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NOTICE

Every Move You Make: How Stories Shape the Law of Stalking

Anna-Rose Mathieson

EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW. By *Orit Kamir*. Ann Arbor: The University of Michigan Press. 2001. Pp. ix, 245. \$50.

INTRODUCTION

“Bunny-boiler” is now an official part of the English language.¹ This word — taken from the scene in *Fatal Attraction*² where Glenn Close’s character boils the pet rabbit of the man she has been stalking³ — was unknown fifteen years ago. Although still not in common parlance, “bunny-boiler” has made its way far enough into our culture that a brief explanation of its source can conjure up an image of the obsessive, vindictive stalker it describes.⁴ Along with the entrance of this word into our language has come an explosive growth in laws punishing stalkers. Before 1990, no state in the nation had an anti-stalking law. Now every state does.⁵

1. Or, at least, it was just added to the *Shorter Oxford English Dictionary*. See *Blairite and Jedi Enter Dictionary*, BBC NEWS, Sept. 27, 2002, at <http://news.bbc.co.uk/1/hi/uk/2282572.stm> (last visited Mar. 3, 2003).

2. *FATAL ATTRACTION* (Paramount Pictures 1987).

3. The word “stalking,” when used to describe this type of conduct, is itself a recent addition to our language. Until the late 1970s, references to “stalking” were generally limited to the wholesome sports of deerhunting and boxing, activities that Kamir suggests are characteristic of American manhood. P. 146. In the media flurry over the serial killer known as Son of Sam, however, the press seized on the term “stalking” to describe the killer’s modus operandi, and soon “stalking” became a common description of the obsessive activities of serial killers and rapists. Pp. 146-48. And now “stalking” is pervasive — as one commentator put it, stalking is the “crime of the nineties.” Gregor Krause, *Stalking: The Crime of the Nineties*, ALBUQUERQUE MAG., Jan. 1993, at 26.

4. A Google search of “bunny-boiler” turned up 1,370 hits as of March 2, 2003, including sites where disgruntled girlfriends could request a Glenn Close-type to stalk their boyfriends via cell phone (http://www.rabbit-on.com/girlfriend_boil.php); the “Bunny-Boiler Bordello” of paintings by a manic-depressive (<http://www.timoldham.co.uk>); and lyrics to the song *Bunny Boiler* by an obscure German rock band (<http://www.purelyrics.com/index.php?lyrics=ibxcicmy>).

5. The federal government does as well, although there is some concern over whether this is a valid exercise of Congress’s Commerce Clause authority. The federal anti-stalking

In *Every Breath You Take: Stalking Narratives and the Law*,⁶ Orit Kamir⁷ traces the development of stalking narratives through Sumerian mythology, British literature, and modern cinema, showing how Glenn Close's bunny-boiling character is merely the latest incarnation of an ancient archetype.⁸ Kamir argues that these stories of stalking influence societal attitudes even though we may not be conscious of the stories themselves (p. 3). Through this historical and literary exploration Kamir answers by illustration one of her central questions: "[W]hat, in the broad, cultural sense, is stalking?" (p. 1).

Yet the legal implications of this inquiry are not immediately apparent. The bulk of the book — 174 out of 215 pages — is devoted to literary analysis of stalking narratives, with a short discussion of law at the end. Kamir's critique is insightful and entertaining, but what exactly does the law have to learn from an analysis of *Fatal Attraction*?

The answer is twofold.⁹ First, although there have been scores of law review articles describing, analyzing, and criticizing the legal system's approach to stalking, Kamir's account is unique in the way her detailed examination of stalking narratives explains the unconscious preconceptions that make us describe, analyze, and criticize stalking law the way we do. Second, stalking narratives fuel the fear of stalking that leads society to criminalize it, and even affect the definition of the crime itself. Since the legal definition of stalking uses the "reasonable person test" — assessing the fears and reactions of a typical person to determine whether actions constitute criminal stalking — stalking stories affect the scope of stalking statutes by shaping the subconscious fears of the "average" member of the community.

law is a component of the Violence Against Women Act ("VAWA"), which was partially struck down in *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating component of Act that created a federal civil remedy). The circuit courts that have examined VAWA's anti-stalking provision so far have concluded it is constitutional. *See, e.g., United States v. Al-Zubaidy*, 283 F.3d 804 (6th Cir. 2002).

