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## Cover Page Footnote

J.D. Fordham University School of Law, 1985; M.Sc. (Criminal Justice Policy), London School of Economics and Political Science (LSE), 1993. The author is currently the director of Special Projects at the New York law firm of Anderson Kill & Olick, P.C., and a doctoral candidate in the Law and Sociology Departments of the LSE, where she is submitting a thesis entitled, *The Politics of Euthanasia and Assisted Suicide: A Comparative Case Study of Emerging Criminal Justice Policy in the United States and the United Kingdom*. This essay is a result of the author's involvement with the (New York) Lawyer's Committee Against Domestic Violence, and is abstracted from a larger work in progress, *The Stalked: Social and Legal Consequences Relating to Victims of Stalking Behavior*, which along with the author's doctoral thesis, will constitute *The Enablement Doublet: Dying and Surviving*. While the author is solely responsible for the contents of this essay, a number of people enabled her to conduct the research and writing of the project, in record time. Anderson Kill and Olick, PC's founding partner, Gene Anderson and Maxa Luppi, Director of Insurance Litigation Support Services, provided a supportive environment as did Ronnie ("Miss Ron") O'Farrell. Professor Paul E. Rock (Sociology) and Professor Rober Reiner (Law) of the LSE have consistently offered academic support, including successfully nominating a related writing by the author for the 1997 William Robson Memorial Writing Prize. Bob Schumacher, Editor-in-Chief of the Fordham Urban Law Journal, engaged in an enormous gesture of trust when he allowed the author to change the topic of an invited piece and provided the time and technical support to make it all happen. Senator Michael A.L. Balboni generously interviewed with the author on the heels of the legislation while his staff answered questions, faxed documents and gave freely of their time and materials. Assemblyman Scott Stringer and Rob Hack, the former Legislative Director to Assemblyman Stringer, also graciously interviewed and provided information on short notice. The Hon. Margaret Marrinan, Judge of the District Court, Second District, of the State of Minnesota, and the soon-to-be Hon. Faith O'Neal of New York acted as sounding boards and provided background information. Elsa and Mac let the author committee her idea at all house of the day and night, the former from halfway around the world, the latter from halfway cross a borough. Last, but not least, Peter Andrews and Jon Springer have, on a number of occasions too numerous to count, brought analytical insight to the author's work, and fun to the author's life.

# STOPPING NEW YORKERS' STALKERS: AN ANTI-STALKING LAW FOR THE MILLENNIUM

*Demetra M. Pappas\**

## INTRODUCTION

This essay was to have discussed, and been entitled, *Recent Historical Perspectives Regarding Judicial Approaches, Prosecutorial Responses and Anti-Stalking Legislative Efforts in New York State*. At the time research for that article commenced, New York enjoyed the dubious distinction of being the only state in the United States that did not have a specifically designated anti-stalking stat-

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ute, and which further had ill-defined harassment and menacing laws.<sup>1</sup> Since the first anti-stalking legislation was passed by California in 1990 (effective 1991),<sup>2</sup> in response to the murder of the actress Rebecca Schaffer by an obsessed fan, there has been an explosion of legislation and litigation regarding stalking behavior, and there had been numerous (failed) efforts to enact legislation in New York.

On October 4, 1999, that latter fact became entirely historical in nature when the New York State Senate passed the Clinic Access and Anti-Stalking Act of 1999,<sup>3</sup> thus ratifying the August 5, 1999 actions of the New York State Assembly.<sup>4</sup> This comprehensive piece of legislation, signed on November 22, 1999,<sup>5</sup> has as an effective date December 1, 1999,<sup>6</sup> thus making the Clinic Access and Anti-Stalking Act of 1999<sup>7</sup> truly the anti-stalking law of the millennium, and the criminalization of stalking behavior in the United States the criminal justice project of the decade.

This essay concerns itself with some of the legislative responses to stalking in New York and will examine some of the specific anti-stalking provisions of the Clinic Access and Anti-Stalking Act of 1999, recently signed by New York Governor George Pataki. The signing ceremony was the concluding event of a largely collaborative process, as it was the Governor himself who requested that the sponsoring Senator, Michael A.L. Balboni (R-Mineola) introduce anti-stalking legislation.<sup>8</sup> The legislative efforts of Senator Balboni and his Assembly anti-stalking counterpart, Assemblyman Scott Stringer (D-Manhattan) were, in fact, coordinated so as to facili-

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1. See *Balboni Anti Stalking Legislation Gains Statewide Support*, NEWS FROM STATE SENATOR MICHAEL A.L. BALBONI (Office of N.Y. State Sen. Michael A.L. Balboni, Albany, N.Y.), May 4, 1999.

