

STALKING AND THE MILITARY:

A PROPOSAL TO ADD AN ANTI-STALKING PROVISION
TO ARTICLE 134, UNIFORM CODE OF MILITARY
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[T]here is an [] epidemic that is spreading across this country, and it is called stalking. It may come as a shock to my colleagues that today the leading cause of injury among American women is being beaten by a man. And nationally an estimated 4 million men kill or violently attack the women they live with or date.²

—Senator William Cohen, 1992

This is Fort Campbell, home of the Army's elite air assault division. In just the past two years, three soldiers stationed here have been charged with killing their wives or girlfriends. One of the victims was Ronnie Spence, murdered by her ex-fiance, Sergeant Bill Coffin, in front of their baby daughter in their trailer home near the Army post . . . Domestic violence cases involving Fort Campbell soldiers routinely show up in [Kentucky Chief

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2. 138 CONG. REC. S13469-02 (daily ed. Sept. 15, 1992) (statement of Sen. Cohen calling for development of model anti-stalking legislation) (cited in Cassandra Ward, *Minnesota's Anti-Stalking Statute: A Durable Tool to Protect Victims from Terroristic Behavior*, 12 LAW & INEQ. J. 613 (1994)).

*District] Judge MacDonald's courtroom, and he says Army commanders routinely ignore his court orders that are supposed to protect abused spouses. In the case of Ronnie Spence, the judge had issued this emergency protective order requiring Sergeant Coffin to stay at least a mile away from Spence at all times. But Coffin violated that order the day he drove off the Army post and killed her.*³

—CBS correspondent Bill Bradley, 1999

I. Introduction

Stalking is harassing or threatening behavior directed by one person toward another. A stalker will frequently follow the targeted person and direct repeated and unwanted communications, such as letters and telephone calls, to the targeted person or that person's family.⁴ These behaviors may escalate to threats against the person or the person's family, and they may be precursors to violence that will culminate in assault or murder.⁵ Stalking is an epidemic that affects hundreds of thousands of ordinary people every year.⁶ Annually, stalkers victimize more than one million women.⁷ More than ten million American women and men report that someone has stalked them at some point during their lifetime.⁸

To combat criminal stalking, all fifty states and the District of Columbia passed anti-stalking statutes⁹ between 1990 and 1994. Congress enacted a law to protect victims of interstate stalking in 1996.¹⁰ The mili-

3. *60 Minutes: The War at Home* (CBS television broadcast, Jan. 17, 1999) [hereinafter *60 Minutes*] (transcript on file with author).

4. DEP'T OF JUSTICE, OFFICE OF JUSTICE POLICY, VIOLENCE AGAINST WOMEN GRANTS OFFICE, STALKING AND DOMESTIC VIOLENCE: THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT, ch. 1 (1998), available at <<http://www.ojp.usdoj.gov/vawo/grants/stalk98>> [hereinafter STALKING AND DOMESTIC VIOLENCE].

5. *Id.*

6. GAVIN DE BECKER, *THE GIFT OF FEAR* 25 (1997).

7. Women are three times more likely to be stalked than raped. STALKING AND DOMESTIC VIOLENCE, *supra* note 4. Stalking is also closely linked to domestic violence. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, DOMESTIC VIOLENCE, STALKING, AND ANTISTALKING LEGISLATION: ANNUAL REPORT TO CONGRESS, MARCH 1996, ch. 1, available at <<http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/>> [hereinafter ANTI-STALKING LEGISLATION].

8. STALKING AND DOMESTIC VIOLENCE, *supra* note 4.

9. *Id.*

10. 18 U.S.C. § 2261A (2000).

tary, though not immune from the societal issues of stalking and domestic violence, currently has no specific provision in the Uniform Code of Military Justice¹¹ (UCMJ) that makes stalking a crime.

This article reviews the increasing prevalence of stalking as a crime in society and addresses the unique nature of stalking offenses. It examines the enactment of anti-stalking legislation by the states and the federal government. The article discusses stalking within the military, including recent cases and charging practices, and notes the need for a military anti-stalking provision. This article recommends an amendment to the *Manual for Courts-Martial*¹² and proposes a specification for an anti-stalking provision under Article 134, UCMJ.

II. Stalking in Society

A. Nature of Stalking Offenses

Stalking is an issue of current societal concern, from the halls of Congress¹³ to newspapers¹⁴ and prime time television.¹⁵ One psychiatrist with experience as a stalking victim describes stalking as social terrorism.¹⁶ “Stalking generally refers to harassing or threatening behavior that an individual engages in repeatedly, such as following a person, appearing at a person’s home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person’s property.”¹⁷ These actions may, but do not necessarily, include threats of injury or other harm and may, but not necessarily, signal future violence.¹⁸ Although not every stalker overtly threatens the victim, a stalker’s course of conduct—by its

11. See 10 U.S.C. §§ 801-964 (2000).

12. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

13. Stalking Prevention and Victim Protection Act of 2000, S. 2011, 106th Cong. (2000) (proposing amendment of Title 18, United States Code, to expand the prohibition on stalking); Federal Jennifer Act, H.R. 3270, 106th Cong. (1999) (proposing enhancement of penalties for stalking a minor).

14. “Theresa,” *My So-Called Stalker: Negotiations with Fear, Obsession, and the D.C. Police*, WASH. CITY PAPER, Oct. 8, 1999, at 22; Liza Mundy, *A Story for the Silent*, WASH. POST, Dec. 5, 1999 (Magazine), at 6.

15. *Larry King Live* (CNN television broadcast, Jan. 5, 2000); *Investigative Reports, Love Chronicles* (A&E television broadcast, Jan. 22, 2000).

16. DR. DOREEN ORION, I KNOW YOU REALLY LOVE ME: A PSYCHIATRIST’S ACCOUNT OF STALKING AND OBSESSIVE LOVE 29-30 (1997).

17. STALKING AND DOMESTIC VIOLENCE, *supra* note 4.

18. *Id.*

very repetition—causes the victim to feel fear. According to the Department of Justice’s 1996 Report to Congress, stalking behavior is characterized by the repetition of certain actions accompanied by the intent to cause fear:

Stalking is a distinctive form of criminal activity composed of a series of actions (rather than a single act) that taken individually might constitute legal behavior. For example, sending flowers, writing love notes, and waiting for someone outside her place of work are actions that, on their own, are not criminal. When these actions are coupled with an intent to instill fear or injury, however, they may constitute a pattern of behavior that is illegal.¹⁹

Typically, a stalker’s behavior escalates from merely annoying to seriously threatening. Over time, a stalker’s actions can become “obsessive, dangerous, violent, and potentially fatal.”²⁰

1. Types of Stalking

Stalking may occur between people who know each well or people who do not know each other at all: “The motivations for stalking cover a wide range of desires for contact and control, obsession, jealousy, and anger—and stem from the real or imagined relationship between the victim and the stalker.”²¹ Based on the relationship with the victim, stalkers generally fall within one of three categories: intimates or former intimates, acquaintances, or strangers.²² Because research in this area is still in its infancy, very little information is available to predict who will become a stalker, particularly in acquaintance or stranger stalking cases.²³

2. National Stalking Survey

The National Institute of Justice and the Centers for Disease Control and Prevention sponsored the first national study on stalking in the United States from November 1995 to May 1996.²⁴ Researchers obtained data for

19. ANTI-STALKING LEGISLATION, *supra* note 7, intro.

20. *Id.* ch. 2.

21. *Id.*

22. *Id.*; STALKING AND DOMESTIC VIOLENCE, *supra* note 4, intro.

23. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, intro.

24. PATRICIA TJADEN & NANCY THOENNES, STALKING IN AMERICA: FINDINGS FROM THE

the study, known as the National Violence Against Women (NVAW) Survey, from a nationally representative telephone survey of 8000 American women and 8000 American men.²⁵ The NVAW Survey consisted of detailed questions about the survey participants' experiences with violence, including stalking.²⁶ The survey "define[d] stalking as 'a course of conduct directed at a specific person that involves repeated visual or physical proximity, nonconsensual communication, or verbal, written, or implied threats, or a combination thereof, that would cause a reasonable person fear,' with *repeated* meaning on two or more occasions."²⁷

The NVAW Survey found that more than ten million Americans—over eight million women and two million men—had been stalked at some time in their lives.²⁸ Women are the primary victims of stalking, and men are the primary perpetrators.²⁹ The NVAW Survey confirmed that most stalking victims know their assailants.³⁰ Young adults are the population

24. (continued) NATIONAL VIOLENCE AGAINST WOMEN SURVEY 15 (1998). "Prior to this study, empirical data on the prevalence and characteristics of stalking in the general population were virtually nonexistent." *Id.* at 13. The survey addressed such questions as, "How much stalking is there in the United States? Who stalks whom? How often do stalkers overtly threaten their victims? How often is stalking reported to the police? What are the psychological and social consequences of stalking?" *Id.* at 1. The NVAW Survey made seven policy recommendations: (1) Treat stalking as the significant social problem that it is; (2) Drop credible threat requirements from anti-stalking statutes; (3) Focus future research on intimate and acquaintance stalking, not celebrity stalking; (4) Train criminal justice practitioners and personnel on the safety needs of stalking victims; (5) Study the efficacy of formal law enforcement measures, such as restraining orders, and informal interventions, such as police warnings; (6) Train mental health professionals on the appropriate treatment of stalking victims; and (7) Include address confidentiality programs as part of anti-stalking and victim protection strategies. *Id.* at 13-14.

25. *Id.* at 1, 15-16 (Survey Methodology and Demographic Description of the Sample), 17 (Survey Screening Questions).

26. *Id.* at 1, 17.

27. *Id.* at 2 (emphasis in original).

