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# Coercive Control and the Limits of Criminal Law

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*Domestic violence does not always include physical violence. While abusive relationships may be punctuated with physical violence, it is the dynamic of control that constitutes the crux of the abuse. This dynamic is characterized by behaviors designed to dominate, degrade, and discipline, including emotional and financial abuse, isolation, rulemaking, and surveillance. These nonviolent forms of abuse are collectively referred to as “coercive control,” and their impact can be debilitating and devastating for survivors of domestic violence. Despite what we know about domestic violence, the criminal legal system focuses its efforts on discrete incidents or encounters between the abuser and the survivor — most commonly physical assaults. For years, domestic violence scholars and activists have advocated for the criminalization of coercive control in order to resolve this fundamental mismatch between the criminal legal system’s blunt tools and the highly-individualized nature of domestic violence. These arguments have been buoyed by the recent passage of coercive control prohibitions internationally, including in England, Scotland, and Ireland. In the United States, several state legislatures are currently considering similar measures.*

*This Article argues that criminalizing coercive control will do far more harm than good. Analyzing the domestic violence movement’s prior attempt to use criminal law to address coercive behavior — the adoption of mandatory arrest and no-drop prosecution policies — underscores how, yet again, the most vulnerable survivors and their families will bear the brunt*

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\* Copyright © 2022 Courtney K. Cross. Associate Professor of Clinical Legal Instruction and Domestic Violence Clinic Director, University of Alabama School of Law. Many thanks to Deborah Epstein, Rachel Camp, Tamara Kuennen, Andrew Budzinski, Kate Kruse, Natali Nanasi, Emily Poor, Allyson Gold, Gillian Chadwick, Amber Baylor, Priya Baskaran, Daria Fisher Paige, and Amy Kimpel for helping shape this piece. Thanks as always to Holly Maguigan and Shamita Das Dasgupta for helping me recognize the nuanced and complex nature of domestic violence. Finally, much gratitude is owed to Sarah Ming for invaluable research assistance. All mistakes are mine.

*of these new criminal laws. As with mandatory policies, coercive control criminal laws will be coopted by abusive partners and used against survivors. These effects will be most pronounced among survivors who do not embody the archetypal straight, white, scared, femme victim. The domestic violence movement must learn from our mistakes rather than double down on the same flawed logic. We must stop sacrificing survivors in the name of expanding the carceral state.*

TABLE OF CONTENTS

INTRODUCTION .....	197
I. DEFINING DOMESTIC VIOLENCE .....	203
A. <i>Epistemological Origins</i> .....	203
B. <i>Domestic Violence Typologies</i> .....	205
C. <i>Gaps in Our Current Understanding</i> .....	209
II. CRIMINAL LAW'S CONCEPTION OF DOMESTIC VIOLENCE .....	211
A. <i>Criminalizing Abuse</i> .....	212
B. <i>The Violent Incident Model of Criminal Law</i> .....	214
III. CURRENT ATTEMPTS TO ADDRESS COERCION IN CRIMINAL LAW .....	217
A. <i>A Steady Stream of Scholarly Proposals</i> .....	217
B. <i>Comparative Legislative Approaches</i> .....	219
C. <i>An Emerging Legislative Trend in the United States</i> .....	222
IV. DOMESTIC VIOLENCE MANDATORY POLICIES — A CAUTIONARY TALE .....	227
A. <i>Removing Discretion and Disempowering Survivors</i> .....	227
B. <i>Assessing the Harm of Mandatory Policies</i> .....	231
V. EVALUATING COERCIVE CONTROL CRIMINALIZATION IN THE U.S. ....	235
A. <i>Criminal Law's Impact on Domestic Violence</i> .....	235
B. <i>Legal Challenges and Problems of Proof</i> .....	237
C. <i>Predictable and Preventable Patterns</i> .....	239
CONCLUSION .....	243