2. See CAL. PENAL CODE § 646.0 (West 1991) (amended 1992).

3. S. 6146, 222d Sess. (N.Y. Oct. 4, 1999), substituted by A. 9036 [hereinafter A. 9036] (on file with author).

4. A. 9036, 222d Sess. (N.Y. Aug. 5, 1999). It should be noted that once the bill passed the Assembly it was referred and delivered to the Senate, which in turn passed it and returned it to the Assembly on Oct. 7, 1999. See *Actions on Bill A. 9036* (visited Nov. 17, 1999) <<http://assembly.state.ny.us>>.

5. See Tom Precious, *Law Enacted to Protect Clinic Workers, Clients*, BUFF. NEWS, Nov. 23, 1999, at B1.

6. See A. 9036 § 19.

7. See *id.* § 1 (offering this "short title," to the legislation that refers to various provisions of, *inter alia*, the criminal procedure law, the penal law, the executive law, the family court act and the civil rights law).

8. See Letter from William J. Fitzpatrick, President of the New York State District Attorneys Association, District Attorney, Onondaga County, to N.Y. State Sen. Michael A.L. Balboni (May 3, 1999) (on file with author).

tate the legislative process. In this regard, interviews by the author with Senator Balboni, Assemblyman Stringer and Assemblyman Stringer's former Legislative Director, Rob Hack, offer elucidation and amplification of that which is on the printed page.<sup>9</sup> The unique perspectives serve as the focus of this discussion and provide an education not to be found in any book.

### I. THE ELEMENTS OF A COLLABORATIVE LEGISLATIVE PROCESS

As a general matter, even where attempts to criminalize stalking and to punish stalkers have been made, these efforts have often neglected the concerns of the victims of stalkers, overwhelmingly women.<sup>10</sup> This is not surprising, in view of the gendered nature of the crime, given that "the politics of battered and raped women had become estranged from local [victim support] schemes, the State, and much of the criminal justice system."<sup>11</sup>

However, New York had the full benefit of participation during the "past seven or eight legislative sessions and multiple revisions of work with a lot of different groups over the years — working closely with the National Organization for Women and the New

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9. Empirical, rather than theoretical in nature, much of what is reported and discussed herein is based upon these recorded interviews, as well as the legislation and supporting documents provided by these individuals.

The interviews were sought and conducted by telephone almost immediately following the passage of the legislation. Procedures consistent with Institutional Review Board requirements were followed, although not required by either the academic institution with which the author is affiliated or by Fordham University School of Law. All interviews were preceded by a lengthy consent colloquy, and each of the interviewees agreed to have the in-depth discussions taped.

10. Senate Majority Leader Joseph L. Bruno wrote in a press release that:

[i]n a 1998 study conducted by researchers from the National Institute of Justice and Centers for Disease Control and Prevention, an estimated one million women and 370,000 men are stalked annually in the United States. One out of every 12 American women and one out of every 45 men have been stalking victims and only 12% of *all* stalking crimes result in criminal prosecution.

Senator Joseph L. Bruno, Majority Leader, *Senate Announces Legislation to Crack Down on Stalkers*, NEWS FROM THE SENATE REPUBLICAN MAJORITY (Office of Senate Majority Leader Joseph L. Bruno, Albany, N.Y.), May 4, 1999 (alteration in original).

11. See P.E. ROCK, *HELPING VICTIMS OF CRIME* 409 (1990). While this comment was a reference to the relationship between the victim support movement in Canada and women generally, certainly stalking, which has, to date, been considered a less serious crime than battering or rape, falls within the ambit of Rock's construct.

York State Coalition against Domestic Violence.”<sup>12</sup> Indeed in its Memorandum of Support of the legislation, the New York State Coalition Against Sexual Assault gave high praise, stating, “[t]hank you to Senator Balboni and Governor Pataki for listening to the advocate community, and working hard to increase the safety and well being of New Yorkers.”<sup>13</sup>

Moreover, the New York legislature enjoyed “bi-partisan leadership on this issue, with Senator Balboni and [Assemblyman Stringer] work[ing] closely this year and . . . that was to the benefit of the people we were trying to help.”<sup>14</sup>