6. The title presumably comes from the Police song, which croons "Every breath you take/Every move you make/Every bond you break/Every step you take/I'll be watching you." POLICE, *Every Breath You Take*, on SYNCHRONICITY (A&M Records 1983). This appears to be a popular title for stalking literature. *See, e.g., ANN RULE, EVERY BREATH YOU TAKE: A TRUE STORY OF OBSESSION, REVENGE, AND MURDER* (2001).

7. Faculty of Law, Hebrew University, Jerusalem; Visiting Professor of Law, University of Michigan Law School, Winter 2004.

8. Kamir uses "archetype" not in its Jungian sense as an image embedded in the human psyche, but instead as a metaphor for "culturally created images." P. 19 n.1.

9. In both of these points, Kamir's intellectual debt to University of Michigan Law School Professor James Boyd White is evident. Professor White, who served as one of Kamir's dissertation advisors, pioneered the field of law and literature with the publication of *The Legal Imagination* in 1973. *See also, e.g., JAMES BOYD WHITE, JUSTICE AS TRANSLATION* (1990). This might, perhaps, be a good point to mention my own great debt to Professor White, one of my mentors throughout law school and advisor for the project that formed the nucleus of this Book Notice.

This Notice explains how Kamir's eloquent examination of stalking narratives provides numerous lessons for scholars willing to actively search out the legal implications. Part I gives an overview of the book, focusing on Kamir's analysis of archetypical male and female stalkers, and on the recent wave of stalking laws enacted throughout the nation. Part II scrutinizes the relationship between stalking and fear, analyzing the ways in which stalking narratives create and shape the fear that defines the behavior that society punishes as criminal stalking. Part III turns to Kamir's central legal argument — a critique of the reasonable person standard in stalking law — and explains how her attack on this standard is more broadly applicable than she suggests. Finally, Part IV examines Kamir's suggestion for avoiding the problems caused by the reasonable person standard, and argues that her solution — entrusting the legislature to define the underlying value judgments of stalking law — is attractive in theory but flawed in practice. Given the societal conflicts Kamir describes in the first half of her book, a jury's case-specific inquiry is better than sweeping legislative judgments.

I. WITCHES & VAMPIRES

Kamir divides stalking narratives by the gender of the stalker,¹⁰ and spends two chapters for each gender showing how stalking narratives evolved through different eras and cultures.¹¹ Throughout all, Kamir employs the language and vocabulary of feminism. Describing the horror flick *Halloween*, for instance, she explains how “[t]he stalker, no longer mama's castrated boy, is now evil incarnate, overpowered by a stronger woman of his own generation” and sums up the plot by saying “the pure virgin-mother Laurie battles the bloodthirsty vampire, survives his attacks, and liberates her community” (pp. 159; 157). In another instance she attempts to translate the arguments of Jean-Paul Sartre into feminist terms, explaining that Sartre can be interpreted as arguing that “the ‘vulvaless’ imageless male God cannot give birth to humans, nor create unity and intimacy; he, therefore, creates abstractly, using language” (pp. 81-82). With this feminist

10. There is a fundamental difference between narratives involving male and female stalkers. P.3; compare chapters 2, and 3 (discussing female stalkers), with chapters 4, and 5 (male stalkers). Dividing stalking by the gender of the perpetrator roughly divides it by the gender of the victim as well, since most stalkers — both male and female, real and fictional — stalk the opposite sex. Not all, however, do. See, e.g., ANNE RICE, INTERVIEW WITH THE VAMPIRE (1976).

11. She punctuates this analysis with six short appendices that are tangentially but intriguingly related to her main discussion. One appendix, for instance, reprints the first chapter of *Varney the Vampire*, a sensational serial from 1840s England. Pp. 109-11; see also pp. 98-99 for Kamir's analysis of the lessons to be learned from *Varney*. Other appendices include “On the (Un)Approachability of Antiquity,” App. 2.1, and “The Literary Summer of 1816: Lamb, Shelly, Byron, and Polidori,” App 5.1.

analysis she reveals how the types of stories told about stalkers depend upon which gender is cast as the aggressor.

The quintessential female stalker is the mythological character of Lilit — a “dark, long-haired, night-flying she-devil” (p. 19). The stalking she-devil first appears in ancient Mesopotamian myths; Kamir argues that this frightening character was created by patriarchal rulers in an attempt to subvert earlier stories of powerful female goddesses.¹² To control the earlier and more benevolent images of women, the patriarchy invented stories that cast powerful women as evil witches, baby-snatchers, sorceresses, and succubae (pp. 30-32). In these new stories, “[f]emale stalking is felt as repetitively returning, sexual, seducing, terrifying, and guilt inducing” (pp. 4-5).