## INTRODUCTION

In December 2020, musician FKA twigs filed a tort lawsuit against her ex-boyfriend, actor Shia LaBeouf, accusing him of sexual battery, battery, assault, intentional infliction of emotional distress, and gross negligence.<sup>1</sup> While FKA twigs, whose birth name is Tahliah Barnett, accused her ex of significant physical violence against her, she has also been open about how the steady barrage of emotional abuse tactics employed by LaBeouf trapped her in the relationship and undermined her healing after the relationship ended.<sup>2</sup> The complaint she filed details incidents of extreme physical violence as well as pervasive dynamics of non-physical abuse in which LaBeouf became furious if she interacted with other men, berated her for hours over differences of opinion, and imposed requirements for how many times a day she needed to kiss him and how quickly she needed to respond to his displays of affection.<sup>3</sup> She tried to comply with these rules, fearing the punishment she might receive if she disobeyed him. Yet throughout the relationship, LaBeouf insisted to twigs that he was the victim and that it was actually her who was exerting control over him.<sup>4</sup>

This kind of all-encompassing psychological abuse is often referred to in domestic violence literature as coercive control. The term coercive control “encompasses acts like creeping isolation, entrapment, denigration, financial restrictions and threats of emotional and physical harm, including to pets or children, that are used to strip victims of

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<sup>1</sup> Complaint at 13-15, *Tahliah Barnett v. Shia LaBeouf*, No. 20STCV47437 (Cal. Super. Ct. 2020), 2020 WL 7382485.

<sup>2</sup> Since the case was filed in December 2020, mediation has been unsuccessful, and the case is currently set for trial on April 17, 2023. Nancy Dillon, *FKA Twigs Cites ‘Gaslighting,’ Gets Trial Date in Shia LaBeouf Sex Battery Case*, ROLLING STONE (May 2, 2022), [https://www.rollingstone.com/music/music-news/fka-twigs-trial-date-shia-labeouf-sex-battery-case-1346308/?sub\\_action=logged\\_in](https://www.rollingstone.com/music/music-news/fka-twigs-trial-date-shia-labeouf-sex-battery-case-1346308/?sub_action=logged_in) [<https://perma.cc/BB9C-2YFK>]; Melena Ryzik & Katie Benner, *What Defines Domestic Abuse? Survivors Say It’s More Than Assault*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/cori-bush-fka-twigs-coercive-control.html> [<https://perma.cc/473P-GEY4>] (describing how Mr. LaBeouf’s “constant ‘belittling and berating’ shrank her self-esteem and made her easier to control. A year later, she said in an interview, she was still suffering the repercussions: ‘I have panic attacks almost every single night’”).

<sup>3</sup> Complaint, *supra* note 1, at 4-5.

<sup>4</sup> *Id.* at 8 (“LaBeouf’s domineering treatment of Tahliah had allowed him to convince her that *he* was a victim, that he genuinely loved her and that he wanted to ‘repair’ their relationship.”); *see also* Ryzik & Benner, *supra* note 2 (quoting twigs recalling how LaBeouf “would also grow angry if she handed him his toothbrush when he was in the shower, even though that’s when he liked to brush his teeth. ‘He said that I was controlling, because I had given him the toothbrush with toothpaste’”).

power.”<sup>5</sup> Although these kinds of behaviors can be a risk factor for abuse that escalates to homicide,<sup>6</sup> most tactics of coercive control are not prohibited by criminal law in the United States.

FKA twigs could have gone to the police to report the multiple incidents of physical and sexual abuse she endured, beginning a process that may have resulted in LaBeouf’s arrest and prosecution. Had she only reported debilitating and interlocking systems of abuse that LaBeouf used to isolate, degrade, and control her, no criminal action could be taken against him.

