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In the United States, approximately 7.5 million people are stalked each year.[1] Stalking is generally defined as a course of conduct directed at an individual that would make a reasonable person fearful.[2] Stalking is a crime under federal law, as well as in all fifty states, the District of Columbia, and the U.S. Territories.[3] In 1999, New York recognized stalking as a crime after research revealed that thirty per cent of all women who were murdered were killed by a former intimate partner who had stalked them.[4] New York proscribes four degrees of stalking, varying in severity from stalking in the fourth degree, a class B misdemeanor, to stalking in the first degree, a class D felony.[5] Stalking in the fourth degree outlines the basic conduct of stalking: a defendant "intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person . . . [that] is likely to cause reasonable fear of material harm."[6]

Stalking is a common form of workplace abuse.[7] Roughly one out of every eight employed stalking victims reports missing as many as five work days or more because of stalking.[8] With changes in technology, the manifestations of stalking behavior have broadened to "cyberstalking," defined as "[t]he act of threatening, harassing, or annoying someone through multiple e-mail messages, as through the Internet, esp[ecially] with the intent of placing the recipient in fear that an illegal act or an injury will be inflicted on the recipient or a member of the recipient's family or household."[9]

Yet, in *People v. Marian*, the New York County Criminal Court ruled that e-mails sent to the victim's work e-mail address did not meet the legal requirements of section 120.45(3) of the New York Penal Law (NYPL), which penalizes stalking someone at her workplace.[10] The court found that a work e-mail address is not a

1. *Stalking Fact Sheet*, Nat'l Ctr. for Victims Crime (Jan. 2015), http://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015_eng.pdf.

2. *Id.*

3. *Id.*

4. 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)). Another study showed that, out of a sample of 141 femicide victims, seventy-six per cent were stalked by an intimate partner within twelve months of the femicide. Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 Homicide Stud. 300, 308 (1999).

5. Penal §§ 120.45–.60.

6. *Id.* § 120.45(1). Factors that increase the severity of the charge include: the age of the victim; whether the stalker used a weapon; and whether the stalker has prior convictions for stalking, harassment, or kidnapping. *Id.* §§ 120.45–.60.

7. *DOL Workplace Violence Program*, U.S. Dep't Lab., https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm (last visited Feb. 5, 2017).

8. *Stalking Fact Sheet*, *supra* note 1.

9. *Cyberstalking*, Black's Law Dictionary (10th ed. 2014).

10. 16 N.Y.S.3d 683, 687 (Crim. Ct. 2015).

"place of employment or business" within section 120.45(3), despite the prevalence of both workplace stalking and cyberstalking.[11]

This case comment contends that the *Marian* court erred in its statutory interpretation by not only looking outside the statute, but by utilizing the New York Civil Practice Law and Rules (CPLR) to define a term from a criminal statute. The court's unduly technical reading of the information charge[12] arbitrarily excluded certain dangerous and prevalent behaviors from the reach of section 120.45(3). Furthermore, the court's reliance on the CPLR and civil practice to support its holding was inconsistent with current case law and should not have been applied to a criminal case.

In *People v. Marian*, the victim and the defendant were involved in a romantic relationship and then broke up, which led to the events at issue in the case.[13] In the ninety-one day period from January 17 to April 17, 2015, the victim received over one hundred Instagram and text messages from her ex-girlfriend, the defendant, and approximately ten to fifteen e-mails, which were sent to her personal and work e-mail addresses.[14] During a three-day period, the victim received approximately eighty phone calls from the defendant.[15] On January 23, the defendant "accused the [victim] . . . of assaulting her."[16] However, the defendant later admitted that this allegation was baseless, and that she intentionally fabricated it to prevent the victim from obtaining a restraining order against her.[17] On February 25, the defendant went to The Bowery Electric bar in Manhattan roughly an hour after the victim did.[18] The victim had not informed the defendant that she would be at that location.[19] Inside the bar, the defendant grabbed the victim by the neck and the victim asked

11. *Id.* at 685.