28. *Id.* at 3. Put differently, one out of twelve American women (eight percent) and one in forty-five American men (two percent) have been stalked during their lives, based on 1995 U.S. Census estimates of women and men aged eighteen and older. *Id.* The NVAW Survey estimates of stalking prevalence are far higher than previous "guessestimates" made by mental health professionals. *Id.* at 4. The rate of stalking prevalence increases if stalking is more broadly defined as requiring only that victims felt a little or somewhat frightened of their assailants, as compared with the NVAW Survey's definition of stalking which required that victims felt very frightened or feared bodily harm. *Id.*

29. Seventy-eight percent of stalking victims are women, and ninety-four percent of their stalkers are men. *Id.* at 5.

30. Fifty-nine percent of female victims are stalked by an intimate or former intimate partner, as compared with thirty percent of male victims, who are more often stalked by acquaintances or strangers. *Id.* at 5-6.

most at risk of becoming targets for stalkers.³¹ The average stalking case lasts for 1.8 years, and cases involving intimates or former intimates last an average of 2.2 years.³²

Stalkers engage in a course of conduct which, considered in context, causes reasonable fear in their victims.³³ Despite the high level of fear described by the victims, however, less than half of the stalkers overtly threatened the victims.³⁴ The NVAW Survey found that only around half of all stalking victims reported the stalking to the police.³⁵ Female victims were more likely than were male victims to obtain protective orders against their stalkers.³⁶ Most victims who obtained protective orders reported that their stalkers had violated the orders.³⁷ Only thirteen percent of women and nine percent of men reported criminal prosecutions of their stalkers; charges included stalking, making threats, harassment, vandalism, trespassing, breaking and entering, disorderly conduct, and assault.³⁸ Criminal convictions resulted for about half of those prosecuted for stalking or related crimes.³⁹

Stalking has strong negative psychological effects on its victims. Concerned about their personal safety, stalking victims reported seeking counseling, missing work or not going back to work at all, and taking a variety of extra precautions—excluding police reports or protective orders—to protect themselves.⁴⁰ Such self-help measures included obtaining a gun, changing addresses or moving out of town, hiring a private investigator, consulting an attorney, varying driving routes, moving to a shelter, refusing to leave home, getting public records sealed, requesting assistance from family and friends, and avoiding the stalker.⁴¹ Commenting on the reaction of the criminal justice system to the impact of stalking

31. Fifty-two percent of victims are eighteen to twenty-nine years old, and twenty-two percent are thirty to thirty-nine years old. The average victim's age was twenty-eight at the time the stalking started. *Id.*

32. *Id.* at 12.

33. *Id.* at 7-8; see DE BECKER, *supra* note 6, at 126 (emphasizing the importance of considering the context of communications, not simply their content).

34. TJADEN & THOENNES, *supra* note 24, at 7-8.

35. *Id.* at 9.

36. *Id.* at 10.

37. *Id.* at 10-11.

38. *Id.* at 10.

39. *Id.*

40. *Id.* at 11.

41. *Id.*

on the victims, one domestic violence expert noted, “Everyone minimizes [the fact] that this kind of behavior freaks people out.”⁴²

3. *Relationship Between Stalking and Domestic Violence*

Results of the NVAW Survey demonstrate a compelling link between stalking and domestic violence.⁴³ Estimates suggest that battered women account for as many as half of female murder victims, and experts believe that stalking may precede a significant number of such murders.⁴⁴ Eighty-one percent of women stalked by an intimate or former intimate partner were also assaulted by that partner, and thirty-one percent were also sexually abused by that partner.⁴⁵ Male stalkers are much more likely to physically or sexually assault their intimate partners—in short, to be batterers—than men in the general population.⁴⁶

B. State Responses to Stalking

1. *California’s Anti-Stalking Law*

Beginning with California in 1990, every state enacted anti-stalking legislation.⁴⁷ The 1989 murder of young actress Rebecca Schaeffer by a male stalker drew attention to the crime of stalking in California.⁴⁸ Although typically cited as the impetus for the California law, the Schaeffer murder was not the sole basis for the statute. The domestic violence murders of four women by the men against whom they had protective orders are at the heart of the nation’s first anti-stalking law. California Municipal Court Judge John M. Watson initiated the stalking legislation in response to the failure of existing laws to protect women from their domestic abusers, despite restraining orders and pending misdemeanor charges.⁴⁹

42. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 3 (statement of Robert C. Gallup, executive director of AMEND, a Denver program for domestic violence offenders).

43. *Id.* at 8.

44. *Id.*

45. *Id.*

46. *Id.*

47. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2 and app. A (Anti-Stalking Legislation Update for States and Selected Territories, March 1998).

48. ORION, *supra* note 16, at 29-30.

49. NANCY K.D. LEMON, DOMESTIC VIOLENCE AND STALKING: A COMMENT ON THE MODEL ANTI-STALKING CODE PROPOSED BY THE NATIONAL INSTITUTE OF JUSTICE (1994), *avail-*

After several amendments, California's stalking statute currently provides as follows:

Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.⁵⁰

The statute addresses two distinct forms of criminal conduct: (1) willful, malicious and repeated following, and (2) harassment.⁵¹ The California law provides for increased punishments for violations of temporary restraining orders, or other court orders, and subsequent stalking convictions.⁵² The statute specifically defines "harasses," "course of conduct," "credible threat," "electronic communication device," and "immediate family."⁵³ California's appellate courts have upheld the statute against constitutional challenges.⁵⁴

49. (continued) *able at* <<http://www.vaw.umn.edu/BWJP/stalking.htm>> [hereinafter COMMENT ON THE MODEL ANTI-STALKING CODE].

50. CAL. PENAL CODE § 646.9(a) (Deering 1999).

51. *People v. McCray*, 58 Cal. App. 4th 159, 170 (Cal. Ct. App. 1997) (concluding that "the two types of conduct upon which a stalking conviction may be based are willful, malicious and repeated following, on the one hand, and harassment (according to the statutory definition) on the other"; clarifying *People v. Heilman*, 25 Cal. App. 4th 391, 399 (Cal. Ct. App. 1994)).

52. CAL. PENAL CODE § 646.9(b), (c) (setting forth increased punishment of imprisonment for two to four years).

53. *Id.* § 646.9(e), (f), (g), (h), (l).

54. *See People v. Borrelli*, 77 Cal. App. 4th 703 (Cal. Ct. App. 2000) (holding that stalking statute did not infringe on free speech rights and that the term "safety" was not unconstitutionally vague); *People v. Ewing*, 76 Cal. App. 4th 199 (Cal. Ct. App. 1999) (reversing conviction due to insufficient evidence that the victim suffered "substantial emotional distress," but upholding constitutionality of stalking statute); *McCray*, 58 Cal. App. 4th at 159 (rejecting claim that harassment must be repeated and holding that a single series of separate acts constituting harassment may properly form the basis for a stalking conviction); *People v. Falck*, 52 Cal. App. 4th 287 (Cal. Ct. App. 1997) (rejecting claims that term "safety" is unconstitutionally vague and that "credible threat" is unconstitutionally broad because it does not require that defendant actually intended to carry out the threat).

2. Variation in State Stalking Statutes

Stalking definitions vary widely across state lines: “Though most States define stalking as the willful, malicious, and repeated following and harassing of another person, some States include in their definition such activities as lying-in-wait, surveillance, nonconsensual communication, telephone harassment, and vandalism.”⁵⁵ Most states require a course of conduct, and half require at least two occurrences.⁵⁶ Threat requirements also vary widely, with most states requiring a credible threat of violence against the victim or the victim’s immediate family and other jurisdictions requiring only that the stalker’s course of conduct amounts to an implied threat.⁵⁷ The states also differ in their classifications of stalking by punishment and severity of offense. Although some states treat stalking as a felony-only offense,⁵⁸ the majority of states classify it as a misdemeanor.⁵⁹

55. TJADEN & THOENNES, *supra* note 24, at 1-2.

56. Twenty-five states require two incidents to demonstrate repeated behavior or a course of conduct. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2 and app. A. These states are Arizona: ARIZ. REV. STAT. ANN. § 13-2921 (West 2000); Arkansas: ARK. CODE ANN. § 5-71-229 (Michie 1999); Colorado: COLO. REV. STAT. ANN. § 18-9-111 (West 1999); Hawaii: HAW. REV. STAT. ANN. § 711-1106.5 (Michie 1999); Illinois: 720 ILL. COMP. STAT. ANN. § 5/12-7.3 (West 1999); Iowa: IOWA CODE ANN. § 708.11 (West 1999); Kentucky: KY. REV. STAT. ANN. § 508.130 (Michie 1998); Maine: ME. REV. STAT. ANN. tit. 17-A § 210-A (West 1998); Michigan: MICH. COMP. LAWS ANN. § 600.2950 (West 1999); Minnesota: MINN. STAT. ANN. § 609.749 (West 1999); New Hampshire: N.H. REV. STAT. ANN. § 633:3-a (1999); New Jersey: N.J. STAT. ANN. § 2C:12-10 (West 1999); New Mexico: N.M. STAT. ANN. § 30-3A-3 (Michie 2000); North Carolina: N.C. GEN. STAT. § 14-277.3 (1999); North Dakota: N.D. CENT. CODE § 12.1-17-07.1 (2000); Ohio: OHIO REV. CODE ANN. § 2903.211-.215 (Anderson 1999); Oklahoma: OKLA. STAT. ANN. tit. 21, § 1173 (West 1999); Pennsylvania: 18 PA. CONS. STAT. ANN. § 2709 (West 1999); South Carolina: S.C. CODE ANN. § 16-3-1700 (Law Co-op. 1998); Tennessee: TENN. CODE ANN. § 39-17-315 (1999); Texas: TEX. PENAL CODE ANN. § 42.072 (West 1999); Utah: UTAH CODE ANN. § 76-5-106.5 (1999); Vermont: VT. STAT. ANN. tit. 13, §§ 1061-1063 (2000); Virginia: VA. CODE ANN. § 18.2-60.3 (Michie 1999); and Wisconsin: WIS. STAT. ANN. § 940.32 (West 1999).

57. Only twelve states define “threat” to include implied as well as actual threats. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2 and app. A. These states are Alabama: ALA. CODE § 13A-6-90 (1999); Arizona: ARIZ. REV. STAT. ANN. § 13-2923 (West 2000); California: CAL. PENAL CODE § 646.9 (Deering 1999); Delaware: DEL. CODE ANN. tit. 11, § 1312A (1999); Georgia: GA. CODE ANN. § 16-5-90 (1999); Indiana: IND. CODE § 35-45-10-1 (1999); Iowa: IOWA CODE ANN. § 708.11 (West 1999); Kentucky: KY. REV. STAT. ANN. § 508.140 (Michie 1998); Maine: ME. REV. STAT. ANN. tit. 17-A § 210-A (West 1998); New Hampshire: N.H. REV. STAT. ANN. § 633:3-a (1999); South Dakota: S.D. CODIFIED LAWS § 22-19A-1 (Michie 2000); and Vermont: VT. STAT. ANN. tit. 13, §§ 1061 (2000).