In the United States, every state has criminal laws that make domestic violence illegal. But what criminal law considers “domestic violence” is fundamentally at odds with what social scientists, advocates, and most individuals view as domestic violence.<sup>7</sup> According to criminal laws across the country, domestic violence consists of an act that already constitutes a crime — almost exclusively acts or threats of physical violence — committed against someone with whom the defendant has an intimate or familial relationship.<sup>8</sup> In the 1970s and 1980s, the mainstream domestic violence movement was resoundingly successful in its advocacy to marshal criminal laws to explicitly prohibit domestic violence.<sup>9</sup> This strategic advocacy focused on the fact that the framework for what acts constitute physical abuse already existed: what needed to be added was primarily the requisite relationship and any sentencing enhancements.<sup>10</sup> But in using the preexisting criminal law

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<sup>5</sup> Ryzik & Benner, *supra* note 2. According to socialist Evan Stark who quite literally wrote the book on coercive control, it “entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control).” EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 15 (2007) [hereinafter COERCIVE CONTROL].

<sup>6</sup> See, e.g., Jane Monckton Smith, *Intimate Partner Femicide: Using Foucauldian Analysis to Track an Eight Stage Progression to Homicide*, 26 VIOLENCE AGAINST WOMEN 1267, 1276 (2019) (examining 25 in-depth case studies of women killed by intimate partners and finding that there were “controlling patterns in every case study”).

<sup>7</sup> Tamara Kuennen, *Not All Violence in Relationships Is “Domestic Violence,”* 86 BROOK. L. REV. 43, 69 (2020).

<sup>8</sup> Evan Stark, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. POLICE CRISIS NEGOTS. 199, 200 (2012) [hereinafter *Looking Beyond Domestic Violence*].

<sup>9</sup> LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 71 (2008); Stark, *Looking Beyond Domestic Violence*, *supra* note 8, at 199-200.

<sup>10</sup> LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 17 (2012) [hereinafter A TROUBLED MARRIAGE]; LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 25 (2018) [hereinafter DECRIMINALIZING DOMESTIC VIOLENCE].

schema to define domestic violence, state legislatures failed to capture and incorporate the realities of domestic violence, resulting in a criminal law regime that emphasizes physical violence and threats of physical violence at the expense of nearly all forms of non-physical abuse.<sup>11</sup>

Advocates and scholars are actively pushing for further expansion of the criminal legal system in the form of state level laws prohibiting coercive control. In fact, misdemeanor and felony coercive control legislation is pending in multiple jurisdictions.<sup>12</sup> This is not a new development: over the past twenty years, many well-regarded domestic violence scholars have proposed variations on coercive control legislation.<sup>13</sup> Current criminalization arguments in the United States are buoyed by the recent passage of anti-coercive control legislation in England, Scotland, and Ireland.<sup>14</sup>

Given the criminal legal system's failure to address coercive control, this may appear to be a solution that unifies law and social science and, in so doing, transforms the criminal legal system into a viable and beneficial tool for survivors. Proponents of criminalizing coercive control argue that, if survivors experiencing coercive control are currently unable to achieve redress from the criminal legal system, then the criminal legal system must expand to be able to vindicate these survivors.<sup>15</sup> This logic, while optimistic, is downright dangerous. It assumes that criminal interventions are both effective and desirable for survivors — two contentions that have been called into question since the earliest days of the domestic violence movement.<sup>16</sup>

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<sup>11</sup> Stalking sits at an uneasy boundary between physical and non-physical violence: stalking statutes have long been challenged for outlawing permissible behavior, but those laws that explicitly require a credible threat have consistently been upheld, whereas those that only require significant emotional injury without such a threat have a more mixed appellate history. Erin Sheley, *Criminalizing Coercive Control Within the Limits of Due Process*, 70 DUKE L.J. 1321, 1357-58 (2021).

<sup>12</sup> See *infra* Part III(c).

<sup>13</sup> See *infra* Part III(a).

<sup>14</sup> See *infra* Part III(b).

<sup>15</sup> See Evan Stark & Marianne Hester, *Coercive Control: Update and Review*, 25 VIOLENCE AGAINST WOMEN 81, 88 (2019) (praising coercive control legislation passed in the United Kingdom as a creative tool to expand the protections of the criminal legal system to better cover survivors).