## II. THE GROWTH OF A LAW AND LESSONS FROM THE EXPERIENCES OF OTHER JURISDICTIONS

When first proposed, the New York anti-stalking legislation was ten to fifteen lines; the law ultimately enacted was over ten single-spaced pages long.<sup>15</sup> By being the last state to enact anti-stalking legislation, New York had the advantage of learning from the examples, both positive and negative, of other states. One such example is that of providing protection for family members and loved ones. Rob Hack notes that California originally passed a simple anti-stalking bill that did not cover family members of the targeted victim, “where the woman is being stalked and all of a sudden the guy switches and goes after the sister or the mother, and its all wrapped into the same kind of offense.”<sup>16</sup> Indeed, the New York legislation not only protects against this, but takes the concept of family one (appropriate) step further, in that, for purposes of the Act, “members of the same family or household,” are included.<sup>17</sup>

Senator Balboni spent time researching legislation and subsequent litigation in other states, as well as combing through law re-

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12. See Interview with Mr. Rob Hack, former Legislative Director to Assemblyman Scott Stringer (Oct. 27, 1999) (tape of interview on file with author) [hereinafter Hack Interview].

13. Memorandum of Support of New York State Coalition Against Sexual Assault to N.Y. State Legislators and Governor Pataki (May 3, 1999) (on file with author) (referring to a S. 1241-A, a predecessor bill to that ultimately passed); see also *Victim Services' Statement in Support of Anti-Stalking Legislation* (undated press release discussing “the bill introduced by Senator Balboni,” and noting with approval that the bill, “will accomplish the key elements of an effective anti-stalking law, [as it] was drafted with the concerns of both prosecutors and victims in mind”) (on file with author).

14. See Interview with Assemblyman Scott Stringer (D-Manhattan) (Oct. 29, 1999) (tape of interview on file with author) [hereinafter Stringer Interview].

15. See Hack Interview, *supra* note 12; A. 9036, 222d Sess. (N.Y. 1999).

16. Hack Interview, *supra* note 12.

17. A. 9036 § 8.

view articles, which he described as providing “a road map of where not to go.”<sup>18</sup> He also incorporated protections arising out of early opposition by the Coalition for the Homeless, which expressed concern regarding possible applications of anti-stalking measures to panhandlers.<sup>19</sup> Among the safeguards to protect otherwise lawful conduct from being prosecutable as stalking are provisions exempting otherwise lawful conduct under the National Labor Relations Act, the National Railway Labor Act, the Federal Employment Labor Management Act and “any other conduct, including, but not limited to, peaceful picketing or other peaceful demonstration, protected from legal prohibition by the federal and state constitutions.”<sup>20</sup> Senator Balboni says that this last provision was designed to protect panhandlers,

but that taken in the spirit of what the issue is, stalking is a personal issue, even if not romantic or familial, i.e., someone who knows someone else, can identify someone else, with whom they have had repeated contact, and they use this contact as an opportunity to continually harass and stalk them; that’s not panhandling — panhandling is random acts, usually done with complete strangers, and therefore that doesn’t fall within the central question, you can’t make it a felony.<sup>21</sup>

### III. WHAT ARE SOME EXAMPLES OF WHAT IS STALKING IN NEW YORK STATE?

Senator Balboni accurately comments on an extraordinary fact relative to a freshly legislated crime, that, “the nature of stalking, as an individualized campaign of terrorism against the victim, has hallmarks which the law enforcement communities are very familiar with.”<sup>22</sup> It should be noted that the New York Legislature set up a standard of intent that does not require that the stalker have a specific intent to stalk, but rather that the stalker intentionally engages in a course of conduct, which s/he “knew or reasonably should have known that such conduct”<sup>23</sup> is likely to cause reasonable fear of material harm to the physical health, safety or property

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18. Interview with State Senator Michael A.L. Balboni (R-Mineola) (Oct. 22, 1999) (tape of interview on file with author) [hereinafter Balboni Interview].

19. *See id.*

20. A. 9036 § 12.

21. Balboni Interview, *supra* note 18.

22. *Id.*

23. A. 9036, 222d Sess. (N.Y. 1999) (amending the New York Penal Law by adding five new sections: 120.40, 120.45, 120.50, 120.55 and 120.60, providing for, respectively, Definitions; Stalking in the Fourth Degree, a class B misdemeanor; Stalking in

of the victim or a member of the victim's family *or* the conduct causes material harm to the mental or emotional health of the victim or a member of the victim's family,<sup>24</sup> *or* that the conduct "is likely to cause such person to reasonably fear that his or her employment is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of employment or business, and the actor was previously clearly informed to cease that conduct."<sup>25</sup>

