranges from social incompetence, intense infatuation, delusions, unstable attachments to more extreme behaviours like rape and murder.

While stalking shares many of the same attributes as the moral panics incited by the Mods and Rockers and mugging, it adds some elements that give it a new twist. Unlike the cases of the Mods and Rockers and muggings, the behaviour (celebrity stalking) that initially triggered the media behaviour, as well as the public response has not remained the focus of the panic. Rather, the problem has morphed into something bigger that is very elusive which makes it difficult, if not impossible, for the government to respond to effectively.[86]

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[84] *Hall et al, supra* note 75 at 730.

[85] Kappeler, V.E., Blumberg, M., & Potter, G.W. (1996). *The mythology of crime and criminal justice.* (2nd ed.). Prospect Heights, Illinois: Waveland.

[86] Of course, an ineffectual response is a defining feature of a moral panic because the focus of the panics described by Cohen and Hall et al, in which youth sub-cultures and petty crime, were not really problems or were so minor that they did not warrant the dramatic, disproportionate response they were given.

With respect to stalking, the problem that was not really a major problem (celebrity stalking) has engulfed something that is a problem and that has been a serious but unacknowledged problem for some time. The focus shifted to intimate partner abuse patterns that include stalking behaviours but ones that are quite different from celebrity stalking. Celebrity stalking (described by researchers as the erotomanic stalker) usually involves a stranger (male or female) who is delusional and believes that the celebrity is in love with him or her, although the stalker can harbour resentful feelings as well. The celebrity may or may not even be aware of the stalker's existence. The stalking behaviours found in intimate partner abuse involve intimidation and control techniques. Usually the stalker is male while the victim is female, and the parties involved have engaged in an intimate relationship. These characteristics are also described by researchers in the simple obsessional stalker category. These profile and relationship differences needed attention at the legislation phase but were ignored in the rush to respond to the "stalking problem."

As will be examined more fully in Chapter four, stalking legislation covers only a small portion of what is understood as male violence against women and goes on to cover other behaviours not included under the feminist umbrella of violence against women. Stalking legislation took pre-existing crimes that were not previously lumped together, added other behaviours not previously criminalized and labelled it 'stalking'. Many but not all of these crimes and other behaviours fall under the rubric of violence against women, an issue which feminists have for decades been trying unsuccessfully to get public attention and a government response. These efforts were instead, scooped, and possibly thwarted, by the moral panic response to the phenomenon called stalking.

The Emergence of a Stalking Moral Panic in the United States

The construction of stalking as a serious crime problem began in the United States with sensationalist media coverage of celebrity stalkings.[87] Prior to the emergence of the celebrity stalking moral panic, intimate partner stalking had been around for a long time with little to no attention paid to it. Early media reports on this kind of behaviour met with minimal reaction from the public. The media was responsible for the shift in target from intimate stalking to celebrity stalking. This target shift garnered a major public response because the problem was perceived as a new and serious crime by a new type of criminal that demanded immediate action. The result was a disproportionate response to the triggering behaviour of celebrity stalking. The celebrity stalking moral panic mirrors what occurred in Britain with the emergence of the mugging moral panic. Mugging had also been around for a very long time under the guise of robbery and assault. It was not until the media re-packaged the behaviour as a new type of crime imported from the United States that the British public responded. In both of these cases, behaviours that were previously ignored became the subject of extreme media attention once the behaviours via the media coverage shifted targets. This is the root of the moral panic.

Lowney and Best[88] conducted a study on the social construction of stalking in which they examined media coverage between 1980 and 1994, including newspapers, television and radio broadcasts, and magazines. Their focus was on how and in what form stalking gained public attention that would eventually lead to the construction of a new

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[87] *Finch, supra* note 1 at 101.

[88] Lowney, K.S., and Best, J. (1995). Stalking strangers and lovers: Changing media typifications of a new crime problem (as cited in Mullen, Pathé, & Purcell, 2000) at 38.

crime problem.[89] Although the media articles did not use a uniform terminology to describe the behaviours, they did present similar findings regarding the nature of the conduct and its likely perpetrators. Terms such as 'sexual harassment', 'obsessive fantasy' and 'psychological rape' were used to describe the conduct[90] and perpetrators were described as 'lovesick', 'compulsive' and 'possessive'.[91]

The first period described was from 1980 to 1988. During this time, articles and discussions referred to stalking behaviours as "psychological rape" and "obsessive following". The word 'stalking' rarely appeared. The behaviour being reported on involved the persistent pursuit of a victim, who was usually female. Conduct such as following, making phone calls, sending letters and unwanted gifts were commonly reported. The articles emphasized the non-violent nature of the conduct while acknowledging that physical violence occurred in extreme cases. The non-violent conduct was directed usually by men towards women,[92] who were depicted as partially responsible for the situation perhaps because this behaviour was usually occurring within intimate relationships. Authorities were portrayed as reluctant to intervene in these cases, often classifying complaints as "boyfriend trouble", even in cases of post-separation.[93]

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[89] *Ibid.*

[90] Mithers, C.L. (1982, October). Can a man be too mad about you? *Mademoiselle*, 36; Wilcox, B. (1982, October). Psychological rape. *Glamour*, 232-33 (as cited in Finch, 2001 at 101); *Lowney and Best, supra* note 88.

[91] Heil, A. (1986, December). Lovesick. *Mademoiselle*, 128-130, 136-138 (as cited in Finch, 2001); *Lowney and Best, supra* note 88.

[92] Kunen, J.S. (1987, October). The dark side of love. *People*, 89-98 (as cited in Finch, 2001).

[93] *Wilcox, supra* note 90.

According to Lowney and Best, these early reports of stalking failed to attract public attention because:

> "Whilst occasional press coverage viewed the behaviour as problematic, the issue had not yet been packaged and presented to command public attention".[94]

Attributing partial blame to the victim perhaps contributed to an unsympathetic reaction from the public and authorities. Perhaps the fact that these incidents were reported as taking place in the context of an intimate relationship normalized them, rendering them of little public interest or concern.

The second period covered 1989 to 1991. It was during this time that Lowney and Best noted the increasing use of the term 'stalker' or 'star stalkers'. The most notable case during this timeframe was the stalking-murder of actress Rebecca Schaeffer.[95] Celebrities were presented by the media as the primary victims of stalking, while the perpetrators were typically described as mentally disturbed and inappropriately obsessed. This period also marked the emergence of the stalking moral panic. By this time, media accounts of celebrity stalkings had the public's rapt attention.

In the final period of 1992-1994, Lowney and Best describe the media as re-defining stalking as a product of failed relationships and male violence as opposed to celebrity obsession. The media was describing stalking as "a women's issue...a widespread precursor to serious violence...a common problem...and a form of domestic violence against women".[96] As this Chapter will later show, this shift occurred based on a series of extreme stalking cases in California that involved average women as opposed to

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[94] *Lowney and Best, supra* note 88 at 39.

[95] *Ibid,* at 18; *Ogilvie, supra* note 22 at 34; MacFarlane, Bruce. (1997). People Who Stalk People. *U.B.C. Law Review*, 31:1 37-94 at 38.

celebrities. However it is more likely that these cases gained significant media attention because their extreme nature resonated with the celebrity cases that had already captured public attention.

The media shift from initial apathy toward stalking in the context of domestic violence to a sensationalized focus on celebrity stalking to a heightened awareness of, and sensitivity to, stalking as a frequent component of domestic violence is reflected in media responses to research on domestic violence issues. In 1988, Stark and Flitcraft[97] published a study that emphasized that women in domestic violence situations were at a heightened risk of physical violence after separation. This study included characterizations of behaviours that would now constitute stalking, with the clear implication that the history of the relationship is integral to understanding this form of stalking. However, this study did not gain attention from the media or the general public and stalking within the context of domestic violence remained unnamed and invisible. Stark and Flitcraft's findings coincide with the first (1980-1988) time period set out by Lowney and Best. By contrast, a similar study released by the Federal Bureau of Investigation (FBI) only a few years later, in the early 1990's, but after celebrity stalking had become a major issue, had a major impact. This study reported that 90 percent of American women who were killed by their husbands were stalked prior to their murders.[98] By this time the concept of stalking had garnered significant public attention that eventually led to the passage of anti-stalking legislation in the US. Moral panic had

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[96] *Lowney and Best, supra* note 88 at 18.

[97] Stark, E., & Flitcraft, A. (1988) Violence among intimates: An epidemiological review. In V.B. Van Hasselt, R.L. Morrison, A.S. Bellack, & M. Hersen (Eds.) *Handbook of Family Violence*, 293-317. New York: Plenum.

set in and provided a receptive audience for the FBI report such that the link between intimate partner abuse and what was now described as stalking could be recognized.

The repackaging of intimate partner stalking in a way that attracted significant public attention flowed from the media coverage of celebrity stalking which shares many of the same elements of other stalking claims, but which had been typified in a different way.[99] Media accounts of celebrity stalkings tend to be more dramatic and sexy than those of the general public. Perhaps more sympathy is aroused for a celebrity who is being stalked because of society's tendency to worship all things celebrity. Scores of magazines and television programs give readers and viewers a bird's eye view into the lives of celebrities. The public is generally eager to know the mundane to intimate details of celebrities' lives. Although most people cannot identify with a celebrity's lavish lifestyle, they can still become familiar with and feel connected in some way with a celebrity. So when the media reports a celebrity stalking, the public tends to be more interested in it, as well as more incensed by it.

Ironically, it is this kind of media hyped connection with a celebrity that can potentially evolve into stalking behaviour. In the 80's and 90's there were a number of extreme examples of stalking of media stars, including John Hinckley's attempted assassination of President Ronald Reagan to gain Jodie Foster's attention;[100] the stalking

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[98] National Institute of Justice. (1993). *Project to Develop a Model Anti-Stalking Code for* States. Washington, D.C. U.S. Department of Justice (as cited in MacFarlane, 1997).

[99] *Finch, supra* note 1 at 103.

[100] John Hinckley became obsessed with Jodie Foster after viewing the film "Taxi Driver". He subsequently enrolled at Yale University after learning that she was to begin attending the school. He made several attempts to contact her, and spoke twice to her on the phone. On March 30, 1981, Hinckley wrote a letter to Foster describing his intention to assassinate the President to impress her with an historical deed. That same day, he attended a function the President was attending, and fired

and attempted murder of actress Theresa Saldana by her obsessed fan Arthur Jackson;[101] and the 1989 stalking and murder of actress Rebecca Schaeffer by obsessed fan Robert Bardo.

The Schaeffer case is often referred to in the literature as the catalyst for implementing anti-stalking legislation.[102] Although this case was not the first serious attack on a celebrity by a fan, particular attention was focused on Bardo's behaviour that preceded the murder: how he persistently pursued Schaeffer, his attempts at establishing a relationship with her, and his escalating anger towards her when his advances were not reciprocated. This was in contrast to the attempted murder of Theresa Saldana that focused more on the violent nature of the crime, than the stalking behaviour that preceded the attack.[103] The attention on Bardo's behaviour prior to the attack is indicative of stalking behaviours slowly emerging as serious, deviant conduct in its own right. The Schaeffer case would lay the groundwork for the media's declaration that stalking was a new phenomenon that was on the rise.

The media pounced on the concept of stalking and constructed it as an unpredictable and potentially lethal form of violence. There was great public sympathy and interest about stalking because its victims were seen as innocent, hapless creatures.

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six shots. He shot the President in the chest and injured three government aides. Hinckley described his actions as an act of love for the actress.

[101] Arthur Jackson travelled from Scotland to Los Angeles specifically in order to kill Saldana. He acquired her address from either the Department of Motor Vehicle Records or a private investigator. He waited for her to leave her home, and then stabbed her ten times. A passing deliveryman saw what was happening and rescued her. In *Ogilvie, supra* note 22 at 34.

[102] *Ogilvie, supra* note 22 at 34; *MacFarlane, supra* note 95 at 38; *Lowney and Best, supra* note 88 at 18; Kamir, Orit. (2001). Every Breath You Take: Stalking Narratives and the Law. Ann Arbor: The University of Michigan Press at 179.

[103] *Lowney and Best, supra* note 88 at 52-53.

This view in turn absolved the victim of any responsibility for the behaviour, as opposed to the earlier reports of intimate stalking behaviours that had portrayed the victim as partially responsible. A second distinction from earlier descriptions was the recognition of stalking as often a prelude to extreme violence and the defining of the stalking behaviour itself as violent. As more cases were publicized, some precursors to physical violence were recognized as consistently present, such as threatening or following the victim. Therefore, any overt or implicit behaviour that was threatening, bizarre or inappropriate came to be seen as potentially dangerous.[104]

The media presented stalking as a new behaviour that was on the rise. Celebrities were depicted as particularly at risk, and the perpetrators were portrayed as obsessed and pathological.[105] The more dramatic stalker profiles, like the erotomanic or sociopathic became the focus and the stereotype of who a stalker is. One article described stalkers as ranging from:

> "...coldblooded killers to lovesick teens, huddled beneath an umbrella of psycholgocial syndromes: paranoia, erotomania, manic depression, and schizophrenia. To some degree, all are mentally or emotionally disturbed..."[106]

These types of stories of romance, violence, innocence and sickness caught the public's attention and stalking became a subject of fascination and alarm.

The media is an extremely influential source of information. It is a primary catalyst for shaping a condition or behaviour into deviance or delinquency, by presenting

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[104] Dietz, P.E., Matthews, D.B., van Duyne, C, Martell, D.A., Parry, C.D.H., Stewart, T., Warren, J. and Crowder, J.D. (1991). "Threatening and otherwise inappropriate letters to Hollywood celebrities", 36(1) *Journal of Forensic Sciences*, 185-209 (as cited in Finch, 2001 at 105).

[105] A fatal obsession with the stars. (July 31, 1989). *Time*, 43-44 (as cited in Cairns Way, 1994 at 385).

[106] Tharp, Mike. (February, 17, 1992). In the mind of the stalker. *US News and World Report*, 112, 28-30 (as cited in Cairns Way, 1994 at 385).

it as contrary to existing social interests and values. As Cohen and Hall et al have shown, the media is very capable of distorting the public's perception of the size and shape of a problem. Media coverage is selective, focusing on stories that are likely to capture the reader's attention, framed in ways intended to capture the reader's attention. The public's endless fascination with celebrities means that stories about them are more likely to be presented to the public than stories involving "ordinary" citizens, unless the latter involves a more bizarre or extreme case. The media coverage of celebrity stalking, coupled with what came to media attention (often the most bizarre or extreme celebrity cases), ultimately formed the basis for the public perception of stalking: that it primarily targeted celebrities, was random in nature, involved a range of behaviours from the fairly innocuous to extreme violence, and was perpetrated by deviant and mentally disturbed individuals.