3. Effect of State Anti-Stalking Laws

Before the passage of state stalking laws, police and prosecutors in the criminal justice system had to address stalking-type offenses using other criminal law prohibitions, such as threats, trespass, harassment, and civil law injunctions.⁶⁰ Use of these related provisions was an inadequate response to stalking offenses. Not only were punishments for relatively minor criminal offenses light, convictions for more serious offenses were difficult to obtain due to the high standard of proof required to show intent.⁶¹ Civil injunctions proved to be too hard to secure. Most impor-

58. States that treat stalking as a felony-only offense are Alabama: ALA. CODE § 13A-6-90 (1999); Arizona: ARIZ. REV. STAT. ANN. § 13-2923 (West 2000); Arkansas: ARK. CODE ANN. § 5-71-229 (Michie 1999); Colorado: COLO. REV. STAT. ANN. § 18-9-111 (West 1999); Delaware: DEL. CODE ANN. tit. 11, § 1312A (1999); Florida: FLA. STAT. ANN. § 748.048 (West 1999); Illinois: 720 ILL. COMP. STAT. ANN. 5/12-7.4 (West 1999); Kansas: KAN. STAT. ANN. § 21-3438 (1999); Maryland: MD. CODE ANN., Stalking § 124 (1999); Massachusetts: MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1999); Michigan: MICH. COMP. LAWS ANN. § 600.2950 (West 1999); Minnesota: MINN. STAT. ANN. § 609.749 (West 1999); Missouri: MO. ANN. STAT. § 565.225 (West 1999); Nevada: NEV. REV. STAT. ANN. § 200.575 (Michie 2000); and Vermont: VT. STAT. ANN. tit. 13, §§ 1062-1063 (2000).

59. States that classify stalking as a misdemeanor, or as both a misdemeanor and a felony depending on the circumstances, are Alaska: ALASKA STAT. § 11.41.270 (Michie 1999); California: CAL. PENAL CODE § 646.9 (Deering 1999); Connecticut: CONN. GEN. STAT. ANN. § 53a-181-d (West 1999); District of Columbia: D.C. CODE ANN. § 22-504 (1999); Georgia: GA. CODE ANN. § 16-5-90 (1999); Hawaii: HAW. REV. STAT. ANN. § 711-1106.5 (Michie 1999); Idaho: IDAHO CODE § 18-7905 (1999); Indiana: IND. CODE § 35-45-10-5 (1999); Iowa: IOWA CODE ANN. § 708.11 (West 1999); Kentucky: KY. REV. STAT. ANN. § 508.150 (Michie 1998); Louisiana: LA. REV. STAT. ANN. § 14:40.2 (West 2000); Maine: ME. REV. STAT. ANN. tit. 17-A, § 210-A (West 1998); Mississippi: MISS. CODE ANN. § 97-3-107 (1999); Montana: MONT. CODE ANN. § 45-5-220 (1999); Nebraska: NEB. REV. STAT. ANN. §§ 28-311.04 (Michie 1999); New Hampshire: N.H. REV. STAT. ANN. § 633:3-a (1999); New Jersey: N.J. STAT. ANN. § 2C:12-10 (West 1999); New Mexico: N.M. STAT. ANN. § 30-3A-3.1, 4.0 (Michie 2000); New York: N.Y. PENAL LAW § 120.45 (McKinney 1999); North Carolina: N.C. GEN. STAT. § 14-277.3 (1999); North Dakota: N.D. CENT. CODE § 12.1-17-07.1 (2000); Ohio: OHIO REV. CODE ANN. § 2903.211-.215 (Anderson 1999); Oklahoma: OKLA. STAT. ANN. tit. 21, § 1173 (West 1999); Oregon: OR. REV. STAT. § 163.732 (1997); Pennsylvania: 18 PA. CONS. STAT. ANN. § 2709 (West 1999); Rhode Island: R.I. GEN. LAWS §§ 11-59-2 (1999); South Carolina: S.C. CODE ANN. § 16-3-1720 (Law Co-op. 1998); South Dakota: S.D. CODIFIED LAWS § 22-19A-1 (Michie 2000); Tennessee: TENN. CODE ANN. § 39-17-315 (1999); Texas: TEX. PENAL CODE ANN. § 42.072 (West 1999); Utah: UTAH CODE ANN. § 76-5-106.5 (1999); Virginia: VA. CODE ANN. § 18.2-60.3 (Michie 1999); Washington: WASH. REV. CODE ANN. § 9A.46.110 (West 1999); West Virginia: W. VA. CODE § 61-2-9a (2000); Wisconsin: WIS. STAT. ANN. § 940.32 (West 1999); and Wyoming: WYO. STAT. ANN. § 6-2-506 (Michie 2000).

60. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2.

61. *Id.*

tantly, police officers and prosecutors did not make stalking a high priority, often relegating it to the same status as unenforced laws against domestic violence.⁶²

The enactment of anti-stalking statutes altered this atmosphere in the criminal justice system in two significant ways. First, the passage of stalking laws reinforced that legislators treated stalking seriously and considered enforcement of such laws important. Second, stalking laws reflected a change by adding a test of reasonableness to show intent.⁶³ Enactment of an anti-stalking statute demonstrates a commitment to making the criminal justice system treat stalking offenses seriously, which is critically important.⁶⁴

C. Federal Responses to Stalking

1. *Development of the Model Anti-Stalking Code for the States*

In 1992, as many states rushed to pass anti-stalking laws, then-Senator William Cohen called for the National Institute of Justice to develop model legislation to assist the states in enacting constitutional measures to address criminal stalking.⁶⁵ Citing specific examples of victims who had been murdered by their stalkers, Senator Cohen noted, "Justice Brandeis identified the 'right to be left alone as the most comprehensive of rights and the right most valued by civilized men.'"⁶⁶ Senator Cohen called for model legislation that would protect the right to privacy without infringing on constitutional rights.⁶⁷ In 1993, the National Institute of Justice responded with the Project to Develop a Model Antistalking Code for States.⁶⁸ The Model Code urges lawmakers to treat stalking as a felony and establish appropriately serious penalties for effective prosecution and

62. *Id.*

63. *Id.*

64. LEMON, *supra* note 49.

65. 138 CONG. REC. S13469-02 (daily ed. Sept. 15, 1992) *quoted in* Cassandra Ward, *Minnesota's Anti-Stalking Statute: A Durable Tool to Protect Victims from Terroristic Behavior*, 12 LAW & INEQ. J. 613 (1994).

66. *Id.*

67. *Id.*

68. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, NAT'L CRIMINAL JUSTICE ASS'N, PROJECT TO DEVELOP A MODEL ANTISTALKING CODE FOR STATES (1993), *available at* <<http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/appendb.htm>> [hereinafter MODEL CODE].

sentencing of stalkers.⁶⁹ Section 1 of the Model Code contains definitions of key terms,⁷⁰ and Section 2 contains the substantive elements.⁷¹

The Model Code differs from state statutes in several ways. For instance, the Model Code does not provide an illustrative list of behaviors that may constitute stalking. Instead, the Code focuses on a broader prohibition against engaging in a course of conduct that would cause fear in a reasonable person.⁷² Unlike most state statutes, the Model Code does not require a “credible threat” but seeks to capture that conduct which would cause a reasonable person fear if taken in context, including threats implied by conduct.⁷³ Only twelve states use a definition that includes implied threats.⁷⁴

69. *Id.*

70. *Id. sec. 1.*

Section 1. For purposes of this code:

- (a) ‘Course of conduct’ means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;
- (b) ‘Repeatedly’ means on two or more occasions; and
- (c) ‘Immediate family’ means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

71. *Id. sec. 2.*

Section 2. Any person who:

- (a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family;
- (b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and
- (c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family; is guilty of stalking.

72. *Id.*

73. *Id.*

74. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2; *see* statutes cited *supra* note 57.

a. Intent requirement

Under the Model Code, proof that a stalker engaged in purposeful conduct with knowledge that such conduct would cause a reasonable person fear suffices as proof of intent. Thus, a defendant whose actual or stated intent is to establish a relationship with his victim need not specifically intend to cause fear, as long as he knows or reasonably should know that his behavior will cause fear.⁷⁵ Protective orders may serve as notice that the conduct is not welcome and that it is causing the victim fear.⁷⁶ The degree of fear suffered by the victim is a central element of stalking, and the level required by the Model Code is high: fear of bodily injury or death.⁷⁷ This requirement of a high degree of fear is related to the Model Code's recommendation that stalking be treated as a felony offense.⁷⁸

b. Felony Classification

The Model Code encourages the states to treat stalking seriously, suggesting that felony classification makes clear to the public that stalking is a unique offense.⁷⁹ Due to the nature of stalking as a series of increasingly serious activities, the Code also suggests "establish[ment of] a continuum of charges that could be used by law enforcement officials to intervene at various stages."⁸⁰ Most states classify stalking as a misdemeanor, although some states do treat stalking as a felony-only crime.⁸¹

2. The Interstate Stalking Punishment and Prevention Act of 1996

Three years after the development of the Model Code, Congress created a new federal stalking offense when it passed the Interstate Stalking Punishment and Prevention Act of 1996. This Act provides as follows:

75. MODEL CODE, *supra* note 68.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2; *see* statutes cited *supra* notes 58-59.

Whoever travels across a State line or within the special maritime and territorial jurisdiction of the United States with the intent to injure or harass another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury (as defined in section 1365(g)(3) of this title) to, that person or a member of that person's immediate family (as defined in section 115 of this title) shall be punished as provided in section 2261 of this title.⁸²

Representative Royce, who as a state legislator was responsible for introducing California's anti-stalking law in 1990, introduced the bill in the House.⁸³ Punishments include imprisonment from five years to life, depending on the circumstances.⁸⁴

III. Stalking in the Military

The military community is not immune from the societal problems of stalking and domestic violence: "The military is said to be a mirror of the society from which it draws its members, and as such it is not immune from domestic violence."⁸⁵ There is a strong link between incidents of stalking and domestic violence, and the military services have come under increasingly close scrutiny for their handling of domestic violence cases.⁸⁶

Stalking offenses present charging challenges for military prosecutors.⁸⁷ Anecdotal evidence suggests that stalking offenses may be resolved

82. 18 U.S.C. § 2261A (2000).

83. 142 CONG. REC. H4457, 4458 (daily ed. May 7, 1996) (statement of Rep. Royce).

84. 18 U.S.C. § 2261(b).

85. Peter A. Dutton, *Spousal Battering as Aggravated Assault: A Proposal to Modify the UCMJ*, 43 NAVAL L. REV. 111, 114 (1996).

86. See *60 Minutes*, *supra* note 3. The National Defense Authorization Act for Fiscal Year 2000, 106 Pub. L. No. 65, 113 Stat. 512 (1999), calls upon the Secretary of Defense to establish a Military-Civilian Task Force on Domestic Violence to create a plan for the Department of Defense (DOD) to address domestic violence issues more effectively. Included are issues such as victim safety, training for military commanders, offender accountability, and prevention of and responses to domestic violence at overseas locations. The task force, which has a three-year tenure, will have representatives from the Department of Justice and the Department of Health and Human Services as well as DOD. Interview with Lieutenant Colonel James Jackson, Chief, Army Community Service, in Alexandria, Va. (Jan. 28, 2000) [hereinafter Jackson Interview].

