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Crimes of Obsession: Harassment, Menacing, Stalking and Contempt
By Tim Franczyk, Esq.

CRIMES OF OBSESSION: HARASSMENT, MENACING, STALKING AND CONTEMPT

Thomas P. Franczyk
Deputy for Legal Education
Assigned Counsel Program
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INTRODUCTION:

In 1983, Gordon Sumner (better known as Sting) wrote one of his biggest hits which, for all intents and purposes, was an ode to obsession. In the opening verse, he writes:

> "Every breath you take. Every move you make. Every bond you break,
> every step you take, I'll be watching you.
>
> Every single day, every word you say, every game you play, every night you stay,
> I'll be watching you."

The chorus, which screams of unbridled possessiveness, asks:

> "Oh can't you see, you belong to me. How my poor hear aches
> with every step you take.
> And every move you make, every vow you break, every side you take,
> every claim you stake, I'll be watching you."

The character in the song (which Sumner reportedly wrote after the break-up with his first wife), would arguably fit right into the category of "rejected stalker." This is a character described by psychologist/ New York University professor Robert T. Muller Ph.D. as one who can't get over and move on from the unwanted end of a romantic relationship. (*See*: In the Mind of a Stalker: Revealing the Five Types of Stalkers, Trauma and Mental Health Report, reposted on 6/22/2013 at Psychology Today, https://www.psychologytoday.com/us/blog/talking-about-trauma/201306/in-the-mind-stalker).

CATEGORIES OF STALKERS:

Referring to an analysis and categorization of diagnosed stalkers by Australian expert Paul Mullen (chief psychiatrist at Forensicare in Victoria Australia), the author pointed to five subsets of offenders including: the aforementioned rejected stalker, the "intimacy seeker" (who fixates on another person, often a stranger, and deludes him/herself into believing the target shares his/her feelings), the affection-starved, "incompetent stalker" (who is intellectually limited and socially awkward but persists in his/her pursuit of the other despite the latter's disinterest), the "resentful stalker" (who believes that he has been wronged and unfairly treated) and the vengeful "predator" who is not seeking or trying to salvage a relationship but, rather, to exercise POWER AND CONTROL (emphasis added.)

LEGAL RESPONSE:

The first anti-stalking laws were introduced in 1990 in California following the murder of Rebecca Schaefer, a 21-year-old, up-and coming actress who was shot and killed in her doorway by a mentally disturbed individual who became obsessed with her. Other states, including New York, followed suit in the early to late 1990's in recognition of the serious, persistent and often escalating nature of harassing, menacing and stalking behaviors that not only unnerve and drive the victims to distraction, but cause them to fear for their (or their families') safety and well-being.

Other high-profile victims of stalking include Brittany Spears and Shania Twain (courtesy of mentally disturbed fans who intruded themselves into their lives), but most victims are average, everyday people who are familiar with their offenders, according to a 2006 stalking study by Brian Spitzberg of San Diego State University. Most of the victims are women but some women can be formidable and persistent offenders (not unlike the Glenn Close character in Fatal Attraction, or Betty Broderick who shot and killed her ex-husband and his new bride in their bed in a fit of rage in 1989).

According to a 2009 victimization study by Katrina Baum of the National Institute for Justice, out of almost three-and-a-half million victims interviewed, 36% of them attributed their assailant's motivation to retaliation, anger, and spite; 32% to control; and 23% cited mental illness and emotional instability as the suspected reason for the behavior. It could well be that these factors may act together in any given case.

DEGREES OF OFFENSIVE CONDUCT:

Harassment can range from unwanted, remote communication (e.g., via telephone, text message, emails) to surreptitious shadowing and surveillance (whether directly or through a third party), or in-person confrontation which may annoy or alarm the victim or put her/him in reasonable fear of physical harm.

Depending on the nature of the communication/conduct, the intent of the offender, the degree of threat conveyed, the repetitiveness of the behavior and its effect on the victim, the offense may range from simple harassment (a violation) to more serious offenses such as aggravated harassment (whether by phone or other electronic communication), varying degrees of menacing, stalking and, if an order of protection has been violated, criminal contempt.

RELEVANT STATUTES:

HARASSMENT 2D DEGREE (PL 240.26): A person is guilty of this offense, (a violation), in relevant part, when with INTENT TO HARASS, ANNOY OR ALARM another person, he:

2. FOLLOWS a person in or about a public place or;

3. engages in a COURSE OF CONDUCT or REPEATEDLY COMMITS acts which ALARM or SERIOUSLY ANNOY such other person and which SERVE NO LEGITIMATE PURPOSE.

The key to this offense is the intent to harass annoy or alarm another person which can be inferred from the circumstances of the encounter. (People v Bryant, 13 AD3d 1170 [4th Dep't 2004]: D displays a tire iron during an argument). *See also* People v Bartkow 96 NY2d 770 [2001]).

While following a person in a public place is selfexplanatory (i.e., purposeful conduct rather than just fortuitously following the same route), COURSE OF CONDUCT has been defined by case law as a PATTERN OF CONDUCT composed of a series of acts committed over a period of time, however short, evincing a CONTINUITY OF PURPOSE. (People v Payton 161 Misc2d 170 [Crim Ct Kings County 1994]), People v Stuart 100 NY2d 1412 [2001).