12. An information is an accusatory instrument that serves the same purpose in a misdemeanor prosecution that an indictment serves in a felony prosecution: it "must set forth 'nonhearsay allegations which, if true, establish every element of the offense charged and the defendant's commission thereof.'" People v. Dixon, No. 2014NY005400, 997 N.Y.S.2d 100, 2014 WL 3746803, at *5 (Crim. Ct. July 30, 2014) (unpublished table decision) (quoting People v. Kalin, 906 N.E.2d 381, 383 (N.Y. 2009)). It is not required to allege facts that would prove the defendant's guilt beyond a reasonable doubt, "[r]ather, the Information need only contain allegations of fact that 'give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense.'" *Id.* (quoting People v. Casey, 740 N.E.2d 233, 236 (N.Y. 2000)).

13. *Marian*, 16 N.Y.S.3d at 685–86.

14. *Id.*

15. *Id.* at 686.

16. *Id.* at 685.

17. *Id.*

18. *Id.* at 686.

19. *Id.*

that she leave.[20] Instead, the defendant waited outside the bar for two hours and then followed the victim for two blocks after she left the bar.[21]

A month later, the victim was at another Manhattan bar, Hotel Chantelle, and the defendant once again appeared without the victim informing the defendant of her destination.[22] Again, the defendant waited for the victim to leave the bar and followed her for two blocks, stating, "I won't leave you alone. I'll never stop."[23] The victim testified that on March 30, the defendant went to her home after one o'clock in the morning and waited outside.[24] Later that day, the District Attorney's Office dismissed the false assault charges that the defendant had made against the victim.[25] On April 8, for a third time, the defendant appeared at a bar where the victim was; once again, the victim had not told her where she would be.[26]

The defendant was arraigned on April 9, 2015, and charged with a misdemeanor in violation of sections 120.45(2)[27] ("Personal Anti-Stalking Statute") and 120.45(3)[28] ("Workplace Anti-Stalking Statute") of the NYPL.[29] The charge under the Workplace Anti-Stalking Statute was based on the ten to fifteen e-mails that the defendant sent to the victim's personal and work e-mail addresses.[30] On May 18, 2015, the defendant filed a motion challenging all counts against her, including both counts of the stalking charge.[31] The defendant argued that the facts were insufficient to support a prima facie case of stalking in the fourth degree under the Workplace

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 685.

26. *Id.* at 686.

27. N.Y. Penal Law § 120.45(2) (McKinney 2017). Section 120.45(2) provides as follows:

> 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 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.

28. Section 120.45(2) differs from section 120.45(3) in that conduct captured within the latter section must cause the victim "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." *Id.* § 120.45(3).

29. *Marian*, 16 N.Y.S.3d at 685.

30. *Id.* at 687.

31. *Id.* at 685.

Anti-Stalking Statute because the victim's work e-mail address was not her "place of employment or business" as required under the statute.[32]

To establish a prima facie case[33] of stalking in the fourth degree under the Workplace Anti-Stalking Statute, the facts of the case must support a showing that (1) the offender engaged in a course of conduct for no legitimate purpose; (2) the course of conduct was intentional; (3) the conduct was directed at a specific person; (4) the acts were committed with actual or constructive knowledge that such conduct was likely to cause that victim to reasonably fear that her employment, business, or career was threatened; and (5) the offender must have been told to cease the conduct of appearing, telephoning, or initiating communication or contact at the victim's place of employment or business.[34]

The primary issue in *Marian*, and a question of first impression in New York, was whether the requirement in the fifth factor, that communications be sent to the victim's "place of employment or business," is satisfied by numerous e-mails sent to the victim's work e-mail address.[35] The court began by stating that its duty is to construe NYPL provisions "according to the fair import of their terms to promote justice and effect the objects of the law."[36] The court determined that the fair import of "place of employment or business" was that the term refers to an "actual, physical location," noting that the CPLR requires a physical location for serving a summons and complaint to a "place of business."[37] The court reasoned that, although courts in New York have allowed service via e-mail on occasion, such is considered an "alternate method of service" under rule 308(5) of the CPLR, which "indicates that an email address is treated as something distinct from an actual, physical location."[38] The *Marian* court acknowledged that the CPLR is not binding on a criminal court, but defended its use thereof by stating that, without instruction from the legislature, or a clear legislative intent to include e-mails in the statute, it was practical to interpret the phrase "place of employment or business" consistently across all practice areas.[39]

The court determined that the phrase "communication or contact" under the Personal Anti-Stalking Statute includes the act of sending an e-mail, but such

32. *Id.* at 686.

33. *Id.* at 686–87.

> The *prima facie* case requirement does not necessitate that an information allege facts that would prove a defendant's guilt beyond a reasonable doubt. Rather, the information need only contain allegations of fact that "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense."

