

10.3: Domestic Violence and Stalking

10.3.0.1 EARNING OBJECTIVES

1. Identify the individuals covered by domestic violence statutes.
2. Identify some of the special features of domestic violence statutes.
3. Define the criminal act element required for stalking.
4. Define the criminal intent element required for stalking, and compare various statutory approaches to stalking criminal intent.
5. Define the harm element required for stalking, and compare various statutory approaches to ascertaining harm.
6. Analyze stalking grading.

Domestic violence and **stalking** are modern crimes that respond to societal problems that have escalated in recent years. Domestic violence statutes are drafted to address issues that are prevalent in crimes between family members or individuals living in the same household. Stalking generally punishes conduct that is a *precursor* to assault, battery, or other crimes against the person, as is explored in [Section 10.3](#).

10.3.1 Domestic Violence

Domestic violence statutes generally focus on criminal conduct that occurs between **family** members. Although family cruelty or interfamily criminal behavior is not a new phenomenon, enforcement of criminal statutes against family members can be challenging because of dependence, fear, and other issues that are particular to the family unit. In addition, historical evidence indicates that law enforcement can be reluctant to get involved in *family disputes* and often fails to adequately *protect* victims who are trapped in the same residence as the defendant. Specific enforcement measures that are crafted to apply to defendants and victims who are family members are an innovative statutory approach that many jurisdictions are beginning to adopt. In general, domestic violence statutes target crimes against the person, for example, assault, battery, sex offenses, kidnapping, and criminal homicide.

10.3.2 Domestic Violence Statutes' Characteristics

The purpose of many domestic violence statutes is *equal* enforcement and treatment of crimes between family members and *maximum protection* for the domestic violence victim. RCW § 10.99.010, accessed February 21, 2011, apps.leg.wa.gov/rcw/default.aspx?cite=10.99.010. Domestic violence statutes focus on individuals related by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together. Ariz. Rev. Stat. § 13-3601(A), accessed February 21, 2011, www.azleg.state.az.us/ars/13/03601.htm. Domestic violence statutes commonly contain the following provisions:

- Special training for law enforcement in domestic issues RCW § 10.99.030, accessed February 21, 2011, apps.leg.wa.gov/rcw/default.aspx?cite=10.99.030.
- Protection of the victim by no-contact orders and nondisclosure of the victim's residence address RCW § 10.99.040, accessed February 21, 2011, apps.leg.wa.gov/rcw/default.aspx?cite=10.99.040.
- Duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims RCW § 10.99.060, accessed February 21, 2011, apps.leg.wa.gov/rcw/default.aspx?cite=10.99.060, Ariz. Rev. Stat. § 13-3601(J), accessed February 21, 2011, www.azleg.state.az.us/ars/13/03601.htm.
- Ability to arrest domestic violence offenders with or without a warrant Ariz. Rev. Stat. § 13-3601(B), accessed February 21, 2011, www.azleg.state.az.us/ars/13/03601.htm.
- Special factors to consider in the sentencing of domestic violence defendants RCW § 10.99.100, accessed February 21, 2011, apps.leg.wa.gov/rcw/default.aspx?cite=10.99.100.
- Peace officer immunity for enforcement of domestic violence provisions Ariz. Rev. Stat. § 13-3601(G), accessed February 21, 2011, www.azleg.state.az.us/ars/13/03601.htm.

10.3.3 Stalking

California was the first state to enact a stalking law in 1990, in response to the high-profile murder of a young actress named Rebecca Schaeffer whose attacker stalked her for two years. Now *all states* and the federal government have stalking laws. 18 U.S.C. § 2261A, accessed February 22, 2011, www.ncvc.org/src/main.aspx?

[dbID=DB Federal Interstate Stalking Institute163#61a](#). Although statutes criminalizing stalking are gender-neutral, in reality, most stalking victims are women, and most stalking defendants are men.

