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"[C]yberstalking involves the use of the Internet, e-mail, or other means of electronic communication to stalk or harass another individual."[1] According to a 2014 study by the Pew Research Center, forty per cent of Internet users indicated that they have personally experienced online harassment.[2] This figure will rise with the increased use of smartphones and social media platforms like Facebook and Instagram, and the ease with which they allow potential victims to be located.[3] Therefore, judicial decisions like *People v. Marian*[4] are particularly troubling as they undermine law enforcement's efforts to combat cyberstalking and weaken victims' protections.

In *Marian*, the defendant, Monique Marian, was charged in a misdemeanor complaint with two counts of stalking in the fourth degree, in violation of sections 120.45(2) and 120.45(3) of the New York Penal Law (NYPL).[5] Marian allegedly stalked the complainant, her ex-girlfriend, from January through April of 2015 by following the complainant around, sending unwanted e-mails to the complainant's personal and work e-mail addresses, and barraging the complainant with phone calls and Instagram messages.[6] In all of these communications, Marian expressed her desire to be with the complainant.[7]

On May 18, 2015, Marian moved to dismiss the information[8] on the ground that it failed to make out a prima facie[9] case of stalking in the fourth degree under section

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1. Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 Mo. L. Rev. 125, 126 (2007).

2. Pew Research Ctr., Online Harassment 2 (2014), http://www.pewinternet.org/files/2014/10/PI_OnlineHarassment_72815.pdf.

3. *See* Aarti Shahani, *Smartphones Are Used to Stalk, Control Domestic Abuse Victims*, NPR: All Tech Considered (Sept. 15, 2014, 4:22 PM), http://www.npr.org/sections/alltechconsidered/2014/09/15/346149979/smartphones-are-used-to-stalk-control-domestic-abuse-victims; Alexandra Topping, *Social Networking Sites Fuelling Stalking, Report Warns*, Guardian (Feb. 1, 2012, 14.00 EST), https://www.theguardian.com/technology/2012/feb/01/social-media-smartphones-stalking.

4. 16 N.Y.S.3d 683 (Crim. Ct. 2015).

5. *Id.* at 685; *see* N.Y. Penal Law § 120.45(2)–(3) (McKinney 2017).

6. *Marian*, 16 N.Y.S.3d at 685–86.

7. *Id.* at 685.

8. *Id.* The misdemeanor complaint was converted to an "information." *Id.* In misdemeanor cases in New York, the prosecution must replace a misdemeanor complaint with an information. N.Y. Crim. Proc. § 170.65(1). This action is called a "conversion." *See id.* Unless defendants waive this right, they may not be prosecuted and tried on misdemeanor complaints. 7 Lawrence K. Marks et al., New York Practice Series—New York Pretrial Criminal Procedure § 3:25, Westlaw (2d ed., database updated Apr. 2016). Since misdemeanor complaints generally contain hearsay allegations, more is required for the prosecution to continue. *Id.* Therefore, the misdemeanor complaint must be converted to an information, in which the prosecution must allege nonhearsay allegations which, if true, establish every element of the offense charged. *Id.*

9. *Prima facie*, Black's Law Dictionary (10th ed. 2014) ("At first sight; on first appearance but subject to further evidence or information."); *id.* ("[Evidence that is] [s]ufficient to establish a fact or raise a presumption unless disproved or rebutted . . . .").

120.45(3) of the NYPL.[10] The People did not answer.[11] On July 14, 2015, the court issued its decision on the motion.[12]

The court concurred with the defendant and held that the information failed to make out a prima facie case of stalking in the fourth degree under section 120.45(3) because it did not satisfy the statute's requirement that the conduct occur at the victim's "place of employment or business."[13] As a matter of first impression, the court held that a work e-mail address did not constitute a person's "place of employment or business" as the term is used in section 120.45(3).[14]

Instead, the court held that "place of employment or business" referred to an "actual, physical location."[15] It cited two civil cases in support of this position.[16] In *Rosario v. NES Medical Services of New York, P.C.*, the court noted that in the context of serving a summons and complaint under rule 308(2) of the New York Civil Practice Law and Rules (CPLR), a person's "actual place of business" is "where the person is physically present with regularity" and where that person "regularly transact[s] business."[17] In the second case, *In re Hille v. Gerald Records*, the New York Court of Appeals held that a record executive's home was his place of business because he frequently conducted his business there.[18] From these holdings, the *Marian* court concluded that "actual, physical locations are simply not the same as an email address."[19]

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10. *Marian*, 16 N.Y.S.3d at 685–86.