Male stalkers appear in a wider and more popular variety of narratives than female stalkers; the range spans from Doctor Faustus to “the biblical God’s watchful, ever-present, and unseen eye” (p. 68). The vampire is the archetypical male stalker, and also “our culture’s most popular and interesting stalker.”¹³ In these stories, “male stalking of a woman objectifies her, posing her as ‘matter’ for her stalker’s subjecting, controlling gaze. It undermines her subjectivity, dehumanizing and humiliating her” (p. 208). Stories involving male stalkers are also used as tools of control by the patriarchal social order, but in a different way than stories of female stalkers. While the latter stories serve as a cohesive force for men by suggesting that female power and sexuality are inextricably linked to evil (p. 42), stories of male stalkers enforce societal norms by punishing those who stray from the mainstream (p. 68).

In general, archetypes of both male and female stalkers peacefully coexist in society’s collective unconscious.¹⁴ From time to time, however, fear of these figures erupts in waves of panic. In these periods of panic, the population becomes obsessed with a “phenomenon that is irrationally perceived as exceptionally dangerous to the collective well-being” (pp. 5; 51-67). Witch-hunts, for instance, erupt when fear of female stalkers comes to a boil. Harmless personal characteristics, like owning a black cat or having a warty nose, can take on a sinister aspect when they fit the image of an evil character described in stories.

12. P. 30; *see also* pp. 19-32. Kamir explains in great detail how “the Great Goddess of antiquity was conquered and replaced by patriarchy’s omnipotent male God.” P. 20.

13. P. 77. Movies involving male stalkers include *BRAM STOKER’S DRACULA* (Columbia Pictures 1992) and *SILENCE OF THE LAMBS* (Orion Pictures 1991). *But see* *FATAL ATTRACTION* (Paramount Pictures 1987). Male stalkers are even good material for a theme park. *See Perhaps No Home Soil for Dracula*, N.Y. TIMES, Jan. 17, 2003, at A8 (describing how conservationists have blocked plans to build a Dracula theme park, complete with amusement rides, a golf course, and a spooky Gothic castle, in the hometown of Vlad the Impaler (the model for Dracula); the developers now plan to build the park outside Bucharest).

14. For Jung’s explanation of the collective unconscious, *see* CARL GUSTAV JUNG, 9 *THE COLLECTED WORKS OF C. G. JUNG* (R.F. Hull & Michael Fordham eds., 1980).

Kamir argues that our society is currently in the midst of one of these moral panics (pp. 140-74). The current wave of alarm first became visible in the late 1970s and early 1980s, as there was a veritable cultural renaissance of stalking stories.¹⁵ Along with these stories, well-publicized incidents of real stalkers¹⁶ fueled societal fear (p. 141). This fear spurred passage of anti-stalking laws in every state, yet these laws “served only to amplify” societal panic (p. 175).

After describing this panic, Kamir argues that our fear of stalking is overblown in proportion to the actual threat (pp. 194-98). Kamir slightly overstates some of her arguments about the current moral panic to prove this point; while our society may be more concerned about stalking now than fifty years ago, it is nothing like the full-blown panic of the Salem witch trials,¹⁷ or, for that matter, the vampire hunts that are currently causing panic in Malawi.¹⁸ Mini-panics may follow publicity over real cases of stalking, but there is not a sustained, overwhelming obsession with stalking.

Kamir argues that in our frenzy to deal with the perceived threat of stalkers, we have passed anti-stalking laws that are underinclusive of the actual threat (pp. 181-86). The California anti-stalking statute, for instance — the first one in the nation and a model for later statutes — punishes “[a]ny 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 of death or great bodily injury.”¹⁹ Under this definition, Ted Bundy, Son of Sam, and Dracula — men whom Kamir suggests fit the classic image of a stalker — would not be deemed guilty of criminal stalking. None of these classic stalkers “harassed” their victims before the crimes, since “harassment” within the meaning of the statute requires a course of conduct over some extended period of time (p. 182). Indeed, even the real-life “stalker” who is generally considered the catalyst for modern anti-stalking legislation would not be guilty under this definition.²⁰

15. Such as Robert DeNiro's character in *Taxi Driver*, pp. 141-43, and the films *Halloween*, pp. 156-60, and *Fatal Attraction*, pp. 171-74.