The concept of a COURSE OF CONDUCT which also appears in the menacing, stalking and contempt provisions, suggests something more than an isolated incident (e.g., People v Hotchkiss 59 Misc2d 823 [Schuyler County Court 1969]: D verbally threatened sheriff's deputy after he seizes D'S loaded handgun), and subsequent acts revealing a continuity of purpose should be similar to the original act and consistent with the defendant's original intent. (People v Payton, *supra*).

The period of time encompassing the offending conduct can be long (a year or more) or short (five to eight minutes) (*see* People v Murray 167 Misc2d 857 [Crim Ct City of NY 1995). In Murray, the defendant was charged with Harassment 1st and 2d degrees, Menacing 2d and 3d degrees and Unlawful Imprisonment based on: following the victim as she walked home from work, offering her money to accompany him to Central Park and continuing to walk along side and pestering her as she tried to evade him. When she tried to duck into a building, the defendant blocked her path and as she continued to walk away, he grabbed her arm and said, "come with me."

The victim then tried to get into a passing van but the defendant restrained her and pulled her toward the park until a security guard interceded in response to her cries for help. The court held that while the entire encounter was only several minutes in duration, the defendant's persistent conduct reflected a continuity of purpose (to take the victim against her will) which, in the court's view is the hallmark of the anti-stalking statutes.

Similarly, in People v Kelly 44 Misc3d 1203 (Crim Ct, City of NY 2014), the Court found the information charging Harassment 2d degree (as well as Stalking 4th degree and Criminal Contempt 2d degree) legally sufficient upon allegations that the defendant, several weeks after the complainant had obtained a Family Court Order of Protection, spied the victim in Central Park and followed her on two separate occasions (a month apart), for several blocks.

In the court's assessment, the defendant engaged in a course of conduct that demonstrated no legitimate purpose other than to hound, frighten or harass the complainant, especially since he already knew that the victim was concerned enough to have obtained an order of protection.

The court rejected the defendant's claim of inadvertent contact and found that unlike People v Lewis 29 Misc3d 978 [Crim Ct, City of NY 2010] where there was no order of protection, the facts here supported an inference that the defendant should have known that his conduct would cause the complainant to be afraid. The information was also deemed sufficient to support the allegation that the defendant intentionally violated the order of protection.

HARASSMENT 1ST DEGREE (CLASS B MISDEMEANOR):

PL 240.25

A person commits this offense when he/she INTENTIONALLY and REPEATEDLY HARASSES ANOTHER PERSON by FOLLOWING SUCH PERSON in or about a public place(s) by

engaging in a COURSE OF CONDUCT OR BY REPEATEDLY COMMITTING ACTS which place such person in REASONABLE FEAR OF PHYSICAL INJURY.

What distinguishes this offense from Harassment 2d degree is conduct that goes beyond alarming or seriously annoying another person to placing her/him is REASONABLE FEAR OF INJURY. Such fear is reasonable when it is beyond being idiosyncratic and would appear reasonable to someone viewing the situation as a reasonable person. (People v Dickson 83 AD3d 89 [3d Dep't 2011]).

In People v Monroe 183 Misc2d 374 (Crim Ct of NY Co. 2000) the court, citing People v Payton 161 Misc2d 170 [Crim Ct, Kings County 1994), found the information charging Harassment 1st degree to be legally sufficient (People v Alejandro 70 NY2d 133 [1987]), upon allegations that on a given date (7/29), the victim was exiting a train station when the defendant approached and insisted on talking to her. She said, "I have an appointment," whereupon she turned around and walked back down the station stairs. The defendant said, "remember what I told you about hurting my feelings. You better not hurt my feelings."

Two days later, the victim was informed that the defendant had stopped by her house, looking for her. The next day at 7:30 a.m., the defendant returned to her house and insisted on talking to her. She said, "I've got nothing to say to you," to which the defendant replied, "if I come back, I won't be alone. If you come out, you'd better watch your back."

Several days later (after the victim called the defendant to say that she no longer wished to speak to him) the defendant approached her with his hand in his pocket at a bus stop and said, "I need to talk to you Charlene." A friend of the victim stepped in between them and she managed to get on the bus. As the bus pulled off, the defendant banged on the window and said, "you're going to see me."

The court noted that the harassment (and menacing) statutes were enacted to address the heightened level of consciousness of the SINISTER EFFECTS of one person stalking another. While the former involves an intent to repeatedly harass another person which RESULTS IN a reasonable fear of physical injury, the latter requires that the offender INTEND TO PLACE another person in reasonable fear of physical injury.

Further, in the court's view, harassment is NOT limited to statements but includes a series of acts committed over a period of time evidencing a CONTINUITY OF PURPOSE (citing People v Payton supra). The court noted that the described tone of the defendant's voice, coupled with the IMPLIED THREATS in his statements, his approaches in public places and frequency of contact was enough to support the harassment charge. (citing People v Murray *supra*).

As for the Menacing count, however, which requires evidence of "physical menace," the court found the information to be legally INSUFFICIENT for failing to allege any PHYSICAL ACTIONS demonstrating an intent to inflict physical harm.

MENACING 3RD DEGREE (CLASS B MISDEMEANOR):

PL 120.15: A person commits this offense when by PHYSICAL MENACE, he/she INTENTIONALLY PLACES (or attempts to place) another person in FEAR OF DEATH, IMMINENT SERIOUS PHYSICAL INJURY OR PHYSICAL INJURY.