<sup>16</sup> ANANNYA BHATTACHARJEE, AM. FRIENDS SERV. COMM., WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 48 (2001) (quoting National Clearinghouse for the Defense of Battered Women founder Sue Osthoff: “Twenty-five years ago, women of color were saying that we should not turn to the criminal legal system. But we put all our eggs in one basket without seeking other creative ways of community intervention. The battered women’s movement has contributed to the

Criminalizing coercive control would not be the first time the criminal legal system has expanded in order to respond to coercive dynamics in abusive relationships.<sup>17</sup> In the 1990s, mandatory arrest and no-drop prosecution policies were heralded as the best way to both remove discretion from recalcitrant police and prosecutors *and* prevent survivors from acquiescing to coercion from their abusive partners to abandon criminal interventions.<sup>18</sup> Survivors were safer, according to advocates of mandatory policies, if there was no mechanism to slow or stop the momentum of the criminal legal machinery once it was in motion. Criminal law was seen as an effective tool in parsing and redistributing power between survivors and their abusive partners.<sup>19</sup> While these policies have no doubt benefited some survivors, they have ushered in a host of consequences for others that range from difficult to devastating including retaliatory violence, financial instability, forced separation, and even survivors' own incarceration.<sup>20</sup> Too many survivors — especially women of color — have had no agency while these policies endangered their safety, their families, and their

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increase in the police state and the increase of men in prisons. We are telling battered women to turn to a system that is classist, sexist, homophobic, arbitrary, and not unlike the batterer”).

<sup>17</sup> Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 223 (2008) (describing some advocates' claims that “a no-drop prosecution policy allows victims to abdicate responsibility for their cases and thereby wrests control from coercive batterers. Advocates and prosecutors observed that when the decision to pursue a prosecution lies in the hands of the victim, often the decision actually resides in the hands of the abusive party. Therefore, no-drop policies effectively deprive the batterer of a powerful coercive tool”).

<sup>18</sup> AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* 81-83 (2020) (discussing the widespread adoption of mandatory arrest policies and their rationales); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996) (laying out then-contemporary arguments for mandatory policies while also recognizing the toll they may take on survivors); *see also* GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 10, at 14 (providing history and context behind the movement for mandatory policies).

<sup>19</sup> Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 280 (1987) (explaining how “instead of the abuser controlling the victim's person or life, the abuser's life and person are instead subjected to control by the state”).

<sup>20</sup> Courtney K. Cross, *Reentering Survivors: Invisible at the Intersection of the Criminal Legal System and the Domestic Violence Movement*, 31 BERKELEY J. GENDER L. & JUST. 60, 95-100 (2016) [hereinafter *Reentering Survivors*] (discussing the myriad of harms survivors have experienced on account of mandatory arrest and no-drop prosecution policies).

freedom.<sup>21</sup> Believing, for a second time, that the criminal legal system can suddenly develop the agility and insight needed to navigate the idiosyncratic and complex dynamics of interpersonal coercion is naïve. Doing so may benefit some survivors but enacting coercive control legislation will further imperil already marginalized survivors, especially when these laws are used against them rather than to protect them. This is particularly true in light of the fact that coercive control criminal laws would operate in conjunction with the mandatory procedural policies already in place. With the ways we have seen mandatory arrest and no-drop prosecution policies used to target survivors and wreak absolute havoc in their lives, we must resist any temptation to implement more criminalization. To advocate for the passage of new criminal laws at this juncture would be an explicit admission that the domestic violence movement cares more about upholding and expanding the carceral state than we do for protecting and supporting marginalized survivors of abuse.