Having laid the groundwork of sensationalistic horror and sick infatuation, the media brought the stalking issue closer to home by publishing stalking statistics, highlighting the dangers of stalking to the general public. In 1992, *US News and World Report* reported that approximately 200,000 people in the US exhibited a stalker's traits and that one person in thirty would be stalked in their lifetime.[107] *Good Housekeeping*[108] reported one person in forty and in 1993, *CNN Prime News*[109] estimated one person in twenty would be the object of stalking behaviours at some point during their life. At that

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[107] *Ibid* at 386.

[108] Safran, C. (November, 1992). A stranger was stalking our little girl. *Good Housekeeping*, 183, 263-266 (as cited in Finch, 2001 at 107).

[109] CNN Prime News. (January, 1993). Michigan legal system takes stalking very seriously (as cited in Finch, 2001 at 107).

time, the research on stalking was extremely limited. Little was known about what constituted stalking and how it should be measured. There was no accepted definition of what behaviours were included in stalking, nor the different possible victims of stalking. The statistics cited and repeated by the media seemed plucked out of thin air, designed to sell newspapers and win television timeslots rather than inform the public. According to Best,[110] statistical estimates of social problems often take on a life of their own. They are repeated by other media sources and eventually become solidified as fact.[111]

The invocation of stalking statistics perhaps marked the zenith in the generation of a moral panic response to stalking. As demonstrated by Cohen and Hall et al with respect to the media generated moral panic responses to the Mods and Rockers and mugging, people will become more frantic about a "social problem" like stalking if they know it can intimately affect them. The statistics reported by magazines and television programs brought stalking into the average person's life. The combination of a celebrity focus that garnered initial attention to stalking, followed by a shift to the risk to ordinary people, proved a very powerful way to create a strong public reaction.

The stalking statistics brought forth by the media in the early 90's amplified the notion that stalking was on the rise, not only affecting celebrities, but 'ordinary' citizens as well. These "new" statistics provided by the media presumably related to the pre-existing problem of intimate partner abuse that had languished in relative media and public obscurity. In publishing these statistics and shifting the focus to the ordinary citizen, the media made no mention of the important differences between celebrity

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[110] Best, J. *Threatened Children: Rhetoric and Concern about Child Victims*. (1990). Chicago, Illinois: University of Chicago Press (as cited in Finch, 2001 at 106).

[111] *Ibid.*

stalking and intimate partner stalking. The public transposed their understanding of celebrity stalking to the media's statistics, assuming large numbers of celebrity type stalkers to be sick strangers becoming infatuated with beautiful women. They did not connect this to the neighbour constantly arriving at his ex-wife's doorstep and threatening her.

The differences between celebrity and intimate partner stalking are significant and warrant attention in the analysis of the problems and in proposed responses. Physical violence in celebrity stalking cases is in fact uncommon.[112] Celebrity stalking cases ending in violence seem more prevalent than they are due to the media's disproportionate coverage of them.[113]

The flurry of media coverage on stalking had both positive and negative implications for intimate abuse stalking. Although the issue was finally getting media attention, abused women and women's groups were unhappy about how victims were being portrayed by the media. Cairns Way argues that "the media coverage of stalking resonated with cultural messages about heterosexuality and the inevitability of male sexual aggression"[114] The media continued to portray "ordinary" victims as passive, objectified, scared, vulnerable, and powerless.[115] As Cairns Way points out, this kind of pornographic imagery made the subject fascinating to readers and viewers. This is

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[112] *Mullen et al, supra* note 4 at 55.

[113] *Ibid* ,at 56. Violence is likely to occur when the perpetrator feels persistently rejected, realizes the hopelessness of the pursuit, or harbours animosity rather than affection for the person. One distinct objective of many celebrity stalkers who turn violent is the achievement of fame or notoriety. To the extent that the media offers stalkers this opportunity, they are actively promoting the stalking of public figures. By reporting on these cases and glamourizing them, the media is fulfilling the stalker's dreams of a pseudo-relationship with the celebrity and potentially encouraging others to follow the same pattern.

[114] *Cairns Way, supra* note 3 at 387.

reminiscent of what initially made celebrity stalking interesting to the public – a mixture of public excitement and disapproval at the thought of a celebrity being pursued and in some cases attacked by a stranger.

In 1993, during the media frenzy surrounding celebrity stalking and the publishing of stalking statistics, there were four cases of partner/acquaintance stalker murders in Orange County, California. In three of the cases, the women were systematically stalked and murdered by former intimate partners despite court issued protection orders. In the fourth case, the woman was stalked and murdered by an acquaintance.[116] Although these cases involved "ordinary" citizens, they gained media attention, probably because they happened in rapid succession and were examples of extreme stalking cases that resonated with the celebrity cases that had already captured public attention. The cases involved violent acts by an obsessed stalker and in this mirrored aspects of celebrity stalking. Further, the media did not address the differences or draw attention to the histories of abuse or the context of domestic violence. These cases were covered as akin to celebrity stalking. On the heels of these high-profile cases, Municipal Court Judge John Watson was prompted to propose anti-stalking legislation in California. He felt that existing protection orders, safety bonds, and misdemeanor charges, were inadequate to protect women who knew in advance that their lives were at risk.[117]

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[115] *Ibid.*

[116] The woman rebuffed the man's persistent advances, still, he held the delusional belief that she was in love with him. He stalked her for ten years before killing her when he learned she was getting married. He decided that if he could not have her no one would. He drove his car into her car, threw sulphuric acid and a flammable liquid on her before igniting it and leaving her to burn to death inside the car. In *Kamir, supra* note 101 at 179.

[117] *Gill and Brockman, supra* note 7 at 9.

Based on the intense media coverage, the general public and politicians pushed for the criminalization of stalking. Existing legislation was deemed ineffective in protecting stalking victims. There was widespread concern from the public that the legal system left victims of stalking virtually remediless. Police were frustrated by their inability to arrest someone for harassment in cases where it had not yet escalated to physical harm. Advocates of anti-stalking statutes argued that victims were being forced to wait in fear of being physically attacked because existing provisions did not permit police to intervene beforehand.[118]

Prior to the introduction of anti-stalking provisions, the primary recourse for stalking victims in most states was an injunctive remedy such as a protection order or a restraining order.[119] These provisions were supposed to have alleviated the victim from the burdens of prosecution and evidence and place those burdens with state law enforcement officials.[120] But they had proved ineffectual. Long standing criticisms of injunctive remedies gained new currency. These criticisms included concerns that orders are not available to every victim of stalking and apply only to certain types of stalking[121];

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[118] *Sohn, supra* note 68 at 206-207.

[119] In the US, a protective order is a court order or decree protecting a person from enumerated behaviours by a specific individual. A restraining order is a temporary injunctive order that forbids a defendant from performing a threatened act until a hearing on the application for a permanent order. A violation of an injunctive order is usually prosecuted as a contempt of court but can be considered a criminal offence.

[120] *Sohn, supra* note 68 at 210.

[121] In some States, protective orders were only available to protect victims from abuse by spouses or someone with whom the victim had cohabited. This meant that victims of stalking by acquaintances or strangers could not seek protection from an injunctive order. Also, the variety of stalking behaviours meant that victims of a particular kind of stalking not covered by an order would be left unprotected. *Ibid,* at 208.

that orders are easy to avoid on technicalities because of their specific nature[122]; that the procedural requirements for obtaining an order are complex and expensive[123]; that orders often aggravate the perpetrator rather than deter the behaviour[124]; and that law enforcement officials were often reluctant to pursue violations unless some form of physical violence had occurred. Although injunctive remedies are still available, these same criticisms continue to plague them.[125] A primary purpose of implementing anti-stalking provisions was to provide police with an immediate cause to make an arrest and the state an immediate reason for prosecution.

California's anti-stalking legislation was the first to emerge in 1990. It prohibited a "course of conduct that included a credible threat, a wilful and malicious intention to place a target under reasonable fear for her or his bodily safety, and the actual arousal of such reasonable fear".[126] This legislation served as a model for other US jurisdictions that quickly implemented their own anti-stalking provisions. Between 1990 and 1993, every American state had enacted new legislation or amended existing statutes to prohibit stalking, while the federal government passed a Bill making such behaviour a federal

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[122] The perpetrator could simply change his method of harassment to avoid the literal language of the order. *Ibid.*

[123] Victims were discouraged from pursuing an injunctive order simply because they could not afford to do so. *Ibid.*

[124] Out of fear, many victims did not pursue an order to avoid the perpetrator's wrath. Victims did not consider a piece of paper to be sufficient protection from their pursuer. In one case in particular, a woman obtained a protective order against her estranged spouse. Her body was found shortly thereafter with the protective order knifed to her chest. In Gerbeth, V.J. (1992). Stalkers: Who They Are. *Law and Order*, 40(10), 138-143 (as cited in Finch, 2001 at 250-251).

[125] Bradfield, Jennifer. (1998). Anti-Stalking Laws: Do They Adequately Protect Stalking Victims? *Harvard Women's Law Journal*, 21, 229-266.

[126] *Kamir, supra* note 101 at 179.

offence.[127] In addition, the Los Angeles Police Department created the Threat Management Unit to deal specifically with stalking cases.

The acceptance of stalking as a social problem in the US clearly influenced other countries, particularly Canada, the United Kingdom and Australia who share the same language and a similar common law system. In the early 1990's, there were growing concerns about stalking behaviour within these other countries. Parallels could be drawn between their experiences with stalking and that of the US. The dominance of the US media and of US celebrities meant that the media hype of the stalking phenomenon extended far beyond the US borders. The many articles concerning celebrity stalking in the US were widely read by audiences in other English speaking countries. As well, Canadian, British and Australian newspapers and television programs chronicled the more extreme cases of celebrity stalking happening in the US.[128] The American publicity given to stalking was influential in raising awareness of the problem, in determining how stalking was understood and in shaping the legislative response of other nations, including Canada.[129]

The inducement of moral panic by the US media is primarily responsible for the criminalization of stalking in the US and abroad. This process from recognition to legislative response accords fairly closely with the moral panic phenomenon described and critiqued by critical criminology scholars. The media defined the persistent pursuit

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[127] *Mullen et al, supra* note 4 at 269.

[128] Looking for trouble: fan letter to the adoring masses. (1992). *The Guardian*; US clamps down on the psychos who stalk the stars. (1992). *The Times*. These articles make reference to Mark Chapman who stalked and killed John Lennon, and John Hinckley who stalked Jodie Foster and attempted to assassinate President Ronald Reagan.

[129] *Finch, supra* note 1 at 98.

of a person by another, culminating in fear and/or physical harm to the victim, as a serious threat to societal values and interests. Those whom the public admired and adored were being hounded and intimidated by mentally deranged misfits. The media depicted this threat in its most basic form as a hunter (stalker) stalking its prey (most often a celebrity victim).[130] Due to a rapid succession of high profile cases, public concern about stalking mounted swiftly. Authorities responded with proposed amendments to existing legislation and the creation of new anti-stalking provisions.

A moral panic response to a media constructed problem, whether real or illusory, potentially gives rise to hasty band-aid solutions that have little hope of achieving anything that is beneficial to society or that can effectively respond to the problem. This is the case with the stalking phenomenon. There was no new crime that was sweeping the nation. Stalking was simply an existing crime with a new label. Countless women had for a long time endured stalking-like behaviour, including mental and physical violence (primarily within intimate relationships) before the media pounced on the issue. It was not until the media began covering higher profile cases involving celebrities that the behaviour, re-packaged as stalking, started to gain significant attention, thereby pressuring the government to pass new legislation. As Chapter four will show, the media panic process experienced in the US was repeated by Canada, which followed on the heels of US action with the passage of its own anti-stalking provisions.

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[130] *Cairns Way, supra* note 3 at 387.

Chapter Four: The Canadian Experience

This Chapter will examine the process that led to the passage of Canada's anti-stalking provisions, with particular focus on how swiftly the legislation came about, which key players were included and excluded from the process and the implications that arise from that, and the criticisms and concerns that were voiced about implementing new legislative provisions. This process was fuelled by the stalking moral panic that had recently emerged in the US.

Canada's early perceptions of stalking were based on the same US media coverage of celebrity stalking that gave rise to US legislation. In addition to this US media coverage, Canadian media chronicled Canada's own series of horrific stalking-homicide cases that took place in the early 90's. Beginning in 1991, a series of Canadian stalking cases involving non-celebrities grabbed media headlines. As in the US, these media stories built upon rising public panic in response to media coverage of celebrity stalking and to the media promulgated statistics on the frequency of stalking. Patricia Allen was stalked for several months by her estranged husband, Colin McGregor, before he killed her with a crossbow in broad daylight on a busy Ottawa street. In late 1992, Ronald Bell shot twenty year-old Terri-Lyn Babb, an acquaintance, in the back of the head after stalking her for two years. In early 1993, Andre Ducharme murdered Sherry and Maurice Paul before killing himself. Ducharme was a close friend of Maurice Paul and had become obsessed with Sherry Paul.[131]

These Canadian stalking cases were a marked departure from the high profile

[131] *MacFarlane, supra* note 95 at 39-40.

celebrity cases that dominated the media at the time because they covered the range of relationship dynamics from intimate to friend to acquaintance. The media attention to celebrity stalking had captured public attention and the coverage of the stalking of ordinary women brought the threat home to the ordinary media consumer. Stalking was no longer linked exclusively to celebrities; the average person was considered just as vulnerable, a scary prospect for the public to face. The murders occurring in fairly rapid succession and the dramatic methods of killing were likely additional factors in the heightened public response and provided additional motivation for the review of existing legislation and the decision to introduce new anti-stalking provisions in Canada.[132]

Making the Case for Section 264

During the August 1992 Uniform Law Conference in Cornerbrook, Newfoundland, a resolution was put forward by Saskatchewan that is considered the first public step taken towards creating specific anti-stalking provisions in Canada.[133] Representatives from all ten provinces, both territories, the Canadian Bar Association, and the defence bar had come together to consider various proposals for reform to the *Criminal Code*. Saskatchewan proposed "that section 423 (c) and (f) be redrafted to prohibit the activities listed therein, where the person knew or was reckless as to whether his or her actions would harass or cause fear to the complainant".[134] At the time, section 423(a-g) addressed compelling someone to do something by resort to threats or violence, through intimidation, by persistently following someone, by besetting or watching

[132] *MacFarlane, supra* note 95 at 63; *Gill and Brockman, supra* note 7.