11. *Id.* at 685.

12. *Id.* at 683.

13. *Id.* at 686 (quoting N.Y. Penal Law § 120.45(3) (McKinney 2017)).

14. *Id.* at 685.

15. *Id.* at 687.

16. *Id.*

17. 963 N.Y.S.2d 295, 297 (App. Div. 2013) (quoting Selmani v. City of New York, 954 N.Y.S.2d 580, 581–82 (App. Div. 2012)). *Rosario* was a medical malpractice case. *Id.* at 296. The defendant medical providers appealed the lower court's decision that denied their motion to dismiss the complaint. *Id.* In their motion to dismiss, the defendants argued that the court lacked personal jurisdiction under rule 3211(a)(8) of the CPLR because the summons was improperly served on them as required by rule 308(2) of the CPLR. *Id.* at 297. Rule 308(2) "permits personal service on a natural person 'by delivering the summons within the state to a person of suitable age and discretion at the actual place of business.'" *Id.* (quoting N.Y. C.P.L.R. 308(2) (McKinney 2017)). However, on appeal, the second department affirmed the lower court's ruling that the defendants had properly been served. *Id.* at 298.

18. 242 N.E.2d 816, 819 (N.Y. 1968). *Hille* involved a worker's compensation claim. *Id.* at 818. Gerald Hille was president of Gerald Records, Inc., which was in the business of recording and releasing phonograph records. *Id.* at 817. Hille's responsibilities included arranging recordings and editing tapes. *Id.* On August 31, 1962, he finished a recording session at a private studio in New York and was returning home to New Jersey when his car struck a utility pole, resulting in his death. *Id.* The issue on appeal was whether this accident occurred in the course of Hille's employment for the purpose of a worker's compensation claim. *Id.* at 817–18. The New York Court of Appeals held in the affirmative because Hille's home also served as his place of employment. *Id.* at 819.

19. *Marian*, 16 N.Y.S.3d at 687.

The court also used the CPLR to guide its interpretation.[20] It reasoned that it "ma[de] good sense, absent a contrary instruction from the Legislature, to interpret the same phrase in the same way across all areas of practice."[21] Since New York courts occasionally allowed service to e-mail addresses as an alternative method of service under rule 308(5) of the CPLR,[22] the *Marian* court reasoned that e-mail addresses differ from actual, physical locations.[23] Thus, the court held that the term "place of employment or business" would bear the same meaning in section 120.45(3) as it did in the CPLR to the exclusion of work e-mail addresses.[24]

In conclusion, the court stated that to include e-mail addresses within the term "place of employment or business" would be contrary to the method by which NYPL provisions are to be construed: "according to the fair import of their terms to promote justice and effect the objects of the law."[25] The New York Court of Appeals has stated that the "fair import" analysis permits courts to "dispense with hypertechnical or strained interpretations of the statute."[26] The *Marian* court reasoned that such an interpretation would do nothing to further justice or the statute's goals.[27] Instead, the court pointed out that the act of stalking via e-mail was "completely subsumed within the conduct specified in [the preceding section] 120.45(2), which covers 'telephoning or initiating communication or contact with' the victim, including contact by email, irrespective of whether the email is sent to a personal or a work email address."[28] Section 120.45(2) criminalizes stalking that occurs anywhere, while section 120.45(3) criminalizes stalking that harms a person at her "place of employment or business."[29] For the foregoing reasons, the court found that the People failed to establish a prima

20. *Id.* at 687–88.

21. *Id.* at 687.

22. Rule 308(5) of the CPLR affords courts discretion to determine the method of service for legal documents. It states that an individual may effect service upon a natural person "*in such manner as the court, upon motion without notice, directs*, if service is impracticable under paragraphs one, two and four of this section." C.P.L.R. 308(5) (emphasis added). Courts have interpreted this language to allow service via e-mail. *E.g.*, *In re* Keith X. v. Kristin Y., 2 N.Y.S.3d 268, 269 (App. Div. 2015) (discussing a family court order, which permitted service via e-mail under rule 308(5)).

23. *Marian*, 16 N.Y.S.3d at 687.

24. *Id.* at 687–88.

25. *Id.* at 687 (quoting N.Y. Penal Law § 5.00 (McKinney 2017)).