As noted above, this statute requires some menacing physical act (e.g. threatened punch, brandishing a weapon) which may or may not be accompanied by threatening statements. In Matter of Pedro H 308 AD2d 374 (1st Dep't 2004), the elements were established by proof that the defendant and his cohorts approached their former teacher (who had failed them), on a subway platform, surrounded her and blocked her way, saying, "you're not going anywhere." When one suggested that they "throw her on the tracks," while the defendant moved toward her, she managed to get away.

Menacing 2D DEGREE (CLASS A MISDEMEANOR):

PL 120.14: A person commits this offense when:

1. he/she INTENTIONALLY places or attempts to place another person in reasonable fear of physical injury, serious physical injury (SPI) or death by DISPLAYING A DEADLY WEAPON (e.g., a gun), DANGEROUS INSTRUMENT (i.e., any object capable of causing SPI), or what appears to be a pistol, revolver rifle, shotgun machine gun or other firearm; or

2. he/she REPEATEDLY FOLLOWS A PERSON OR ENGAGES IN A COURSE OF CONDUCT OR REPEATEDLY COMMITS ACTS OVER A PERIOD OF TIME INTENTIONALLY PLACING OR ATTEMPTING TO PLACE ANOTHER PERSON IN REASONABLE FEAR OF PHYSICAL INJURY, SERIOUS PHYSICAL INJURY OR DEATH; or

3. he/she commits Menacing 3d degree in violation of a duly served ORDER OF PROTECTION (or of which he has knowledge because he was present in court when it issued), pursuant to section 8 of the Family Court Act or CPL 530.12 (or an order from a court of competent jurisdiction in another state) which directed the defendant to STAY AWAY FROM THE PERSON (or persons) on whose behalf the order was issued.

In order for this statute to be satisfied, the threat must actually be communicated to the intended victims. That was not the case in Matter of Kyle L 268 AD2d 836 (3d Dep't 2000) where the defendant told a third party over the phone that he intended to harm two of his classmates but there was no proof that the threat was ever brought to their attention. Hence, they could not be said to have been placed in reasonable fear of physical injury.

In People v Payton *supra*, the defendant challenged the legal sufficiency of an information charging him with two counts of Menacing 2d degree, alleging that the allegations that on two occasions (11/24 and 12/1), the defendant: 1. followed the victim for two blocks and 2. stared at him, crossed the street and approached him and only walked away when other people arrived, was not enough to support the claim that he had engaged in a course of conduct or placed the complainant in reasonable fear for his physical safety.

The court found, first of all, that a course of conduct is not measured by any particular number of acts or period of time. Citing, *inter alia*, People v Tralli 88 Misc 2d 117 (NY Sup Ct/ App Term 1976), the court stated that the statute prohibits EITHER a course of conduct OR repeated acts occurring over some period of time, which intentionally places another person in reasonable fear of physical injury.

The court went on to say that while the incidents, viewed in isolation would probably not support a menacing charge, when viewed in CONTEXT of two earlier incidents which were set forth in the accusatory instrument (including a violent sexual assault on 10/15 and a threatening phone

message the next day, [“I know where you live and where your kids go to school”], the seemingly innocuous conduct of following and approaching the victim on two separate occasions took on a more sinister (i.e. culpable) significance.

The court found, therefore, that there were sufficient factual allegations to support the accusation that the defendant intentionally attempted to place the victim in reasonable fear of physical injury. (citing Matter of Victor P. 120 Misc2d 770 [Crim Ct City of NY 1983]).

Menacing 1st Degree (CLASS E FELONY);

PL 120.13

A person is guilty of this offense, when he/she commits Menacing 2d degree and has been PREVIOUSLY CONVICTED of Menacing 2d degree or Menacing a Police/Peace officer (PL 120.180), within the preceding 10 years.

STALKING OFFENSES:

Stalking has elements that are common to Harassment and Menacing (e.g. intentionally engaging in a course of conduct that has no legitimate purpose) but addresses patterns of behavior specifically aimed at a particular person that the actor knows (or should know) are likely to cause reasonable fear of: harm to the victim’s (or his/her family’s) physical safety or property, a threat to his/her employment/career, or causes material harm to the victim’s (or his/her family’s or friends’) emotional health.

PL 120.45 STALKING 4TH DEGREE (CLASS B MISDEMEANOR):

A person is guilty of this offense when he/she INTENTIONALLY, and FOR NO LEGITIMATE PURPOSE, engages in a COURSE OF CONDUCT DIRECTED AT A SPECIFIC PERSON, and KNOWS or REASONABLY SHOULD KNOW that such conduct:

1. is LIKELY TO CAUSE REASONABLE FEAR OF MATERIAL HARM to the PHYSICAL HEALTH, SAFETY, or PROPERTY of such person, a member of his/her IMMEDIATE FAMILY or a THIRD PARTY with whom such person is acquainted; or

2. CAUSES MATERIAL HARM to the MENTAL OR EMOTIONAL HEALTH of such person where such conduct consists of: FOLLOWING*, TELEPHONING OR INITIATING COMMUNICATION OR CONTACT with such person, a member of his/her IMMEDIATE FAMILY or a THIRD
   PARTY ACQUAINTANCE and the actor was previously CLEARLY INFORMED TO CEASE SUCH CONDUCT.

3. is LIKELY to cause such person to reasonably fear that his/her EMPLOYMENT, BUSINESS or CAREER is THREATENED, where such conduct consists of TELEPHONING OR INITIATING COMMUNICATION OR CONTACT AT SUCH PERSON’S PLACE OF EMPLOYMENT OR BUSINESS, and the actor was PREVIOUSLY CLEARLY INFORMED to cease such conduct.