16. Particularly Son of Sam, pp. 143-48, and Ted Bundy, pp. 148-49.

17. See generally FRANCES HILL, *A DELUSION OF SATAN: THE FULL STORY OF THE SALEM WITCH TRIALS* (1995); MARION L. STARKEY, *THE DEVIL IN MASSACHUSETTS: A MODERN ENQUIRY INTO THE SALEM WITCH TRIALS* (1969).

18. See Rachel L. Swarns, *Not Your Usual Vampires, but Scary Nonetheless*, N.Y. TIMES, Jan. 14, 2003, at A4 (describing how Malawi “is in the grip of a form of hysteria” over men in black clothing who strike at night, drugging their victims and draining their blood), available at <http://www.nytimes.com/2003/01/14/international/africa/14VAMP.html>.

19. P. 182; CAL. PENAL CODE § 646.9(a) (2003). The punishment is a maximum of one year and/or a fine of \$1,000.

20. Pp. 182-83. This man is Robert Bardo, who stalked and killed actress Rebecca Schaeffer in California. Pp. 175-79.

It is certainly true that current stalking laws are not precisely tailored to capture all stalking behavior. Some of the underinclusiveness that Kamir laments, however, is directly related to the way the earlier part of the book answered the question of “[W]hat, in the broad, cultural sense, is stalking?” (p. 1). The crime of stalking may be underinclusive of what we describe as stalking because the word “stalking” is itself overinclusive of what we believe should be punished as criminal. The fact that stalking laws do not punish everyone whom Kamir has labeled as a “stalker” does not in itself prove that the legislature negligently drafted underinclusive laws; it could instead be a legislative judgment that some “stalkers” are better dealt with under existing murder and assault statutes.²¹

It is also unclear if the legislative response is as haphazard and incoherent as Kamir portrays. The initial wave of statutes were, of course, hastily passed — all fifty states and the federal government passed anti-stalking laws within a three-year period (p. 1). Kamir is quite right that this rush may have “rendered [the statutes] incapable of properly addressing many types of stalking, including those very types [they] supposedly set out to address” (pp. 181-82). But while the initial stalking laws may have been passed in a frantic flurry, most states have been revising these laws as the flaws that Kamir points out become more obvious.²² Kamir primarily focuses on the California anti-stalking statute — which happens to be one that has not been substantially revised since its passage — and spends only a single paragraph describing the statutes of other states (pp. 184-85). Because of this focus on California, Kamir glosses over the conscientious attempts made by many other states to fine-tune their statutes.

II. CREATING FEAR, CREATING CRIME

The legal definition of stalking criminalizes a pattern of conduct, not a single act. Considered separately, many of the individual acts that together constitute stalking are subject to punishment already.²³ A

21. Indeed, as Kamir explains elsewhere, the majority of law review articles responded to the initial wave of underinclusive statutes by arguing that the laws were unconstitutionally vague and that the crime should “be redefined so that the law would capture even fewer types of stalking.” P. 185. At least one court has agreed, *see* *Commonwealth v. Kwiatkowski*, 637 N.E.2d 854 (Mass. 1994), while others have found the state statutes constitutional, *see* Marjorie A. Caner, Annotation, *Validity, Construction, and Application of Stalking Statutes*, 29 A.L.R.5th 487 (1995 & Supp. 2003) (collecting cases).

22. *See, e.g.*, J. Thomas Kirkman, *Every Breath You Take: Massachusetts Steps up Its Efforts to Stop Stalkers*, 85 MASS. L. REV. 174, 176 (describing the gradual evolution of Massachusetts’s anti-stalking laws after a hasty enactment); *Development: Criminal Law and Procedure: Stalking Amendments*, 1999 UTAH L. REV. 1156, 1156-57 (explaining how Utah’s anti-stalking law was first passed in 1992, and amended in 1994, 1996, and 1999, each time making it more effective).