[133] *MacFarlane, supra* note 95 at 63.

someone, or by blocking a highway.[135] After debate, the resolution was carried. Although at this stage the proposed reform was directed to section 423, the seeds for Canada's eventual anti-stalking legislation had been planted.[136]

In September 1992, then Attorney-General of Manitoba, the Honourable James McCrae, wrote to then Federal Minister of Justice, the Honourable A. Kim Campbell, urging action in the area of violence against women with a particular focus on stalking.[137] The request would prove to be prescient in light of the stalking-murders of Sherry and Maurice Paul that occurred in Winnipeg soon after in January 1993.[138] Campbell's response was favourable to the request:

> "As you are aware, the treatment of women in our society and the question of violence against women are issues of grave concern to me and should be of concern to all Canadians. In order to improve the situation, we must look not only to our laws, but also to our beliefs and attitudes toward women and their role in Canadian society. Canadian women are saying that they are afraid of violence and we must address these fears. Certainly the issue you have raised in this context, that is "stalking", is important and should be given serious consideration."[139]

In December 1992, on the heels of McCrae's request, a private member's Bill was tabled in the House of Commons by George Rideout, the Opposition Justice Critic. The Bill proposed that the Criminal Code be amended by adding a new section, s. 246.1(1):

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[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.*

[137] *Ibid.*

[138] *Ibid.*

[139] *Ibid.*

> "Every one who wilfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury is guilty of an indictable offence."[140]

The Bill proposed a maximum $1000 fine and/or one year in jail for a first offence and $5,000 and/or two years imprisonment for subsequent offences. An enhanced penalty was also available for accused who while stalking had violated a protective court order[141] granted to the victim. The Bill did not proceed further because the Federal Department of Justice began consultations with provinces and interest groups about the stalking issue.

In April 1993, the Federal Justice Department held an "Exchange of Information Meeting on Stalking" in Ottawa. [142] A background briefing note circulated during the Exchange reflects the mood of the general public and government at the time:

> " Stalking is a phenomenon that is increasingly attracting media attention in Canada and the United States. More and more cases are being reported of women being stalked by men they used to be involved with and from whom they may be trying to escape. Recent cases in various Canadian cities in which women were stalked and killed by men they knew have greatly increased the public concern directed at this issue...These cases made it clear that a new provision in the Criminal Code was urgently needed to explicitly criminalize these types of acts".[143]

The briefing note reflects the shift away from celebrity stalking towards the plight of average women that had taken place in the media and that had fuelled the moral panic response. The emphasis placed in the note on the recent high profile cases of women

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[140] *Ibid.*

[141] See Appendix A for definition.

[142] Department of Justice. (April 1993). *Exchange of Information Meeting on Stalking: Information Document.* Ottawa, Ontario. For further details about the meeting, see *Cairns Way, supra* note 3.

[143] *MacFarlane, supra* note 95 at 64, 67.

being killed by men whom they knew accords with this shift in focus. The issue is being presented as a new crime or threat, as opposed to the enduring problem of male violence against women. This briefing note has a sense of urgency about it that responds to the public moral panic and indicates government officials were mobilized and ready to make changes.

This meeting reviewed existing Criminal Code provisions that could be used to combat stalking behaviours and the shortcomings of these provisions in explicitly addressing stalking. The following provisions were examined: ss. 177 (prohibits loitering or prowling at night on another person's property near a dwelling house), 264.1 (prohibits knowingly uttering a threat to cause death or serious bodily harm to someone), 372 (prohibits making repeated telephone calls to someone with the intent to harass him), 430 (wilfully obstructing or interfering with someone's lawful enjoyment or operation of property) and 423 (prohibits intimidation).[144]

At the time, section 423, the prohibition against intimidation, was considered Canada's main anti-stalking provision. This provision prohibits,

> "using violence or threats of violence against someone or his spouse or children, or intimidating someone by threats that violence will be done to him or his relatives, or persistently following someone about, or watching where he lives or works, for the purpose of compelling him not to do anything that he has a lawful right to do, or compelling him to do anything that he has a lawful right not to do".[145]

This section was particularly criticized by victims and women's groups for reasons such as difficulty of proof and inadequacy of coverage.[146] Based on section 423's arrest and

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[144] *MacFarlane, supra* note 95 at 64-65.

[145] *Ibid,* at 67.

[146] *Ibid.*

evidentiary limitations, police were required to catch the perpetrator while in the process of committing the crime.[147]

To a varying degree, these provisions already covered behaviours that are included in the term stalking. However, it was believed that the provisions on their own did not adequately address all aspects of stalking and therefore new legislation was required. The consensus by law enforcement agencies and victims was that existing provisions could not be simply amended to include the aspects of stalking that were considered missing because that would not have explicitly criminalized stalking behaviours. In addition, they saw existing provisions as inadequate due to their specific requirements that placed a heavy evidentiary burden on the Crown (eg: establishing an overt threat or specific intent to harm), arrest and sentencing limitations and common classification as summary conviction offences.[148]

Stalking had been packaged by the media as an escalating new crime that warranted new legislative action. Amendments to existing provisions would not have been considered adequate by the public. The explicit naming and description of stalking were perhaps the primary reasons for the new legislation.

During the same Information Exchange, criticisms about existing provisions also spurred discussion about the content of the proposed legislation, including: whether or not the legislation should require a threat to kill or seriously hurt someone; what mental element (mens rea)[149] is appropriate for the offence and should recklessness be included

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[147] Mulkern, Tara Lee. (1996). *The Criminalization of Stalking: Addressing the Behaviour or the Politics?* Carleton University: Ottawa, Ontario at 23; *Gill and Brockman, supra* note 7.
[148] See Appendix A for definition.

[149] *Ibid.*

as a form of mens rea; should the level of fear experienced by the victim be assessed subjectively or objectively; should the offence only protect the victim or be broad enough to cover harm directed at the victim's family or new partner; and what the maximum penalty should be.[150]

It was also during this meeting that the term "stalking" was abandoned in favour of "criminal harassment". Representatives of women's groups suggested the change in order to avoid the offensive imagery of a hunter and its prey, which they believed contributed to the objectification of the victim and the sensationalism of the behaviour.[151] Even though the change in terminology was promoted by some women's groups, the new term remains vulnerable to feminist critique for several reasons. First, the term "criminal harassment" masks the fact that most of its victims are women. "Criminal harassment" does not really convey the reality of women's experiences with violence. Re-naming an issue, like stalking, that has come to be recognized as of particular concern to women and as largely affecting women, can potentially disempower women and degender the offence.[152] The renaming of stalking is reminiscent of the government's renaming of "rape" to "sexual assault", a change that was also advocated by women's groups at the time but has since come under considerable feminist critique.[153] Even though the term itself is gender neutral, rape is recognized as a predominantly gender-specific crime. Renaming rape as sexual assault redefined rape as a gender-neutral crime. This also had the effect of disempowering women. The term "sexual assault" did not suitably convey

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[150] *MacFarlane, supra* note 95 at 65.

[151] *Cairns Way, supra* note 3 at 380.

[152] Smart, Carol (1989). *Feminism and the Power of Law*. London: Routledge at 109.

[153] *Cairns Way, supra* note 3 at 380.

the gender specific experience of being raped. Lastly, the fact that the words "harass" and "harassment" are not clearly defined within the *Criminal Code* raised additional concerns about the importation of this terminology into the *Criminal Code* provision.

On April 27, 1993, three weeks after the Information Exchange, then Minister of Justice, Pierre Blais tabled Bill C-126, containing the proposed criminal harassment legislation. The proposed legislation provided the following:

> (1) No person shall, without lawful authority and with intent to harass another person or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably to fear for their safety or the safety of anyone known to them.
>
> (2) The conduct mentioned in subsection (1) consists of
> (a) repeatedly following from place to place the other person or anyone known to them;
> (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
> (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
> (d) engaging in threatening conduct directed at the other person or any member of their family.
>
> (3) Every person who contravenes this section is guilty of
> (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
> (b) an offence punishable on summary conviction.[154]

Criticisms of Bill-C126

During the May 6, 1993 debate on second reading of Bill C-126, concerns were raised about the proposed legislation being too broad or too narrow to adequately deal with stalking behaviours.[155] Many of these criticisms echoed the earlier criticisms of the

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[154] *MacFarlane, supra* note 95 at 65-66.

[155] *Ibid,* at 67.

existing *Criminal Code* provisions currently being used to respond to stalking behaviours, raising concerns that this new legislation did not really move the issue forward at all.

The following criticisms and concerns were raised by representatives of government departments and private organizations who had been active on the stalking issue: the Ontario Attorney General and Minister responsible for Women's Issues, the Chair of the Criminal Justice Section of the Canadian Bar Association, the Assistant Deputy Attorney General of Manitoba, and the Canadian Police Association. All of these organizations spoke to the proposed legislation and raised valid points about both the positive and negative aspects of implementing anti-stalking legislation. A number of suggestions for improvements to the legislation were made. Perhaps the most obvious group missing from these later discussions was women's groups. As will be discussed below, their role throughout this entire process was very limited.

Marion Boyd, then Ontario Attorney General and the Minister responsible for Women's Issues, recommended that further discussions and specific amendments were needed before implementing new legislation. She had three primary concerns with the Bill. First, it lacked a preamble[156] that would contextualize the reality of women's experience in this area, and in the area of criminal law generally.[157] By not including a preamble similar to the one found in Bill C-49,[158] it would be very difficult to understand the social context that frames women's experiences of criminal harassment. She argued that a preamble was necessary in order to emphasize male violence against women especially within intimate relationships. Furthermore, without a preamble the legislation

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[156] See Appendix A for definition.

[157] *Ibid,* at 68.

could potentially be used to address issues not necessarily related to violence against women.

Second, Boyd was concerned about the legislation requiring that the victims' fear for their safety be "reasonable". This requirement gave rise to the concern that victims would be subjected to cross-examinations about their mental health or character, possibly resulting in re-victimization.

Boyd's third concern was that the requirement of proof of intent would be very difficult to meet, considering the apparently innocuous nature of some forms of harassing behaviour.[159] For example, it might be difficult to prove a person's intent to harass another if he was merely walking along the same sidewalk as another person. It is context and history that can transform innocuous behaviours into threatening behaviours. For example an apparently innocent walk can constitute criminal harassment if that person is routinely following the same route as his former intimate partner and making his presence known to her. To establish the required level of intent in criminal harassment cases, the Crown must prove not only a fault or mental element that relates to the performance of the act in question, but some ulterior intent or purpose.[160] Although the Bill included the language "recklessly as to whether the other person is harassed", even proving a reckless level of intent might be challenging.

Michelle Fuerst, the Chair of the Criminal Justice Section of the Canadian Bar Association argued that the term "harass" made the section overly broad because it could

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[158] *MacFarlane, supra* note 95 at 68; *Cairns Way, supra* note 3 at 395.

[159] *Cairns Way, supra* note 3 at 395.

[160] Roach, Kent. (2000). *Criminal Law*. Second Edition. Irwin Law: Toronto, Ontario at 341.

include any behaviour that was merely "annoying".[161] She further suggested that the reasonableness standard not be assessed from a strictly male perspective. In order to broaden the test to ensure the inclusion of the experience of women, Fuerst proposed that the wording be changed to, "reasonably fear in all of the circumstances". Boyd disagreed with this addition. She felt it did not provide much substance to the legislation because circumstances are already considered within the concept of reasonableness.

The Assistant Deputy Attorney General of Manitoba observed that during a two month period, six people (five women and one man) were murdered in Manitoba and a seventh one nearly died due to stalking behaviour that had escalated into physical violence. He emphasized the need for law enforcement to intervene quickly and early and for the Crown to be able to prosecute an accused regardless of his or her intent to harm the victim. Like Boyd, he felt that the federal government's insistence on a specific intent or an adverting to the risk (as is required in recklessness) would defeat the social purposes of the law. He reasoned that the proposed legislation did not necessarily capture the accused's intentions. Instead the accused may reason that he or she can't live without the victim, loves the victim or is protecting the victim and that his or her actions were not criminally intended to harm or cause fear.[162]

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[161] These same kinds of concerns were voiced after the passage of 264 with a number of unsuccessful *Charter* challenges to section 264. These *Charter* challenges focused on section 264 being vague and overly broad and therefore void under sections 2(b) (Freedom of expression) and 7 (Life, liberty and security of the person). *R. v. Hau*, [1994] B.C.J. No. 677, Vancouver Registry No. 70202KC2 (B.C. Prov. Ct.) (see also *R. v. Hau*, [1996] B.C.J. No. 1047, Vancouver Registry No. CC941071 which upheld the constitutionality of the section but allowed an appeal and ordered a new trial); *R. v. Sillipp* (1997), 120 C.C.C. (3d) 384 (Alta. C.A.); *R. v. Cloutier*, [1995] Montreal No. 500-01-005957 (Que. Ct. (Cr. Div.)); and *R. v. Yonik*, [1996] O.J. No. 3765 (Ont. Ct. (Prov. Div.)) (as cited in Gill and Brockman, 1996 at 13-15).

[162] *MacFarlane, supra* note 95 at 69.

The Canadian Police Association expressed additional concerns about the passing of the Bill if it was not accompanied by education and procedural information for police and other professionals in the criminal justice system, as well as victims. The Association acknowledged that the attitudes of police, judges and Crowns towards criminal harassment cases and victims are important to the proper enforcement of the legislation. They stressed the importance of education as the key component for police and justice professionals in order to effectively enforce the legislation and provide appropriate support to victims.[163]

In May 1993, Bill C-126 was amended by adding two changes. It would now be sufficient to show that the accused knew that the victim was being harassed or that he or she was reckless as to whether the victim was being harassed rather than show that the accused intended to harass the victim. Second, the objective test[164] regarding the victim's level of fear was to be measured against "all of the circumstances" of the case.[165]

These changes did not respond to all of the concerns raised, particularly concerns relating to the broad wording of the legislation. Still, the Bill proceeded apace. In less than six weeks, the Bill proceeded through first, second and third readings in the House of Commons. After passage at third reading, the Bill was sent to the Senate for its consideration. The Senate reported the Bill without amendment and the Bill received Royal Assent[166] on June 23, 1993.[167]

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[163] Jessop, Neal, Kingston, James, and Newark, Scott. (1993). *Canadian Police Association Brief to the Legislative Committee Bill C-126,* Ottawa, Ontario (as cited in Mulkern, 1996 at 30).

[164] See Appendix A for definition.

[165] *MacFarlane, supra* note 95 at 69-70.

[166] See Appendix A for definition.

Exclusion from the Political Process

Criticisms abound from many women's groups regarding the political process leading up to the creation and implementation of Bill C-126. The legislation was passed with almost complete disregard for the most relevant stakeholders: women. The discussions that were held with women's organizations were extremely limited, thereby denying them a chance to participate in a meaningful way. These women's groups contended that any government initiative made on behalf of women without their participation or consent lacks legitimacy. The Department of Justice gave potential participants less than a week's notice to attend the information exchange that was the antecedent to the legislation that followed a mere three weeks later. Approximately twenty representatives from women's organizations were in attendance at the information exchange, and unanimously positioned themselves against the stalking initiative. Instead of new legislation, they emphasized the need to improve the application and enforcement of existing laws and to bring about attitudinal and systemic change. Although the participants pushed for more meaningful consultation with stakeholders, Justice Minister Blais asserted the need for a quick legislative response and introduced Bill C-126.