* For purposes of subdivision 2, “following” includes the UNAUTHORIZED TRACKING of

of such person's movements or location by use of a GPS or other device.

Per PL 120.40(4), IMMEDIATE FAMILY means the spouse, former spouse, child, sibling or any other person who regularly resides or has regularly resided in the household of a person.

STALKING 3D DEGREE (CLASS A MISDEMEANOR):

PL 120.50 A person is guilty of this crime when he/she:

1. commits Stalking 4th degree against THREE OR MORE PERSONS IN THREE OR MORE SEPARATE TRANSACTIONS for which the actor has NOT previously been convicted; or

2. commits Stalking 4th degree against any person and has PREVIOUSLY BEEN CONVICTED within the preceding 10 years of a SPECIFIED PREDICATE CRIME defined in PL 120.40(5), and the victim of such predicate crime is the victim or an immediate family member of the victim of the present offense;

The SPECIFIED PREDICATE CRIMES (SPC) set forth in PL 120.40(5) include:

a. a VIOLENT FELONY OFFENSE (see PL 70.02);
b. SEX OFFENSES defined in PL 130.20, 130.25, 130.30, 130.40, 130.45, 130.55, 130.60, 130.70, 255.25 (Incest), 225.26 or 225.27;
c. Assault 3d degree, Menacing 1st, 2d and 3d degrees, Coercion 1st, 2d and 3d degrees, Aggravated Harassment, Harassment 1st and 2d degrees, Criminal Mischief 1st, 2d and 3d degrees, Criminal Tampering 1st degree, Arson 3d and 4th degrees, Criminal Contempt 1st degree, Endangering the Welfare of a Child; or
d. Stalking 2d, 3d or 4th degree; or

e. an offense in any other jurisdiction that includes ALL THE ESSENTIAL ELEMENTS of any such crime for which a sentence in excess of one year (i.e. a felony) was authorized and is authorized in this state (whether or not such sentence was actually imposed).

3. (PL 120.50 cont'd): with INTENT TO HARASS, ANNOY OR ALARM A SPECIFIC PERSON, he/she engages in A COURSE OF CONDUCT directed at such person which is LIKELY to cause such person to REASONABLY FEAR PHYSICAL INJURY OR SERIOUS PHYSICAL INJURY, THE COMMISSION OF A SEX OFFENSE AGAINST OR THE KIDNAPPING, UNLAWFUL IMPRISONMENT OR DEATH OF SUCH PERSON OR A MEMBER OF HIS/HER IMMEDIATE FAMILY; or

4. commits Stalking 4th degree and has previously been convicted with the preceding 10 years of Stalking 4th degree.

STALKING 2D DEGREE (A CLASS E FELONY):

PL 120.55: A person is guilty of this crime when he/she:

1.commits Stalking 3d degree and in the course and furtherance of such crime: i. DISPLAYS OR POSSESSES AND THREATENS THE USE OF A FIREARM, PISTOL, REVOLVER, RIFLE, SHOTGUN MACHINE GUN ELECTRONIC DART GUN OR STUN GUN, CANE SWORD, BILLY, BLACKJACK, BLUDGEON, PLASTIC OR METAL KNUCKLES, CHUKA STICK SANDBAG, SAND CLUB, SLING SHOT, SHIRKEN, KUNG FU STAR, DAGGER, DANGEROUS KNIFE, DIRK, RAZOR, STILETTO, IMITATION PISTOL, DANGEROUS INSTRUMENT OR DEADLY WEAPON; OR ii. DISPLAYS WHAT APPEARS TO BE A PISTOL, REVOLVER, RIFLE, SHOTGUN, MACHINE GUN OR OTHER FIREAM; or

2. commits Stalking 3d degree against any person and has been CONVICTED within the PRECEDING FIVE YEARS of an SPC (PL 120.40[5]) and the victim of such SPC is the victim or an immediate family member of the victim of the present offense; or

3. commits Stalking 4th degree and has previously been convicted of Stalking 3d degree (per PL 120.50[4[) against any person; or

4. being 21 or older, he/she REPEATEDLY FOLLOWS a person under 14 or engages in a COURSE OF CONDUCT or REPEATEDLY COMMITS ACTS over a period of time. INTENTIONALLY PLACING (or attempting to place) such underage person in REASONABLE FEAR of physical injury, SPI or death; or

5. commits Stalking 3d degree (per PL 120.50[3]) against TEN OR MORE PERSONS IN TEN OR MORE SEPARATE TRANSACTIONS FOR WHICH THE ACTOR HAS NOT BEEN PREVIOUSLY CONVICTED.

SOME CASES:

In People v Stuart 191 Misc2d 341 (Sup Ct App Term, 1st Dep't 2002), the court held that the stalking statute was NOT UNCONSTITUTIONALLY VAGUE and provided sufficient notice of the proscribed conduct. (citing People v Shack 86 NY2d 529 [1995]).

The defendant in Stuart was convicted after a bench trial of Stalking 4th degree for approaching the 21-year-old victim, who was a stranger to him, and offering her flowers and chocolates on Valentine's Day. When she told him that she had a boyfriend and could not talk to him, the defendant followed her every day for five weeks from home to school (lingering and circling around her), ducking behind buildings then re-emerging, all of which made her "scared and very uncomfortable."