Id. (citation omitted) (quoting People v. Casey, 740 N.E.2d 233, 236 (N.Y. 2000)).

34. *See* People v. Stuart, 797 N.E.2d 28, 41 (N.Y. 2003).

35. *See Marian*, 16 N.Y.S.3d at 685.

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

37. *Id.*

38. *Id.*

39. *Id.*

conduct is "completely subsumed" within the Personal, rather than the Workplace Anti-Stalking Statute.[40] It found that the defendant's act of sending e-mails to the victim's work e-mail address also failed to meet the requirements that the conduct be unsolicited, and that the defendant must be "clearly informed to cease" the conduct.[41] Moreover, the court reasoned that because the legislature contemplated that the Personal Anti-Stalking Statute would remedy the harm caused by such conduct, it would not "effect the objects" of the law to provide a remedy for the same level of harm under another subsection.[42] Therefore, the court found that the victim did not have a remedy under the Workplace Anti-Stalking Statute, and dismissed that charge against the defendant.[43]

This case comment contends that the New York County Criminal Court erred in dismissing the Workplace Anti-Stalking Statute charge against the defendant because it: (1) disregarded the principles of statutory interpretation and used civil practice guidelines to define a term in a criminal statute and in doing so, employed an over-narrow definition of "place of employment or business"; (2) supported this narrow definition with assertions about the CPLR and civil practice that are at odds with current case law; and (3) read the information in a restrictive and unduly technical manner.

First, the *Marian* court disregarded principles of statutory interpretation by failing to consult the textual construction, legislative intent, or legislative history of the statute before turning to an unrelated area of law.[44] Under traditional principles of statutory interpretation, unless the court finds an ambiguity, the court must give effect to the plain meaning of the text.[45] If the court finds an ambiguity, then it should look to the legislative intent and legislative history for guidance.[46] However, the *Marian* court failed to engage in a textual analysis to address whether there was an ambiguity in the Workplace Anti-Stalking Statute. Instead, it concluded that, because the term "place of employment or business" within an unrelated statute, the CPLR, is defined by courts as a physical location, the "fair import" of the term in general, and specifically within the Workplace Anti-Stalking Statute, must be a physical location.[47]

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40. *Id.* at 688.

41. *Id.*; *see also* People v. Kitsikopoulos, No. 2014NY037848, 16 N.Y.S.3d 793, 2015 WL 2235070, at *7 (Crim. Ct. May 13, 2015) (unpublished table decision).

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

43. *Id.*

44. *See id.* at 687.

45. People v. Garson, 848 N.E.2d 1264, 1268 (N.Y. 2006).

46. People v. Ballman, 930 N.E.2d 282, 284 (N.Y. 2010).

47. *See Marian*, 16 N.Y.S.3d at 687. To support the statement that this was the traditional definition in New York, the court looked to civil practice, invoking the definition that is used for the purpose of serving a summons under the CPLR, "where the person is physically present with regularity, and . . . regularly transact[s] business at that location." *Id.* (quoting Rosario v. NES Med. Servs. of N.Y., P.C., 963 N.Y.S.2d 295, 297 (App. Div. 2013)).

The court's reliance on civil practice resulted in a narrow definition of "place of employment or business." The court's inappropriate deference to the CPLR caused the court to frame its final inquiry as whether an e-mail inbox is a place where the individual is physically present with regularity to transact business.[48] But a work e-mail address is a vehicle through which someone can regularly transact business; thus, physical presence is not necessary. The court's narrow interpretation is discordant with the legislature's intent to strengthen the law, which includes offering victims protection from "[s]talkers who repeatedly follow, phone, write, confront, threaten or otherwise unacceptably intrude upon their victims."[49]

Had the court followed the principles of statutory interpretation, it would have found that "place of employment or business" was ambiguous and that its interpretation is inconsistent with section 120.45's purpose. Legislative intent regarding section 120.45 is expressed in the statute from which it was codified, the Clinic Access and Anti-Stalking Act of 1999, which states:

> The unfortunate reality is that stalking victims 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.[50]

This statement illustrates that the legislature intended to provide strong protection against stalking in section 120.45.