26. People v. Ditta, 422 N.E.2d 515, 517 (N.Y. 1981). Using this analysis, "conduct that falls within the plain, natural meaning of the language of a Penal Law provision may be punished as criminal." *Id.*

27. *Marian*, 16 N.Y.S.3d at 688.

28. *Id.* (quoting Penal § 120.45(2)).

29. Penal § 120.45(2)–(3). Sections 120.45(2) and 120.45(3) of the NYPL are different. According to section 120.45(2):

> A person is guilty of stalking in the fourth degree when he or 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: . . . 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 such

facie case of stalking in the fourth degree under section 120.45(3) and dismissed that count of the information.

This case comment contends that the court erred in its holding. It argues that work e-mail addresses should be covered by the statute's "place of employment or business" language. First, the *Marian* court erred by failing to engage in statutory analysis in contravention of U.S. Supreme Court precedent, which holds that an analysis of statutory language is always the starting point in statutory interpretation cases, and New York State precedent, which extends this rule to language in the NYPL.[30] The court should have analyzed the statutory language using the textualist approach of applying the semantic canons of construction to the text of the statute. Second, the court should have considered a Connecticut judicial decision that was based on similar facts and where the court interpreted a criminal statute similar to section 120.45(3) without analyzing civil practice guidelines and case law. Third, this decision will cause troubling consequences for victims of cyberstalking.

The text of the statute is the starting point in all cases involving issues of statutory interpretation.[31] The court violated this principle when it failed to conduct an analysis of the language of section 120.45(3). Instead, the court looked beyond the four corners of the statute and analyzed civil case law and the CPLR.[32] Textualism, by contrast, "centers on the primacy of enacted text as the key tool in statutory interpretation."[33] "[T]extualists place a heavy emphasis on text and text-based interpretive rules (for example, dictionary definitions, textual 'context,' and the so-called 'linguistic' or 'textual' canons [or semantic canons]—default presumptions based on common rules of grammar and word usage)."[34] The *Marian* court should have exhausted the textualist approach in its analysis before it looked beyond the statute. It should have used the semantic canons in its construction of section

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person's immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct[.]

Id. § 120.45(2). The criminal conduct may occur anywhere so long as it involves initiating communication or contact with the victim. *See id.* However, under the terminology of section 120.45(3), the criminal conduct must occur at the "person's place of employment or business." *Id.* § 120.45(3). This case comment contends that, despite this distinction, the *Marian* court treated both sections similarly when it held that the defendant's conduct was covered under section 120.45(2), thus making section 120.45(3) superfluous. *See infra* pp. 295–96.

30. *See infra* note 31.

31. The U.S. Supreme Court has consistently held "that the starting point for interpreting a statute is the language of the statute itself." *E.g.*, Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Similarly, the New York Court of Appeals has instructed lower courts to look to the statute as a "starting point" in statutory interpretation cases. State v. Patricia II., 844 N.E.2d 743, 745 (N.Y. 2006). This method of statutory interpretation is commonly followed by New York courts construing the NYPL. *See*, *e.g.*, People v. Torres, 708 N.Y.S.2d 578, 579 (Crim. Ct. 2000).

32. *Marian*, 16 N.Y.S.3d at 687–88.

33. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1762 (2010).

34. *Id.* at 1763 (footnote omitted).

120.45(3).[35] Had it done so, it would have concluded that the statute's "place of employment or business" language covered work e-mail addresses.

Ejusdem generis is Latin for "of the same kind or class."[36] Pursuant to this canon, "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."[37] New York courts have consistently applied this canon in various areas of the law.[38]

The language of section 120.45(3) lends itself to the application of the *ejusdem generis* semantic canon of construction. Section 120.45(3) states:

> A person is guilty of stalking in the fourth degree when he or 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: . . . is likely to cause such person to reasonably fear that his or her employment, business or career 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.[39]

The statute itemizes "appearing" and "telephoning" and then follows these words by the more general language of "or initiating communication or contact."[40] Thus,

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35. Some have criticized the use of the semantic canons of construction on the grounds that there is no clear roadmap for selecting which canons to apply to the statutory text and which ones to disregard, and that "judges deciding statutory interpretation cases simply invoke the canon that favors the result they wish to reach." John F. Manning & Matthew C. Stephenson, Legislation and Regulation 205 (Robert C. Clark et al. eds., 2d ed. 2010) (citing Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950)). However, proponents of their use have contended that

> in a wide array of situations, common sense or practical wisdom will inform judges' decisions about which canon to employ in a given context. . . . [W]hile it is true that no meta-rule or formal model is available to instruct judges in picking and choosing among canons, in the same way that people who do not know the rules of grammar can employ grammatically correct language when speaking English, it seems plausible that judges can select among canons in a sensible and coherent fashion even in the absence of known rules to guide them.