Before the states enacted stalking laws, a victim who was threatened and harassed but not assaulted had no remedy except to go to court and obtain a **restraining order**. A restraining order is a court order mandating that the defendant neither contact nor come within a certain distance of the victim. If the defendant violated the restraining order, law enforcement could arrest him or her. Until a restraining order was in place, however, the defendant was free to continue frightening the victim. Restraining orders typically take some time to obtain. The victim must contact and employ an attorney and also set up a court hearing. For this reason, the restraining order method of preventing a defendant from stalking was cumbersome, ineffective, and frequently resulted in force or violence against the stalking victim.

The modern crime of stalking allows law enforcement to arrest and incapacitate defendants *before* they complete an assault, battery, or other violent crime against a victim. Like all crimes, stalking requires the defendant to commit a voluntary act supported by criminal intent. In many jurisdictions, stalking also has the elements of causation and harm, as is discussed in [Section 10.3.2 "Stalking"](#).

10.3.4 Stalking Act

Various approaches have been made to criminalize stalking, and a plethora of descriptors now identify the stalking criminal act. In the majority of jurisdictions, the **criminal act** element required for stalking includes *any course of conduct* that **credibly** threatens the victim's safety, including following, Tex. Penal Code § 42.072, accessed February 22, 2011, [www.ncvc.org/src/main.aspx?dbID=DB Texas176](#). harassing, Cal. Penal Code § 646.9, accessed February 22, 2011, [www.ncvc.org/src/main.aspx?dbID=DB California176](#) (accessed February 22, 1022). approaching, Md. Code Ann. § 3-802, accessed February 22, 2011, [www.ncvc.org/src/main.aspx?dbID=DB Maryland678](#). pursuing, or making an express or implied threat to injure the victim, the victim's family member, Ala. Code § 13A-6-90, accessed February 22, 2011, [www.ncvc.org/src/main.aspx?dbID=DB Alabama390](#). or the victim's property, Tex. Penal Code § 42.072(a) (1) (c), accessed February 22, 2011, [www.ncvc.org/src/main.aspx?dbID=DB Texas176](#). In general, credible threat means the defendant has the **apparent ability** to effectuate the harm threatened. S. D. Codified Laws § 22-19A-6, accessed February 22, 2011, [www.ncvc.org/src/main.aspx?dbID=DB SouthDakota123](#). The stalking criminal act is unique among criminal acts in that it must occur on *more than one* occasion or repeatedly. Colo. Rev. Stat. Ann. § 18-3-602, accessed February 22, 2011, [www.ncvc.org/src/main.aspx?dbID=DB Colorado285](#). The popularity of social networking sites and the frequency with which defendants use the Internet to stalk their victims inspired many states to specifically criminalize **cyberstalking**, which is the use of the Internet or e-mail to commit the criminal act of stalking. Alaska Stat. § 11.41.270 (b) (3) (F), accessed February 22, 2011, [www.ncvc.org/src/main.aspx?dbID=DB Alaska803](#).

10.3.5 Example of a Case Lacking Stalking Act

Elliot tells Lisa on two separate occasions that he loves her. Lisa intensely dislikes Elliot and wants nothing to do with him. Although Elliot's proclamations of love are unwelcome, Elliot probably has not committed the criminal act element required for stalking. Elliot's behavior does not threaten Lisa's *safety* or the safety of her family members or property. Thus Elliot may not be charged with and convicted of stalking in most jurisdictions.

10.3.6 Example of Stalking Act

Change the example in [Section 10](#) so that Elliot tells Lisa he loves her on one occasion. Lisa frowns and walks away. Elliot then follows Lisa and tells her that he will "make her pay" for not loving him. Lisa ignores Elliot's statement, climbs into her car, and drives away. Later that evening, Elliot rings Lisa's doorbell. Lisa does not answer the door but yells at Elliot, telling him to leave. Disgruntled and angry, Elliot carves, "you will die for not loving me" into Lisa's front door with his pocketknife.