87. The Army's Trial Counsel Assistance Program (TCAP) has received inquiries from prosecutors in the field concerning stalking, including how to charge it and whether

through administrative rather than military justice channels,⁸⁸ although military trial and appellate courts have considered stalking issues. Despite the potentially serious effects of criminal stalking, however, military law enforcement organizations are not specifically tracking stalking offenses,⁸⁹ nor are military family advocacy groups reporting the incidence of stalking as it relates to domestic violence.⁹⁰

87. (continued) lawful no-contact orders to prevent stalking behavior are transferable to a soldier's next duty station. See TCAP Memo #89 (December 1993); TCAP Memo #117 (October 1997-January 1998) (on file with author).

88. Federal courts have considered stalking issues raised by members of the military in civil litigation. In *Fuller v. Secretary of Defense*, 30 F.3d 86 (8th Cir. 1994), the plaintiff brought a civil complaint seeking review of an administrative decision to separate him from the United States Marine Corps Reserves and correction of his military records to delete all references to a stalking incident upon which his administrative separation was based. In *Butler v. Department of the Air Force*, Civil No. 94-2306, 1996 U.S. Dist. LEXIS 4062 (D.D.C. Apr. 1, 1996) (unpub.), the plaintiff brought an action under the Freedom of Information Act (FOIA) and the Privacy Act seeking access to records of the Air Force and the Air Force Office of Special Investigations (AFOSI) after the AFOSI initiated an investigation into the plaintiff's stalking conduct in connection with the murders of his fiancée and her daughter, crimes in which the plaintiff was the prime suspect. The plaintiff was later arrested for stalking, though at trial those charges were dismissed.

89. In the Army, the Criminal Investigation Command (CID) "is responsible for investigating those Army-related felonies (offenses punishable by death or confinement for more than one year) listed in Appendix B." DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION: CRIMINAL INVESTIGATION ACTIVITIES, ¶ 3-3 (30 Oct. 1990). Further, the CID is responsible for all felony investigations in which the Army is a party of interest. Such investigations routinely include felony crimes listed in the United States Code, foreign felony crimes, state felony crimes in areas of exclusive or concurrent federal jurisdiction, and felony crimes that might be assimilated under the UCMJ from state law. However, Appendix B does not list stalking—it is not a UCMJ offense. The Army Crime Records Center (CRC) serves as the repository for maintenance of permanent CID and selected military police files. *Id.* ¶ 5-1. Neither the CID nor the CRC tracks stalking offenses separate and apart from individual reports of investigation in which such offenses may appear. Therefore, although the CID may investigate felony stalking, records of the number of such cases are not available. Telephone Interview with Major Jamie Eaker, Deputy Staff Judge Advocate, U.S. Army Criminal Investigation Command (Nov. 4, 1999).

90. In the Army, the Family Advocacy Program (FAP) is intended "to prevent spouse and child abuse, to encourage the reporting of all instances of such abuse, to ensure the prompt assessment and investigation of all abuse cases, to protect victims of abuse, and to treat all family members affected by or involved in abuse." DEP'T OF ARMY, REG. 608-18, PERSONAL AFFAIRS: THE ARMY FAMILY ADVOCACY PROGRAM, ¶ 1-5 (1 Sept. 1995). While it might be possible to obtain a known report concerning a particular individual who engaged in stalking behavior, it is not possible to conduct a search or obtain statistics for soldiers whose family violence included stalking. Neither the FAP nor the Army Community & Family Support Center tracks or reports stalking offenses separately from individual records in which such offenses may appear. Jackson Interview, *supra* note 86.

A. Trial Courts

1. Survey of Military Judges

Based on a survey of military trial judges, stalking is appearing in courts-martial. In the fall of 1999, the author prepared five questions on stalking offenses that the Chief, Army Trial Judiciary, circulated to military judges of all of the services.⁹¹ Though not intended to be a comprehensive historical survey, the results represent a snapshot of stalking offenses in the military from the perspective of current military judges as of November 1999. Judges of every service except the Navy-Marine Corps reported stalking offenses. In the Army, Air Force, and Coast Guard, military judges reported stalking offenses at courts-martial, as both charged and uncharged misconduct.

2. Army

An Army judge reported a stalking offense charged as a violation of 18 U.S.C. § 2261A, the federal anti-stalking statute.⁹² Another Army judge reported an overseas stalking case charged as service discrediting conduct under the general article, Article 134, UCMJ.⁹³ Other Army

91. Although part of the Department of Transportation and not technically part of the armed forces, the Coast Guard trial judges were included in this survey because they practice under the UCMJ and *MCM*.

The survey questions were as follows:

- (1) Have you seen stalking offenses at courts-martial as either charged or uncharged misconduct?
- (2) How do stalking offenses most often come before the court (e.g., assimilated under the Assimilative Crimes Act using Article 134, charged as pure Article 134 violations, charged under Article 92, uncharged misconduct, victim testimony only)?
- (3) Have you ever seen the federal anti-stalking provision (18 U.S.C. § 2261A) used at a court-martial?
- (4) What problems of proof does the government encounter in prosecuting stalking offenses?
- (5) Do stalking charges generally survive motions and trial to conviction? Is there a difference in stalking conviction rates in cases before a judge alone versus a panel?

Survey of Military Trial Judges (Oct.-Nov. 1999) [hereinafter Judge Survey] (results on file with author).

92. *Id.*

judges reported stalking offenses at courts-martial charged as violations of lawful orders under Article 92, UCMJ, and as uncharged misconduct or actions otherwise in the background of charged misconduct.⁹⁴ The judges reported issues concerning jurisdiction, including the assimilation of state law at courts-martial.⁹⁵ The judges also mentioned issues relating to proof of intent, admissibility of uncharged misconduct, and victims who send “mixed” signals to their stalkers concerning the contact.⁹⁶

3. Air Force

An Air Force judge reported trying a stalking case in which the conduct was charged as a general disorder or neglect under Article 134, UCMJ, in addition to charges of failure to obey an order (Article 92, UCMJ), damage to personal property (Article 109, UCMJ), and forgery (Article 123, UCMJ).⁹⁷ The judge cited the preemption doctrine as a limitation on charging stalking behaviors under Article 134, UCMJ.⁹⁸ Many of the acts that could be charged as stalking are preempted by other punitive articles of the UCMJ and thus are properly subject to motions to dismiss.⁹⁹ The judge also reported other cases in which stalking was involved but charged as a violation of another punitive article, such as failure to obey a no-contact order, communicating a threat, or simple assault.¹⁰⁰

4. Coast Guard/Navy/Marine Corps

A Coast Guard judge reported a court-martial in which stalking was charged as a violation of Article 93, UCMJ, because the victim was a sub-

93. *Id.*

94. *Id.*

95. The Federal Assimilative Crimes Act (ACA) permits the assimilation of state criminal laws in federal prosecutions in areas under exclusive or concurrent federal jurisdiction, such as military installations. 18 U.S.C. § 13(a) (2000). The vehicle for charging assimilated offenses at courts-martial is through Article 134, UCMJ. MCM, *supra* note 12, pt. IV, ¶ 60c(4)(c)(ii). The ACA does not apply absent proof that the offenses occurred on a military installation, nor does it apply to military installations located overseas. *See* 18 U.S.C. § 13(a); *see also* Judge Survey, *supra* note 91.

96. Judge Survey, *supra* note 91.

97. *Id.*

98. *Id.*

99. “The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80-132.” MCM, *supra* note 12, pt. IV, ¶ 60c(5)(a).

100. Judge Survey, *supra* note 91.

ordinate of the accused, and another case in which stalking actions were introduced as uncharged misconduct.¹⁰¹ Navy and Marine Corps judges reported no stalking cases.¹⁰²

B. Appellate Courts

Between 1994 and 1999, appellate courts addressed stalking-type issues in three cases. Stalking or harassment offenses were charged as violations of state anti-stalking laws under Article 134, UCMJ, using the Assimilative Crimes Act; violations of Article 134, UCMJ, modeled on state anti-stalking or anti-harassment statutes; or violations of Article 92, UCMJ.

1. Court of Appeals for the Armed Forces

Although no stalking issues are currently pending before the Court of Appeals for the Armed Forces,¹⁰³ that court considered a stalking case in 1998. In *United States v. Sweeney*,¹⁰⁴ the court considered whether the military judge properly allowed evidence of appellant's threatening conduct toward his first wife into evidence in his court-martial for stalking his second wife. A general court-martial convicted appellant of stalking his second wife in violation of North Carolina's anti-stalking law,¹⁰⁵ as assimilated under 18 U.S.C. § 13, and the Air Force Court of Criminal

101. *Id.*

102. *Id.*

103. Telephone Interview with Ken Albert, Office of the Clerk of Court, Court of Appeals for the Armed Forces (Oct. 25, 1999).

104. 48 M.J. 117 (1998).

105. N.C. GEN. STAT. § 14-277.3 (1992), provides as follows:

(a) Offense. A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose: (1) with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury; (2) after reasonable warning or request to desist by or on behalf of the other person; and (3) the acts constitute a pattern of conduct over a period of time evidencing a continuity of purpose.

Sweeney, 48 M.J. at 119 n.2.

106. *United States v. Sweeney*, No. ACM 32026 (A.F. Ct. Crim. App. Jan. 17, 1997) (unpub.). Before the Air Force Court of Criminal Appeals, appellant challenged his stalking conviction on grounds that the assimilated North Carolina statute was void for vague-

Appeals affirmed.¹⁰⁶ At issue was appellant's intent to cause emotional distress to his second wife when he continued to contact her and follow her, over her objections, after their separation.¹⁰⁷

Writing for the majority, Judge Sullivan concluded that the uncharged misconduct directed against the appellant's former spouse was sufficiently similar to the charged acts (wrongful entry into the spouse's home, damage to her car, and threats against her home and person) against appellant's then-current spouse to be relevant on the issue of appellant's intent. "Such evidence was 'specially' relevant in determining appellant's later intent because it showed his awareness that such conduct directed towards an estranged spouse could reasonably be viewed as a 'true threat.'"¹⁰⁸

2. Courts of Criminal Appeals

In 1999, the Air Force Court of Criminal Appeals upheld a conviction based on Article 134 for stalking-type misconduct in *United States v. Rowe*.¹⁰⁹ In that case, a general court-martial convicted appellant of failure to obey two lawful orders, damage to personal property, breach of the peace, three assaults, two threats, and "harassment," all resulting from his breakup with Airman First Class (A1C) N.M. Over a two-month period, appellant "assaulted, threatened, insulted, repeatedly telephoned her, blocked her automobile in a parking lot in order to force her to read a love letter, broke a window in her residence, refused to leave her residence when requested, and disobeyed orders to cease contact with her."¹¹⁰ Mod-

106. (continued) ness and that the evidence supporting his conviction was factually and legally insufficient. The Air Force court found that the North Carolina statute was neither vague nor arbitrary. On the gravamen of a stalking offense, the Air Force court noted that "the offense of stalking requires a pattern of conduct which causes the victim emotional distress because she fears what is not overtly threatened: death or bodily injury. A stalker deliberately creates fear without words or physically menacing behavior." *Id.* slip op. at 10. The court concluded that appellant's conduct was "just the sort of pattern of continuous harassment which constitutes stalking." *Id.* slip op. at 10-11.