Id. at 207 (quoting Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647, 650–51 (1992)). Using the common sense approach articulated by Macey and Miller, this case comment contends that the court should have used the following canons in its construction of section 120.45(3): *ejusdem generis*, *noscitur a sociis*, the absurdity doctrine, the rule against surplusage, and *in pari materia*.

36. *Ejusdem generis*, Black's Law Dictionary (10th ed. 2014).

37. *Id.*

38. *See* Abdulla v. Gross, 998 N.Y.S.2d 549, 551 (App. Div. 2015) (using the canon of *ejusdem generis* to interpret a release signed by a tenant); People v. Sengupta, 993 N.Y.S.2d 710, 711 (App. Div. 2014) (using the canon of *ejusdem generis* to limit the scope of the term "other instrument" in section 170.10(1) of the NYPL); *In re* Will of Delisa, No. 2010-362527/C, 2014 WL 7773986, at *2 (N.Y. Sur. Ct. Sept. 30, 2014) (using the canon of *ejusdem generis* to construe the terms of a will).

39. N.Y. Penal Law § 120.45(3) (McKinney 2017) (emphasis added).

40. *Id.*

pursuant to the *ejusdem generis* canon, the words "communication or contact" should capture all communications or contacts that are of the same kind or class as the immediately preceding words: "appearing" and "telephoning."

What do the words "appearing" and "telephoning" tell us about the kinds of communications or contacts that are covered by section 120.45(3)? By definition, "appearing" requires a physical appearance at a physical location.[41] By contrast, "telephoning" is a remote form of communication or contact that extinguishes the need for a physical appearance at a physical place.[42] In short, "appearing" and "telephoning" are two different modes of communicating with or contacting others, the former requiring physical appearances at specific locations and the latter allowing for remote communications or contacts with others. Thus, pursuant to the canon of *ejusdem generis*, the general words "communication or contact" must be interpreted similarly. The interpretation must capture all actions that involve the kinds of physical communications or contacts that "appearing" does as well as the kinds of remote communications or contacts that "telephoning" does.

If the term "communication or contact" includes both physical and remote communications and contacts, as the *ejusdem generis* analysis suggests, "place of employment or business" cannot be limited to physical locations as the *Marian* court concluded. The *Marian* court's decision would have made sense if section 120.45(3) only included the verb "appearing." However, the statute also uses the verb "telephoning,"[43] which suggests that the terms of the statute should cover the act of remotely communicating with another's "place of employment or business." Therefore, when the *ejusdem generis* analysis is combined with the remainder of section 120.45(3), the term "place of employment or business" should cover physical locations and the remote modes of communication used to initiate contact with those locations, such as telephone numbers and work e-mail addresses.

The court should also have used the *noscitur a sociis* canon in its statutory analysis of section 120.45(3). *Noscitur a sociis* is Latin for "it is known by its associates."[44] According to this canon, "the meaning of an unclear word or phrase, esp[ecially] one in a list, should be determined by the words immediately surrounding it."[45] New York

41. Since "appearing" is the present participle of the word "appear," it is best to define the root word. Merriam-Webster's definitions of the word "appear" include: "to be or come in sight"; "to show up"; and "to come into public view." *Appear*, Merriam-Webster, https://www.merriam-webster.com/dictionary/appear (last visited Feb. 6, 2017).

42. Since "telephoning" is the present participle of the word "telephone," it is best to define the root word. Merriam-Webster defines "telephone" as "an instrument for reproducing sounds at a distance [that are] converted into electrical impulses for transmission" and the verb form as "to speak to or attempt to reach by telephone," "to send by telephone," and "to communicate by telephone." *Telephone*, Merriam-Webster, https://www.merriam-webster.com/dictionary/telephone (last visited Feb. 6, 2017).

43. Penal § 120.45(3).

44. *Noscitur a sociis*, Black's Law Dictionary (10th ed. 2014).

45. *Id.*

courts have consistently applied this canon in various areas of the law.[46] Had the court interpreted the term "place of employment or business" in context, specifically in relation to the language, "where such conduct consists of appearing, telephoning or initiating communication or contact,"[47] it would have applied a broader meaning that would have covered remote communications and contacts.