Elliot's conduct could constitute the criminal act element required for stalking in most jurisdictions. In this example, Elliot has *followed* Lisa and *approached* her, which is a repeated course of conduct. On two occasions Elliot threatened Lisa: once by telling her he will "make her pay" and again by carving a death threat into her front door. Keep in mind that Elliot's threat to Lisa's safety must be *credible* in many jurisdictions. Thus if Elliot is unable to actually harm Lisa for any reason, the trier of fact could find that he does not have the **apparent ability** to carry out his threat, and he could not be convicted of stalking.

10.3.7 Stalking Intent

The criminal intent element required for stalking also varies, depending on the jurisdiction. In most states, the defendant must commit the criminal act willfully or maliciously. Cal. Penal Code § 646.9, accessed February 22, 2011,

www.ncvc.org/src/main.aspx?dbID=DB_California176 (accessed February 22, 1022). This indicates a **specific intent** or **purposeful** conduct. However, in states that require the victim to experience **harm**, a different criminal intent could support the harm offense element. States that include bad results or harm in their stalking statutes require either **specific intent** or **purposely**, **general intent** or **knowingly**, **reckless intent**, **negligent intent**, or **strict liability** (no intent) to cause the harm, depending on the state. “Criminal Stalking Laws,” Ncvc.org website, accessed February 22, 2011, www.ncvc.org/src/main.aspx?dbID=DB_StatebyState_Statutes117.

10.3.8 Example of Stalking Intent

Review the stalking act example in [Section 10](#). In the majority of states, Elliot must make the threatening statement and carve the threatening message into Lisa’s front door **willfully** or **maliciously**. However, the requirement that Elliot act with the intent to **cause** Lisa’s *reaction* to this conduct varies, depending on the jurisdiction. In some jurisdictions, Elliot must act with the specific intent or purposely to **cause** Lisa to suffer the stalking harm, which is generally *fear* for bodily safety, the safety of family members, or fear of damage to Lisa’s property. In others, Elliot can act to cause Lisa’s fear with general intent or knowingly, reckless intent, or negligent intent. In some jurisdictions, Elliot’s purpose or awareness as to Lisa’s feeling of fear is irrelevant because **strict liability** is the intent supporting the harm or bad results requirement.

10.3.9 Stalking Causation

In jurisdictions that require harm for stalking, the defendant’s criminal act must be the **factual** and **legal** cause of the harm, which is defined in [Section 10](#).

10.3.10 Stalking Harm

As stated previously, some states require a specific **harm** element in their stalking statutes. This element is defined differently depending on the state but generally amounts to victim **fear**. The fear is typically fear of bodily injury or death of the victim Ala. Code § 13A-6-90, accessed February 22, 2011, www.ncvc.org/src/main.aspx?dbID=DB_Alabama390, or of the victim’s family member, Alaska Stat. § 11.41.270 (a), www.ncvc.org/src/main.aspx?dbID=DB_Alaska803, or damage to the victim’s property. Tex. Penal Code § 42.072(a) (1) (C), accessed February 22, 2011, www.ncvc.org/src/main.aspx?dbID=DB_Texas176. States also employ different tests to ascertain the harm element. States can require subjective *and* objective fear, Tex. Penal Code § 42.072, accessed February 22, 2011, www.ncvc.org/src/main.aspx?dbID=DB_Texas176, *just* subjective fear, Alaska Stat. § 11.41.270 (a), accessed February 22, 2011, www.ncvc.org/src/main.aspx?dbID=DB_Alaska803, or *just* objective fear. Md. Code Ann. § 3-802, accessed February 22, 2011, www.ncvc.org/src/main.aspx?dbID=DB_Maryland678. Subjective fear means the victim must actually experience fear. Objective fear means a reasonable victim under similar circumstances would experience fear.