107. *Sweeney*, 48 M.J. at 119.

108. *Id.* at 121 (citations omitted).

109. ACM 32852 (A.F. Ct. Crim. App. Apr. 7, 1999) (unpub.), *pet. denied*, 52 M.J. 417 (1999).

110. *Rowe*, slip op. at 4-5.

eled on a Georgia stalking statute, the harassment offense¹¹¹ was charged under Article 134, UCMJ.

On appeal, appellant challenged the harassment conviction on three grounds: the conduct at issue in the specification was not unlawful and could not be rendered so by charging it as a violation of Article 134; the specification was void for vagueness because it failed to put him on notice of the meaning of “harass;” and that, in light of his previous relationship with A1C N.M., he could not have known that his conduct toward her was criminal.¹¹² Noting at the outset that “there is no specifically defined offense of ‘stalking’ or ‘harassment’ in the UCMJ,”¹¹³ the Air Force court discussed the three categories of offenses under Article 134, the general article: disorders and neglects to the prejudice of good order and discipline in the armed forces (clause 1); conduct of a nature to bring discredit upon the armed forces (clause 2); and federal crimes and offenses not capital (clause 3), including those state criminal statutes assimilated under the Assimilative Crimes Act (ACA) for areas of exclusive or concurrent federal jurisdiction.¹¹⁴ In *Rowe*, the ACA could not be used to assimilate

111. The harassment specification provided as follows:

That [appellant] did at or near Warner Robins, Georgia, on divers occasions between on or about 5 January 1997 and 19 February 1997 knowingly and willfully harass [A1C N.M.] by repeatedly contacting her telephonically and in writing, at her residence, refusing to leave her residence and following her without her consent, thereby causing the said [A1C N.M.] substantial emotional distress and reasonable fear of bodily injury.

Id. at 5-6.

112. *Id.* at 6.

113. *Id.*

114. *Id.* at 6-7; see MCM, *supra* note 12, pt. IV, ¶ 60c(i).

Georgia state law because the offenses occurred off base and thus outside an area of exclusive or concurrent federal jurisdiction.¹¹⁵

The Air Force court next considered the Georgia stalking law¹¹⁶ upon which the harassment charge had been modeled. The court noted that the statute had survived a void-for-vagueness challenge in Georgia state court, because the definition of harassment included the specific intent to cause substantial emotional distress or reasonable fear of bodily harm or injury.¹¹⁷ The military judge had defined harassment consistently with the Georgia statute.¹¹⁸ The Air Force court concluded, under the circumstances of appellant's case, that he could not reasonably have believed that his actions toward A1C N.M.—“compulsive telephoning, refusing to leave her residence, leaving unsolicited notes, and nonconsensual following”—were lawful.¹¹⁹

In *United States v. Diaz*,¹²⁰ a general court-martial convicted appellant of rape, threats and harassment, and cocaine use.¹²¹ The government charged the threat and harassment offenses under Article 134, UCMJ. At trial, appellant's defense counsel sought dismissal of the harassment specification (charged as a violation of clauses 1 and 2 of Article 134) for failure to state an offense because no such offense appeared in Article 134.¹²² The military judge denied the motion to dismiss, but failed to define

115. *Rowe*, slip op. at 7.

116. GA. CODE ANN. § 16-5-90 (1997) provides as follows:

A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purposes of harassing and intimidating the other person . . . For purpose of this article, the term “harassing and intimidating” means a knowing and willful course of conduct directed at a specific person which causes emotional distress

116. (continued)

by placing such person in reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family, and which serves no legitimate purpose. This Code section shall not be construed to require that an overt threat of death or bodily injury has been made.

Rowe, slip op. at 8-9.

117. *Rowe*, slip op. at 9 (citing *Johnson v. State*, 449 S.E.2d 94 (1994)).

118. *Id.*

119. *Id.* slip op. at 11-12.

120. 39 M.J. 1114 (A.F.C.M.R. 1994).

121. *Id.* at 1115.

122. *Id.* at 1118-19.

“harass” when he instructed the members of the panel on the elements of that offense.¹²³ The Air Force Court of Military Review¹²⁴ held that the judge’s failure to properly instruct the members on the elements of the offense, including definitions of essential terms, constituted plain error: “‘Harassment’ was the gravamen of the offense. Without an understanding of what ‘harass’ or ‘harassment’ meant, the members could not properly determine if appellant criminally engaged in that conduct.”¹²⁵ Accordingly, the Air Force court set aside the harassment conviction.¹²⁶

IV. Current Military Practice Fails to Adequately Address Stalking

A. Review of Current Military Charging Practices

Based on the survey of military judges and the judicial opinions on stalking in the military justice system, the most common ways that military prosecutors charge stalking at courts-martial is through existing UCMJ articles such as Article 92 (violations of no-contact orders) and Article 134 (communication of a threat, conduct prejudicial to good order and discipline, or service-discrediting conduct). In addition to clauses 1 and 2 of Article 134, prosecutors also use clause 3 to assimilate state law offenses

123.

(1) On divers occasions at the time and place alleged, appellant wrongfully harassed CAY by stalking her and calling her repeatedly after being told not to call, trespassing at her home, and by making repeated, unwanted sexual advances, and (2) under the circumstances, appellant’s conduct was to the prejudice of good order and discipline in the armed forces or service discrediting.

Id.

124. On 5 October 1994, the service Courts of Military Review were renamed the Courts of Criminal Appeals. Thus, the service courts are now known as the United States

124. (continued) Air Force Court of Criminal Appeals, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. The United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

125. *Diaz*, 39 M.J. at 1119.

126. *Id.*

under 18 U.S.C. § 13, or the 1996 federal anti-stalking statute, 18 U.S.C. § 2261A. Each of these approaches presents problems.

1. Existing UCMJ Provisions

a. Article 92, UCMJ

Prosecutors use Article 92 to charge stalking-type behavior as violations of lawful orders, such as stay-away or no-contact orders issued to service members by their commanders.¹²⁷ There are at least two significant problems with charging stalking violations in this manner. First, a conviction for violating a lawful order carries a maximum punishment of only six months' confinement, forfeiture of all pay and allowances, and a bad-conduct discharge.¹²⁸ This minor, misdemeanor-level punishment fails to squarely address the stalking behavior or recognize the conduct as a step on a continuum of potentially escalating violence.

Second, protective or restraining orders fail to serve as an effective means of deterring stalker behavior. Arrest or punishment on charges of assault and battery or other violations of law involves the offender versus the system, whereas arrest or punishment on charges of violating a restraining order involves the offender versus his victim.¹²⁹ Stalkers who are emotionally invested in relationships with their victims frequently ignore such orders.¹³⁰ Military personnel engaged in stalking behavior or embroiled in domestic disputes, such as Airman Rowe (the airman who repeatedly disobeyed his commander's order to stay away from his former girlfriend) or Sergeant Coffin (the Fort Campbell soldier who disregarded a state court order protecting his former fiancée and ultimately killed her),

127. *United States v. Rowe*, ACM 32852 (A.F. Ct. Crim. App. Apr. 7, 1999) (unpub.); Judge Survey, *supra* note 91.

128. MCM, *supra* note 12, pt. IV, ¶ 16e(2). Willful disobedience of a superior commissioned officer's lawful order under Article 90, UCMJ, carries a maximum punishment

128. (continued) of confinement for five years, forfeiture of all pay and allowances, and a dishonorable discharge. *Id.* pt. IV, ¶ 14e(2). To be lawful, such orders must have a valid military purpose. *Id.* pt. IV, ¶ 14c(2)(a)(iii). Based on the information available to the author, Article 90, UCMJ, is not commonly used to prosecute no-contact orders.

129. DE BECKER, *supra* note 6, at 229.

130. *See id.* at 227 ("Restraining orders are most effective on the reasonable person who has a limited emotional investment. In other words, they work best on the person least likely to be violent anyway."); *see also* TADEN & THOENNES, *supra* note 24, at 11 (reporting that stalking victims who obtained restraining orders, sixty-nine percent of women and eighty-one percent of men reported that their stalkers violated the order).

displayed no more obedience to such orders than their civilian counterparts.¹³¹ Indeed, the failure of protective orders to prevent the murders of four California women served as the impetus for the nation's first anti-stalking law in 1990.¹³²

b. Article 134, UCMJ (Communicating a Threat)

Prosecutors sometimes charge stalking as communicating a threat under Article 134.¹³³ To be guilty of this offense, a person must have "communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future."¹³⁴ A conviction for communicating a threat carries a maximum punishment of three years' confinement, forfeiture of all pay and allowances, and a dishonorable discharge.¹³⁵

The offense of communicating a threat is not an effective weapon to combat stalking, because stalkers often refrain from making overt threats against their victims. The NVAW Survey found that less than half of both female and male stalking victims reported that their stalkers overtly threatened them.¹³⁶ "[S]talkers do not always threaten their victim verbally or in writing; more often they engage in a course of conduct that, taken in context, causes a reasonable person to feel fearful."¹³⁷ The Air Force Court of Criminal Appeals disposed of an argument that appellant was not guilty of stalking because he had not assaulted his victim or communicated a threat:

The offense of which the appellant was convicted [violation of Article 134 assimilating Georgia stalking statute] does not require that either an offer to do harm or an overt threat to do harm be proved. (One might argue that a separate offense of stalking would not be needed if proof of stalking required proof that the offender communicated a threat to kill or injure the vic-

131. Rowe, slip op. at 9-12; 60 Minutes, *supra* note 3.

132. 142 CONG. REC. H4457, 4458 (daily ed. May 7, 1996) (statement of Rep. Royce).

133. See United States v. Diaz, 39 M.J. 1114 (A.F.C.M.R. 1994); see also Judge Survey, *supra* note 91.

134. MCM, *supra* note 12, pt. IV, ¶ 110b(1).

135. *Id.* ¶ 110e.