What is particularly alarming about the expedited passage of the legislation is that it was introduced even though not a single national women's organization had requested new laws; none had even developed a position on anti-stalking laws at the time the legislation was introduced. With the introduction of Bill C-126, women's groups were pigeonholed into responding to the issue from within the language and structure of the legislative process and the proposed legislation; there was no room made for women-

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[167] *Cairns Way, supra* note 3 at 390-391; *MacFarlane, supra* note 95 at 69.

defined approaches.[168] Many women's groups maintained that the criminal justice system's historic failure to protect women was an attitudinal and systemic failure due to the marginalization of women's experiences; the problem was not the absence of specific legislation.[169] Participants from women's organizations, the provincial attorneys general, the Canadian Bar Association, victims' groups, and police associations raised similar concerns regarding the government's failure to meaningfully consult with survivors and women's advocates prior to introducing the Bill.[170]

Section 264 is inherently flawed because of the process involved to create it. Canadian women were left with legislation (that was drafted without their significant inclusion or response) that failed to address the systemic nature of violence against women.[171] It is a separate and additional question whether or not, despite this serious flaw, section 264 has nonetheless effectively extended protection to victims of stalking, most notably within the context of violence against women and domestic violence? This question will be explored in Chapter five.

As part of the stalking moral panic that swept the US and Canada, the implementation process behind section 264 was not reflective of women's experiences with violence. Section 264 was nothing more than a knee-jerk reaction to media coverage that re-packaged an old crime and gave it a new label. The combination of sensationalized media coverage, a perceived new threat, and heightened public awareness and fear led to swift government action that was not well thought out. Consistent with a

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[168] *Cairns Way, supra* note 3 at 390.

[169] *Ibid.*

[170] *Ibid,* at 394.

[171] *Ibid,* at 400.

moral panic response to a social problem, the government jumped into action before knowing exactly what it was dealing with. The problem was not clarified before a solution was put in place.

Chapter five will look at the government reports that have been published since the passage of section 264. The significant problems experienced by researchers in their attempts to accurately determine how prevalent stalking has become and to assess the overall effectiveness of the legislation, reinforce the critique that the stalking problem was not adequately understood by the government prior to legislative action.

Chapter Five: Measuring the Effectiveness of Section 264

Since the passage of Canada's anti-stalking provisions, four reports have reviewed the legislation and tried to gauge its effectiveness thus far. This Chapter will examine all of the known Canadian reports on criminal harassment that were completed as of September 2004.[172] One report was conducted on behalf of the Federal Department of Justice,[173] two on behalf of the Canadian Centre for Justice Statistics (CCJS),[174] and one on behalf of the BC Institute Against Family Violence.[175]

The purpose of the studies conducted by Gill and Brockman, Kong, and Hackett, on behalf of the Federal Department of Justice and CCJS respectively, was to examine how the justice system had handled criminal harassment cases since the passage of the legislation in 1993. Each of these studies focused on larger urban centres and was not nationally representative. Gill and Brockman's study largely focused on police and Crown case files, charging and conviction rates and sentencing patterns, the enforcement of the legislation by law enforcement officials and the judicial system (in terms of attitude; victim awareness and access to available protection; and the effectiveness of available protection, particularly protection orders). Kong and Hackett's reports largely relied on police-reported statistics collected by the Canadian Centre for Justice Statistics (CCJS) and the policing community that were presented in the Revised Uniform Crime

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[172] This review will not include *A Handbook for Police and Crown Prosecutors on Criminal Harassment* by the Department of Justice because it provides guidelines for legal professionals to follow in criminal harassment situations and does not address issues relating to the effectiveness of the legislation.

[173] *Gill and Brockman, supra* note 7.

[174] *Kong, supra* note 8; *Hackett, supra* note 9.

[175] *Pacey, supra* note 10.

Reporting Surveys (UCR Survey and UCR2 Survey respectively). Kong's report, produced in 1996, was the first attempt at producing a detailed analysis of criminal harassment data and involved the participation of 130 police agencies. Hackett's 2000 report is an update of Kong's findings. This report outlines the characteristics of criminal harassment incidents, characteristics of the accused and victim for 1999, and identifies trends over a five-year period (1995-1999). Like Kong, Hackett relied on police reported statistics in the UCR2 Survey to which 106 police forces reported as well as information collected from adult criminal courts to review the charges laid and sentences imposed for cases involving criminal harassment. Both reports provide only a partial picture of the extent of criminal harassment in Canada and how the legislation is being enforced by the police and courts. The reports are based on a non-random sample of urban police centres (not all Canadian police departments reported to the UCR and UCR2 Surveys) therefore collected data is not nationally or geographically representative.[176]

A fourth study was conducted by Pacey on behalf of The BC Institute Against Family Violence. The purpose of the study was to determine the extent to which section 264 was being used by Vancouver's metropolitan police officers in cases involving a current or ex-intimate partner. In-person interviews with twenty police officers was the methodology used by Pacey to learn more about their response patterns to these kinds of cases. Although the scope of this study is limited to one urban area, its findings may still have implications for other police departments across Canada. This chapter will provide an overview of the four reports, a critical assessment of their findings and a brief discussion of their implications with respect to the legislation.

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[176] *Hackett, supra* note 9 at 3.

The Gill and Brockman Report

In 1996, Gill and Brockman conducted a review of section 264 for the Department of Justice. The key purpose of the review was to assess whether or not the legislation was functioning properly by providing a specific response that would protect women from physical attacks and harassment, recognizing that these often occurred within the context of domestic violence.[177] The review was primarily based on an analysis of a sample of 601 criminal harassment cases that were handled by police, Crown Attorneys, and courts from 1993 to 1996 in Vancouver, Edmonton, Winnipeg, Toronto, Montreal and Halifax. The review included open-ended interviews with victims and with a small number of police officers, Crown Attorneys, defence attorneys, federal and provincial justice policy officials, and victim advocates (including representatives from women's shelter organizations and court-based victim assistance programs).

Four hundred and seventy-four criminal charges were laid in the cities studied during the three-year period under review. The vast majority of accused were male (91 percent) and the majority of victims were female (88 percent). Cases involving partners or former partners[178] were a slight majority (57 percent) over cases involving friends, acquaintances or co-workers that did not involve a current or previous intimate relationship (28 percent); total strangers (12 percent); and cases involving the stalking of a public figure (0.7 percent). These findings indicate the predominance of the simple

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[177] *Gill and Brockman, supra* note 7 at vii.

[178] Of the 340 cases, 95 percent involved a male accused and a female victim. Sixteen women were accused of criminal harassment against a partner or former partner (with twelve of them charged) and there were five same-sex partner cases (two involving men and three involving women).

obsessional form of criminal harassment in which the stalker-victim profile involves a prior intimate relationship (current or former spouses or current or former partners) and the victim is most often female while the stalker is usually male.[179] The deranged celebrity stalker who initially garnered so much media attention is virtually absent from the statistics.

Although Gill and Brockman's findings indicate the legislation was being employed frequently by both police and Crowns to lay harassment charges, 58 percent of the 474 criminal harassment charges in the research sample were stayed or withdrawn by Crown counsel before they reached trial. Charges were withdrawn or stayed at a consistent rate although in Vancouver and Edmonton charges were withdrawn by Crown counsel at a slightly higher rate (28 percent and 26 percent of cases) in comparison to Halifax where only one case out of a total of 10 cases was withdrawn by Crown counsel. In cases where the charge was stayed or withdrawn, approximately 40 percent of the accused agreed to a peace bond[180] as part of the resolution of their case. The majority of accused were released prior to trial. About 35 percent of those who were charged were convicted. Of those, 25 percent received a jail term (usually four months or less) and 94 percent received a probation term.[181] Many of those who were released had previous criminal records and a significant number had records of breaches of court orders and were reported violent with their partners.

With only 165 cases (approximately 35 percent of the total charges laid) resulting in criminal harassment convictions, Gill and Brockman acknowledged that breakdowns

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[179] *Mullen et al, supra* note 4.

[180] See Appendix A for definition.

of jail sentences by research site provided figures too low to be reliable indicators of sentencing patterns. However, they did note that in their sample no jail sentences were imposed for criminal harassment convictions in Vancouver, and in Toronto 20 percent of convictions resulted in jail sentences. In Montreal, Winnipeg, Edmonton and Halifax the jail sentence figures were 33 percent, 36 percent, 37 percent and 50 percent respectively. When all charges against the accused are included, the jail figures shift. Six percent of those convicted in Vancouver received jail sentences (three people) 15 percent in Toronto and Montreal, 24 percent in Winnipeg, 28 percent in Edmonton and 43 percent in Halifax (four people). These figures contradict both Hackett and Kong's later findings that where criminal harassment charges are coupled with other charges, the sentence is likely more severe. Of course, Gill and Brockman did caution that their sentencing figures for each research site are low and may not be an accurate indicator of sentencing patterns. Nineteen of those convicted of criminal harassment (12 percent) were given fines, ranging from $100 to $1000. Probationary terms were imposed in 144 cases (87 percent of those convicted of criminal harassment), and in 72 percent of those cases probation was the only sentence. The length of probation ranged from six to 36 months, with a median of 24 months.

The police interviewed in the Gill and Brockman study unanimously supported the new legislation because they viewed it as a significant improvement in the charges previously available to address harassment. Prior to section 264's enactment, those interviewed had been frustrated by situations in which harassment was taking place and seriously impacting the victim but, in the absence of a clear and substantiated threat of harm, the only recourse for victims was a protection order. Under section 264, police felt

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[181] *Ibid.*

they had an effective vehicle to deal with such cases because the charge captures both threatening and harassing behaviours and allows for consideration of background information in establishing whether or not the complainant reasonably fears for her safety. They also felt that by classifying criminal harassment as a hybrid offence[182] rather than a summary conviction offence they were given broader powers during the investigation phase.

With two exceptions, the Crown attorneys generally noted the same advantages as the police respondents with respect to the legislation. Most Crown respondents considered section 264 to be an effective tool in prosecuting criminal harassment cases and an improvement over what was available before.[183]

The Crown attorneys noted some problems with the wording of the legislation which made it difficult to obtain a conviction. Two respondents felt that subsection 1[184] of the legislation was chaotic and unnecessary. For example, they said that the words "knowing...or recklessly" set too high a standard and that just the intention to commit the acts as set out in subsection 2[185] should be sufficient.

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[182] *Ibid.*

[183] *Gill and Brockman, supra* note 7 at 61.

[184] Subsection 1 of section 264 states: "No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them." In *Martin's Annual Criminal Code*, Student Edition C. 2004, c. C-519, s. 264 at 518.

[185] According to subsection 2 of section 264 the conduct mentioned in subsection (1) consists of: (a) repeatedly following from place to place the other person or anyone known to them; (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or (d) engaging in threatening conduct directed at the other person or any member of their family. *Ibid.*

Two Crown respondents also noted that penalties should be more severe, especially for a second offence or where a restraining order was breached during an offence.[186] This desire for harsher sentences seems inconsistent with the criticisms that were voiced by both advocates and police, regarding the leniency of Crown practices.

The report found that victim advocates and police were critical of the Crown with respect to the number of charges being dropped or bargained down to peace bonds or guilty pleas with suspended sentences, and the number of cases being prosecuted as summary offences[187] rather than by indictment.[188] The critics believed that these practices indicated that harassment charges were not being taken seriously by the Crown. By way of explanation, some Crown Attorneys attributed these statistics to pressure by the courts to limit the number of incarcerations that in turn pressured them to settle more cases out of court. Some reported that they were instructed to pursue only serious cases that involved significant violence or where the harassment was linked to another indictable offence. One Crown Attorney remarked "we get a lot of flack if we take 'garbage' up to superior court".[189]

Crowns were further criticized by victim advocates for not spending sufficient time on individual cases or with the victim, and thus failing to provide adequate support to victims during the legal process. As a result, it was felt that the Crowns did not understand the nature and seriousness of the harassment nor the impact it was having on the victim. Gill and Brockman found that pre-sentence reports and victim impact

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[186] *Gill and Brockman, supra* note 7 at 60.

[187] See Appendix A for definition.

[188] *Ibid.*

statements were seldom used to support sentencing recommendations. Advocates suggested that the failure to request victim impact statements distanced victims from the court process. This, combined with inadequate support, would act as disincentives for victims to proceed with the process.

The advocates said that the Crown should be required to proceed with a charge if the victim wants them to, and that police should further investigate to strengthen the case if need be.[190] The advocates were generally critical of the sentences given. Overall, the sentences were described as far too lenient to be effective. If minor sanctions are generally imposed, the wrong message is being sent to offenders.

Gill and Brockman's findings revealed a wide range of police perspectives on how and when to intervene in criminal harassment cases. The existence of such a range of views among those responsible for enforcing the criminal harassment provision raises concerns about the consistency of police practices. Some officers treat criminal harassment as part of the criminal justice response to violence against women while others tend to view it more sceptically. According to the authors of the report, the view taken by officers can have major implications for the way criminal harassment cases are investigated. An officer who understands the context of spousal abuse is likely to collect better, more relevant evidence and is more apt to probe beyond the obvious circumstances of the case. In contrast, an officer with a sceptical view of cases involving spousal violence or harassment (perhaps as a result of handling many cases in which the victim did not cooperate with the prosecution or cases that resulted in lenient penalties)

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[189] *Gill and Brockman, supra* note 7 at 65.

[190] *Ibid.*

may be reluctant to conduct an in depth investigation based on a harassment complaint unless it appears quite serious from the start.[191]

Gill and Brockman interviewed in person thirty-six front line victim advocates from across the country. These advocates were divided on how effectively police were enforcing section 264. Some felt that the police were becoming more responsive to women's 911 calls. However, they attributed this heightened police response to those periods that followed murder cases involving former spouses/partners. They also noted that an effective police response was more likely in places that had implemented a special unit to deal with domestic violence.[192] Other advocates expressed complete dissatisfaction with the police response. They felt that the same slow, inadequate and ineffective response of police that had existed prior to section 264 was still quite evident three years later. They argued that police responded more quickly to male complainants and did not take similar complaints from women seriously. They suggested that the requirement to respond quickly and effectively to calls from battered women be written into police job descriptions and that there be specific sanctions for not doing so, such as withholding funds from individual officers or from his/her police unit. The assumption behind such a suggestion is that criminal harassment legislation is designed and intended to improve police and criminal justice response to domestic violence.[193]

These more critical advocates indicated that they have had to lobby police on numerous occasions to ensure that charges were laid against a harasser. They maintained that people should be able to engage the law without having to resort to an advocate and

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[191] *Ibid,* at 63.