Another relevant piece of legislative history was an amendment made to section 120.45 in October 2014, just nine months before the *Marian* decision.[51] The legislative amendment stated that the meaning of "following" in the Personal Anti-Stalking Statute shall include "unauthorized tracking of such person's movements or location through the use of a global positioning system or other device."[52] The legislature cited the increased prevalence of technology in stalking cases as the reason for the modification.[53] So, by the time of *Marian*, the legislature had already determined that "following," which in prior cases had been limited to a physical act, could be done remotely through the use of technology. Had the court engaged in a textual analysis of the Workplace Anti-Stalking Statute, it would have noted an ambiguity in the phrase "place of employment or business." The court could have

48. *See id.* at 687–88.

49. 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)).

50. *Id.*

51. An Act to Amend the Penal Law, in Relation to Stalking in the Fourth Degree, ch. 184, § 1, 2014 N.Y. Laws 922, 922 (codified at Penal § 120.45).

52. *Id.*

53. Legislative Memorandum Relating to Ch. 184, 2014 N.Y. Laws 1693, 1693.

found guidance in the legislative intent that would have led to an interpretation that belied the one the court ascertained from the CPLR and civil practice.

Second, the court used outdated case law to determine that serving a summons to an e-mail address is an alternative (less valid) method to traditional "nail and mail" service because an e-mail address is not a "physical location," as the CPLR requires.[54] While e-mail is not a physical domain, even if it is accepted, *arguendo*, that the CPLR's definition of "place of employment or business" applies in a criminal context, the court's assertion that physicality is the reason for the distinction between e-mail and other methods of service is not supported by current case law.[55] Courts applying New York law that have considered service through e-mail to be an alternative to traditional forms of service have done so not because of physicality, but because of concerns regarding due process and whether e-mail messages provide the recipient with sufficient notice of a pending lawsuit.[56] However, courts have long considered traditional forms of service, such as publication, to be valid independent of their likelihood of being received.[57] Accordingly, as courts have grown more comfortable with online service, they have increasingly upheld its validity as a form of service.[58]

Fortunato v. Chase Bank USA, N.A. was an early case discussing the standard for service through the Internet.[59] In *Fortunato*, the U.S. District Court for the Southern District of New York noted that electronic service had until then been permitted only in cases when evidence existed that the electronic medium was actually used to receive messages by the person being served.[60] The court found that neither the Facebook profile at issue, nor the e-mail address posted thereon, was shown to be operational and actually used to receive messages by the party for whom the summons and complaint were intended.[61] Although the court in *Fortunato* did not think highly

54. *See* People v. Marian, 16 N.Y.S.3d 683, 687 (Crim. Ct. 2015).

55. *See* Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442, 448 (Civ. Ct. 2008).

56. *See* Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *3 (S.D.N.Y. June 7, 2012) (denying service via e-mail or Facebook because there was no evidence that the e-mail address or Facebook page was in fact owned or used by the third-party defendant); S.E.C. v. Nnebe, No. 01 Civ. 5247(KMW)KNF, 2003 WL 402377, at *4 (S.D.N.Y. Feb. 21, 2003) (allowing service by publication when there was evidence that service by the traditional methods was impracticable); Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 715 (Sup. Ct. 2015) (noting that service via Facebook was a "method reasonably calculated to give defendant notice"); *Snyder*, 857 N.Y.S.2d at 448 (allowing service via e-mail because e-mail had a higher chance of notifying the defendant than publication did, when traditional means of service were unavailable).

57. *See Snyder*, 857 N.Y.S.2d at 447–48. As the *Snyder* court notes, "courts have long resorted to publication of the summons in a newspaper as a means of alternate service," *id.* at 447, and "[New York] law has long been comfortable with many situations in which it is evident, as a practical matter, that parties to whom notice was ostensibly addressed would never in fact receive it," *id.* at 448 (quoting Dobkin v. Chapman, 236 N.E.2d 451, 458 (N.Y. 1968)).

58. *See, e.g.*, Safadjou v. Mohammadi, 964 N.Y.S.2d 801, 803–04 (App. Div. 2013).

59. 2012 WL 2086950, at *1.

60. *Id.* at *2.