For an example of how these laws could backfire, we need only reexamine FKA twigs' experience. Shia LaBeouf is a wealthy, well-known, white American actor; twigs, while widely respected in creative circles, is a Black non-citizen who is open about her sexuality and may be best known for her prior engagement to *Twilight* star Robert Pattinson.<sup>22</sup> LaBeouf spent the relationship insisting he was the victim being controlled by her manipulation: had he gone to the police first — perhaps to get ahead of any claims of physical violence — twigs would have had to defend herself against both his allegations and stereotypes and value judgments about her identity that would no doubt play a role in any investigation or trial. An arrest — which would have been mandatory had the acclaimed actor's version of events been believed —

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<sup>21</sup> Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 431 (2003) (arguing nearly 20 years ago that "[t]he negative impacts on communities of color, of all classes, and on poor people, of all ethnicities, were entirely predictable many years ago. Racial disparities were already well established throughout the criminal justice system at the time battered women's advocates started working for more reliance on the system. They are starker now"). This observation remains true today.

<sup>22</sup> Carly Stern, *"I Don't Keep My Sexy on the Down-Low – I Throb": Robert Pattinson's Rumored Fiancée FKA Twigs Discusses Her Sexuality – and Her Future Kids – as She Covers Paper Magazine*, DAILYMAIL.COM (Oct. 7, 2015, 10:28 EST), <https://www.dailymail.co.uk/femail/article-3263561/I-don-t-sexy-low-throb-Robert-Pattinson-s-rumored-fianc-e-FKA-twigs-discusses-sexuality-future-kids-covers-Paper-magazine.html> [<https://perma.cc/7AY7-VF6T>] (FKA twigs saying of her own sexual energy "I throb. . . . Do you know what I mean? I have that throbbing energy, and I accept it, and I harness it when I need to").

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would have impacted both her rising career and her status in the United States, to say nothing of the consequences of a trial or conviction.<sup>23</sup> Had she gone to the police first, these same stereotypes and sources of skepticism would have pervaded the investigation into her claims and his counterclaims.<sup>24</sup>

This Article uses the timely example of coercive control legislation to highlight the inadequacies of the criminal legal system in addressing intimate partner violence. Part I explores the evolution of our current social understanding of what does and does not constitute domestic violence within relationships, paying particular attention to the distinct importance of motive and impact while also emphasizing how much remains unknown about domestic violence as a social phenomenon. Part II examines how the criminal legal system came to define and prohibit domestic violence. It highlights how the emphasis on bright-line rules diverges significantly from the more nuanced non-legal conceptions of domestic violence. Part III analyzes different scholarly proposals for criminalizing coercive control that have emerged during the twenty-first century, including current advocacy around enacting laws similar to those adopted in the England, Scotland, and Ireland. It then discusses currently pending coercive control criminal laws in state legislatures. Part IV analyzes the pitfalls of the last attempt at incorporating coercion-based policies into domestic violence criminal law via mandatory arrest and no-drop prosecution policies, predicting parallel challenges and consequences. Part V argues against criminalizing coercive control in the United States and discusses how these laws will imperil survivors via both prosecutions against their abusive partners and against survivors themselves. It emphasizes how gender and race-based stereotypes (particularly when intersecting) will result in coercive control laws being used to criminalize survivors rather than protect them. The Article concludes by urging those in the domestic violence movement to oppose the criminalization of coercive control and to advocate instead for the ratcheting down of the domestic violence criminal legal apparatus.

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<sup>23</sup> Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 829 (2015) (describing the ways in which “arrests play a significant role in shaping how immigration enforcement unfolds today”).

<sup>24</sup> ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 19-42 (Beacon Press 2017) (discussing how the history of policing Black women has culminated in danger and disbelief for Black women).



## I. DEFINING DOMESTIC VIOLENCE

Debates over what constitutes domestic violence, who commits it, and why it happens have been a part of domestic violence discourse since feminist consciousness raising groups in the late 1960s first illuminated domestic violence as a widespread phenomenon.<sup>25</sup> Even in these early days, there were multiple theories about the nature of domestic violence: while some saw it as a dynamic born out of unequal and inequitable patriarchal structures like marriage, others saw it as being intertwined with other similarly oppressive social forces like poverty and racism.<sup>26</sup> As informal self-help conversations transformed into formal social science research, new theories and explanations developed that attempted to square this early divide and distinguish between various types of domestic violence. Yet even with these advances, we still lack a definitive understanding of the very questions plaguing domestic violence survivors and scholars alike for over 60 years.