When a case involves statutory interpretation, the court must always "presum[e] . . . that the legislature intended to enact only that which is reasonable, and that no unreasonable or absurd result was intended by the legislature."[48] This is known as the absurdity doctrine.[49] "[E]ach part of a statute is to be given meaning and be interpreted so as to avoid absurd results."[50] Thus, in the absence of clear legislative intent, a court must interpret all ambiguous language rationally and sensibly.[51] New York courts have consistently applied this canon in various areas of the law.[52]

If the court had used the absurdity doctrine, it would have realized that its own interpretation was absurd because it captures the one form of remote communication explicitly referenced in the statute—"telephoning"—but not others, like e-mail. It is highly unlikely that the legislature intended such a result. And the legislative history suggests as much. The court was correct when it stated, "the inclusion of a provision dealing with stalking in connection with the victim's employment is not specifically discussed in the legislative history to § 120.45."[53] However, the legislative history shows that the legislature intended this statute to be interpreted broadly. In 1999, when the legislature passed this law, it expressed its intent in the following way:

> The legislature finds and declares that criminal stalking behavior, including threatening, violent or other criminal conduct *has become more prevalent in New York state in recent years*. The unfortunate reality is that stalking victims

46. *See* Expedia, Inc. v. City of N.Y. Dep't of Fin., 3 N.E.3d 121, 127 (N.Y. 2013) (using *noscitur a sociis* to interpret the term "charge" in a challenged local law); NFL v. Vigilant Ins. Co., 824 N.Y.S.2d 72, 73, 77 (App. Div. 2006) (using *noscitur a sociis* to interpret the terms of an insurance policy); People v. Cuesta, 901 N.Y.S.2d 825, 828–29 (Sup. Ct. 2010) (using *noscitur a sociis* to interpret section 70.06 of the NYPL); People v. Conti, 895 N.Y.S.2d 660, 665 (Dunkirk City Ct. 2010) (using *noscitur a sociis* to interpret the term "school" in a local city code).

47. Penal § 120.45(3).

48. 97 N.Y. Jur. 2d *Statutes* § 191 (2017) (footnotes omitted).

49. *Absurdity Doctrine*, Black's Law Dictionary (10th ed. 2014) ("The principle that a provision in a legal instrument may be either disregarded or judicially corrected as an error . . . if failing to do so would result in a disposition that no reasonable person could approve.").

50. 97 N.Y. Jur. 2d, *supra* note 48, § 191.

51. *Id.*

52. *See In re* Raritan Dev. Corp. v. Silva, 689 N.E.2d 1373, 1374 & n.1, 1376 (N.Y. 1997) (finding that "cellar space" was excluded from floor area ratio calculations and that, contrary to the dissent's contention, such an interpretation was not "absurd"); Roberts v. Tishman Speyer Props., L.P., 874 N.Y.S.2d 97, 99, 105 (App. Div. 2009) (using the absurdity doctrine to determine whether the lower court had properly interpreted various provisions of the Rent Stabilization Law); *In re* R.A. Bronson, Inc. v. Franklin Corr. Facility, 680 N.Y.S.2d 719, 720–21 (App. Div. 1998) (using the absurdity doctrine to reject the petitioner's interpretation of section 2051-e(9) of the Public Authorities Law).

53. People v. Marian, 16 N.Y.S.3d 683, 688 (Crim. Ct. 2015).

> have been intolerably forced to live in fear of their stalkers. Stalkers who repeatedly follow, phone, write, confront, threaten or otherwise unacceptably intrude upon their victims, often inflict immeasurable emotional and physical harm upon them. *Current law does not adequately recognize the damage to public order and individual safety caused by these offenders. Therefore, our laws must be strengthened to provide clear recognition of the dangerousness of stalking.*
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> . . . .
>
> *. . . This act will protect victims by providing real and effective sanctions for stalking conduct even at its earliest stages*.[54]

Evidently, the legislature wanted courts to interpret section 120.45 broadly to effectively combat stalking, which in 1999 was considered a growing problem. Thus, it likely would have rejected the *Marian* court's narrow interpretation of this statute.[55]

The court should have also used the rule against surplusage. According to this rule:

> In the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose. As a general rule, a statute should be construed so that effect is given to all its provisions so that no part will be inoperative or superfluous, void or insignificant. It should not be presumed that any provision of a statute is redundant. . . .
>
> Effect should be given, if possible, to every section, paragraph, sentence or clause, phrase, and word of a statute.[56]

New York courts have consistently applied this canon in various areas of the law.[57]

The *Marian* court's interpretation of section 120.45(3) violated the rule against surplusage. The court stated that the act of stalking another person by e-mail messages to her work e-mail address would not go unpunished because such conduct was "completely subsumed within the conduct specified in § 120.45(2)."[58] However, under this logic, the next subsection, section 120.45(3), is superfluous since, as the court suggests, section 120.45(2) captures the same kind of conduct covered by section 120.45(3).[59] While the court indicated that it was differentiating conduct

54. Clinic Access and Anti-Stalking Act of 1999, ch. 635, § 2, 1999 N.Y. Laws 3365, 3365 (codified as amended at N.Y. Penal Law § 120.45 (McKinney 2017)) (emphasis added).

55. Moreover, the legislative history indicates that the legislature mentioned another remote form of communication: writing. *Id.* Therefore, the *Marian* court should have broadly interpreted the term "place of employment or business" to cover work e-mail addresses.

56. 73 Am. Jur. 2d *Statutes* § 156 (2016) (footnotes omitted).

57. *See* FCI Grp., Inc. v. City of New York, 862 N.Y.S.2d 352, 356 (App. Div. 2008) (using the canon to reject the defendant's interpretation of a contractual provision because "[s]uch an interpretation, moreover, renders the language limiting the scope of the [alternative dispute resolution] provision mere surplusage, in contravention of the settled rule that a contract is to be construed so as to give effect to each and every part"); URS Corp. v. Zurich Am. Ins. Co., 979 N.Y.S.2d 506, 511 (Sup. Ct. 2014) (using the canon to reject the plaintiff's reading of the defendant's insurance policy because "[t]o read the terms 'land,' 'atmosphere' and 'watercourse or body of water' as 'everywhere' would render the modifying clause misleading and useless surplusage").

58. *Marian*, 16 N.Y.S.3d at 688.

59. *See supra* note 29.

according to how it defined "at" the workplace (as a physical location), the effect of its decision detracts from the independent functions of sections 120.45(2) and 120.45(3).

A fundamental premise of the superfluity canon is that courts should avoid construing statutory provisions in ways that detract from their independent functions.[60] The court's reasoning subtracts from the function that the legislature intended section 120.45(3) to serve because it conflates the separate types of conduct remedied by this section and section 120.45(2). Further, the effect of the court's holding is that harassing behavior that hurts a victim's ability to do her job is not within 120.45(3) when the victim is outside her work building, despite that the hindrance to job performance is what section 120.45(3) is meant to prevent. But post-*Marian*, any victim in New York County whose business exists solely online does not have a remedy under section 120.45(3).[61] The court's holding confuses the purpose of section 120.45(3) and diminishes its ability to remedy harassing conduct that hinders job performance, thus violating the superfluity canon.

In pari materia is Latin for "in the same matter."[62] According to this canon, "statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject."[63] New York courts have consistently applied this canon in various areas of the law.[64]

The court violated the canon of *in pari materia* when it used the CPLR and civil case law interpreting it to decipher the meaning of the term "place of employment or business" in a penal statute. The court recognized that it was out of the ordinary to use the CPLR in penal cases[65] but nevertheless concluded that it "ma[de] good sense, absent a contrary instruction from the Legislature, to interpret the same phrase in the same way across all areas of practice."[66] Without expressly stating it, the court applied the *in pari materia* canon, albeit erroneously. In fact, it violated the canon because New York courts have long held that the CPLR is not *in pari materia* with

60. *See* 73 Am. Jur. 2d, *supra* note 56, § 156.

61. The Census Bureau of the U.S. Department of Commerce has determined that U.S. retail e-commerce sales have been steadily increasing. *See* Press Release, U.S. Census Bureau, Quarterly Retail E-Commerce Sales 3rd Quarter 2016 tbl. 1 (Dec. 7, 2016), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. E-commerce composed 8.4% of total retail sales in the third quarter of 2016, a 15.7% increase from the third quarter of 2015. *Id.*

62. *In pari materia*, Black's Law Dictionary (10th ed. 2014).