61. *Id.*

of improvised service by means of Facebook, subsequent cases have allowed electronic service when the medium was shown to belong to the party to be served and that such party actually used that medium for communicating.[62]

In *Baidoo v. Blood-Dzraku*, the New York County Supreme Court upheld service through Facebook.[63] In *Baidoo*, the court distinguished the plaintiff's situation from that of the *Fortunato* plaintiff, determining that the plaintiff sufficiently proved that the Facebook profile was both operational and actually used by the intended party.[64] In light of this finding, *Baidoo* not only allowed service through Facebook, but also, in an unprecedented verdict, ruled that service through Facebook alone was sufficient.[65] Previous cases upheld service through Facebook as long as it was accompanied by another method, usually e-mail,[66] which demonstrates that courts are growing to accept e-mail as a legitimate form of service.[67] The *Baidoo* decision stands for the proposition that the newness of service through social media is not a sufficient reason for a court to reject it, especially considering that the overlap of the law and modern technology is a concept to which courts must adapt.[68]

Further, had the *Marian* court looked to more contemporary and informed case law involving service with process to businesses, it would have found the same legal principles outlined in *Fortunato* and *Baidoo*.[69] In *Snyder v. Alternate Energy, Inc.*, the New York City Civil Court for New York County allowed service to a work e-mail address in lieu of a physical business location because the plaintiff could not locate a place of business where the intended party was physically present with regularity, a factor necessary to perfect service.[70] The *Snyder* court found that despite the likelihood that the intended party was operating out of an unknown, physical place of business, service to an e-mail address was proper because the intended party regularly used the work e-mail address.[71] The court expanded the definition of "place of employment or business" to include a virtual location from which the defendant regularly transacted business because due process concerns were satisfied.[72] The *Marian* court neglected this trend in its discussion of civil practice case law.[73]

62. *See* Alfred E. Mann Living Tr. v. ETIRC Aviation S.A.R.L., 910 N.Y.S.2d 418, 422–23 (App. Div. 2010); Hollow v. Hollow, 747 N.Y.S.2d 704, 708 (Sup. Ct. 2002); *Snyder*, 857 N.Y.S.2d at 488.

63. 5 N.Y.S.3d 709, 716 (Sup. Ct. 2015).

64. *Id.* at 714.

65. *Id.* at 716.

66. *Id.* at 714–15.

67. *Id.* at 714.

68. *See id.* at 713–14.

69. *See* Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442 (Civ. Ct. 2008).

70. *Id.* at 445, 448–49.

71. *Id.* at 448.

72. *See id.*

73. *See* People v. Marian, 16 N.Y.S.3d 683, 687–88 (Crim. Ct. 2015).

Third, the court subjected the information to an unfair and unduly technical reading, leading to improper conclusions that contradicted the very case law that the *Marian* court cited in its decision.[74] An information, similar to a felony indictment, is required only to lay out the factual allegations of a misdemeanor charge in a manner that "give[s] an accused notice sufficient to prepare a defense."[75] The factual allegations must be "adequately detailed to prevent a defendant from being tried twice for the same offense."[76] To require an information to go beyond this threshold is to subject its allegations to an unfair and unduly technical reading.[77] The *Marian* court reasoned that even if it erred in its conclusion that a work e-mail is not a "place of employment or business," it was proper to dismiss the Workplace Anti-Stalking Statute charge against the defendant because the information did not allege that the e-mails were unsolicited and the defendant was "clearly informed to cease" the conduct.[78]

Regarding the requirement that the e-mails must be unsolicited (uninvited and unwanted), the court cited precedent from *People v. Kitsikopoulos*, wherein the New York County Criminal Court found that the language "initiating communication" in the Personal Anti-Stalking Statute "is clearly intended to cover only contact that is uninvited and unwanted, whether electronic, in person, or by mail."[79] The *Kitsikopoulos* court provided that whether the communication is uninvited and unwanted depends on two factors: (1) whether the communication emanated from the defendant and was not invited by or in response to communications from the victim; and (2) the effect the communication has on the victim, not the specific content of the communication.[80] As to the first factor, the court stated that the information must allege that the defendant initiated the communications.[81] To illustrate the second factor, the irrelevance of the content of the communication, the court contrasted signing an e-mail to a friend with "I love you" versus sending multiple unsolicited e-mails to a friend asserting "I love you."[82] The *Kitsikopoulos* court counseled that the first situation would not meet the test for uninvited and

74. *Id.* at 688 (citing *People v. Kitsikopoulos*, No. 2014NY037848, 16 N.Y.S.3d 793, 2015 WL 2235070, at *7 (Crim. Ct. May 13, 2015) (unpublished table decision), for the proposition that the phrase "initiating communication" in the Workplace Anti-Stalking Statute requires a victim to allege that e-mails sent to a work e-mail address were unsolicited).