23. Harassment, for instance, typically covers making “a telephone call without purpose of legitimate communication” or “any other course of alarming conduct serving no legiti-

stalker who boils the pet bunny of his²⁴ target, for instance, can be punished for trespass, conversion, and intentional infliction of emotional distress. While overcriminalization is certainly rampant in our legal system,²⁵ however, anti-stalking laws do not merely give prosecutors another basic charge to heap upon someone accused of a violent act. Instead, anti-stalking laws can be used to punish the repetition of otherwise “innocent” behavior — repeated phone calls; excessive, obsessive love letters; watching someone from afar.²⁶

What is the harm in the repetition of behavior that transforms conduct from merely annoying to criminal stalking? Is it just that society worries that this obsessive behavior is a sign that the stalker will soon progress to more serious physical harm? This may be some of the concern, but there is more at stake than the desire to preventatively incapacitate the stalker before he commits an actual act of violence.²⁷ The legislative record surrounding the passage of state and federal anti-stalking statutes suggests that we would punish stalking even if we knew no violent crime would result. Stalking causes fear of what might happen next, yet we punish it not just to prevent the crime that might happen, but also for causing the fear itself.

Not many crimes are explicitly linked to fear in this way. Of the few that are, the correlation is often a side effect. We punish attempted murder, for instance, because it shows the culprit had a bad mind and the willingness to act upon it, not just because of the fear it caused the victim — we would consider the criminal as culpable even if the intended victim never learned her life was in danger.²⁸ While assault does punish conduct because of the fear it causes, it is a much

mate purpose.” MODEL PENAL CODE § 250.4 (2001). Indeed, many of the individual incidents could be prosecuted twice or thrice over given the overcriminalization of American law. Thus, “[s]talking is a complicated crime to pursue. Because of the level of proof required by many state stalking laws, it’s often easier to pursue a different, related crime, such as assault. . . .” Janet L. Holt, *Interstate Stalking Ban Survives Constitutional Challenge in Sixth Circuit*, TRIAL, July 2002, at 90, 92 (quoting Diane Alexander of the Stalking Resource Center).

24. Following Kamir’s usage, this Notice uses female pronouns to refer to stalking victims and male pronouns for stalkers.

25. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

26. See, e.g., Jennifer L. Bradfield, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN’S L.J. 229, 234 (1998) (“While individual acts may not be criminal in isolation, combined they may constitute an illegal pattern of behavior. . . .”).

27. Indeed, if this were the true motivation, it would raise several serious due process issues. Cf. *Kansas v. Hendricks*, 521 U.S. 346 (1997). In an ironic twist, the need for preventative incapacitation can actually be addressed by “stalking” the stalker. Police can use ankle devices equipped with G.P.S. monitors to track every detail of a convicted stalker’s movements. See Eric Chabrow, *Every Move You Make, Every Breath You Take*, INFORMATIONWEEK, Aug. 30, 2002, at <http://www.informationweek.com/story/IWK20020830S0027> (last visited Oct. 27, 2002).

28. The effect upon the victim may sometimes be considered in sentencing, however, and often is tacitly included in a jury’s determination.

more concentrated, definable fear than stalking. We can specifically describe what the victim was afraid of — getting punched in the face or stabbed with a knife — so this fear can be discussed and evaluated semi-objectively.²⁹ Although we may never have been punched in the face, we have at least experienced some analogous type of physical fright and felt the gut-wrenching sensation of fear.

Stalking is different. It is hard to define what the victim is afraid of, and often there are no specific acts of the stalker that we can identify as the direct cause of fear. This is where Kamir's detailed examination of legal narrative helps us understand the law, because narratives of stalking help construct the fear that causes our society to criminalize stalking.

First, stalking stories shape the way we perceive patterns of conduct. An obsessed, ex-boyfriend is transformed from someone we pity into someone we fear because we have read so many newspaper articles in which these seemingly pathetic figures have snapped. If innocent actions fit into the patterns we have learned from stalking narratives, we suspect the actions are not truly innocent. Indeed, it was the explosion of media stories following an actual incident of stalking — an obsessed fan stalked and killed actress Rebecca Schaeffer — that was the primary catalyst for the first anti-stalking law in the United States.³⁰ This murderer perfectly fit the archetypal image of a stalker, so both the population and politicians panicked. It is eerie to have fact conform to fiction, particularly when the genre is horror. And in a rush to appear to be doing something to solve the problem, legislatures tailored the new anti-stalking laws to punish the mythical stalkers that our culture fears instead of dealing with the reality of stalking in America (p. 175).