63. *Id.*

64. *See In re* Fitzpatrick v. County of Orange, 991 N.Y.S.2d 246, 250–51 (Sup. Ct. 2014) (using the *in pari materia* canon to find that there was no meaningful distinction between the two standards laid out in each statute); *In re* Russo v. N.Y.C. Hous. Auth., 986 N.Y.S.2d 800, 816 (Sup. Ct. 2014) (treating both parties' regulatory schemes *in pari materia* because "both . . . speak on the same matter or subject—affordable housing for low and/or middle income residents").

65. People v. Marian, 16 N.Y.S.3d 683, 687 (Crim. Ct. 2015) (citing People v. DeFreitas, 9 N.Y.S.3d 822, 824 (Crim. Ct. 2015)).

66. *Id.*

the NYPL and that one cannot be used to construe the meaning of the other.[67] Therefore, the court erred when it used the CPLR to construe the term "place of employment or business" in section 120.45(3).

Instead of analyzing the CPLR, the court should have taken guidance from case law that interpreted similarly worded penal statutes in other states. A majority of states have cyberstalking or cyberharassment statutes.[68] There are three types of cyberstalking statutes: those that do not expressly mention cyberstalking, those that address some aspects of cyberstalking, and those that address it expressly.[69] Section 120.45 falls into this first category of statutes[70] because, while it does mention "appearing," "telephoning," and "initiating communication or contact," it does not expressly use the phrase "electronic communication."[71] The same is true of Connecticut's stalking statute.[72] In fact, Connecticut's statute contains similar language to that in section 120.45(3). It states, in relevant part:

> A person is guilty of stalking in the second degree when:
>
> . . . .
>
> (2) [s]uch person intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person that would cause a reasonable person to fear that such person's employment, business or career is threatened, where (A) such conduct consists of the actor *telephoning to, appearing at or initiating communication or contact* at such other person's place of employment or business . . . .[73]

Like section 120.45(3), this statute does not mention "electronic communications." Despite this, in *Marino v. Greene*, a Connecticut court held that this language covered the respondent's sanctioning of her husband's acts of stalking the victim by e-mail and Facebook messaging.[74]

The *Marian* court should have followed the *Marino* decision in interpreting section 120.45(3). In *Marino*, the applicant, Kayla Marino, a twenty-seven-year-old single mother of two, prayed the court to issue a civil order of protection against the respondent, Susan Greene, a patron at the restaurant where she worked as a waitress.[75]

67. *See* Perry v. People, 86 N.Y. 353, 357 (1881). By contrast, the NYPL and the Code of Criminal Procedure, both of which relate to criminal law, have been held to be *in pari materia*. People v. Buccolieri, 152 N.Y.S. 707, 714 (Ct. Gen. Sess. 1914).

68. *See* Steven D. Hazelwood & Sarah Koon-Magnin, *Cyber Stalking and Cyber Harassment Legislation in the United States: A Qualitative Analysis*, 7 Int'l J. Cyber Criminology 155, 159 (2013).

69. Goodno, *supra* note 1, at 141–44.

70. This category makes no express reference to electronic communications. *See id.* at 141.

71. *See* N.Y. Penal Law § 120.45 (McKinney 2017).

72. *See* Conn. Gen. Stat. § 53a-181d (2016).

73. *Id.* § 53a-181d(b)(2) (emphasis added).

74. Marino v. Greene, No. LLICV154015225S, 2015 WL 1727430, at *4 (Conn. Super. Ct. Mar. 20, 2015).

75. *Id.* at *1–3. Kayla Marino had previously filed an application for an order of protection against Edward Greene, Susan Greene's husband. *Id.* at *2. In that case, the court extended the order of protection against Mr. Greene for one year. *Id.* The discussion above concerns the case against Susan Greene.

Initially, the respondent showed interest in Marino's well-being, and even once helped her wrap Christmas gifts for her daughters.[76] Later, the respondent's husband, Edward Greene, began sending messages to the applicant via social media.[77] Over time, Mr. Greene's electronic communications became inappropriate.[78] On one occasion, he asked Marino to send him nude photos of herself.[79] Additionally, Mr. Greene frequented the restaurant where Marino was employed and asked her coworkers deeply personal questions about her, including asking for her home address, the reasons for her failed marriage, and whether her children had the same biological father.[80] The applicant eventually blocked the respondent and her husband on Facebook, but the inappropriate electronic communications continued via e-mail.[81]