75. People v. Casey, 740 N.E.2d 233, 236 (N.Y. 2000).

76. *Id.*

77. *Id.*

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

79. 2015 WL 2235070, at *7. While *Kitsikopoulos* involved an information that alleged a count under the Personal Anti-Stalking Statute, *id.*, the basis of the "unsolicited" requirement comes from language appearing in both the Personal and Workplace Anti-Stalking Statutes—"initiating communication"—and thus the requirement pertains to informations that allege either charge. *See* N.Y. Penal Law § 120.45(2)–(3) (McKinney 2017).

80. *See Kitsikopoulos*, 2015 WL 2235070, at *7.

81. *Id.*

82. *Id.*

unwanted communication under the Personal Anti-Stalking Statute, but the second one "easily could."[83] The second hypothetical situation is directly on point with the facts of the *Marian* case,[84] yet the *Marian* court concluded that the information failed to show that the work e-mails, but not the personal e-mails, were unsolicited.[85]

Regarding whether the information sufficiently alleged that the defendant was clearly informed to cease the conduct, the *Marian* court stated: "Specifically, [the information] alleges that . . . the complainant told the defendant to leave the bar in which she had accosted the complainant, but the defendant instead waited outside . . . , followed the complainant . . . , then continued to stalk the complainant for nearly six more weeks."[86] The court concluded that this demand, as stated in the information, was sufficient to inform the defendant to stop following the victim, calling her, and e-mailing her personal e-mail address, but not sufficient to inform the defendant to cease sending e-mails to her work e-mail address.[87]

The *Marian* court's conclusions that the information failed to allege that the work e-mails were unsolicited and that the defendant was clearly informed to cease the conduct stem from an unduly restrictive and technical reading of the misdemeanor information. First, the allegations in the information satisfied the *Kitsikopoulos* test for unsolicited communication.[88] As to the first factor, the information alleged that the defendant initiated the contact by "bombard[ing]" the victim with various communications, including the e-mails at issue in the proceeding.[89] In relation to the second factor, the uninvited e-mails asserted the defendant's desire to be with the victim, with the effect of causing the victim to fear for her safety.[90] These allegations satisfied the *Kitsikopoulos* test, and gave the defendant adequate notice to prepare a defense to the uninvited and unwanted communication.[91] Second, the allegation that the victim demanded that the defendant leave the bar to which she followed the victim, clearly informed the defendant to cease her conduct.[92] However, the *Marian* court found this allegation sufficient to inform the defendant to cease all conduct *except* for sending e-mails to the victim's work e-mail address.[93] This exception requires the information to go beyond merely being adequately detailed to prevent the accused from being tried twice for the same offense, and thus is an unduly

83. *Id.*

84. *See* People v. Marian, 16 N.Y.S.3d 683, 685 (Crim. Ct. 2015).

85. *Id.* at 688–89.

86. *Id.* at 689.

87. *Id.* at 688–89.

88. *Kitsikopoulos*, 2015 WL 2235070, at *7.

89. *See Marian*, 16 N.Y.S.3d at 685.

90. *Id.*

91. *See Kitsikopoulos*, 2015 WL 2235070, at *3, *7.

92. *Marian*, 16 N.Y.S.3d at 689.

93. *See id.* at 688–89 (dismissing only the Workplace Anti-Stalking Statute claim for failure to allege that the defendant was "clearly informed to cease" sending e-mails to the victim's work e-mail address).

restrictive and technical interpretation. Both of these conclusions subjected the information to an unwarranted level of scrutiny, even though the information provided the defendant with adequate notice to prepare a defense and would prevent the defendant from being tried twice for the same offense.[94]

The court's decision to exempt work e-mail addresses from the purview of the Workplace Anti-Stalking Statute is damaging from a policy perspective. It denies a victim recourse against conduct that causes her to reasonably fear that her employment, business, or career is threatened. The result in *Marian* creates a troubling situation where a victim whose stalker calls her at home and at work has recourse under both the Personal and Workplace Anti-Stalking Statutes, but a victim whose stalker e-mails her at home and at work is limited to recourse solely under the Personal Anti-Stalking Statute. This loophole could potentially be exploited by cyberstalkers, who can harm victims both personally and professionally.