Second, stories of stalking manufacture fear through emotional manipulation. This process is particularly visible in horror films, for “the emotional manipulation of film teaches viewers . . . to expect that stalkers, both male and female, might hunt them in real life” (p. 116). The fictional nature of horror films is obvious, yet who is not a little uneasy at being alone in a dark house after watching a particularly

29. In assault crimes, the victim can describe the conduct that caused him fear. This is true for both the crime and tort of assault, which punish conduct that raises a “reasonable apprehension of imminent battery.” See DAN B. DOBBS, *THE LAW OF TORTS* § 34 (2000).

30. Rebecca Schaeffer's killer was dubbed by *US News & World Reports* as “the archetypal stalker.” P. 177. Kamir presents this as the theory accepted by almost all other scholars, but challenges the validity of the explanation herself. Pp. 175-79; see also, e.g., Nancy K. D. Lemon, *Domestic Violence & Stalking: A Comment on the Model Anti-Stalking Code Proposed by the National Institute of Justice* (1994) (“Popular myth has attributed the motivation for this statute to be the stalking/homicide of Rebecca Schaeffer. . . [but] the statute actually has its roots in domestic violence.”), at <http://www.vaw.umn.edu/BWJP/stalking.htm> (last visited Apr. 13, 2003). She does agree, however, that the California law was the catalyst for every other state to enact an anti-stalking law within the next three years. P. 1.

scary film? By showing how danger can be everywhere — even fictional danger — stalking narratives train us how and what to fear.

Finally, stalking stories affect the actual experience of the victim. If you were to discover tomorrow that someone was taking an obsessive interest in you, you would likely become more attentive to stalking narratives. Movies that were once entertaining would become real and frightening as you began to see parallels to your own experience. Conduct that might otherwise seem innocent would take on a new dimension when following the traditional patterns of stalking narratives. Fear would feed your attention to stalking stories, which in turn would fuel your fear, for “the fear of stalking within our culture is a product of an ongoing interaction between fears and the stories told about them” (p. 3). And this fear is a legally cognizable element of the crime of stalking.³¹

III. THE REASONABLE PERSON & THE STALKING VICTIM

Perhaps the most interesting legal application of Kamir’s research is on the reasonable person test built into most definitions of stalking. Unlike most other crimes, anti-stalking laws generally apply this standard to the *victim’s* reactions, not the defendant’s conduct. The California statute requires that the stalker’s course of conduct “must be such as would cause a reasonable person to suffer emotional distress, *and* must actually cause substantial emotional distress to the person.”³²

Kamir argues that this use of the reasonable person standard to test the rationality of the victim’s fear places the victim in the place usually occupied by the person on trial — it subtly suggests the victim’s guilt by judging her emotional reactions to determine if they were “reasonable” (pp. 188-89). By requiring the jury to determine both what the actual victim felt *and* what a reasonable person would feel, Kamir argues that the victim’s actions are subjected to scrutiny and judgment in a manner reminiscent of the archetypal male stalker’s piercing gaze.³³

31. P. 184. Although Kamir only considers the relationship between stalking and criminal law, filing a civil claim against a stalker is another possibility for victims. *See, e.g., Seema Zeya, Civil Lawsuits and Safety Planning for Stalking Victims*, 44 *ADVOCATE*, June 2001, at 23. Pursuing only civil claims, however, can pose substantial risks of retaliation from the stalker. *See id.* (providing warning signs of escalating danger and practical safety tips for those filing civil claims against stalkers). Permanent injunctions are another possibility, and several states offer these at no cost to the victim. *See, e.g., Development: Criminal Law and Procedure, supra* note 22, at 1158.

32. P. 182 (quoting CAL. PENAL CODE § 646.9(e) (West Supp. 1998)) (emphasis added).

33. P. 188 (describing the reasonable person standard as “the male stalker par excellence of the legal world’s stories”).

The “reasonable victim” standard is used more often than Kamir suggests; her discussion leaves the reader with the impression that it is *only* used in cases tinged with gender and racial bias, such as stalking, sexual harassment, and hostile work environment claims.³⁴ Yet this standard finds frequent use in torts such as assault and intentional infliction of emotional distress.³⁵ To recover for the tort of assault, for instance, the victim must prove he felt a “reasonable apprehension” of unwanted physical touching.³⁶ To be sure, the “reasonable victim” standard is not always augmented with a subjective requirement that the victim prove that he felt *fear* as well. If someone throws a punch at you and misses, as long as you were aware that the punch was thrown we allow recovery for assault, even if through foolish bravado you felt no fear.³⁷ Yet it is unclear why judging the victim’s fear in comparison to the fear a reasonable person would feel is any more intrusive than judging the victim’s other sensations in comparison to a reasonable person’s. And it seems even more intrusive to judge the victim’s actions — which is, in a sense, what we do for the victim of an assault who reacts with deadly force in self-defense.