136. TJADEN & THOENNES, *supra* note 24, at 7-8.

137. *Id.* at 8.

tim.) Rather, the offense of stalking requires a pattern of conduct which causes the victim emotional distress because she fears what is not overtly threatened: death or bodily injury.¹³⁸

Although the Model Code recommended that states define stalking without a requirement for an express threat,¹³⁹ state stalking statutes require a “credible threat” of violence. The Model Code encouraged states to adopt a definition of stalking that would include implied threats.¹⁴⁰

c. Article 134, UCMJ (The General Article)

Prosecutors sometimes use the General Article to craft stalking specifications as disorders or neglects. This may be the only technique available to charge stalking behavior that does not occur on a federal installation, such as off-post in the United States or anywhere outside of the United States.¹⁴¹ Use of the General Article to charge stalking offenses raises two problems. The first is the inevitable court challenges such specifications will generate based on the fact that the UCMJ does not prohibit stalking and that the specification therefore fails to state an offense. Related arguments are that the specification does not provide sufficient notice of criminality, that the conduct at issue is private, and that such conduct is neither prejudicial to good order and discipline (direct and palpable prejudice under clause 1) nor service discrediting (tending to lower the service in public esteem under clause 2).¹⁴² A prosecutor must establish the criminality of stalking under the particular circumstances of every case so charged.

The second problem with such Article 134 specifications charging stalking misconduct is that other punitive articles of the UCMJ may preempt part or all of such charges.¹⁴³ This limitation may severely undercut a stalking specification, which includes conduct such as damage to personal property,¹⁴⁴ assault,¹⁴⁵ or any conduct that is itself the subject of a no-

138. *United States v. Sweeney*, No. ACM 32026, slip op. at 10 (A.F. Ct. Crim. App. Jan. 17, 1997) (unpub.).

139. MODEL CODE, *supra* note 68.

140. *Id.*

141. *See United States v. Rowe*, ACM 32852 (A.F. Ct. Crim. App. Apr. 7, 1999) (unpub.); *see also* Judge Survey, *supra* note 91.

142. *Rowe*, slip op. at 6.

143. MCM, *supra* note 12, pt. IV, ¶ 60c(5)(a).

144. UCMJ art. 109 (2000).

contact order.¹⁴⁶ As an example, Airman Rowe engaged in many forms of misconduct toward his former girlfriend, including threats, assaults, repeated telephone calls, damage to her residence, and violation of a no-contact order.¹⁴⁷ Much of this misconduct could not be properly charged under Article 134 because it is preempted by other punitive articles of the UCMJ. Thus, if a prosecutor fails to charge the stalking conduct under each applicable UCMJ provision, then the conduct improperly included in the Article 134 specification—due to the preemption doctrine—is subject to dismissal. This mandates the separate charging of one course of conduct under several different punitive articles in what may appear to be an unreasonable multiplication of charges.¹⁴⁸ Such a requirement frustrates a prosecutor's effort to demonstrate at a court-martial that an accused's conduct is all a single course or pattern of conduct united by the common theme of stalking.

d. Assimilative Crimes Act

Federal prosecutors may use the ACA to assimilate state law for offenses committed in areas of exclusive or concurrent federal jurisdiction,¹⁴⁹ with the caveat that no federal criminal law (including the UCMJ) has defined an offense for the misconduct at issue.¹⁵⁰ The purpose of the

145. UCMJ art. 128.

146. UCMJ arts. 90, 92.

147. *Rowe*, slip op. at 5, 11-12.

148. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." MCM, *supra* note 12, R.C.M. 307(c)(4), discussion.

149. Special maritime and territorial jurisdiction of the United States is defined as follows:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13(a) (2000).

150. MCM, *supra* note 12, pt. IV, ¶ 60c(4)(c)(ii).

ACA is to “fill in the gaps” in federal criminal law by adopting state criminal laws to address acts or omissions in areas of federal jurisdiction when such acts or omissions are not made punishable by any act of Congress.¹⁵¹ Article 134, clause 3 (crimes and offenses not capital) provides the vehicle for charging violations of state law in such cases.¹⁵²

Trial counsel have used Article 134 and the ACA to charge stalking offenses on military installations.¹⁵³ Problems with charging stalking offenses under the ACA include jurisdiction, that is, proof that the offense occurred in an area of exclusive or federal jurisdiction;¹⁵⁴ the real possibility of inconsistent results based on different definitions, elements, and punishments contained in the different states’ anti-stalking statutes;¹⁵⁵ and the fact that, by its very terms, the gap-filler ACA¹⁵⁶ leaves additional “gaps” for military prosecutors—those offenses committed off the military installation or offenses committed by personnel assigned outside the United States, its possessions or territories.

2. *Effect of Federal Anti-Stalking Statute on ACA Stalking Prosecutions*

Congressional enactment of a federal stalking law greatly reduced the availability of the ACA in prosecutions for stalking in areas of exclusive or concurrent federal jurisdiction. Military prosecutions for offenses under Article 134, UCMJ, may proceed under the ACA as long as the act or omission has not been made punishable by any enactment of Congress; if Congress has enacted a federal statute relating to the act or omission, then the question becomes whether the federal statute that applies to the act or omission precludes application of the state law in question.¹⁵⁷ Under *Lewis*,¹⁵⁸ Congress’s enactment of the Federal Stalking Punishment and

151. *United States v. Lewis*, 523 U.S. 155, 160 (1998) (citations omitted).

152. MCM, *supra* note 12, pt. IV, ¶ 60c(4)(a).

153. *See United States v. Sweeney*, 48 M.J. 117, 118-19 (1998); *see also* Judge Survey, *supra* note 91.

154. Judge Survey, *supra* note 91.

155. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, app. A-D.

156. 18 U.S.C. § 13(a) applies only to areas within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 7 (2000).

157. *United States v. Lewis*, 523 U.S. 155, 164 (1998) (setting forth a two-part test for determining the applicability of the ACA).

158. *Id.*

Prevention Act of 1996¹⁵⁹ requires an analysis of whether the federal statute precludes application of state stalking laws:

[I]t seems fairly obvious that the [Assimilative Crimes] Act will not apply where both state and federal statutes seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional, or other technical, considerations, or where differences amount only to those of name, definitional language, or punishment. . . . Hence, ordinarily there will be no gap for the Act to fill where a set of federal enactments taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amounts to different ways of committing the same basic crime.¹⁶⁰

The federal stalking statute prohibits conduct crossing state lines or within the special maritime and territorial jurisdiction of the United States “with intent to injure or harass another person,” which conduct places another person “in reasonable fear of the death of, or serious bodily injury” to “that person or a member of that person’s immediate family.”¹⁶¹ The jurisdictional coverage is identical to that of the ACA.¹⁶² In light of the federal enactment, there appears to be no gap for the ACA to fill in the area of stalking within federal jurisdiction. In *Lewis*, the Supreme Court emphasized, “The primary question (we repeat) is one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defendant’s to the exclusion of the particular state statute at issue?”¹⁶³

The language of the federal statute itself criminalizes stalking conduct occurring under two distinct circumstances. The first circumstance is “traveling across a State line,” defined as “a person who travels across a State line or enters or leaves Indian country.”¹⁶⁴ The second circumstance is “within the special maritime and territorial jurisdiction of the United States.”¹⁶⁵ Based on the plain language of the statute, Congress intended the reach of the statute to encompass both circumstances. Had Congress

159. 18 U.S.C. § 2261A (2000).

160. *Lewis*, 523 U.S. at 165.

161. 18 U.S.C. § 2261A. The applicable punishments range from five years to life imprisonment. 18 U.S.C. § 2261(b)(1)-(5).

162. 18 U.S.C. § 13(a).

163. *Lewis*, 523 U.S. at 166.

164. 18 U.S.C. §§ 2261(a)(1), 2261A.

165. 18 U.S.C. §§ 7, 2261A.

only intended to make the law consistent with the prohibition against interstate domestic violence,¹⁶⁶ then it need not have added the language about the special maritime and territorial jurisdiction of the United States—language that is absent from the interstate domestic violence statute.¹⁶⁷

Reasons given by the legislation's author on the floor of the House of Representatives the day that the House approved House Bill 2980 support the plain meaning of the federal anti-stalking statute.¹⁶⁸ Representative Royce stated that House Bill 2980 made crossing a state line to stalk someone or in violation of a restraining order a felony.¹⁶⁹ He then added that the legislation "makes it a felony to stalk someone on Federal property such as a post office or a military base or a national park."¹⁷⁰ The purpose of the legislation was to restore freedom of movement to stalking victims, who otherwise would lose the protection of their state laws if they moved to another state.

State laws are not the same and restraining orders obtained in one State may not be valid in another. This bill addresses that problem by making it a felony to cross a State line to stalk someone in violation of a restraining order, and in addition it protects victims on Federal property.¹⁷¹

Federal property includes military installations.

4. *Federal Anti-Stalking Statute*

In passing the Federal Stalking Punishment and Prevention Act of 1996, Congress intended for that statute to punish stalking conduct on federal property to the exclusion of state law assimilated under the ACA.¹⁷² However, certain problems common to ACA prosecutions still exist in assimilating the federal statute. As an example, the federal statute covers exactly the same jurisdictional territory as the ACA—with the same gaps. Military prosecutors may charge only that stalking conduct that actually occurs on a federal installation; actions off-post remain subject to state law.

166. 18 U.S.C. § 2261(a).

167. *Id.*

168. 142 CONG. REC. H4457, 4458 (daily ed. May 7, 1996) (statements of Rep. Royce).

169. *Id.*

170. *Id.*

171. *Id.*

This bifurcation deprives the military prosecutor of the ability to place an alleged stalker's entire course of conduct (crucial to a stalking prosecution) before a military court-martial, and also requires close coordination with state authorities to ensure that all of the stalker's conduct is appropriately investigated and prosecuted. Overseas, military prosecutors must still rely on clauses 1 and 2 of Article 134 specifications (now modeled perhaps on the federal statute) to charge stalking.

172. It is possible to conceive of a situation in which a person who lives or works on a military installation (under concurrent federal jurisdiction) in a given state would have had the opportunity to avail herself of the state's stalking laws and protective orders; for instance, she could have been a resident of the state prior to her affiliation with the federal government, or she could be a military family member residing off the installation. In that case, if she has availed herself of the state's laws and protections, then perhaps it would be reasonable to permit that state's law to be assimilated in a prosecution under the ACA. Except for such a situation, however, given Congress's overriding concern with protection of victims and their freedom of movement, application of the federal law would be appropriate. In light of the high degree of mobility associated with military members and their families, the federal law ought to become the default for stalking prosecutions on military installations absent a change to the UCMI or the *MCM*.