A. *Epistemological Origins*

In the late 1960s, feminist consciousness-raising circles highlighted how common it was for women to be abused by their husbands: through sharing their experiences, many women came to understand that the abuse was not their fault but was instead part and parcel of “society’s systematic subordination of women.”<sup>27</sup> Anti-patriarchy activists thus saw intimate partner violence as arising out of the same gender inequality that pervaded the public sphere.<sup>28</sup> Recognizing male privilege as “the root cause of violence against women” enabled women to see how this dynamic undermined their success in the public sphere and jeopardized their safety at home.<sup>29</sup> Some early domestic violence activists came to see marriage itself as an institution that, in perpetuating harmful gender roles and stereotypes, encouraged abuse.<sup>30</sup> These activists desired greater intervention in the home as they fought

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<sup>25</sup> See GOODMAN & EPSTEIN, *supra* note 9, at 31.

<sup>26</sup> GRUBER, *supra* note 18, at 49-58 (reviewing early writings and speeches from the 1970s to highlight this tension between anti-patriarchy and anti-poverty activists).

<sup>27</sup> GOODMAN & EPSTEIN, *supra* note 9, at 31.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 32.

<sup>30</sup> DEL MARTIN, BATTERED WIVES 154 (1976) (“The basic problem, as I see it, is the institution of marriage itself and the way in which women and men are socialized to act out dominant-submissive roles that in and of themselves invite abuse.”).

for more regulation in the workplace — seeing both as necessary to achieve equality.<sup>31</sup>

This message that women’s private lives should be subject to scrutiny intervention in the name of women’s equality did not resonate with all women: many Black anti-violence activists were loath to invite intervention into their homes, where they and their partners were already afforded less privacy and experienced greater state regulation.<sup>32</sup> Rather than seeing abuse as being caused solely or primarily by patriarchy, they viewed white supremacy and economic inequality as critical causal forces.<sup>33</sup> They advocated that marginalization impacted abuse, undermining the “everywoman” idea<sup>34</sup> that all women were equally vulnerable to domestic violence.<sup>35</sup> While these activists recognized the role of patriarchy in domestic violence, they argued that other oppressive forces play a significant role in causing abuse and creating vulnerabilities for experiencing abuse, which has in fact been borne out by social science data.<sup>36</sup>

While tensions existed between these two camps, both recognized the significant impact that social structures and social location had on both

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<sup>31</sup> GOODMAN & EPSTEIN, *supra* note 9, at 32.

<sup>32</sup> GRUBER, *supra* note 18, at 52.

<sup>33</sup> *Id.* at 52-53; *cf.* GOODMAN & EPSTEIN, *supra* note 9, at 39 (noting that early movements viewed “differences among women as quantitative rather than qualitative; an individual woman might be more or less oppressed than any other, but her experiences were not seen as substantively different”).

<sup>34</sup> BETH RICHE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION 90* (N.Y. Univ. Press 2012).

<sup>35</sup> GRUBER, *supra* note 18, at 51-58 (highlighting this tension through examining different speakers’ remarks at the 1978 Commission on Civil Rights hearing on domestic violence).