10.3.11 Example of Stalking Harm

Review the stalking act example in [Section 10](#). In jurisdictions that require subjective **and** objective victim fear as the harm element for stalking, Elliot must cause *Lisa* to experience fear that is *reasonable* under the circumstances. In a jurisdiction that requires only subjective victim fear, Elliot must cause Lisa to feel fear, either reasonably or unreasonably. In a jurisdiction that requires only objective fear, Elliot must act in a manner that would cause a reasonable victim under similar circumstances to experience fear. Keep in mind that if Lisa is aware of a circumstance that makes it unlikely that Elliot can carry out his threat, Elliot *could not* be convicted of stalking in a jurisdiction that requires Lisa to experience *subjective* fear.

10.3.12 Stalking Grading

Jurisdictions vary as to how they **grade** stalking. Many states divide stalking into degrees or grade it as simple and aggravated. First-degree or aggravated stalking is generally graded as a felony, and second-degree or simple stalking is generally graded as a misdemeanor. Alaska Stat. §§ 11.41.260, 11.41.270, accessed February 22, 2011, www.ncvc.org/src/main.aspx?dbID=DB_Alaska803. Factors that could enhance grading are the violation of a restraining or protective order, the use of a weapon, a youthful victim, or previous convictions for stalking. Alaska Stat. § 11.41.260, accessed February 24, 2011, www.ncvc.org/src/main.aspx?dbID=DB_Alaska803.