Although the vehicle for charging stalking on federal installations may have changed from state to federal law, jurisdictional knots remain. For the military, the only issue resolved by the passage of the federal anti-stalking law is the problem concerning different definitions and punishments contained in state stalking laws. Trial counsel's use of the federal statute to charge stalking offenses occurring on federal installations¹⁷³ will minimize inconsistent results. However, the limits on the application of the statute represent wide gaps preventing a coherent and fair approach to stalking in the military.

B. Reasons to Make Stalking a Military Offense

A central purpose of the criminal law is to define what crime is: "The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what is criminal and prescribes the punishment to be imposed for such conduct."¹⁷⁴ Behavior is criminal only when a legislature has defined it as such and established a punishment for its commission; conduct not prohibited is, of course, no crime.¹⁷⁵ Another important purpose of the criminal law is to provide notice to the public as to what actions are criminal and their corresponding penalties.¹⁷⁶ Notice of criminality is especially important for an offense such as stalking, which may begin as lawful or innocuous behavior that annoys the recipient and later escalates to threatening or violent behavior that terrifies the recipient.¹⁷⁷ The Model Code emphasized the importance of a state's decision to treat stalking offenses seriously and advocated classification of stalking at the felony level. The Code also urged the states to establish a continuum of charges that law enforcement officials could use to intervene at various stages.¹⁷⁸

173. The author discovered only two military prosecutions under the federal anti-stalking statute. In both cases, the accused entered mixed pleas of guilty and obtained dismissal of the stalking charge as part of a pretrial agreement. *See* United States v. Boulton (JRTC & Fort Polk, Jan. 6, 2000); United States v. McDaniel, 52 M.J. 618 (1999) (stalking charge does not appear in opinion; appellate judge advised author of relevant case history by electronic mail, Oct. 28, 1999).

174. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 1.2 at 8 (1986).

175. *Id.* at 12.

176. *Id.* at 12-13.

177. MODEL CODE, *supra* note 68.

178. *Id.*

Defining crimes and providing notice of prohibited behavior are important in military law, the purpose of which is as follows:

Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.¹⁷⁹

The Supreme Court has long recognized that the military is a society apart, subject to more rigorous standards and discipline than those applicable to civilian society: "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."¹⁸⁰ The special role played by military commanders is an integral part of the military's disciplinary system. To achieve the goal of maintaining good order and discipline, military law requires the effective participation of military commanders whose inherent authority over those service members under their command extends to matters of discipline under the UCMJ, nonjudicial punishment as well as courts-martial. Conduct that the UCMJ defines as criminal and the notice of criminality that inclusion in the UCMJ provides are essential for both those who administer discipline and those who are subject to it.

To be effective, an anti-stalking provision must be a tool at the disposal of commanders, who are in the best position to impose discipline on service members in efforts to resolve problems at the lowest possible level. The military law that commanders use is the UCMJ. The criminalization of stalking and its addition to the listed offenses in the UCMJ would enhance the ability of commanders to address stalking behavior at an early stage. Commanders could cite to the specific anti-stalking provision when administering nonjudicial punishment¹⁸¹ or when issuing an administrative memorandum of reprimand. Most importantly, commanders could assemble a record that accurately reflects the true nature of stalking mis-

179. MCM, *supra* note 12, pt. I ¶ 3.

180. *Parker v. Levy*, 417 U.S. 733, 758 (1974) (upholding the constitutionality of Articles 133 and 134 of the UCMJ against void for vagueness and overbreadth challenges).

181. 10 U.S.C. § 815 (2000).

conduct and permits an appropriate punishment in the event that a service member is ultimately tried by court-martial.

Punishment or separation from the service, however, is not the only goal of the UCMJ.¹⁸² Deterring others from misconduct furthers the goal of maintaining good order and discipline. If nonjudicial punishment or discipline imposed on others deters a would-be stalker from committing misconduct, then good order and discipline improve. Punishment is not the only goal of the military justice system: “The armed forces have long recognized that the object of any criminal law is not alone to punish the offender or wreak revenge upon him for the harm he has done but to provide such a penalty as will deter or discourage others from committing the acts prohibited.”¹⁸³

In addition to notice of what behavior is criminal and fair treatment under the law for offenders at all disciplinary levels, the military has a duty to protect and assist the victims of crime. Congress,¹⁸⁴ the Department of Defense,¹⁸⁵ and all of the military services¹⁸⁶ recognize the importance of protecting crime victims. Victims of federal crimes have the following rights:

The right to be treated with fairness and with respect for your dignity and privacy; the right to be reasonably protected from the accused offender; the right to be notified of court proceedings;

182. In sentencing cases, the military recognizes “rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution.” MCM, *supra* note 12, R.C.M. 1001(g). The military also recognizes the protection of society as a valid sentencing consideration. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK, ¶ 239 (30 Jan. 1998).

183. Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1, 54 (1995) (quoting 4 MORRIS O. EDWARDS & CHARLES L. DECKER, *THE SERVICEMAN AND THE LAW* 23 (6th ed. 1951)).

184. Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1501, 1503, 1505, 1510, 1512-1515, 3146, 3579-3580 (1988); Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10603 (1988); Victims’ Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (Supp. III 1991).

185. U.S. DEP’T OF DEFENSE, DIR. 1030.1, VICTIM AND WITNESS ASSISTANCE (23 Nov. 1994); U.S. DEP’T OF DEFENSE, INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (23 Dec. 1994).

186. U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ¶¶ 18-1—18-26 and app. D (20 Aug. 1999); U.S. DEP’T OF AIR FORCE, INSTR. 51-201, VICTIM AND WITNESS ASSISTANCE (25 Apr. 1997); SECNAVINST 5800.11A, VICTIM AND WITNESS ASSISTANCE PROGRAM (16 June 1995); U.S. MARINE CORPS, ORDER 5800.15A, VICTIM AND WITNESS ASSISTANCE PROGRAM (3 Sept. 1997).

the right to be present at all public court proceedings related to the offense, unless the court determines that your testimony would be materially affected if you as the victim heard testimony at trial; the right to confer with the attorney for the government in the case; the right to available restitution; the right to information about the conviction, sentencing, imprisonment, and release of the offender.¹⁸⁷

Victims may be entitled to transitional compensation for dependent abuse offenses¹⁸⁸ or to compensation for damage to or theft of their personal property.¹⁸⁹

Protecting stalking victims and safeguarding their privacy present special challenges for the military. Because the very nature of the crime is pursuit, stalking victims are particularly vulnerable. The location and duty assignment of military victims are available through use of military personnel locators and the Freedom of Information Act.¹⁹⁰ Civilian victims may enjoy more privacy, but the reality of life in an Internet society means that a determined searcher or stalker can locate most people, or hire someone to do so for money.¹⁹¹ Maintaining privacy may be difficult or impossible in cases of intimates or former intimates, who may have children together. Legal, investigative, and social service organizations must work

187. DD Form 2701, Initial Information for Victims and Witnesses of Crime (Dec. 94).

188. 10 U.S.C. § 1059 (2000).

189. *Id.* § 939.

190. 5 U.S.C. § 552 (2000). The DOD Privacy Program permits release of agency organizational rosters and telephone directories, including names, duty assignments, duty addresses, duty telephone numbers, and even duty e-mail addresses (except for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories). U.S. DEP'T OF DEFENSE, REG. 5400.7-R, FREEDOM OF INFORMATION ACT PROGRAM, para. 3-200 (14 Apr. 1997); Memorandum, Director, Department of Defense Directorate for Freedom of Information and Security Review, subject: Duty E-mail Addresses (26 Oct. 1999). U.S. Army regulations mirror DOD policy. U.S. DEP'T OF ARMY, REG. 25-55, INFORMATION MANAGEMENT: RECORDS MANAGEMENT: THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM, para. 3-200, Number 6b (14 Apr. 1997); U.S. DEP'T OF ARMY, REG. 340-21, OFFICE MANAGEMENT: THE ARMY PRIVACY PROGRAM, para. 3-3a(1) (5 July 1985). *Cf.* Schwaner v. Department of the Air Force, 898 F.2d 793 (D.C. Cir. 1990) (holding that Exemption 2 of the FOIA did not permit withholding of personnel rosters including names, duty assignments, and unit addresses and telephone numbers to the public).

191. The Internet provides numerous "people finders," such as 1800USSEARCH ("FIND OUT ABOUT ANYONE!"), People Finder Search Services, and U.S. Locator's People Search Services, which charge a fee to locate current and previous addresses, telephone numbers, and other personal information about people.

with commanders at all stages of the proceedings to ensure protection of victims. Addition of an anti-stalking measure to the body of military law is a necessary first step in raising the awareness of the military establishment about stalking and its effects on the victims.

A provision prohibiting stalking would address problems of jurisdiction, applicability, and fairness. The ready availability of such a provision would eliminate problems of jurisdiction, because the UCMJ applies to service members worldwide, not just those who commit offenses on federal installations. Because jurisdiction is determined according to military status, offenses are punishable under the UCMJ whether committed on or off the military installation, in the United States or overseas.¹⁹² In terms of fairness and consistency, all service members would be subject to the same elements and the same maximum punishment for stalking misconduct. In short, a standard anti-stalking measure would provide the military with a means to approach the offense in a manner that is just for both offenders and victims.

V. Proposed Solution

Current military practice, including the use of existing UCMJ provisions and assimilation of state and federal law, is inadequate to address the unique aspects of stalking crimes. Jurisdictional barriers and gaps prevent the military from pursuing a consistent and reasoned course to combat stalking in the ranks. The best way to address stalking in the military would be through legislative action, that is, for Congress to enact a law adding a new anti-stalking provision to the UCMJ. In light of the passage of the Federal Stalking Punishment and Prevention Act of 1996 (with its express application to federal military installations) and other recent congressional proposals to expand the statute's reach, however, it is unlikely that Congress will take such action anytime in the near future, if at all.

The most expedient and effective alternative to congressional legislation is executive action. The President may use his rule-making authority to amend the *Manual for Courts-Martial (MCM)*.¹⁹³ A valid *MCM* provision has the force and effect of law, and the President's authority in prescribing rules of procedure is constrained only by the requirement that such rules be consistent with the Constitution and other provisions of the

192. See 10 U.S.C. §§ 802, 803.

UCMJ or *MCM*.¹⁹⁴ The President has used his authority to add offenses to Article 134, UCMJ.¹⁹⁵

The addition of the proposed anti-stalking provision to the *MCM*,¹⁹⁶ modeled on the California anti-stalking statute, is consistent with state and federal court practice. The proposed provision draws primarily on the most recent version of the California law, the nation's oldest and most evolved anti-stalking measure, which prohibits both harassment and repeated conduct. The California law, which has survived court challenges as to its validity,¹⁹⁷ requires only that the victim fear for his or her safety, or the safety of his or her immediate family,¹⁹⁸ not the higher standard of fear of bodily injury or death required by some state laws, the new federal statute, and even the Model Code. The "credible threat" requirement is satisfied by either written or verbal threats, or threats that may be implied from a pattern of conduct. The intent requirement is satisfied upon proof that the accused made a credible threat with the intent to place the targeted

193.