Many states make the availability of a self-defense claim turn on the objective reasonableness of the action.³⁸ The assault victim — who now finds himself on trial for murder — is explicitly held up in comparison to the objective reasonableness standard: his actions are justified only if his fear was reasonable and his reactions proportional to the force a reasonable person would use. Indeed, if as Kamir argues the stalking victim is harmed by the mere act of scrutinizing her actions, a murder defendant who claims he acted in self-defense is hurt even more; not only does the jury pass on the reasonableness of his reaction, but that determination is literally the dividing line between guilt and innocence. The law not only compares his action to the model of an “ideal average man” — scrutinizing his instincts and judging him in comparison to a fictional construct — but condemns him if he does not live up to that fictional standard.

34. Kamir never asserts this directly, but the implication is drawn from her characterization of this standard as “rare” coupled with her description of the few instances when the standard is used.

35. See DOBBS, *supra* note 29, at 33-34. See generally Richard Restak, *The Fiction of the “Reasonable Man”*, WASH. POST., May 17, 1987, at C3 (criticizing that standard).

36. DOBBS, *supra* note 29, at § 34 n.7.

37. *Id.* § 34 & nn.1-2 (citing PROSSER & KEETON ON TORTS § 10).

38. The MODEL PENAL CODE (“MPC”) does not incorporate a requirement that the victim’s fear be reasonable, just that it be honest. See MODEL PENAL CODE § 3.04(2)(c) (2001). Most states, however, require that the fear be objectively as well as subjectively reasonable. See *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986) (concluding that the New York legislature clearly rejected the MPC approach and incorporated an objective test of reasonableness into the definition of self-defense); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 801-14 (6th ed. 1995).

Indeed, every use of the reasonable person test *as applied to the defendant* takes place before the determination of guilt and serves to commute innocent activity into culpability or liability. If legal scrutiny using the reasonable person test is akin to the domineering gaze of a male stalker — an experience that Kamir argues is harmful in itself — is it fair to subject anyone to this ordeal?³⁹ Kamir's critique is broader than she casts it: her arguments are not limited to stalking, but apply generally to the use of a reasonable person standard to evaluate criminal and tortious conduct.⁴⁰

Despite its potential harms, however, the reasonable person standard “allows for an interesting integration, in the real-world setting of the courtroom, of the legal stalking story with fictional narratives of stalking” (p. 192). The average person called to serve on a jury in a stalking case has probably never experienced firsthand the terror of being stalked. But the jurors probably are intimately familiar with cultural narratives of stalking. Kamir points to *Fatal Attraction* as the image that might first come to mind as a juror struggles to understand what a reasonable person would feel in the victim's situation. Since the stalking victim in *Fatal Attraction* (played by Michael Douglas) is a fairly normal, empathetic, rational person, it is easy for the jury to use that fictional character as a model for the fictitious legal standard they are supposed to apply (pp. 192-94). Kamir argues that by asking the jury to evaluate what an ill-defined “ideal average man” would feel, the reasonable person standard “invites uncritical import of cultural images into the legal discourse, thereby potentially allowing moral panic to penetrate the law” (p. 186).

But how does this differ from any legal judgment that asks jurors to determine how they would have acted in another's position? Our societal narratives are a key reference point whenever we are asked to determine the appropriate action in an unfamiliar situation. Indeed, how are we ever to guess how a “reasonable person” would have acted except through the stories we tell, both fact and fiction, about the actions of others? Consider the self-defense scenario discussed earlier. Few people have ever been assaulted at gunpoint, but almost all have seen movies where heroic figures protect themselves and their families. When asked to evaluate whether a reasonable person would have perceived a need to use deadly force in self-defense, a juror

39. Does the stalking victim's experience render her more deserving of special treatment than the average innocent person? Kamir's analysis suggests the answer is yes: since she has already been the victim of a stalker, our legal system should be sensitive to these scars and avoid scrutinizing her in a way that might trigger fears that would not register in a person who had never been stalked.