[192] *Ibid,* at 63-64.

recommended that in cases where there appears to be insufficient evidence, police should be required to further investigate the situation. Women are routinely advised by police to keep a journal to document incidents of harassment, which many advocates considered "outrageous and unacceptable". They argued that recording such incidents is part of police procedure and not the responsibility of the victim.[194]

Advocates reported that they have dealt with police officers who are dedicated and understand domestic violence and its relationship to criminal harassment but they have also dealt with other officers who do not know how to conduct a proper investigation in these kinds of cases and often revert to blaming the victim for not wanting to go to court and testify. Many of the police interviewed acknowledged that some of their fellow officers understood the new section well and conducted good investigations, while others did not.

Advocates were also critical of police wasting their time creating stalker profiles (perhaps using the kinds of profile categories outlined in Chapter two) in order to determine who is most dangerous and when they should respond. Advocates argued that police prefer to deploy staff to what are considered more high profile and "macho" kinds of crimes. This invariably leads to a focus on the more extreme forms of stalking behaviours. They believe that police are well aware of the domestic violence context behind many of the calls they receive but choose not to respond to these women's calls because they know they can get away with it. In other words, the critics are accusing police of not placing enough importance on cases involving women in domestic violence situations, even though these cases warrant intervention.

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[193] *Ibid,* at 64.

The Crown Attorneys interviewed by Gill and Brockman generally did not agree with the criticisms of the police levelled by the victim advocates. By and large, the Crowns felt that police have learned how to use section 264 effectively and that the evidence they collect is usually sufficient to make the case. Some Crowns thought that the police were taking the charge seriously, based on the numerous occasions that they have consulted with one another. However, this persistence by the police did not lead to higher prosecution and conviction rates due to the tendency by Crown Attorneys to drop the charge rather than pursue what they consider a weak harassment case.

Overall, the majority of the respondents in the Gill and Brockman study felt that the justice system was not effectively enforcing section 264 and that criminal harassment was not being treated as a serious offence. The following barriers were consistently raised by respondents: insufficient police resources devoted to investigating criminal harassment cases; a lack of adequate victim service and victim/witness programs to serve the needs of victims and enable them to participate in a meaningful and constructive way in the prosecution of their cases; gender bias throughout the system that contributes to the above systemic barriers and results in extremely weak dispositions by the courts; and insufficient training of some police and Crowns as to the nature and complexities of criminal harassment.[195] Gill and Brockman cautioned that further research was needed to substantiate these findings and sufficiently analyze them in order to determine a future course of action.

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[194] *Ibid.*

[195] *Ibid,* at 68.

These findings seem to suggest that the primary problem lies with the enforcement of the legislation by police and Crowns rather than the legislation itself. Although a significant number of charges were laid, the majority of cases were dropped, bargained down or prosecuted as summary offences rather than by indictment. The findings further revealed that many victims have experienced a serious lack of support from the legal system that in turn has made victims reluctant to proceed with charges. Judging by the outcomes of the sample of cases in this study, the justice system appears to have mounted a weak response to the problem of criminal harassment. However, it is unclear from the evidence provided by the Gill and Brockman study if changes need to be made to the legislation or if the focus should be on implementation measures.

The Kong and Hackett Reports

In 1996, Kong conducted a review of section 264 on behalf of the Canadian Centre for Justice Statistics (CCJS). As previously noted, her report findings were derived from police-reported statistics that were collected in the UCR Survey from 1994 to 1995 and the Adult Criminal Court Survey (ACCS) that collected data for 1994. One-hundred and thirty police agencies participated in the UCR Survey, while seven jurisdictions reported to the ACCS: Newfoundland, Prince Edward Island, Nova Scotia, Quebec, Saskatchewan, the Yukon, and the Northwest Territories.[196] Because Kong's report is non-random and focuses only on larger urban centres, it is not nationally or geographically representative.

[196] The court data represents 34 percent of the total provincial caseload. *Kong, supra* note 8 at 8.

Data from the UCR Survey were consistent with Gill and Brockman's findings. During 1994-1995, the majority of accused were male (88 percent) and the majority of victims were female (80 percent).[197] Of those female victims, the majority, were stalked by a current or ex-intimate partner (58 percent).[198] In 50 percent of the 7,472 reported harassment incidents an accused was identified and a charge was laid. In approximately 1,868 of the reported incidents (25 percent) an accused was identified but not charged by police. There were several reasons why charges were not laid in these situations: the victim was reluctant to proceed (16 percent), departmental discretion (5 percent), for reasons beyond the control of the police department (such as policy directives) (3 percent) and miscellaneous (1 percent).[199] In the remaining 25 percent of cases, an accused was not identified. The most reluctant victims to pursue the laying of charges were those involved in work relationships with their stalkers (32 percent), followed by women who were stalked by a current or ex-husband or boyfriend (29 percent).[200]

In 1994, the seven jurisdictions comprising the ACCS reported a total of 972 cases involving at least one offence under section 264. A total of 1,110 charges of criminal harassment were dealt with in these cases which meant there were multiple charges of criminal harassment in a number of cases.[201] The ACCS data showed that of

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[197] In the Gill and Brockman study, 5, 948 of the 7,472 reported stalking victims (80 percent) were female while 4,733 of the 5,382 persons accused (88 percent) were male. *Gill and Brockman, supra* note 7 at 3.

[198] *Ibid.*

[199] *Ibid,* at 8.

[200] *Ibid.*

[201] The ACCS reported that the most serious offences in criminal harassment cases were criminal harassment, assault, uttering threats, failure to appear, failure to comply and probation. Defining the most serious offence as 'criminal harassment' is problematic because it does not indicate what kind of behaviour this includes. *Ibid.*

the 311 charges of criminal harassment resulting in a conviction, 60 percent received probation as the most serious sentence (usually for a period ranging from one to two years) in comparison to 33 percent who received a prison term (usually less than six months) and 7 percent who received either a fine or other type of sentence. The ACCS noted that cases involving criminal harassment coupled with another violent and serious offence were more likely to receive a prison sentence (56 percent) than cases where criminal harassment was the most serious offence (19 percent).[202]

This study was a first attempt by the Canadian Centre for Justice Statistics (CCJS) to provide detailed information about criminal harassment. The stalker-victim profiles, high number of charges being dropped and lenient sentencing practices are consistent with Gill and Brockman's 1996 findings. This study further noted that criminal harassment cases received harsher sentences only when the criminal harassment charge was coupled with a more serious offence. This suggests that up until 1996 criminal harassment cases were not being treated as seriously as other crimes by the police, Crowns or the courts. This again indicates enforcement issues with the legislation as opposed to the legislation itself.

In 2000, Hackett conducted a second study on criminal harassment on behalf of CCJS, elaborating on Kong's 1996 findings. This study also examined police and court data on criminal harassment cases from the UCR2 Survey.[203] A total of 106 police forces reported to the UCR2 Survey consistently from 1995 to 1999. However, not all police

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[202] *Ibid,* at 10.

[203] *Hackett, supra* note 9 at 3.

forces in Canada reported to the UCR2 survey, therefore this report is not nationally or geographically representative.

The stalker-victim profile was the same as Gill and Brockman and Kong's respective findings. The majority of accused were male (84 percent) while the majority of victims were female (77 percent in 1999).[204] Again, cases involving partners or former partners were a slight majority (56 percent in 1999).[205]

The number of criminal harassment cases reported to police from 1995 to 1999, rose by 32 percent, from 4,250 reports in 1995 to 5,382 reports in 1999. However, there was a notable drop in the number of incidents that resulted in a charge being laid for 1999 (in 42 percent of cases) when compared to 1995 (in 51 percent of cases). In 1999, 27 percent of complainants did not wish to proceed with charges in cases where an accused was identified (in comparison to 17 percent of complainants in 1995).[206] Hackett relies on Gill and Brockman's speculations with respect to why victims are reluctant to proceed with charges. They attribute this reluctance to the harassment stopping after being reported and/or the accused and victim no longer living in the same region.[207]

There are more plausible and more complex explanations for a victim's reluctance to proceed with charges especially when the perpetrator is her spouse or ex-spouse. Such reasons may relate to economic issues, emotional/psychological fear, and/or discomfort with the judicial process. The victim may be economically dependent on the perpetrator because he is the sole or primary breadwinner. The victim may have conflicting

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[204] The rate of women being stalked in 1999 based on the population for the areas covered by the 106 police forces was 69 per 100,000. *Ibid,* at 5.

[205] *Ibid,* at 8.

[206] *Ibid* ,at 12-13.

emotional and/or psychological feelings about the perpetrator, especially if she still loves or cares for him, as her (former) partner or as the father of her children or she may feel that her children need their father. She may be subjected to subtle or overt threats by the accused, directed not only at her but at her loved ones. Or she may be feeling uncomfortable with the judicial process, including feeling intimidated or trivialized by police, or perceiving an overall lack of support from the system. A victim may experience one or a combination of factors that may discourage her from proceeding against her (ex) spouse.[208]

The report found that the conviction rate for criminal harassment for 1998/1999 (53 percent) was consistent with conviction rates for common assault (54 percent) as well as for all crimes against the person (53 percent). Similar to Kong's findings, Hackett found that in cases where criminal harassment charges were combined with at least one other charge, the conviction rate was significantly higher (60 percent) as opposed to cases where criminal harassment was the only charge (36 percent). In cases where criminal harassment was the sole charge, 51 percent were stayed or withdrawn. Hackett suggests that, in addition to increasing the likelihood of conviction, the presence of related charges (such as common assault, uttering threats and threatening telephone calls) influences the type and severity of sentences that are imposed by the court. Hackett notes an increase in the number of convictions in which imprisonment was imposed as a penalty (35 percent) in comparison to 24 percent in Gill and Brockman's 1996 findings. But again the higher penalties occurred where criminal harassment was not the only charge or most severe

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[207] *Gill and Brockman, supra* note 7.

[208] *Johnson, supra* note 41 at 188.

charge. Although both reports concur that the percentage of those imprisoned was still lower than for all other kinds of violent offences (55 percent), Hackett's findings show an increase in the length of prison sentences in criminal harassment since 1994/1995. The median length of a prison sentence for criminal harassment rose from 30 days in 1994/1995 to 90 days in 1998/1999.[209] Despite this minor increase in sentence lengths, the majority of criminal harassment cases continued to receive probation as the most serious sentence.[210]

Hackett concludes that positive changes have been occurring since earlier studies. She contends that the court is treating criminal harassment cases as severely as other violent crimes: that conviction rates and median sentence lengths are consistent with other crimes against the person and that the median length of incarcerations has increased significantly over the past five years. Her findings seem to suggest that there is no issue with the criminal harassment legislation, including its enforcement. However, these conclusions gloss over a significant factor. Her findings show that criminal harassment cases are more likely to be treated seriously when there are other related charges, as opposed to on their own. In half of the cases, charges were stayed or withdrawn where criminal harassment was the sole charge. This indicates that criminal harassment is not being taken seriously on its own merits by the police or the courts, which again suggests an enforcement problem.

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[209] *Hackett, supra* note 9 at 12-14.

[210] *Ibid*, at 13.

The BC Institute Against Family Violence Report

The 2002 study undertaken by Pacey for the BC Institute Against Family Violence supports this concern about enforcement, with its conclusion that the primary problem with the criminal harassment legislation is enforcement. This study demonstrates the reluctance of Vancouver police officers to enforce section 264 regardless of pro-arrest policy measures.

The purpose of the study was to determine Vancouver's current police practices in response to a victim who is being criminally harassed by a current or ex-intimate partner. The Institute wanted to gain more insight into why, when and how police officers are enforcing section 264. This study had a different focus and methodology from the other studies because it focused on a single urban area, Vancouver, while the other studies focused on several urban centres. Further, Pacey's data was solely based on interviews with a small number of police officers, unlike Gill and Brockman's study that was primarily based on an analysis of a sample of criminal harassment cases handled by the police, Crowns and courts and a small number of interviews, and Kong and Hackett who primarily relied on police and court reported statistics.

Pacey conducted twenty interviews with police officers from the Vancouver Police Department (VPD). The officers were asked open-ended questions after being given a scenario that represented a typical criminal harassment call they might receive from a victim's residence. According to the findings, many officers assessed the level of risk involved in criminal harassment incidents as low. They described criminal harassment as fundamentally different from other forms of violence against women in relationships in that the officers believed that many harassment victims are not

necessarily at immediate risk of physical harm and therefore the immediate need to arrest is lower. One officer described criminal harassment as a grey area in which it is difficult to determine the perpetrator's intent.[211]

These views are not supported by current research that considers criminal harassment to be as potentially dangerous as assault incidents, especially when the situation involves current or ex-intimate partners. Research shows that most homicides of women by their former partners occur after a period of stalking and that the period after separation from an abusive relationship can be the most dangerous for women.[212] The underlying problem identified by Pacey's study is the failure by police to recognize criminal harassment as part of a pattern of behaviour. Instead, criminal harassment is looked at in isolation which ultimately renders it less threatening and harmful in comparison to situations where the behaviour has already escalated to physical violence.

The officers expressed difficulty with arresting criminal harassment suspects who have engaged in emotional or psychological abuse of the victim rather than physical violence. Although they acknowledged that emotional or psychological abuse could be equally dangerous, they considered physical violence to be more serious and therefore warranting police action. These findings are consistent with other reports that found that the likelihood of arrest in domestic violence calls increased considerably where physical injuries were involved.[213]

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[211] *Pacey, supra* note 10 at 22.

[212] *Pearce and Easteal, supra* note 63 at 165; *Violence Against Women Grants Office, supra* note 50 at 2; *Bernstein, supra* note 6; *Walker, supra* note 6; *Johnson, supra* note 41.

[213] *Gill and Brockman, supra* note 7; Buzawa, E. and T. Austin. (1993)."Determining Police Response to Domestic Violence Victims". *American Behavioral Scientist* 36:610-623.

The officers were also reluctant to intervene in criminal harassment cases because they felt it might aggravate the situation and escalate the perpetrator's anger towards the victim.[214] Given the common practice of releasing suspects a day or so after the arrest, several of the respondents felt that victims could be placed in greater danger after police involvement and this concern was their rationale for non-arrest and non-intervention. As the previous reports have shown, there is a significant percentage of criminal harassment cases in which charges are dropped, for a variety of reasons including the victim's reluctance to proceed. This might indicate support for Gill and Brockman's findings that there is a significant lack of victim support services. Perhaps if victims received more support during this early stage, more arrests would be made because fewer charges would be dropped. Of course, then the issue becomes how seriously the Crown and courts will treat these kinds of cases if the victim does proceed. As the other reports have shown, many charges are stayed or plea bargained down to a peace bond and those cases that do lead to a conviction are more likely to be punished with probation than a prison sentence (which is usually only short term).