Section 46b-16a of the Connecticut General Statutes ("General Statutes") governs the issuance of civil protection orders.[82] According to the statute, "[a]ny person who has been the victim of sexual abuse, sexual assault or stalking, as described in section[] . . . 53a-181d . . . may make an application to the Superior Court for relief under this section . . . ."[83] To determine whether the applicant was entitled to an order of protection, the court turned to section 53a-181d for the definition of "stalking."[84] Section 53a-181d of the General Statutes does not use the term "electronic communications," and yet the *Marino* court held:

> [T]he respondent engaged in multiple acts, through electronic media and in person, directly and indirectly, as well as through a third party (her husband) in which she followed, lay in wait for, monitored, observed, threatened, harassed, and communicated with the applicant. The respondent knowingly engaged in a course of conduct directed at the applicant that would cause a reasonable person to fear for such person's physical safety. Further, the respondent's actions at the applicant's place of employment, and the actions of her husband which, the court finds, were sanctioned by the respondent, would cause a reasonable person to fear that her employment or career is threatened, in that the respondent's conduct consisted of the respondent appearing at, or initiating communication or contact at, the applicant's place of employment . . . .[85]

76. *Id.* at *3.

77. *Id.* The husband's name is spelled "Green" in the court documents but this was possibly an error. *See* Kayla M. v. Greene, 136 A.3d 1 (Conn. App. Ct. 2016).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at *1.

83. Conn. Gen. Stat. § 46b-16a (2016).

84. *Marino*, 2015 WL 1727430, at *1.

85. *Id.* at *4.

The *Marino* court found that section 53a-181d of the General Statutes, which is similar to section 120.45(3), covered stalking via e-mail and messages through Facebook, a social media platform. Thus, the *Marian* court should have considered this decision in resolving the issue in its case because both cases dealt with similar facts, in that the *Marian* case also involved a victim who was stalked via e-mail and messages through a social media platform: Instagram.

The *Marian* court's misguided approach to statutory interpretation will have devastating consequences for victims of cyberstalking. Stalking can cause post-traumatic stress disorder, depression, and serious emotional distress, and can escalate into physical attacks.[86] Given the increasing prevalence of cyberstalking, more people are likely to suffer these consequences.[87] Unlike traditional stalkers, "[c]yberstalkers can use the Internet to instantly harass their victims with wide dissemination."[88] Additionally, cyberstalkers can prey on their victims remotely from different states and even from different countries.[89] The Internet provides cyberstalkers with a cheap and easy way to make the lives of their victims miserable.[90] For example, they can easily impersonate their victims.[91] The Internet also affords cyberstalkers newer and more improved methods of stalking. For example, cyberstalkers can remain anonymous and can employ third-parties to do the stalking for them.[92] All of these factors make it easier for cyberstalkers to harass their victims, and with judicial decisions like *Marian*, it will become even easier for them to do so and harder for victims to get the help they need.

The *Marian* decision comes at a time when cyberstalking is on the rise. According to a 2011 survey, 14.3% of female victims and 9.4% of their male counterparts were electronically stalked via unwanted e-mail messages, instant messages, or social media messages.[93] In addition, 55.3% of female victims and 56.7% of male victims were targeted via text or voice messages.[94] With the proliferation of smartphones and

86. Goodno, *supra* note 1, at 128.

87. *See* Alexandra Katehakis, *Cyberstalking: Fastest Growing Crime*, Huffington Post: Blog (May 6, 2016), http://www.huffingtonpost.com/alexandra-katehakis-mft/cyberstalking-fasting-growing-crime_b_6810154.html.

88. Goodno, *supra* note 1, at 128.

89. *Id.* at 129.

90. *Id.*

91. *Id.* at 131 ("[P]retending to be the victim, the cyberstalker can send lewd e-mails, post inflammatory messages on multiple bulletin boards, and offend hundreds of chat room participants. The victim is then banned from bulletin boards, accused of improper conduct, and flooded with threatening messages from those the stalker offended in the victim's name.").

92. *Id.* at 130, 132.

93. Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 Morbidity & Mortality Wkly. Rep., Sept. 5, 2014, at 1, 8 tbl.5.

94. *Id.*

social media websites, these statistics will likely increase, leaving more victims helpless in the face of their vicious and persistent stalkers.

Marian exemplifies why courts should engage in proper statutory interpretation. Had the *Marian* court conducted a careful examination and analysis of the statutory text, it would have concluded that the term "place of employment or business" covered work e-mail addresses. Instead, the court's decision significantly weakened cyberstalking victims' protections.

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