In view of the persistent pattern of conduct, the trial court was deemed to have properly rejected the defendant's claim of innocent, coincidental contact. (The defendant claimed that he ran into her as he was passing out flyers for his employer).

Regarding the defendant's claim of constitutional vagueness, the court held that the phrase "no legitimate purpose" was not unduly subjective because it measures the defendant's conduct by an objective standard of reasonableness (of the victim's fear) and requires intentional conduct on the offender's part. In the court's view, the defendant's "insidious actions" in pursuing the victim over five weeks were not even remotely legitimate.

Similarly, in People v Clark 52 AD3d 860 (3d Dep't 2008), evidence that the defendant, in violation of a no-contact order of protection (NCOP), appeared at the victim's place of work and then proceeded to follow her in a vehicle on a public highway at a close distance and then continued to contact her for six months was sufficient to support the convictions for stalking and contempt.

See also People v Brown 61 AD3d 1007 (3d Dep't 2009): Evidence was sufficient, in light of the PAST HISTORY between the defendant and the victim, to support stalking conviction where the defendant, who was previously convicted of stalking the victim, called the victim upon his release from jail and spoke to her husband while the victim (who falsely told husband, "I don't know him") was within ear shot. The evidence was insufficient, however, to support the charge of Contempt 1st degree for lack of proof of intent to place the victim in reasonable fear of physical injury.

In contrast, see People v Noka 51 AD3d 468 (1st Dep't 2008) where sufficient evidence of reasonable fear was established when the defendant, who had a HISTORY OF MAKING VIOLENT THREATS upon his ex-wife and daughter, repeatedly approached them with an angry look while holding his hand in his pocket in a manner suggesting concealment of a gun.

In People v Givens 2020 NY Slip Op 50334(U) (Crim Ct, City of NY, Kings County 3/3/20), the court analyzed an information charging the defendant with multiple counts of stalking (3d and 4th degrees), harassment and aggravated harassment covering six separate incidents.

The first incident (harassment and aggravated harassment) alleged that on 5/9/19, the victim received phone messages from a number she recognized as the defendant's which stated, "I know you're going to meet someone at a concert and I know where you are right now. I have someone following you." The defendant also accurately described what the victim was wearing.

After dispensing with a technical argument over an (amendable) discrepancy in the times stated in the information, the court rejected the defendant's claim of "legitimate purpose" based on their past relationship, noting that a relationship, past or present, does not render any and all communications between the parties legitimate.

The court said that a communication has no legitimate purpose when its objective is to cause harm or otherwise reflects a proscribed intent set forth in the statute. Here, the allegation that the defendant claimed to know where the victim was (and was going) sufficiently supported an intent to harass the victim.

The court also found that a common sense reading of the entire accusatory instrument sufficiently established that the victim properly identified the defendant (whom she knew) as the caller, and that the failure to specify the precise number of calls was not insufficient to establish "repeated acts."

The court also found the Harassment charge (PL 240.26[3]) based on emails from the defendant's address (identified by the victim as his) which stated: "I went through your computer and I saw pictures of you and your boyfriend," to be legally sufficient.

Two of the incidents which resulted in charges of harassment and aggravated harassment were dismissed for failing to specify facts (i.e., the contents of the communications) in support of the accusations. (CPL 100.15, 100.40).

Another harassment count (PL 240.26[3]) ("You didn't love me. You're sleeping with other people. You broke my body"), was dismissed for failing to plead a "series of acts." Yet another harassment court ("I apologize for repeatedly calling your work"), was upheld as were multiple stalking counts (including the threat to have her followed coupled with the accurate description of her clothing), which were deemed sufficient to establish the element of reasonable fear.

In contrast, see People v Demisse 24 AD3d 118 (1st Dep't 2015) where the defendant's repeated declarations of love (by phone and in writing), while upsetting to the complainant, lacked any element of hostility in either tone or content to convey any express or implied threat so as to cause a reasonable fear of injury.

In the same vein, in People v Ubbink 120 AD3d 1574 (4th Dep't 2014), the Fourth Department reduced the defendant's conviction for Criminal Contempt 1st because the proof established that while the defendant violated the order of protection by going to the victim's residence, there was no evidence that he intentionally placed or attempted to place the victim in reasonable fear of physical injury (let alone SPI or death). Accordingly, the court reduced the conviction to Criminal Contempt 2d degree. (citing, *inter alia*, People v Brown *supra*).

In People v Pytlak 99 AD3d 1242 (4th Dep't 2012), the Fourth Department affirmed the defendant's convictions for Stalking 4th degree and Aggravated Criminal Contempt stemming from his persistent and unnerving pursuit of his ex-girlfriend (e.g. following her all over town in his car, scoping her out with binoculars from a nearby parking lot, sitting behind her in church), and rejected his argument that the trial court erred in admitting evidence of his prior conduct (e.g. slapping, tire slashing) aimed at the victim.

In the court's view, the prior conduct was relevant to show that that victim had a reasonable basis to be afraid for her safety (citing People v Crump 77 AD3d 1335). It was also relevant with respect to motive and intent. (citing People v Long 93 AD3d 1492)

STALKING 1ST DEGREE (CLASS D FELONY):

PL 120.60: A person is guilty of this offense when he/she commits Stalking 3d degree (PL 120.50[3]) or Stalking 2d degree (PL 120.50) and in the course and furtherance thereof, he/she:

1. intentionally or recklessly causes physical injury to the victim of such crime; or

2. commits a Class A Misdemeanor defined in PL Art. 130 (sex offenses), or a Class E Felony of PL 130.25, 130.30 or 130.35.