This last, particularly bold, initiative was to provide within the statute recourse for victims who suffer employment, business or career consequences or reasonable fear in that regard, emanating from the conduct of the stalker, where the stalker has been clearly informed *once* to cease that conduct.<sup>26</sup> Senator Balboni noted that prior to this enactment, there was no recourse for interference with employment and business, even civilly.<sup>27</sup> This excellent provision statutorily recognizes that most stalking is statistically done by former intimates or arises out of or intrudes into the workplace.<sup>28</sup> Senator Balboni acknowledged the leadership of Governor George Pataki, "to get it into the statute . . . because now you are going to see a very different prosecution going on . . . because now you are going to actually take into account business interest."<sup>29</sup>

Senator Balboni says that "everything works off of the provision for Stalking in the Fourth Degree, including a ten-year predicate felony, and including cases where a stalker stalks multiple victims as a higher offense."<sup>30</sup> Similarly, the legislature has created the status crime of the stalking of a minor, which Senator Balboni likened to statutory rape, where an adult stalks a child.<sup>31</sup>

#### IV. THE WAY FORWARD

Successfully enacting anti-stalking legislation is not the end of the story, although it is a good beginning. Assemblyman Stringer observes that "[p]assing a stalking/anti-stalking bill is important, it

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the Third Degree, a class A misdemeanor; Stalking in the Second Degree, a class E felony; and Stalking in the First Degree, a class D felony).

24. *See id.* § 13 (alteration in original).

25. *Id.* (alteration in original).

26. *See* Balboni Interview, *supra* note 18.

27. *See id.*

28. *See* K. SEAGRAVE, *THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE*, 1600 TO 1993 11 (1994).

29. Balboni Interview, *supra* note 18.

30. *Id.*

31. *See id.*

will deter people from stalking, it will save lives, but we've really now got to focus our attention not just on the legislative piece, but on the budget side."<sup>32</sup> He further notes that in addition to funding crisis centers, it is imperative to educate police officers and to

do a lot of preventative education with kids at a young age, teach young boys to respect young girls at the *beginning* of their education, so that . . . we don't have to initiate a stalking law — a lot of this can be prevented through education, through counseling — and we have not yet dedicated the dollars in the state budget, given our surplus, to these issues.<sup>33</sup>

Stringer says the real test for the legislature is going to be in upcoming budgets,

where money is put into programs, into communities, where we can deal with domestic violence issues, where we can deal with stalking issues, if we need, for example, to move a woman and a child into a shelter to shield them from an abuser or a stalker, we need clean, safe shelters where women can find a safe haven, and we have not yet dealt with that in the state budget.<sup>34</sup>

It is Assemblyman Stringer's hope and goal take a comprehensive approach, noting that "now we have an obligation to do the preventative work that will lessen the violence and protect people."<sup>35</sup>

One thing that Senator Balboni sees as interesting is the development of caselaw as a result of the legislation.<sup>36</sup> He looks forward to the statute being challenged in the courts, and to seeing how the courts of New York State respond to the challenge.<sup>37</sup> It bears noting, in this regard, that the New York State Legislature wisely included a severability clause protecting the integrity of each remaining provision of the statute should any portion of it be held to be invalid.<sup>38</sup>

### CONCLUSION

There can be no doubt that the New York State Legislature has benefited from the experiences of other states in terms of how to craft its anti-stalking legislation. The Clinic Access and Anti-Stalking Act of 1999 does more than merely protect against stalking as

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32. Stringer Interview, *supra* note 14.

33. *Id.*

34. *Id.*

35. *Id.*

36. See Balboni Interview, *supra* note 18.

37. See *id.*

38. See A. 9036 § 18, 222d Sess. (N.Y. 1999).

traditionally defined or described, including following, phoning and/or mailing a target. By legislating protections regarding the safety and lives of victims and their family members, and further statutorily protecting the victims' employment, educational and financial lives, this enactment provides the means for victims to take back ownership and control of their lives. Perhaps more important, the legislation provides the criminal justice system with a way in which to fight the insidious and pernicious conduct that previously was viewed as legally innocuous. What was once viewed as the crime before the crime is now culpable, criminal, prosecutable and punishable.

Ultimately, that makes the recent historical perspectives a mere — and soon to be distant — forerunner to the instant history regarding anti-stalking legislation in New York. As Senator Balboni observed,

[i]t is not only the end of the millennium, but it is also the end of the decade, the decade of the 1990s; the decade saw the wave across the nation of stalking legislation, beginning in 1990 in California, so it's fitting that it [is] now 1999 and New York is the last state — it literally has crossed the nation geographically, politically and in chronological order.<sup>39</sup>

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39. Balboni Interview, *supra* note 18.