Further, the majority of officers maintained that pro-arrest policies are not always appropriate for victims of criminal harassment. This opinion was based on the officers' (mis)understanding of the dynamics of violence against women. Many of the officers felt that women became more empowered post-separation as opposed to when they were still involved in an intimate, abusive relationship.[215] Based on their answers to the study questions, some officers felt that victims of criminal harassment are no longer in the

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[214] *Pacey*, *supra* note 10 at 22.

[215] *Ibid,* at 24.

cycle of violence once they have separated from their spouse and therefore there is no need to arrest the harassing ex-spouse. This is clearly a misunderstanding of the dynamics of domestic abuse. Women who are victims of criminal harassment by former partners are certainly not at less risk of abuse, nor are they immune from feelings of threat and vulnerability.

Most of the officers felt that the primary problem with the legislation was the courts' leniency on offenders who were charged under section 264 and most blamed an inadequate legal system for women's difficulties in obtaining protection and safety.[216] They felt that the system provided inadequate short term and long-term protection to victims. Officers described the stages of the process that fail to protect victims adequately: ineffectual bail conditions for released perpetrators, time and resource consuming court processes and inadequate sentencing measures. Due to such flaws in the system, they felt less compelled to arrest and force a victim's case into the criminal justice process. Most officers preferred to give the perpetrator a warning or execute a peace bond because such interventions would require less involvement from the victim, the perpetrator and the courts. This seems to contradict what victim advocates want from the justice system in terms of acknowledgement, inclusiveness, protection, and accountability.

The study's findings that police officers are exercising significant discretion in choosing not to arrest in domestic criminal harassment cases despite the presence of pro-arrest policies is contrary to Gill and Brockman's findings that an effective police response was more likely in places that had implemented a special unit to deal with

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[216] *Ibid,* at 23.

spousal violence.[217] Pacey's findings clearly show that many officers are still exercising significant discretion in these kinds of cases despite a pro-arrest policy, introduced in order to eliminate these kinds of discretionary assessments. What is particularly disturbing is the grounds on which the officers in Pacey's study are basing their discretionary decision-making, that is on the assumption that the victim is no longer at risk. Ultimately this reluctance on the part of the police seems directly linked to lack of faith in the criminal justice system's ability to protect victims adequately. This lack of faith is shared by many feminists and abused women, further emphasizing that the system is not adequately protecting women.

The legal process that follows an arrest is frightening and stressful for many victims. Gill and Brockman's study noted a lack of support services for victims during this tumultuous time. Most victims fear retaliation by the perpetrator, and/or view the justice system as an ineffective tool. A lack of support has hindered victims' ability to participate in a meaningful and constructive way during the prosecution phase. This re-enforces the notion that victims' issues and concerns are not being adequately addressed by the legal system. Perhaps a viable solution is to review the legal system and existing support measures with a view to improving the process in the hope that victims might become more comfortable in proceeding with charges against an intimate harasser. Perhaps this review needs to come first before victims are forced to proceed in such a chaotic system.

Pacey suggests that police officers be given more in-depth training about criminal harassment, domestic violence and pro-arrest policies to lessen the number of officers

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[217] *Gill and Brockman, supra* note 7 at 63-64.

who are exercising broad discretion in these kinds of cases. With more training, they may be apt to lay charges more frequently in criminal harassment cases that fall within the context of domestic violence. Pacey suggests that police officers need to be educated about the adverse effects of psychological abuse on victims and the risk of escalation to physical violence in criminal harassment cases that involve current and former intimate partners.[218]

Pacey recommends creating greater consistency within educational materials and publications on policing criminal harassment so that it is clearly defined as falling under the pro-arrest/pro-charge protocol stipulated by provincial domestic violence policies. The report does not explicitly state that the status of criminal harassment is unclear at present, but such would be the implication to be drawn from this recommendation.

Perhaps the lack of education and training are not the only problem. The policy is already quite clear in its objectives and protocols yet the police are still ignoring them. The real problem may be rooted more deeply in pervasive societal attitudes about domestic violence and the women who are experiencing it. Domestic violence tends to be disregarded as something ordinary or commonplace and therefore often receives an indifferent response from the general public and the legal system. As Pacey's study shows, the "commonality" and "ordinariness" associated with domestic violence has de-sensitized police and affected response measures. This is reminiscent of the media's treatment of stalking cases, in which the more extreme celebrity stalkings were given much more attention and treated more seriously than situations involving "ordinary citizens". And even when attention was turned to cases involving "ordinary citizens" and

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[218] *Pacey, supra* note 10 at 33-34.

anti-stalking legislation was passed, the real problem of domestic violence was rendered invisible by its collapse into the concept of stalking. That problem seems to have persisted in the implementation of the criminal harassment legislation.

Conclusion

Although these studies focused on problems associated with the enforcement of section 264, many of these problems seem to flow from how the legislation came to fruition. The most fundamental problem was the inability of the government to specifically define criminal harassment prior to passing legislation. Chapter two illustrated how elusive the criminal harassment concept can be. It covers such a multitude of diverse behaviours that it is virtually impossible to capture what is included within a single definition. These kinds of definitional issues have significantly impacted on the legislation's enforcement, as can be seen in the results of the studies that have been conducted to assess the legislation's effectiveness.

The stalker-victim profiles in each study were consistent. Female victims and male stalkers within a current or former relationship make up the predominant profile, that of the simple obsessional category as set out by Mullen et al.[219] While the studies do indicate that the legislation is being used to address other forms of stalking involving acquaintances and strangers, this is to a much lesser degree.

Although the majority of police and Crowns interviewed were satisfied with section 264, their actual enforcement of the legislation contradicted this finding. Both police and Crowns were met with heavy criticism from victims and victim advocates for

[219] *Mullen et al, supra* note 4.

their weak handling of criminal harassment cases. The reports consistently showed that the majority of criminal harassment charges are stayed or withdrawn, lenient sentences are imposed, and that the legislation's enforcement by police, the Crowns and the courts is weak and inconsistent.

These problems may well go back to the definitional problems associated with the legislation. No one, from media to politicians to police to Crown Attorneys to judges, seems to fully understand the nature or potential seriousness of criminal harassment, at least in the context of domestic violence. It is not clear what behaviours are actually covered by this prohibition. For example, Kong and Hackett's reports on the number of criminal harassment cases did not elaborate on what kinds of behaviour constituted criminal harassment. The concept is not fleshed out enough, either in the legislation or in the reports, to give the reader any indication about the kinds of cases (and their level of seriousness) that warranted the laying of charges. The fact that criminal harassment seems only to be taken seriously when charged in conjunction with other apparently more serious offences indicates that the criminal harassment provision is a weak and uncertain tool. The absence of a commonly accepted definition of criminal harassment has made it very hard for researchers to measure its effectiveness. This research difficulty reinforces the initial critique that the criminal harassment problem was not clearly understood by the government prior to its passage of section 264.

In all four studies, the criticisms focused on the enforcement of the legislation rather than the legislation itself. Emphasis was placed on stricter enforcement measures and education for officers. However, none of the studies addressed the underlying problems. Nonetheless the findings of these studies reinforce the notion that there are

more deeply rooted problems associated with the legislation itself, problems that are endemic to a moral panic response to a media created social threat. Clearly, Cairns Way's prediction that anti-stalking legislation would have little impact on women's lives is sadly true.[220]

[220] *Cairns Way, supra* note 3.

Chapter Six: International Perspectives

In the early 1990's, in addition to the US and Canada, there were growing concerns about stalking behaviour in other countries, including Australia and the United Kingdom. These concerns were in part fuelled by the stalking moral panic that emerged from the US. Like Canada, these countries were privy to sensationalistic US media print and television stories about celebrity stalking. This coverage raised awareness about the concept of stalking, influenced how it was to be understood and in part, shaped the subsequent legislative responses in these other countries.

Aside from media coverage of celebrity stalking, the passage of anti-stalking legislation in Australia is primarily attributed to the media attention that was brought to domestic violence cases in which women were methodically stalked, usually by a former intimate partner, and in some cases fatally attacked.[221] These publicized cases of "average" women, brought the stalking issue closer to home for the public and gave the government a significant push toward crafting a legislative response to stalking behaviour

[221] In New South Wales, anti-stalking legislation was passed soon after the highly publicized domestic homicide case of Andrea Patrick in 1993. She had lived with her partner for a long period of time during which there was a history of domestic violence, including a knife attack in 1991, for which he was imprisoned for eight months. Andrea relocated to Sydney, where she was pursued by her ex-partner who begged her to give their relationship another chance to which she agreed. He was again charged with assaulting Andrea in 1993. He consented to a protection order being made against him and was released on bail. Andrea went to stay at her parents' home. Two days later, the tires on her mother's car were slashed. Andrea reported seeing her ex-partner near the home and arranged to meet her parents at a nearby club. By the time her parents arrived, Andrea had been stabbed twenty times by her ex-partner and died soon after. In Gouda, Natalie. (December 7-8, 2000). *Legislative and Criminal Justice Responses to Stalking in the Context of Domestic Violence.* Paper presented at the Stalking: Criminal Justice Responses Conference convened by the Australian Institute of Criminology.

that, unlike Canada, was more specifically addressed to stalking within the domestic violence context.[222]

In the UK, cases involving average citizens also gained significant media attention, although they did not particularly focus on stalking within a former or current intimate relationship. The cases were more diverse and included stranger and acquaintance stalking. Perhaps this wide range of cases contributed to the passing of very general harassment legislation more akin to the stalking legislation in Canada.

Since the passage of anti-stalking provisions in Australia and the UK, these countries have experienced difficulties both with the legislation itself and with its enforcement. Again, the most fundamental problem with the legislation has been the inability of the Australian and British governments to specifically define stalking behaviour prior to passing legislation. Like Canada, this has led to enforcement difficulties that will be explored in this Chapter.

Australia

Between 1993 and 1996, stalking legislation was introduced into all Australian jurisdictions. Queensland was the first jurisdiction to introduce the offence of "unlawful stalking" into its *Criminal Code* in 1993. Other Australian states and territories followed with the passage of their own stalking legislation between 1993 to 1996.[223] In Queensland, members of parliament focussed on the problem of domestic violence and

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[222] Keenahan, D. and Barlow, A. (1997). Stalking: A Paradoxical Crime of the Nineties. *International Journal of Risk, Security and Crime Prevention*, 2 (4), 291–300, as cited in *Ogilvie, supra* note 22 at 56.

[223] Urbas, Dr. Gregor. *Australian Legislative Responses to Stalking*. (December 7-8, 2000). Paper presented at *the Stalking: Criminal Justice Responses* Conference convened by the Australian Institute of Criminology at 3.

the importance of passing new legislation to address stalking behaviours within that context:

> "Violence committed against people by estranged partners has made our community painfully aware of the fact that some individuals who may be disposed towards violence are not deterred by restraining orders. Therefore, new measures such as that embodied in this Bill must be enacted". (Queensland Hansard; November 9, 1993)[224]

> "In Brisbane, it is reported that up to 50 callers a month are contacting the Domestic Violence Resource Centre with news that they are considering moving interstate or overseas to escape being stalked. That is a horrendous figure...this legislation shows our concern". (Queensland Hansard; November 9, 1993)[225]

This is reminiscent of Canada's experience with the media coverage of several domestic abuse stalking cases prior to the passage of its own anti-stalking provisions. As discussed in Chapter three, these cases received significant media attention and became a focus of subsequent Parliamentary debates leading up to the passage of section 264.

Even though, as a result of highly publicized incidents of intimate partner stalkings, both countries stressed the importance of addressing stalking within the domestic violence context, the resulting Australian legislation was more stringently defined in comparison to Canada in an effort to keep the focus on the more serious cases of stalking. Most Australian states have narrowly defined stalking behaviour by focusing on more extreme examples of the conduct; most states employ a subjective understanding of an offender's intent to cause harm, and require that that a course of conduct be repeated on at least two occasions.[226] New South Wales' provisions in particular, require

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[224] *Ogilvie, supra* note 22 at 56.

[225] *Ibid.*

[226] *Ibid,* at 85.

that the acts engaged in which amount to intimidation occur within the context of a domestic relationship.[227] Canada's definition of stalking behaviour is broader; the legislation employs an objective standard with respect to an offender's intent, and a repeated course of conduct is not required. Canada's provisions allow the legislation to be used in a much wider context than Australia that goes beyond the legislation's original purpose.

Prior to 1993 and the passage of Australia's first anti-stalking legislation, several Australian states already had legislation in place that criminalized many of the behaviours that would constitute stalking such as harassment, intimidation or malicious communications. South Australia's *Criminal Law Consolidation Act* stipulated that, "whereby any person who persistently follows another person, watches or besets their house or place of business or uses violence to, or intimidates another person, was guilty of an offence."[228] Other states, such as Tasmania and Queensland covered stalking behaviours within their respective domestic violence legislation.[229] Despite these kinds of provisions, the general consensus was that more focused legislation was needed to address stalking within the context of domestic violence which they felt existing provisions failed to do.[230] Every Australian state and territory soon opted to pass new anti-stalking legislation rather than strengthen existing provisions:

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[227] *Ibid,* at 6. Australian Capital Territory, the Northern Territory and South Australia require that acts be engaged "in on at least 2 separate occasions, which could be expected to arouse the other persons [sic] apprehension or fear". *Ibid.*

[228] *Ibid,* at 56.

[229] *Keenahan and Barlow, supra* note 222 at 297.

[230] *Ogilvie, supra* note 22 at 53-54.

> "In general terms, an awakening of concern about this type of behaviour in this country has been caused by its prevalence in domestic violence cases. The creation of a criminal offence dealing with this behaviour is presented and argued for as an adjunct to the arsenal of legal weapons arrayed against domestic violence." (South Australia Hansard, October 13, 1993)[231]

Like Canada and the US, Australia's seven jurisdictions, [232] commonly define stalking as repeated behaviours causing fear and apprehension. Most jurisdictions specify conduct that constitutes stalking behaviours, including: following; loitering outside the place of residence of the victim or some other place frequented by the victim; entering or interfering with the victim's property; giving offensive material or leaving such material for the victim to find; keeping the person under surveillance; and acting in any other way that could reasonably be expected to arouse the victim's apprehension or fear.[233]

Differences in stalking legislation across Australia primarily focus on the level of intent that is required to establish the stalking offence. Like Canada, the UK, and most of the US, Queensland, employs an objective test of intent in which a reasonable person would have known that he or she was causing apprehension and fear. Queensland's legislation is more broadly drawn because it does not require that the offender intend that the victim feel apprehension or harm. The purpose of this is to ensure that the more innocuous forms of stalking can be included within the legislation. However, it also has the effect of casting the net quite far in terms of who can be prosecuted under the legislation. For example, a person conducting a survey who repeatedly calls someone in

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[231] *Ibid,* at 57.