CRIMINAL CONTEMPT OFFENSES:

As some of the above-referenced cases suggest, it is not uncommon for defendants who stalk, harass and/or menace to also be charged (and convicted) of CRIMINAL CONTEMPT for

VIOLATING ORDERS OF PROTECTION that have previously been granted in favor of the person who is the target of their attention. As with harassment, menacing and stalking, there are increasing degrees of contempt based on the severity of the defendant's conduct in violation of the order. (People v Cajigas 19 NY3d 697 [2012]).

CRIMINAL CONTEMPT 2D DEGREE:

PL 215.30: A person is guilty of this offense when he/she engages in:

3. INTENTIONAL DISOBEDIENCE OR RESISTANCE to the lawful process or other mandate of a court (e.g., an order of protection).

It should be noted that to violate an order of protection, the defendant must be aware of its contents (e.g., "stay away from the victim and her home and place of employment"), and the conduct in violation thereof must be intentional rather than inadvertent (e.g., running into the victim at the supermarket).

In People v Inserra 4 NY3d 30 (2004), the court held that the defendant's knowledge of the contents of the order could properly be inferred from the presence of his signature on the signature line of such order. And, in People v DeAngelo 98 NY2d 733 (2002), the defendant's actions in leaving voice mail messages on the answering machines of specified persons who had previously obtained an order of protection based on prior acts of harassment, was sufficient to support the defendant's conviction.

But see People v Lewis 5 NY3d 546 (2005) where the Court of Appeals held that while a defendant's intent to engage in conduct prohibited by an order of protection while in precluded premises (e.g. assault, menacing), may satisfy the "'intent to commit a crime therein" element of Burglary 2d degree, it is not enough (to meet that element) that the defendant simply intended to enter the premises that are off limits in violation of the order. (In other words, to be guilty of burglary, the defendant must enter the premises with the intent to commit a crime other than violating the order of protection by the act of unlawful entry).

CRIMINAL CONTEMPT 1ST DEGREE:

PL 215.51: A person is guilty of this crime when:

b. in violation of a DULY SERVED order of protection, or such order of which the defendant has personal knowledge because he/she was present in court when it was issued, or an order issued by a court of competent jurisdiction in this or another state, he/she:

i. intentionally places or attempts to place a person for whose protection such order was issued (i.e., the protected party) in REASONABLE FEAR of physical injury, serious physical injury or death by DISPLAYING a deadly weapon (PL 10.00[12], dangerous instrument (PL 10.00[13]) or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, or by means of a THREAT or threats; or
ii. intentionally places (or attempts to place) the protected party in REASONABLE FEAR of physical injury, SPI or death by REPEATEDLY FOLLOWING such person or by engaging in

a COURSE OF CONDUCT or by REPEATEDLY COMMITTING ACTS over a period of time; or

iii. intentionally places (or attempts to place) the protected party in REASONABLE FEAR of physical injury, SPI or death when he/she COMMUNICATES (or causes a communication to be initiated) with such person by MECHANICAL OR ELECTRONIC MEANS or otherwise, anonymously or otherwise, by TELEPHONE, TELEGRAPH, MAIL OR BY ANY OTHER FORM OF WRITTEN COMMUNICATION. (x-ref PL 240.30[2][a]); or
iv. with intent to HARASS, ANNOY or ALARM a protected party, REPEATEDLY MAKES TELEPHONE CALLS TO SUCH PERSON, WHETHER OR NOT A CONVERSATION ENSUES, WITH NO PURPOSE OF LEGITIMATE COMMUNICATION (x-ref PL 240.30[2]); or
v. with intent to HARASS, ANNOY, THREATEN or ALARM a protected party, he/she STRIKES, SHOVES OR KICKS OR OTHERWISE SUBJECTS SUCH OTHER PERSON TO PHYSICAL CONTACT OR ATTEMPTS/THREATENS TO DO THE SAME; or
vi. by PHYSICAL MENACE, he/she INTENTIONALLY PLACES (or attempts to place) the protected party in REASONABLE FEAR OF DEATH, IMMINENT SPI OR PHYSICAL INJURY (x-ref PL 120.15).

c. he/she commits Criminal Contempt 2d degree by VIOLATING that part of a DULY SERVED ORDER OF PROTECTION (or of which the defendant has actual knowledge because he/she was present in court when it was issued), under CPL 530.12 (O/P for a family offense), or under DRL 240, 252 or FCA Articles, 4,5,6 and 8, (or by an out-of-state/territory or tribal court of competent jurisdiction), which REQUIRES THE DEFENDANT TO STAY AWAY FROM THE PERSON(S) (i.e. protected parties) AND WHERE THE DEFENDANT HAS BEEN PREVIOUSLY BEEN CONVICTED OF AGGRAVATED CRIMINAL CONTEMPT, CRIMINAL CONTEMPT 1ST OR 2D DEGREE FOR VIOLATING AN ORDER OF PROTECTION WITHIN THE PRECEDING FIVE YEARS; or

d. in violation of a duly served order of protection (or one of which D has personal knowledge), or from another court of competent jurisdiction, he/she INTENTIONALLY OR RECKLESSLY DAMAGES THE PROPERTY OF A PROTECTED PARTY IN AN AMOUNT EXCEEDING $250.00. (ex-ref PL 145.00).