The court underestimated the seriousness of this behavior by falsely concluding that violent, threatening behavior is not present in an e-mail, and that it would neither "promote justice" nor "effect the objects" of the law to consider e-mail to be behavior the Workplace Anti-Stalking Statute intended to prevent.[95] This assertion is legally unsound, because a conviction under the Workplace Anti-Stalking Statute does not require a threat of immediate and real danger; such a requirement would be a legitimate reason to exclude e-mail from conduct targeted by the statute because it entails an imminence that a remote communication like e-mail does not present.[96] Furthermore, many stalking cases include e-mails with threats as severe as the assault, rape, or murder of the victim.[97] Even the U.S. Supreme Court has recognized the validity of online threats.[98] The *Marian* court's conclusion ignores the nature of stalking itself: that a stalker purposefully selects a victim and persistently engages in escalating conduct that is likely to frighten the victim.[99] While each instance of conduct might seem "benign . . . in isolation," the collective conduct "amounts to psychological terrorism when done incessantly."[100]

Likewise, the court's conclusion fails to recognize the undisputable truth that just as the Internet has changed most facets of daily life, it has changed the face of

94. *See* People v. Cobb, 768 N.Y.S.2d 295, 299 (Crim. Ct. 2003) (finding that requiring an accusatory instrument to allege the specific, "actual date" by which the defendant was supposed to have registered as a sex offender would be subjecting it to an unduly restrictive and technical reading because the information alleged that the defendant had failed to register within the required ten-day period).

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

96. *See* People v. Wong, 776 N.Y.S.2d 194, 196 (Crim. Ct. 2004).

97. *See* Joseph C. Merschman, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 Harv. Women's L.J. 255, 256–57 (2001) (discussing severe cyberstalking cases that included threats of murder and rape sent via e-mail).

98. *See* Elonis v. United States, 135 S. Ct. 2001, 2004–08 (2015) (discussing a defendant's threatening conduct on Facebook).

99. *See* Merschman, *supra* note 97, at 262 (describing the escalation to violence that is associated with classic stalking behavior).

100. *Id.* at 269.

stalking. A stalker is no longer necessarily a delusional malefactor who waits outside your home, approaches you with unwanted tokens of affection, or ducks behind corners and bushes while following you.[101] Instead, through the evolution of modern technology, a new breed of stalker has emerged: one who can follow, threaten, and frighten victims from anywhere, at any time.

The court turned a blind eye to the realities of technological advancement by excluding e-mail from the Workplace Anti-Stalking Statute. In a time when many people have their work e-mail on smartphones, and even more have e-mail access on laptops, their employment relies on the Internet. Excluding a work e-mail address from the purview of the Workplace Anti-Stalking Statute because it is not a physical location keeps the court shackled to a narrow and anachronistic idea of employment. Also, the court's conclusion that the communication did not meet the requirement of being unsolicited leads to the troubling inference that the victim wanted to be bombarded by communications from her stalker. Finally, concluding that the victim did not clearly inform her stalker to cease e-mailing her at work puts an undue burden on the victim to further engage with her stalker to specifically list each instance of conduct she wants stopped.

The unfortunate reality of the *Marian* decision is that a victim who is stalked through e-mail to her work e-mail address has been forced to continue living in fear of her stalker. The defendant in *Marian* repeatedly followed, phoned, wrote, confronted, and unacceptably intruded upon the victim, likely inflicting upon her emotional and psychological harm.[102] The decision to dismiss the violation of the Workplace Anti-Stalking Statute does not adequately recognize the damage to public order and risk to an individual's safety caused by this type of offender. With the lion's share of cyberstalking victims reporting having been stalked through e-mail,[103] the *Marian* court's exception likely leaves a large number of victims with insufficient legal protection. *People v. Marian* fails to appreciate the clear danger that this type of stalking entails and will only serve to subject victims of twenty-first century stalking techniques to inadequate protections under outdated twentieth century laws.

101. *See* People v. Stuart, 797 N.E.2d 28, 40 (N.Y. 2003) (discussing a stalker who trailed the victim and presented her with flowers as a sign of his affection).

102. People v. Marian, 16 N.Y.S.3d 683, 685–86 (Crim. Ct. 2015).

103. *See Stalking*, Bureau Just. Stat., http://www.bjs.gov/index.cfm?ty=tp&tid=973 (last updated Feb. 17, 2016) (noting that eighty-three per cent of cyberstalking victims were stalked by e-mail).