[232] Australia consists of the following states and territories: Queensland, Australian Capital Territory, Northern Territory, New South Wales, Victoria, Western Australia, and Tasmania.

the hope of increasing his sample size might constitute stalking behaviour and result in a conviction.[234] This raises the question of whether or not the effect of the legislation is in line with its original purpose: stalking behaviour within the context of domestic violence.

The majority of jurisdictions, South Australia, Australian Capital Territory, Northern Territory, Tasmania, and New South Wales take a narrower approach by employing a subjective test of intent[235] where the perpetrator had to intend apprehension or fear.[236] Although stricter intent requirements may keep the stalking issue focused on domestic violence and other harmful situations, it can also have the opposite effect of shutting out the very same kinds of cases by having too high a threshold. For example, a woman who has left her abusive partner may still be receiving communications of some sort from him. The perpetrator's true harmful intentions may actually be hidden and these communications may seem harmless to the average observer. In such circumstances, it may be difficult or impossible to establish that the perpetrator intended to cause apprehension or fear and some form of serious harm.

The "breadth" of anti-stalking legislation has been the principle concern in Australia. There has been considerable debate about how narrowly or broadly defined anti-stalking legislation should be. In his 1996 study of Australian anti-stalking legislation, Swanwick suggested that each jurisdiction try to reach a comfort zone within

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[233] *Mullen et al, supra* note 4 at 269.

[234] *Ogilvie, supra* note 22 at 75.

[235] See Appendix A for definition.

[236] *Ibid.*

their respective legislation that falls between the two extremes of a broad and narrow scope.[237]

Queensland did attempt to find such a middle ground by adding "exceptions" to its 1993 provisions. If the defendant could prove that his/her conduct was for the purpose of an industrial dispute, public dispute or other issue carried out for the general interest of the public, it was not considered criminal harassment. This was met with public criticism because it still raised the question of who could be legitimately defined as a stalker and who could be legitimately defined as innocent.[238]

Many of the recent amendments to anti-stalking legislation in Australian jurisdictions have focused on broadening the legislation by removing strict intent requirements, in an attempt to allow objective experiences of fear and apprehension to be treated more seriously.[239] There have been concerns about the effectiveness of subjective tests of intent. Although the subjective test is intended to limit the possibilities for stalking charges so that the most serious cases are processed by the criminal courts, the opposite effect seems to be occurring. Trivial cases, such as neighbour disputes, are being brought before the criminal courts. Meanwhile, there is a failure to charge cases of stalking that under other circumstances would be deemed criminal.[240] Of course, at the other end of the spectrum, the objective test has tended to yield the same results. This consistency in problematic results would indicate that the problem may well not lie with whether the standard is objective or subjective or at least that the problem may be more

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[237] *Swanwick, supra* note 12 (as cited in Ogilvie, 2001 at 72; *Gill and Watson*, 2004 at 9).

[238] *Ibid,* at 72; *Gill and Watson, supra* note 25 at 9.

[239] *Swanwick, supra* note 12 at 85.

[240] *Ibid,* at 134.

fundamental and incapable of being resolved whichever standard is applied. These same concerns have been raised by the Canadian literature about section 264.

A second concern involves the absence of a uniform definition of "stalking" in Australian jurisdictions. This has led to discrepancies between jurisdictions in how stalking cases are accounted for, responded to, and prosecuted by the police, Crowns, and courts.[241] More specifically, research shows that police are grappling with how and when to use the legislation in cases involving domestic violence. In 1999, Pearce and Easteal conducted a review of how police were dealing with domestic stalking complaints based on a survey of the Australian Federal Police (AFP) and interviews with various legal professionals. One hundred and twenty-five surveys were distributed in the Australian Capital Territory (ACT) with forty-two completed. Survey questions focused on interventions police used in dealing with stalking over the twelve months following the introduction of the legislation in 1996, what interventions they would use in dealing with this behaviour in the future and why stalking laws were or were not employed by police in cases involving stalking behaviours.[242] Despite the low response rate, the survey findings are quite similar to Pacey's study of the Vancouver Police Department, and therefore merit discussion in the context of this thesis.

Pearce and Easteal found a very low usage of the stalking law with 75 percent of police officers indicating they had never used the legislation. The officers were then given hypothetical situations and asked whether or not they would employ the legislation. Again, the majority of respondents indicated that they would not use the legislation. One

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[241] *Ibid,* at 133.

[242] *Pearce and Easteal, supra* note 63 at 169.

scenario involved a woman's estranged partner making threats of violence toward the woman through her children. Eighty-seven percent of the respondents reported that they would not use the stalking law in this circumstance. In another scenario, a woman was being persistently threatened with physical harm by her estranged partner who appeared on three occasions at the supermarket while she was shopping. Seventy-five percent of respondents still indicated that they would not charge the perpetrator under the stalking legislation. A third scenario included threats and physical damage to property (spray painting offensive words on the victim's car). Again, 79 percent of respondents would not use the stalking legislation in this situation. Even when the same scenarios were posed to respondents with the added element of a protection order, the same responses were given.[243]

Most officers indicated that they would use the civil domestic violence legislation when responding to domestic violence situations rather than the stalking legislation. Many officers referred to non-legal courses of action such as relocating the woman to a safe house, advising the victim to screen her phone calls, change routine, or refer the victim to the Domestic Violence Crisis Service.

When asked why they were more likely to not use the stalking legislation, 91 percent responded that evidentiary requirements played a role in their decision. Many officers considered that it would be difficult to prove the elements of the stalking offence. More specifically, 78 percent of officers felt that the stalking law was too narrowly defined in terms of the level of apprehension and fear required to prove intent.

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[243] Refer to Appendix B to view a cartoon Pearce and Easteal included in their article that depicts the most likely situation in which police would use anti-stalking legislation.

Alternative explanations for the low usage of the legislation were given by officers. When the legislation was introduced, there was no awareness or education program to inform officers. Others felt that the stalking legislation was not an option due to their perception of the situation as falling within the context of domestic violence. This was coupled with a lack of understanding about the dynamics of domestic violence and the psychology of the 'former intimate' stalker that led officers to treat stalking within the domestic violence context as warranting less serious intervention.

Similar responses were found in Pacey's study of Vancouver police officers that was discussed in Chapter five. Respondents in that study also illustrated the tendency of officers to misunderstand the cycle of domestic violence. Despite a pro-arrest policy, officers were still reluctant to utilize section 264 and expressed difficulties in pressing charges in the absence of physical violence.

Pearce and Easteal suggest a preventive policing approach in the form of a specialized unit similar to the Los Angeles Police Department's Threat Management Unit to improve the policing of stalking. The Unit would assess the threat imposed by the individual stalker and try to prevent the behaviour from escalating. In Canada, this Unit has been adopted by both the Criminal Behavioural Analysis Branch of the Royal Canadian Mounted Police and the Behavioural Sciences Section of the Ontario Provincial Police as a theoretical framework in threat assessments.[244] These Canadian units were only set up in the 1990's and there is as of yet no research on their effectiveness.

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[244] *Department of Justice Canada, supra* note 2 at 3.

Other suggestions include more police training, increased community awareness, and better victim support networks.[245] Victim support services in Australia remain scarce. As of 2000, there were only two known victim support networks for stalking servicing all of Australia, a domestic violence and stalking shelter and a 10-week pilot program initiated by the Victorian Institute of Mental Health and funded by the Victim's Referral and Assistance Service.[246] A lack of victims support services was also raised by Gill and Brockman's report on section 264. Victims and support workers in Canada indicated that existing support services for stalking victims during the legal process are insufficient.

Australia's experience with anti-stalking legislation illustrates how a much narrower approach to defining stalking behaviours, by comparison to Canada, has not produced more effective results. Despite different approaches, both countries have experienced enforcement difficulties with respect to police, Crowns and courts. Victims in neither country feel more protected or empowered by their respective anti-stalking legislation. Despite Australia's efforts to clearly define the concept of stalking, every jurisdiction continues to grapple with when and how to use their respective legislation. Australia, like Canada, has been unable to legislate behaviour that seems incapable of precise definition in the first place. The core issue seems to be one of definition.

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[245] *Ogilvie, supra* note 22 at 135.

[246] *Pearce and Easteal, supra* note 63 at 135.

United Kingdom

During the early to mid 1990's, US media coverage of celebrity stalking was widely consumed by the British public.[247] The dominance of such US media reports brought the stalking issue to the political and public forefront. People were incensed by this new phenomenon that had swept through the US and were concerned that it would soon emerge as a problem in the UK which it subsequently did.[248] The media reported on several UK cases in which the victim was subjected to repeated unwanted behaviour at the hands of another individual. The behaviour ranged from the innocuous to the clearly criminal. In all cases, the victim was subjected to mental and/or physical harm and distress. The relationship between the stalker and the victim in these cases ranged from stranger to acquaintance to intimate.[249] One case in particular, *R v Burstow*,[250] is widely considered to have been an important catalyst for the passage of anti-stalking legislation in the UK. Tracey Morgan was stalked by an acquaintance for several years, and endured considerable emotional distress although no physical harm. The case established the

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[247] When fans turn into fanatics: nervous celebs call for help from security expert Gavin de Becker. (1990). *People*; Every star's nightmare: the fan who is fuelled by madness. (1992). *The Times* (as cited in Finch, 2001 at 33);

[248] Law in urgent need of reform. (1996, September 19). *The Independent*; Ban on stalking is urged to protect victims. (1996, September 9). *The Times*; Law call change after stalking acquittal. *The Guardian* (1996, September, 18); This man is stalking a girl aged TEN and the police cannot do anything. (1996, July 2). *Daily Mirror* (as cited in Finch, 2001 at 11).

[249] *Budd and Mattinson, supra* note 50 at 1.

[250] The victim, Tracy Morgan, befriended Anthony Burstow, a work colleague, because she felt sorry for him. Shortly thereafter, he became obsessed with her and began actively pursuing her after she ended the friendship. Burstow sent her a soiled sanitary napkin, stole her underwear from a laundry line, and poured chemicals on her car. He littered her garden with condoms and wrote her disturbing notes including one that read: "Remember this is totally personal and nothing will change how much I hate you." In *Finch, supra* note 1 at 40; *Gill and Watson, supra* note 25 at 5.

doctrine of psychological assault that enabled a defendant to be convicted of assault even though no direct physical force was used.[251]

By 1996, as more stalking cases and official reports about stalking[252] emerged, there was increasing public pressure on the government to pass anti-stalking legislation.[253] The issue received considerable attention during the 1997 election campaign due to intense media coverage of the perceived inadequacies of existing legislation to counter stalking. [254]

The *Protection from Harassment Act* (the "Act") was enacted in 1997, which together with the *Malicious Communications Act 1988,* prohibit a wide range of behaviour that is designated as "harassment".[255] The Act specifies that a person must not pursue a course of conduct which (a) amounts to harassment of another and, (b) which he knows or ought to know amounts to harassment of the other. This kind of behaviour is considered both a criminal and civil offence in England and Wales.[256]

Ironically, the Act contains no definition of stalking. The general term "harassment" is used, which the government chose not to define for several, albeit conflicting, reasons. First, the government felt that the courts were already familiar with

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[251] Harris, J. (2000). *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997.* Home Office Research Study 203, London at 67-68; von Heussen, Evonne. (2000). The Law and 'Social Problems': The Case of Britain's Protection from Harassment Act 1997. *Web Journal of Current Legal Issues*. Retrieved August 2003, from http://wwebcli.ncl.ac.uk/2000/issue1/vonheussen1.html.

[252] Despite limited stalking research in the UK and abroad, by December 1996, the Police Federation reported that there were approximately 3,000 stalking cases every year. *Finch, supra* note 1 at 10.

[253] *Ibid.*

[254] Law in urgent need of reform. (1996, September 19). *The Independent*; Ban on stalking is urged to protect victims. (1996, September 9) *The Times*; Law call change after stalking acquittal. (1996). *The Guardian*, 18, (as cited in Finch, 2001 at 11).

[255] *Urbas, supra* note 223 at 3.

the concept of harassment so it did not merit further clarification.[257] This is in sharp contrast to the earlier comments made by then Home Secretary Michael Howard during discussions as to whether or not anti-stalking provisions were necessary:

> "Stalking is a particularly difficult thing to define, which is why we are taking so much care to make sure that we get it right. As soon as we are satisfied that we have a workable definition of the crime, we will legislate."[258]

By December 1996, a mere six months after Howard's comments, government proposals to legislate against stalking began to emerge in the absence of a solid definition. Clearly, the courts' familiarity with the concept is questionable.

Second, the government reasoned that stalking behaviours were too diverse to be captured within a single definition (which clearly contradicts their contention that the courts' familiarity with the concept made definition unnecessary).[259] The government anticipated that a broader approach would help accommodate those victims whose experiences may not fit within specific categories of stalking behaviours.

Third, the government felt that if prohibited behaviours were specifically outlined under the legislation, perpetrators would take care not to commit them, instead employing other forms of harassment not specifically outlined by the legislation. Essentially, by specifically defining the behaviour, perpetrators would be able to find loopholes in order to continue harassing victims without falling within the ambit of the legislation.[260] The resulting sweeping UK legislation can be applied to domestic violence cases, neighbour

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[256] *Harris, supra* note 251 at 3-4.

[257] *Finch, supra* note 1 at 10.

[258] *Ibid.*

[259] *Ibid.*

[260] *von Heussen, supra* note 251.

disputes, workplace, racial, and sexual harassment, political demonstrations and the media.[261]

Unlike Canada, most Australian jurisdictions and the US, the *Harassment Act* does not require proof of the person's intent to cause fear and/or physical harm in order to prove that he or she knew the conduct constitutes harassment.[262] All that is required is the establishment of a "course of conduct" (two or more harassing incidents) during which the suspect knew his/her behaviour constituted harassment, or that he/she ought to have known that his/her behaviour constituted harassment. The latter requirement is based on the "reasonable person" test that is whether a reasonable person would have recognized that his/her course of conduct amounted to harassment. The broadness of the legislation and the objective test create low threshold criteria for proving harassment.

In 2000, an evaluation of the use and effectiveness of the legislation since its passage was conducted by Harris on behalf of the Research, Development and Statistics Directorate (RDS) within Britain's Government Statistical Service (GSS). The study examined one hundred and sixty-seven *Protection from Harassment* cases sent by the police to the Crown Prosecution Service (CPS) during 1998 for a decision on prosecution. Using CPS files as the main source of information, details were recorded about the characteristics of each case and its progress through the criminal justice system. Harris also conducted interviews with police officers, Crown Prosecutors, magistrates and victims of harassment.[263]

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[261] Sheridan, L. and Davies, G.M. (2000). What is Stalking? The Match Between Legislation and Public Perception. *Legal and Criminological Psychology* at 2.