SOME CASES:

In People v Roach 1 AD3d 963 (4th Dep't 2003) the evidence was deemed legally sufficient to support Contempt 1st degree where the defendant, who assaulted the victim in July, went to her house three months later in violation of an order of protection and tried to compel her to give false testimony.

And in People v Ruey Dei 2 AD3d 1459 (4th Dep't 2003), the court found the evidence legally sufficient to support both Contempt 1st degree and Aggravated Harassment where the defendant left threatening messages on his wife's answering machine.

See also People v Tiffany 186 Misc.2d 917 (Crim Ct, City of NY 2001) where the allegations that the defendant made more than one threatening phone call to the complainant every day for two months (e.g. " if you keep me away from my son, I'll put a bullet in your head"), provided ample basis to infer that such communications were made in a manner likely to cause annoyance and alarm.

But see People v Dewall 15 AD3d 98 (2d Dep't 2005) where the court reduced the Contempt 1st degree to Contempt 2d degree because the evidence established that the victim was not home when the defendant went there in violation of the order of protection.

AGGRAVATED CRIMINAL CONTEMPT (CLASS D FELONY)

PL 215.52: A person is guilty of this offense when:

1. in violation of a duly served order of protection (or of which the defendant has actual knowledge), he INTENTIONALLY OR RECKLESSLY CAUSES PHYSICAL INJURY OR SPI TO A PROTECTED PARTY; or

2. he/she commits Contempt 1st degree under PL 215.51(b)or(d) and has previously been convicted of Aggravated Criminal Contempt; or

2. he/she commits Criminal Contempt 1st degree (PL 215.51[b][i][ii][iii][v] or [vi]) and has been PREVIOUSLY CONVICTED of Contempt 1st degree under PL 215.51(b)(c)or(d) within the PRECEDING FIVE YEARS.

DIAL M FOR MAYHEM: AGGRAVATED HARASSMENT:

While in-person harassment brings its own level of annoyance, over-the-phone harassment (whether or not a conversation ensues) can, in some instances, be in even more disquieting because such communication can invade one's peace and quiet from a distance, giving rise to real (or imagined) fear and pre-occupation over what might happen next. (Think Doris Day in "Midnight Lace" or Barbara Stanwyck in "Sorry Wrong Number"). Consequently, (if not ironically), conduct that would qualify as a violation if committed in person (PL 240.26) is elevated to a Class A Misdemeanor if perpetrated by phone or other electronic (or written) communication.

AGGRAVATED HARASSMENT 2D DEGREE (CLASS A MISDEMEANOR):

PL 240.30: A person is guilty of this crime when:

1. with intent to HARASS ANOTHER PERSON, he/she either:

a. COMMUNICATES ANONYMOUSLY or otherwise, by TELEPHONE, COMPUTER OR ANY OTHER ELECTRONIC MEANS, OR BY MAIL, BY TRANSMITTING/DELIVERING ANY OTHER FORM OF COMMUNICATION, A THREAT TO CAUSE PHYSICAL HARM TO, OR UNLAWFUL HARM TO THE PROPERTY OF SUCH PERSON, A MEMBER OF HIS/HER SAME FAMILY/HOUSEHOLD (as per CPL 530.11), AND THE ACTOR KNOWS OR REASONABLY SHOULD KNOW THAT SUCH COMMUNICATION WILL CAUSE SUCH PERSON TO REASONABLY FEAR HARM TO SUCH PERSON'S PHYSICAL SAFETY OR PROPERTY, (OR TO THAT OF A MEMBER OF HIS/HER SAME FAMILY/HOUSEHOLD); or

b. CAUSES A COMMUNICATION TO BE INITIATED anonymously or otherwise, by telephone, computer or any other electronic means, or by mail, or by transmitting/delivering any form of

communication, a THREAT TO CAUSE PHYSICAL HARM, OR UNLAWFUL HARM TO THE PROPERTY OF SUCH PERSON (or member of his family/household), and the actor knows that such communication will cause such person to REASONABLY FEAR HARM TO HIS/HER PHYSICAL SAFETY OR PROPERTY OF A MEMBER OF HIS/HER FAMILY/HOUSEHOLD; or

2. with INTENT to HARASS OR THREATEN another person, he/she MAKES A TELEPHONE CALL, whether or not a conversation ensues, WITH NO PURPOSE OF LEGITIMATE COMMUNICATION; or

3. with INTENT to HARASS, ANNOY, THREATEN OR ALARM another person, he/she STRIKES, SHOVES, KICKS, OR OTHERWISE SUBJECTS ANOTHER PERSON TO PHYSICAL CONTACT, (or attempts or threatens to do the same) BECAUSE OF A BELIEF OR PERCEPTION REGARDING SUCH PERSON'S RACE, COLOR, NATIONAL ORIGIN, ANCESTRY, GENDER, RELIGION, RELIGIOUS PRACTICE, AGE DISABILITY, OR SEXUAL ORIENTATION, (regardless of whether such belief/perception is correct); or

4. with intent to HARASS, ANNOY THREATEN OR ALARM another person, he/she STRIKES, SHOVES, KICKS OR OTHERWISE SUBJECTS ANOTHER PERSON TO PHYSICAL CONTACT THEREBY CAUSING PHYSICAL INJURY TO SUCH PERSON OR TO A MEMBER IF HIS/HER FAMILY/HOUSEHOLD; or

5. he/she commits Harassment 1st degree and has PREVIOUSLY BEEN CONVICTED of Harassment 1st degree (PL 240.25) within the PRECEDING TEN YEARS.