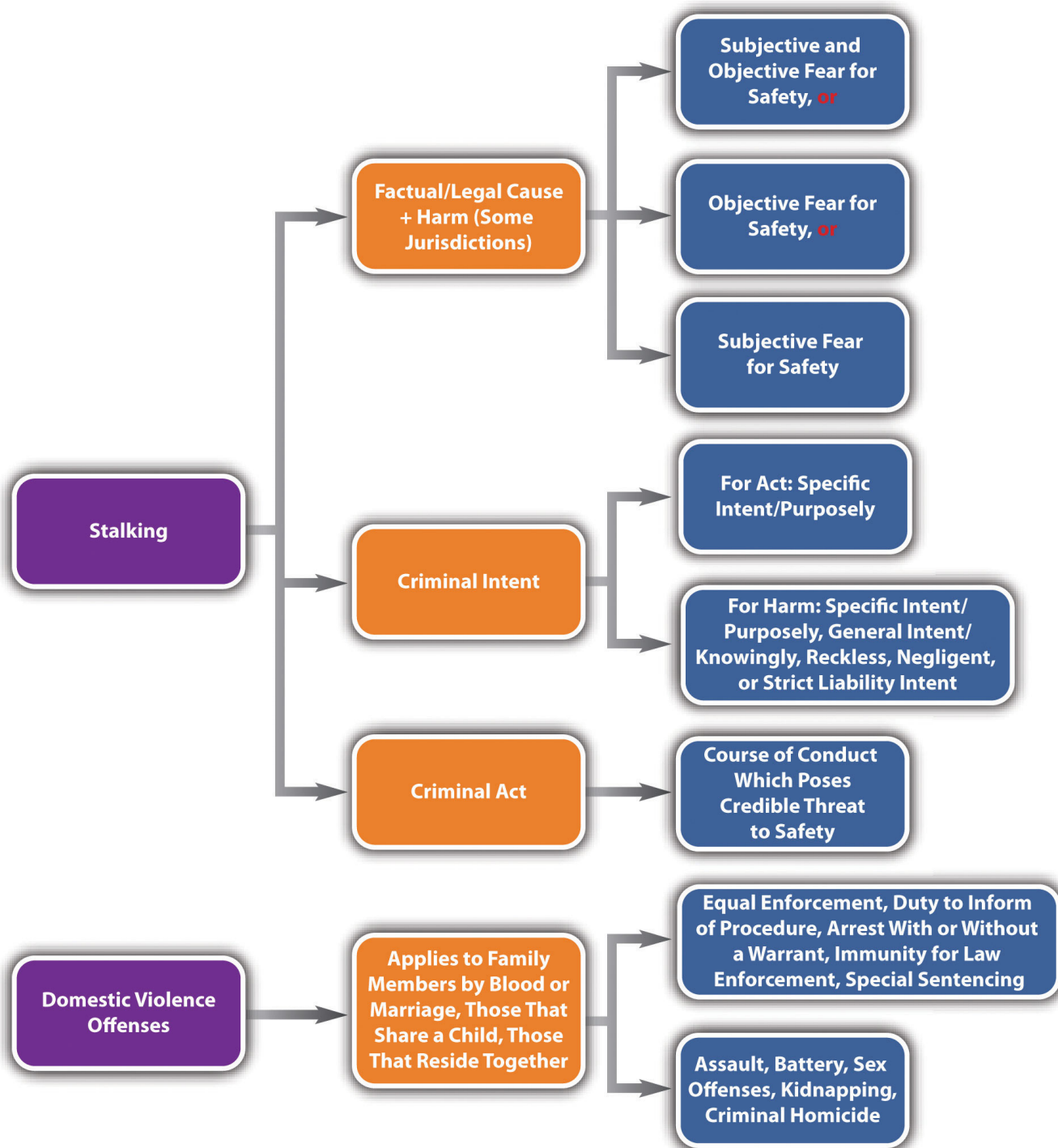


Figure 10.9 Diagram of Domestic Violence and Stalking

10.3.13 Exercises

- Individuals covered by domestic violence statutes are relatives by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together.
- Some special features of domestic violence statutes are special training for law enforcement in domestic issues, protection of the victim by no-contact orders and nondisclosure of the victim's residence address, the duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims, the ability to arrest domestic violence offenders with or without a warrant, special factors to

consider in the sentencing of domestic violence defendants, and peace officer immunity for enforcement of domestic violence provisions.

- The criminal act element required for stalking varies, but in general it is repeatedly engaging in a course of conduct that poses a credible threat to the victim's safety, including following, harassing, approaching, or pursuing the victim.
- The criminal intent supporting the stalking criminal act is specific intent or purposely in most jurisdictions. Some jurisdictions require a different criminal intent to support the harm requirement: either specific intent or purposely, general intent or knowingly, reckless intent, negligent intent, or strict liability.
- Some jurisdictions require the defendant to cause harm, which is victim fear of serious bodily injury, fear of death of the victim or the victim's family member, or damage to the victim's property. The test for victim fear varies and could be either subjective and objective fear, just subjective fear, or just objective fear.
- It is common to divide stalking into degrees or grade it as simple and aggravated. First-degree or aggravated stalking is generally graded as a felony, and second-degree or simple stalking is generally graded as a misdemeanor. Factors that can aggravate grading are the violation of a restraining or protective order, the use of a weapon, a youthful victim, or previous convictions for stalking.

10.3.14 Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Chris punches and slaps Rhianna, his roommate and girlfriend. Could this be considered domestic violence?
2. Read *State v. Holbach*, 2009 ND 37 (2009). In *Holbach*, the defendant appealed a conviction for stalking based on his constitutionally protected right to travel around town and do errands. The defendant was on probation for stalking the victim and subject to conditions of probation, including a stay-away order. However, the victim claimed that she saw the defendant following her around town on many occasions. Did the Supreme Court of North Dakota uphold the defendant's stalking conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=14788412528928431856&q=stalking&hl=en&as_sdt=2,5&as_ylo=2009.
3. Read *Burke v. State*, 676 S.E.2d 766 (2009). Why did the Court of Appeals of Georgia reverse the defendant's conviction for aggravated stalking in this case? The case is available at this link: http://scholar.google.com/scholar_case?case=14247986447862424093&q=stalking&hl=en&as_sdt=2,5&as_ylo=2009.

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