[262] *Finch, supra* note 1 at 11.

[263] *Harris, supra* note 251 at V.

According to the study, the broad wording of the legislation poses difficulties for police, magistrates and judges, in particular when determining what kind of behaviour constitutes criminal harassment and whether it would be more appropriate for the victim to pursue the action civilly rather than under the criminal law.[264] Under section 3 of the Act, applications can be made to the High Court or County Court under a statutory tort of harassment. It is possible for victims in the UK to pursue a civil action in circumstances in which they might equally have reported the matter to the police and sought the arrest of the offender.[265] There have been criticisms about the use of criminal proceedings for minor offences that could be addressed through civil proceedings. It is feared that the Act may no longer be regarded as a viable tool to be used in more serious situations.[266] The study recommends more clarification for police, Crown Prosecution Service (CPS), magistrates and judges about the kinds of cases that the criminal provisions of the Act are intended to cover and the circumstances in which civil action might be more appropriate. The overlap of criminal and civil law with respect to stalking cases has not been raised as a concern in the Canadian studies.

As in other jurisdictions, victims in the UK have experienced difficulties with the enforcement of the stalking legislation. The majority of victims interviewed for Harris' 2000 study wanted to be better informed about their case. Many victims were not aware of available criminal and civil remedies prior to contacting police. Lack of support before and during court proceedings resulted in one-third of cases being dropped due to non-

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[264] *Ibid,* at 44.

[265] *Ibid,* at 5.

[266] *Ibid,* at 44. For example, police tend to use the criminal remedy more often because it may be easier to resolve a situation such as a domestic or neighbour dispute through an arrest and charge (and possibly avoid future calls to the same location), rather than to notify the involved parties about civil remedies.

cooperation from the victim. There is also potential for further harassment by alleged offenders who represent themselves during proceedings because they are allowed to cross-examine complainants. Presumably, the same can occur in Canadian courts if the alleged offender elects to represent himself or herself.

Further, victim support services currently in place in the UK are considered to provide a valuable service but referrals to them are not mandatory. Such referrals are also not mandatory in Canada although the *Criminal Harassment Handbook* distributed by the Federal Department of Justice, clearly states that a primary objective in criminal harassment cases should be to keep the victim safe, informed and involved.[267] Of course, based on Gill and Brockman's findings, it is questionable as to whether or not these objectives are being met.

The UK's experiences with their harassment legislation mirror many of the challenges faced by Canada. The government failed to define what constituted stalking behaviour; instead drafting legislation so broadly that virtually any behaviour could be deemed criminal under the Act. Even the name of the Act, the *Protection from Harassment Act*, does not give any significant indication as to what sort of behaviour is being legislated against. This has had serious implications for proper enforcement of the Act. As the above noted studies show, police, Crowns, and the courts are grappling with when and how to apply the legislation. Victims are not receiving sufficient support from the legal system and this has contributed to the significant number of charges that have been dropped because victims do not want to proceed.

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[267] *Department of Justice Canada, supra* note 2 at 31.

United States

As Chapter three discussed, the US was the first country to pass anti-stalking provisions, beginning with California in 1993. Every state has anti-stalking provisions or harassment legislation that encompasses stalking behaviours. Legal definitions of stalking vary considerably between states however, most define the behaviour as: "the willful or intentional commission of a series of acts that would cause a reasonable person to fear death or serious bodily injury and that, in fact, does place the victim in fear of death or serious bodily injury".[268] Other legislative differences between states relate to the type of repeated behavior that is prohibited, whether a threat is required as part of stalking, the reaction of the victim to the stalking, and the intent of the stalker.[269]

Critiques of the stalking laws in the United States have primarily focused on the broadness of legislation and its arguably unconstitutionally vague wording. Like Canada, most states have defined the concept of stalking quite broadly. Court cases have challenged that overly broad legislation can criminalize constitutionally protected conduct such as the first amendment right to free speech. Other claims have been made about the use of a wide range of words and phrases within stalking legislation that are too vague. Challenges to words and phrases such as, "legitimate purpose", "alarms", "annoys" and "harasses" have led some states to eliminate some of these phrases, while others have now included an objective standard test or defined key terms such as "course

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[268] U.S. Department of Justice. (January, 2002). *Strengthening Anti-Stalking Statutes*. Legal Series Bulletin at 1.

[269] *Ibid.*

of conduct", "credible threat" and "harassment".[270] The objective standard now employed by many states is similar to Canada's section 264.[271] It is not known if this approach has been met with favourable results in the US.

Although stalking legislation has been introduced throughout the US, stalking remains difficult to investigate, prosecute and prevent. Most of the police departments are lacking clearly defined policies and appropriate procedures for dealing with stalking cases. The National Center for Victims of Crime received funding from the U.S. Department of Justice Office of Community Oriented Policing Services to develop and test a model protocol based on the principles of community policing that would help guide law enforcement responses to stalking.[272] The Model Protocol has been adapted and field-tested by the Philadelphia Police Department with assistance from the National Center.[273] The hope for the protocol was that a network of community stakeholders including but not exclusive to, prosecutors, members of the judiciary, victim advocates, mental health treatment providers, and housing and social service providers would collectively strengthen stalking policies and the response measures used in stalking cases. These measures included an intensive assessment of both the victim and stalker, including the status of their relationship, the stalker's behaviour toward the victim and its

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[270] *Ibid,* at 3; *Gill and Watson, supra* note 25.

[271] *Mullen et al, supra* note 4 at 275.

[272] National Center for Victims of Crime. (2002). *Creating an Effective Stalking Protocol.* Arlington, Virginia: U.S. Department of Justice at 3.

[273] The Philadelphia Police Department is the fourth largest police department in the US with approximately 7,000 sworn officers and a civilian staff of 900. It was reasonable to assume that a police department of this size that serves a large and diverse metropolitan population would have a high volume of cases (especially domestic violence cases) to make a pilot test of the stalking protocol worthwhile. The PPD was also looking for new ways to enhance police-community partnerships and was open to participating in the model protocol pilot. *Ibid.*

potential for escalation, and the safety of the victim. Participants noted that police were taking a more proactive response to stalking cases, including those cases within the domestic violence context. Participants highlighted the importance of community involvement in the development and implementation of policies to improve the policing of stalking. Computer access was the primary concern of participants. It was felt that a computerized tracking system was vital to the successful implementation of the protocol and effective policing of stalking cases. The report indicated that computers allow for the collection and analysis of data in order to build a case history, get a clearer picture of the perpetrator's behaviour and see the full impact of the behaviour on the victim.[274] At this time, this approach remains at the test model stage. It is therefore premature to determine whether or not this is the most effective approach. Based on Philadelphia's findings, the protocol seems to be a step in the right direction with respect to enforcing anti-stalking provisions and providing adequate support to victims and perpetrators. It will be interesting to follow the protocol's future progress.

The problems now faced by the US are strikingly similar to those experienced by Canada, Australia, and the UK. Definitional problems again come into play, along with enforcement issues. Anti-stalking provisions have not been effective in preventing, prosecuting or punishing stalking behaviours. These problems again raise the issue of what the purpose was in passing new legislation. Most US states already had provisions in place that addressed stalking behaviours. The government's knee jerk reaction to media coverage and public pressure resulted in legislation that is not consistent across the US in content or enforcement.

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[274] *Ibid* at 73.

Conclusion

As this Chapter has shown, the problems associated with anti-stalking legislation are not unique to Canada. The experiences of these other nations with their respective legislation are relatively the same as the experience in Canada. The passage of legislation in each of these countries was prompted by the US moral panic. None of these countries was able to define exactly what constituted criminal harassment prior to the passage of their respective legislation. This definitional problem is reflected in the legislation's subsequent enforcement problems experienced by police, Crown and courts. The legal community in each of these countries has grappled with the elusiveness of the stalking concept and when and how the legislation should be used to combat the behaviour. Attempts by these nations to harness or broaden the stalking concept within their respective legislation have been far from effective.

Chapter Seven: Conclusion

This paper has demonstrated how the moral panic response process by which section 264 came to fruition meant that the legislation and its implications were not adequately thought through. The legislation was doomed from the outset as a tool that would be ineffective in the protection of Canadian women.

Several proposals have been put forth by women's organizations and researchers regarding stalking and in which context it should be understood and addressed. It has been proposed that stalking be understood and addressed within the context of domestic violence. Problems with this approach were addressed in Chapter four. Pacey's report revealed that many police officers are reluctant to lay charges under anti-stalking legislation in cases of domestic violence; further entrenchment of stalking in the domestic violence context might serve to exacerbate the existing reluctance. A second proposed approach involves placing stalking on a continuum of violence against women, a broader approach than the domestic violence paradigm. This approach would exclude less serious forms of harassment such as neighbour disputes and would keep the focus on violence against women which section 264 has failed to do. The third approach, that views the concept of stalking within a wider context that includes violence against women as well as a broader range of behaviours, is effectively what is in place currently with section 264. The effect of this approach has been to downplay the seriousness of women's experiences with violence.

This thesis has illustrated that Canada needs to get back to the root of the stalking problem - domestic violence against women - and there needs to be serious input from victims of domestic violence and women's groups in order to determine what the best

course of action would be to address that problem through the criminal law.

This thesis has determined that it is not possible nor is it desirable to capture all forms of stalking within a single provision. The legislation in place that has tried to do so is vague and uncertain and has resulted in uneven enforcement that has tended to minimize the root problem of intimate partner stalking. However, at this point, it is not known whether stalking is really a helpful addition, either conceptually or practically, and, if the term stalking is or might be helpful, how the concept should be articulated. The suggested approach of placing stalking behaviour on a continuum of violence against women seems to be a step in the right direction because it keeps the attention on the primary victims of stalking and focuses on their experiences with violence. However, it is not clear how this continuum might be articulated in the criminal law context. In the absence of concerted and effective education about violence against women and about the escalation of violence in the domestic violence context, such an approach might well fall prey to similar problems as those that currently undermine the stalking legislation.

The false start of the media focus on celebrity stalking and the moral panic response that it generated meant the anti-stalking efforts were misdirected and rushed. The federal government needs to go back to the beginning to closely and fully examine the stalking problem in order to determine what if any legislative response or responses might be appropriate. And ultimately, there needs to be more participation from women if meaningful changes are to be made.

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Appendix A: Definitions of Legal Terms

Hybrid Offence: Term applied to a *Criminal Code* offence which may be tried by summary conviction procedure or by indictment at the option of the prosecutor.[275]

Indictable Offence: A criminal offence which is triable by way of indictment; the most serious criminal offences are indictable offences. Murder, for example, is an indictable offence.[276]

Mens Rea: A key basis for the imposition of criminal liability in Canada. Mens rea focuses on the mental state of the accused and requires proof of a positive state of mind such as intent, recklessness or wilful blindness.[277]

Objective Test (The Reasonable Person): In the context of criminal law, the Crown must prove that the accused had the fault or mental element of intending to commit the offence. The accused must have the required fault element, or *mens rea*. Usually, the courts infer what type of fault element is required. An objective fault element does not depend on the accused's own state of mind, but on what a reasonable person in the circumstances would have known or done. Therefore, the objective test requires that a reasonable person in the accused's position would have had the required guilty knowledge or would have acted differently.[278]

Peace Bond: A written promise made to a court to keep the peace.[279]

Preamble: A preface to a piece of legislation that states the reasons for and purpose of the legislation.[280]

Probation Term: The disposition of a court authorizing a person to be at large subject to the conditions of a probation order or community service order.[281]

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[275] Dukelow, Daphne. (2002). *Dictionary of Canadian Law*. Third Edition. Toronto, Ontario: Carswell at 201.

[276] *Ibid,* at 210.

[277] *Ibid,* at 259.

[278] Roach, supra note 160 at 11.

[279] *Dukelow, supra* note 275 at 302.

[280] *Ibid,* at 315.

[281] *Ibid,* at 323.

Protective Court Order (Restraining or Protection Order): An order forbidding a person from being in the presence of another; commanding a party to do or not to do something in particular; an order is a term of a recognizance or probation or otherwise.[282]

Royal Assent: Approval of a bill, public or private, agreed to for federal legislation by both the Senate and the House of Commons. In a province, the Lieutenant Governor gives royal assent to a bill in order to make it a law. Unless the bill contains a clause setting another date, a bill comes into force on the day on which it receives royal assent.[283]

Subjective Test: A subjective fault or mental element depends on what was in the particular accused's mind at the time that the criminal act was committed. When the judge or jury is making such a determination, all evidence that is presented must be considered.[284]

Summary Conviction Offence: An offence that is tried summarily. This type of offence is less serious.[285]

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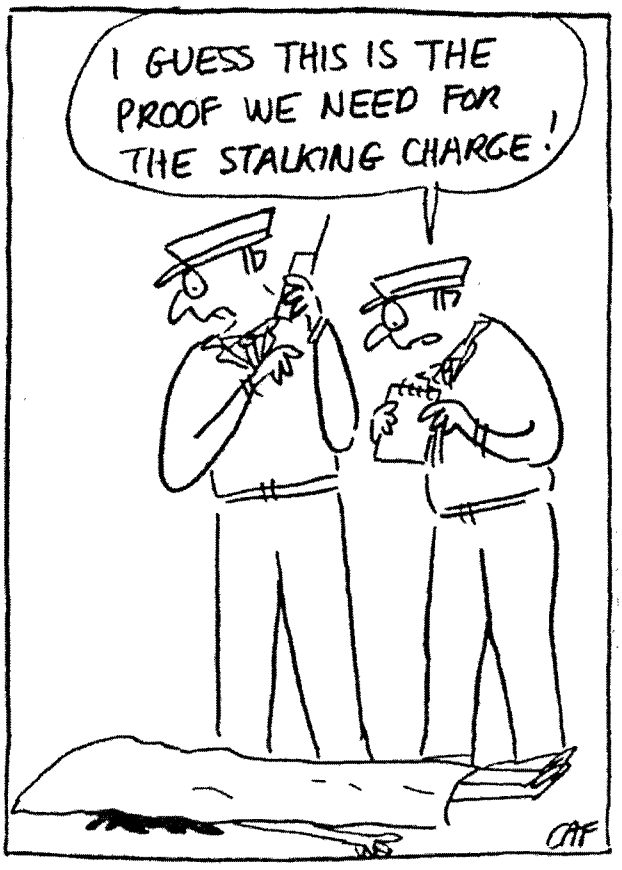
[282] *Ibid,* at 292, 356.

[283] *Ibid,* at 362.

[284] *Roach, supra* note 160 at 11.

[285] *Dukelow, supra* note 275 at 392.

Appendix B: Example of Police Response



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[286] *Pearce and Easteal, supra* note 63 at 165.