According to People v Shack, *supra*, this statute does not unduly restrict freedom of speech, is not overly broad, nor does it violate Due Process.

In People v Monroe, *supra*, the court found that the count of the information charging Aggravated Harassment was facially insufficient because the complaint (apparently at her wit's end from all the other harassment), called the defendant on the phone (to say "I don't want to talk to you anymore"), to which he replied "if you come out, watch your back."

In the court's analysis, to be guilty of this offense, the defendant must INITIATE the call rather than be the recipient. Noting that the purpose of the statute is to protect the privacy interests of victims of such harassment, the court concluded that no such interests are implicated when the victim her/himself calls the offender. (citing, *inter alia*, People v Amalfi 141 Misc2d 940 [Rochester City Court 1988]).

The court also pointed to People v Rusciano 171 Misc 2d 908 (Town of East Chester Justice Court 1997), where an information charging Aggravated Harassment was dismissed upon allegations that the complainant (after hitting "Star 69" following a phone ring), called the number and heard the defendant say, "I can always find you and get my hands on you."

The court observed, "the gravamen of the crime of Aggravated Harassment is the USE OF THE PHONE but for which the accompanying conduct would be simple harassment. Since there is nothing inherently more evil in threatening or annoying someone over a phone line than doing so face-to-face, the more severe sanctions of PL 240.30 are clearly directed at the AFFIRMATIVE (RATHER THAN) PASSIVE USE OF THE INSTRUMENT BY THE OFFENDER. IT IS THE ADDITIONAL HARM INFLICTED BY THE INTRUSIVE QUALITY OF THE ACT OF TELEPHONING THAT AGGRAVATES THE HARASSMENT, AND WHERE OFFENSIVE

REMARKS ARE UTTERED (and initiated) BY THE RECIPIENT OF THE CALL, THE ADDITIONAL HARM IS SIMPLY NOT PRESENT."

The court declined to credit the People's reliance on People v McDermott 160 Misc 2d 769 (Nassau County Dist Ct 1994) where the complainant responded telephonically to a "HELP WANTED" ad at a news publication only to have the recipient of the call pepper her with lewd and sexually explicit questions.

The court did acknowledge however, that a defendant who invites, solicits or precipitates a call from the victim (as opposed to being an unexpected recipient) with the intent to harass the victim, or who CAUSES HARASSING CALLS TO BE MADE TO THE VICTIM could fall within the ambit of the statute.

In People v Diraimondo 174 Misc 2d 932 (Nassau Dist Ct 1997), for example, the court found sufficient facts to support the information where the defendant was alleged to have written on a train station wall, "FOR HOT EZ SEX CALL… (the victim's phone #), whereupon the victim received several unwanted calls from men seeking what the defendant had offered on her behalf.

In People v Mangano 100 NY2d 569 (2003), the Court held that the defendant's messages, while crude and offensive, did not rise to the level of Aggravated Harassment because they consisted of complaints about certain government actions made to a government agency responsible for responding to such complaints.

In contrast, see People v Smith 86 Misc 2d 789 (Sup Ct App Term NY County 1977) where the defendant made 27 harassing calls to the police department in three hours after being told that the matter about which he had complained was civil and not criminal.

AGGRAVATED HARASSMENT 1ST DEGREE (E FELONY):

PL 240.31: A person is guilty of this offense when with intent to harass, annoy, threaten or alarm another person, because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation (regardless of whether such belief/perception is correct, he/she:

1. DAMAGES PREMISES primarily used for RELIGIOUS PURPOSES, or acquired per RCL 6 and maintained for purpose of religious instruction, and such damage exceeds $50.00; or

2. commits Aggravated Harassment 2d degree per PL 240.30(3) and has previously been convicted of violating PL 240.30(3) or has previously been convicted of Aggravated Harassment 1st degree within the preceding TEN years; or

3. etches, paints, draws upon or otherwise places a swastika on any building or other real property, public or private, owned by any person, form or corporation or any public agency or instrumentality without express permission of the owner or operator of such building or real property; or

4. sets a cross on fire in public view; or

5. etches, paints, draws upon or displays a noose on any building or real property, public or

private, owned by any person firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property.

FINAL THOUGHT:

Whether harassment takes the form of in-person contact (e.g., following, approaching, blocking, pleading, threatening) or telephonic/electronic communication, depending on the relationship between the parties (stranger, ex-spouse or former romantic partner), and the context and circumstances, such conduct can escalate from annoying to alarming to horrifying depending on the persistence and pugnacity of the perpetrator.

Counsel who represent such offenders must carefully evaluate the particular offenses to see if all the elements (e.g. course of conduct, absence of legitimate purpose, requisite intent and reasonable fear of harm, as the case may be), are satisfied. If the People's evidence is suspect (e.g., unreliable or incredible complainant) or there is a viable defense (e.g., legitimate purpose for the communication, inadvertent rather than purposeful contact in violation of a protective order), counsel should not hesitate to defend the case with vigor.

On the other hand, if the People's proof is compelling or the client seems to fit the profile of an obsessive, disturbed or deluded soul who can't get it through his head that "over means finished," (or "it only existed in your mind"), perhaps the better tack would be to negotiate the most favorable disposition possible (preferably with little or no incarceration) and get the client into appropriate counseling as soon as possible.

Thanks to Peter P. Vasilion Esq. for suggesting this article. TF