<sup>36</sup> *See, e.g.*, MICHAEL L. BENSON & GREER L. FOX, *CONCENTRATED DISADVANTAGE, ECONOMIC DISTRESS, AND VIOLENCE AGAINST WOMEN IN INTIMATE RELATIONSHIPS* (2004), <https://www.ojp.gov/pdffiles1/nij/199709.pdf> [<https://perma.cc/JDN4-4T66>] (finding correlations between rates of domestic violence and rates of male unemployment); MATTHEW R. DUROSE, CAROLINE WOLF HARLOW, PATRICK A. LANGAN, MARK MOTIVANS, RAMONA R. RANTALA & ERICA L. SMITH, *FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES* (2005), <https://bjs.ojp.gov/content/pub/pdf/fvs.pdf> [<https://perma.cc/83QK-5KGZ>] (showing that there was a higher number of victims from households making less than \$7500 than households making more than \$75000). For a discussion of the relationship between social and individuals determinants of violence generally, see DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 67* (The New Press 2019) (noting that “[d]ecades of research about the individual-level causes of violence (as opposed to community conditions like poverty and disenfranchisement) has demonstrated four key drivers: shame, isolation, exposure to violence, and a diminished ability to meet one’s economic needs”).

survivors and their abusive partners. Over time, however, the focus on understanding violence shifted away from an emphasis on the role that structures and institutions play in perpetuating and condoning violence onto a much more individualized understanding of abuse.<sup>37</sup>

### B. Domestic Violence Typologies

Conversations about the causes of domestic violence have existed and evolved since the beginning of the battered women's movement, as have conversations about who engages in abusive behavior.<sup>38</sup> Advocates and scholars have vehemently disagreed about who engages in abusive behavior: some advocates argue that men and women commit domestic violence equally while others argue that men commit significantly more domestic violence than women.<sup>39</sup> Importantly, both camps cite to data that supports their positions, causing disarray among which position is correct.<sup>40</sup> However, in the early 2000s several domestic violence scholars began offering theories that square the two positions by suggesting that there are different types of violence within relationships that men and women commit at different rates.<sup>41</sup> Domestic violence typologies are numerous in number, and advocates and scholars still

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<sup>37</sup> JOSHUA M. PRICE, STRUCTURAL VIOLENCE: HIDDEN BRUTALITY IN THE LIVES OF WOMEN 23 (2012) (observing how “over the past ten years the nature of women’s groups offered by shelters and battered women’s programs has evolved from a cultural and social analysis of violence to a much more personal psychological approach”).

<sup>38</sup> For in-depth discussions about this heated debate, see GOODMAN & EPSTEIN, *supra* note 9, at 13-15 (arguing that claims that women commit as much domestic violence as men fail to account for the nature, severity, and intent of the violence); GRUBER, *supra* note 18, at 76-81 (providing great detail about the family violence cohort which emphasized women’s engagement in violence). See generally Russell P. Dobash, R. Emerson Dobash, Margo Wilson & Martin Daly, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 71-91 (1992) (providing an overview as to how domestic violence, and wife-beating specifically, has been extensively surveyed and investigated); L. Kevin Hamberger & Sadie E. Larsen, *Men’s and Women’s Experience of Intimate Partner Violence: A Review of Ten Years of Comparative Studies in Clinical Samples: Part I*, 30 J. FAM. VIOLENCE 699, 699-717 (2015) (finding that “[w]hile both men and women participate in emotional abuse tactics, the type and quality appear to differ between the sexes; men tend to use tactics that threaten life and inhibit partner autonomy whereas women primarily use tactics that consist of yelling and shouting”); Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 284 (1995) (claiming that family violence and feminist researchers disagree because they are analyzing different phenomenon).

<sup>39</sup> See sources cited *supra* note 38.

<sup>40</sup> GOODMARK, A TROUBLED MARRIAGE, *supra* note 10, at 38.

<sup>41</sup> *Id.*

disagree over which typology is veracious.<sup>42</sup> However, many advocates, lawyers, and social services assist survivors in modern day by applying these domestic violence typologies.<sup>43</sup> Therefore, examining and understanding different domestic violence typologies and how they have been modified throughout time is imperative to sufficiently aiding survivors as well as ensuring the domestic violence field evolves rigorously.