40. For reasons such as this, the MPC has generally abandoned use of reasonable person analysis in favor of evaluating the defendant's subjective mental states. See Kyron Huigens, Correspondence, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 815-19 (2002)

might certainly recall these cinematic images. It is not just for stalking that the reasonable person standard “facilitates the superimposition of film scenarios and victims onto the performance of the story in courts of law” (p. 192). Once again, Kamir’s analysis can teach us broad lessons about the effects of narrative on legal standards, but readers are on their own to discover what those broader implications might be.

IV. STALKING SOLUTIONS FOR A CONFLICTED SOCIETY

Kamir’s exploration of stalking narratives powerfully highlights the underlying incoherencies of current stalking law. The basic problem is that our society is deeply conflicted about how to deal with stalking. While recent passage of anti-stalking laws shows a concerted attempt “to liberate women from wide-spread, oppressive social norms” that condone stalking, the “liberation” is not yet complete. The oppressive patriarchal norms still pervade societal consciousness (p. 191). Since the reasonable person standard “is ‘a mechanism for importing a pre-existing societal consensus into the law,’ ”⁴¹ Kamir argues that it should not be used when there is no clear societal consensus about the proper bounds of the behavior (p. 191). She argues that the reasonable person test should be eliminated from the definition of stalking, and suggests that instead “[t]he legislature should bear sole authority for the determination of such fundamental value judgments; it should not pretend to assume social consensus where it does not exist” (p. 191).

Kamir’s critique of the reasonable person standard is valid and powerful, and she argues quite convincingly that the ideal solution would be to abandon this standard entirely and adopt rules focusing on the defendant’s specific intent, course of conduct, and mens rea (p. 212). Yet it is unclear why legislatures stand in a good position to fix the problem through firmer control of the underlying value judgments. The anti-stalking laws actually enacted show that legislators are also deeply conflicted about stalking, arguably more conflicted than society at large (pp. 181-86). Indeed, right after Kamir suggests that legislatures take sole control of the value judgments needed for coherent stalking laws, she points out that legislators are confused by stalking and suspicious about making it a serious crime (pp. 191-92). In drafting stalking statutes, legislators evidence “a fear of hysterical, hypersensitive women” and do not always take the harm from stalking seriously (p. 191).

To overcome these biases, Kamir urges legislatures to deeply engage in a critical study of stalking narratives, for this would be “enlightening and helpful in understanding the subtleties of the effects stalking may have on targeted victims; it may shed light on the

41. P. 191 (quoting Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990)).

damage, anxiety, and anguish they may suffer” (pp. 204-05). A deep study of stalking narratives would undoubtedly improve legislatures’ ability to craft a comprehensive stalking law — by the end of this book, Kamir has certainly convinced the reader of at least this much. Yet no real legislature has the time or inclination for this study. In the real world, the legislators’ conflicts and biases will continue to exist. It is thus unclear why legislatures should “bear sole authority” to dictate fundamental value judgments that would displace the problematic reasonable person standard.

Indeed, a jury may actually be in a better position than a legislature to accept the legitimacy of a stalking victim’s fear. Since stalking often involves a pattern of actions innocent on their own, legislators considering the matter abstractly may indeed be suspicious of “hysterical, hypersensitive women.” Jurors, hearing the real-life stalking story of an actual victim, may be able to understand the fear she describes because they have experienced this fear vicariously through stalking stories. Because of the emotional manipulation of horror films, jurors who have never experienced stalking might be able to understand the fear that a repeated pattern of unwanted activity can cause.

While stalking narratives do skew the perspective of jurors to some extent, priming them to expect that stalkers and their victims will fit into narrowly defined gender and social roles, many of these social biases are endemic to all determinations of the jury. The archetypal stalking story and the stalking story told by the victim may not perfectly match, but at least the vast variety of stalking stories that pervade our culture has taught us that not everything fits neatly into a simple pattern.⁴² While stalking stories are far from a perfect aid to judging this crime, at least these narratives give us a glimpse of the terror of being stalked and put us in a position to take seriously the victim’s claim. Stalking stories can at least teach us that much.

42. The diversity of stalking stories is immediately apparent, far more so than the underlying patriarchal themes that form the focus of Kamir’s attention. The genre, after all, encompasses ancient Hebrew myths, Dracula, and the “watchful eye” of our legal system. “Diverse” is perhaps an understatement.