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

10 U.S.C. § 836(a). Chief Judge Cox of the U.S. Court of Appeals for the Armed Forces has cited UCMJ art. 56 (Maximum limits) as the basis for the President's authority to identify particular misconduct under Article 134 and differentiate it from other misconduct through elements of proof. *United States v. Izquierdo*, 51 M.J. 421, 422 (1999); *United States v. Bivins*, 49 M.J. 328, 329-30 (1999). "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U.S.C. § 856.

194. *United States v. Kelson*, 3 M.J. 139, 140-41 (C.M.A. 1977); *United States v. Johnson*, 42 C.M.R. 66, 68 (1970).

195. Added offenses include wrongful interference with an adverse administrative proceeding (Exec. Order No. 12,888) and self-injury without intent to avoid service (Exec. Order No. 12,960). *MCM*, *supra* note 12, app. 25, Historical Executive Orders. Recently added is the offense of reckless endangerment. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

196. *See* Appendix, *infra*.

197. *See* cases cited *supra* note 53.

198. CAL. PENAL CODE §646.9(a) (Deering 1999) (Notes, 1993 Amendment).

person in reasonable fear for his safety or the safety of his or her immediate family.

The proposed provision also adopts some of the recommendations advanced by the Model Code. The explanation portion of the proposal does not contain a list of examples of stalking behavior. The rationale is based on the fact that some courts have interpreted an illustrative list of examples to be exclusive, thus limiting the behaviors that may be properly charged as stalking.¹⁹⁹ Given the creativity and ingenuity applied to stalking and harassing conduct by its perpetrators,²⁰⁰ risking a narrow interpretation is unwise.

California's approach to stalking intent, adopted in the proposal, is consistent with the Model Code's implied threat standard. The Code recommended that states not require a "credible threat," as that term was often limited to overt verbal or written threats, and stalkers frequently avoid making such overt threats.²⁰¹ Instead, the Code recommended that the states use the language "threats implied by conduct" in order to capture that conduct which, taken in context, would cause a reasonable person fear. The proposal adopts California's use of the term "credible threat," and includes the state's definition of that term which includes not only verbal or written threats but also threats implied by conduct. Like the California statute, the proposal does not adhere to all of the Model Code recommendations concerning intent. The Model Code recommended that states adopt stalking statutes that required only the intent to engage in a purposeful course of conduct when a person knows or should know that it will cause fear in the victim.²⁰² Like most states, California's statute requires both a course of conduct and the specific intent to cause fear.²⁰³

The California statute sets a relatively low level of punishment for stalking: misdemeanor penalties of one year and a \$1000 fine for cases not involving violations of restraining orders or repeat offenders.²⁰⁴ By contrast, the federal stalking law sets punishments beginning at five years' imprisonment and increasing to ten to twenty years, or life for cases result-

199. MODEL CODE, *supra* note 68.

200. Judge Survey, *supra* note 91 (noting that one accused ordered a pink dumpster delivered to his victim's home).

201. MODEL CODE, *supra* note 68.

202. *Id.*

203. CAL. PENAL CODE § 646.9(a) (Deering 1999).

204. *Id.* § 646.9(a)-(c).

ing in the death of the victim.²⁰⁵ The federal approach is consistent with the Model Code recommendation to establish felony penalties for stalking offenses.²⁰⁶ In an effort to balance these competing levels of punishment for stalking and to make the penalty for stalking under the *MCM* consistent with related UCMJ provisions, the proposal establishes a two-tier punishment scheme.

The penalties for stalking in the military would occupy a middle ground, more severe than the misdemeanor approach of many states but less severe than the serious felony treatment set forth in the federal statute. For stalking offenses, the penalty of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years would be the same as that specified for communicating a threat under Article 134.²⁰⁷ For aggravated stalking offenses (defined as violating a protective order, targeting a child, or using a weapon), the penalty of six years' confinement would be within the range of punishments specified for aggravated assault under Article 128.²⁰⁸

The California model is appropriate for the military because it criminalizes acts constituting harassment, crimes not currently found in the UCMJ. Making repeated telephone calls or sending e-mail messages of a nonconsensual nature meets this definition, as does sending unwanted gifts or trespassing. Stalkers typically engage in these behaviors at an early stage in order to get their victims' attention. Later on the stalking continuum, stalkers may commit more serious acts that are properly the subject of other UCMJ articles, such as damage to private or government property, assault, or even murder. Mechanisms already exist to prosecute and punish these acts; what is lacking is a means to intervene at an early stage to stop stalking behavior before it escalates to infliction of injury or other violence.

205. 18 U.S.C. §§ 2261, 2261A (2000).

206. MODEL CODE, *supra* note 68.

207. MCM, *supra* note 12, pt. IV, ¶ 110e.

208. The maximum punishment for assault consummated by a battery upon a child under the age of sixteen years is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. *Id.* pt. IV, ¶ 54e(7). The maximum punishment for assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years; the maximum confinement term increases to eight years if the weapon used is a loaded firearm. *Id.* pt. IV, ¶ 54e(8)(b), (a).

There is an overlap between acts that constitute stalking and acts already prohibited by the UCMJ. Because the proposal suggests adding the anti-stalking provision to Article 134, the issue of preemption remains.²⁰⁹ Trial counsel will have to charge acts that may be part of a stalker's overall course of conduct under separate articles of the UCMJ, not under a single stalking specification.²¹⁰ At courts-martial, trial counsel should address this issue by emphasizing that the prosecution's theory of the case is stalking, that the charges—though disparate in type and severity—represent a pattern or course of conduct by the alleged stalker, and that all of the charged acts are united by the desire to inspire fear in the victim.

VI. Conclusion

Stalking represents actions on a continuum, with behavior ranging from annoying to terrifying and potentially deadly. There is no magic formula to predict stalker behavior. Ignoring the early, relatively minor signs such as harassment and implied threats may ultimately result in serious injury or even death for the victim. All states and the federal government have recognized that stalking is a crime and have taken steps to increase awareness and deterrence of stalking as well as its prosecution and punishment.

More than ten million stalking victims have experienced fear, frustration, and terror at the hands of their stalkers, often for months or even years. Like the society from which its members are drawn, the military has stalkers in its ranks, as evidenced by appellate court decisions and the observations and experiences of current military judges. There is no way to determine how many cases involving stalking are resolved through methods other than court-martial, or even how many court-martial charges for stalking do not survive the judicial process.

Unlike civilian jurisdictions, the military currently has no effective means to combat stalking. Existing UCMJ provisions are inadequate. To

209. *Id.* pt. IV, ¶ 60c(5)(a).

210. "Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense." *Id.* R.C.M. 307(c)(4). "There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses." *Id.* at discussion. As a general rule, "all known charges should be referred to a single court-martial." *Id.* R.C.M. 601(e)(2), discussion.

ensure that the military treats stalking as a crime, it must be defined as a crime between the covers of the *MCM*. An anti-stalking provision in the *MCM* represents a necessary first step in combating stalking. Enacting such a provision now demonstrates that the military is taking a proactive stance on stalking, far better than a reactive approach in the wake of a tragedy.

APPENDIX

**EXECUTIVE ORDER XXXXX
AMENDMENTS TO THE MANUAL FOR
COURTS-MARTIAL, UNITED STATES**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. §§ 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order No. 12,473, as amended by Executive Order No. 12,484, Executive Order No. 12,550, Executive Order No. 12,586, Executive Order No. 12,708, Executive Order No. 12,767, Executive Order 12,888; Executive Order 12,936; Executive Order 12,960; Executive Order 13,086; and Executive Order 13,140, it is hereby ordered as follows:

Section 1. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

The following new paragraph is inserted after paragraph XX:

XX. Article 134 (Stalking)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Stalking.*

(a) That the accused willfully, maliciously, and repeatedly followed another person, or that the accused harassed another person;

(b) That the accused made a credible threat, either express or implied by conduct, with the intent to place the person so followed or harassed in reasonable fear for his or her safety, or the safety of his or her immediate family; and

(c) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) Aggravated stalking.

(a) That the accused willfully, maliciously, and repeatedly followed another person, or that the accused harassed another person;

(b) That the accused made a credible threat, either express or implied by conduct, with the intent to place the person so followed or harassed in reasonable fear for his or her safety, or the safety of his or her immediate family;

(c) That the accused engaged in said conduct by:

(i) violating a restraining or protective order, injunction, or other valid order issued by a court of competent jurisdiction; or

(ii) targeting a child under the age of sixteen years; or

(iii) using or displaying a dangerous or deadly weapon; and

(d) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* For purposes of this paragraph, the following definitions apply:

(1) “Followed” means maintained a visual or physical proximity to another person without legitimate purpose;

(2) “Harassed” means a knowing and willful course of conduct directed at a specific person that seriously alarmed, annoyed, tormented, or terrorized the person and that served no legitimate purpose;

(3) “Credible threat” means a verbal or written threat, including that performed through the use of an electronic communication device, made with the intent to place the person who is the target in reasonable fear for

his or her safety or the safety of his or her immediate family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. A credible threat need not be express; it may be implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her immediate family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. It is not necessary to prove that the accused had the intent to actually carry out the threat. The present confinement of an accused who makes a credible threat shall not be a defense under this paragraph.

(4) “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of “course of conduct.”

(5) “Electronic communication device” includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers.

(6) “Immediate family” means any spouse, parent, child, sibling, or any other person who regularly resides in the household of the targeted person, or who within the previous six months regularly resided in the household of the targeted person.

d. *Lesser included offenses.* Article 80—attempts.

e. *Maximum punishment.*

(1) *Stalking.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *Aggravated stalking.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 6 years.

f. *Sample specifications.*

(1) In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20__, stalk _____ by (willfully, maliciously, and repeatedly following _____, by maintaining a visual or physical proximity to _____, spying on _____, going to _____'s home or place of work) (harassing _____, by making nonconsensual telephone calls, trespassing, sending/ mailing/ delivering unwanted letters, gifts, or other items, sending unwanted electronic communication).

(2) In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20__, stalk _____ (a child under the age of 16 years) by (willfully, maliciously, and repeatedly following _____, by maintaining a visual or physical proximity to _____, spying on _____, going to _____'s home or place of work) (harassing _____, by making nonconsensual telephone calls, trespassing, sending/ mailing/ delivering unwanted letters, gifts, or other items, sending unwanted electronic communication such as e-mail or fax) (in violation of a restraining/protective/court order)(accompanied by use/display of a dangerous/deadly weapon).