In 2005, psychologists Mary Ann Dutton and Lisa Goodman proposed a model of coercive control employed by men through a series of tactics that serve the ultimate goal of controlling nearly every aspect of women's life and ensuring compliance with demands through use of threatened negative outcomes.<sup>44</sup> The central elements of Dutton and Goodman's model included social ecology; setting the stage; coercion involving a demand and a credible threat for noncompliance; surveillance; delivery of threatened consequences; and the victim's behavioral and emotional responses to coercion.<sup>45</sup> Importantly, these elements "occur in spiraling and overlapping sequences to establish an overall situation of coercive control."<sup>46</sup> The model further identifies eight domains of control in which an abuser can make demands: personal activities/appearance, support/social life/family, household, work/economic/resources, health, intimate relationship, immigration, and children.<sup>47</sup> For Goodman and Dutton, coercion exists at the core of domestic violence, and they advocated for a deeper understanding within the field of what exactly coercive control is and how it impacts survivors.<sup>48</sup>

In 2006, activists Ellen Pence and Shamita Das Dasgupta offered five types of relationship violence: battering, resistive/reactive violence, situational violence, pathological violence, and antisocial violence.<sup>49</sup> In this conception, battering is very motive-driven: in attempts to exert dominance and control, abusive partners employ a range of tactics

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<sup>42</sup> *Id.* at 30-50 (analyzing different social science definitions of domestic violence and typologies).

<sup>43</sup> *Id.*

<sup>44</sup> Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *SEX ROLES* 743, 746-47 (2005).

<sup>45</sup> *Id.* at 746.

<sup>46</sup> *Id.* at 743.

<sup>47</sup> *Id.* at 747.

<sup>48</sup> *Id.* at 744.

<sup>49</sup> ELLEN PENCE & SHAMITA DAS DASGUPTA, *PRAXIS INT'L, RE-EXAMINING 'BATTERING': ARE ALL ACTS OF VIOLENCE AGAINST INTIMATE PARTNERS THE SAME?* 5-14 (2006), [http://www.biscmi.org/wp-content/uploads/2015/05/FINAL\\_Article\\_Reexamining\\_Battering\\_082006.pdf](http://www.biscmi.org/wp-content/uploads/2015/05/FINAL_Article_Reexamining_Battering_082006.pdf) [<https://perma.cc/MW6B-GGFX>].

including coercion, intimidation, threats, and physical violence.<sup>50</sup> They argue that this behavior is related to male privilege and patriarchal gender norms.<sup>51</sup> Resistive/reactive violence is described as acts of violence used by people (particularly women) experiencing violence to either stop abuse while it is happening or reassert power in the relationship to protect themselves and their children.<sup>52</sup> Situational violence consists of violence employed as a coping or response mechanism triggered by specific situations and not used to assert dominance generally.<sup>53</sup> Pathological violence is employed by individuals suffering from behavioral health challenges that causes or exacerbates violent tendencies.<sup>54</sup> Finally, anti-social violence is linked to an antisocial personality disorder and the violence is not limited to intimate partners.<sup>55</sup> Pence and Das Dasgupta further clarify that “the categories are not always mutually exclusive” and that some violence may not fit squarely into the categories in certain circumstances.<sup>56</sup> These statements further show the constant evolving of domestic violence typologies and their application.

In 2007, sociologist and social worker Evan Stark published his theories on coercive control.<sup>57</sup> He argued that men coerce or compel compliance from women by engaging in numerous controlling tactics including intimidation, deprivation, exploitation, and demands.<sup>58</sup> Stark conceives of coercive control as undermining women’s liberty as men vie for total dominance, which requires women cede their privacy, preferences, and, ultimately, personhood to their abusive partners.<sup>59</sup> While physical violence may be present in coercively controlling relationships, it is not a necessary component and may not ever be employed in some relationships.<sup>60</sup> He notes that gender discrimination

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<sup>50</sup> *Id.* at 5-9.

<sup>51</sup> *Id.* at 7.

<sup>52</sup> *Id.* at 9-11.

<sup>53</sup> *Id.* at 11-12.

<sup>54</sup> *Id.* at 12-13.

<sup>55</sup> *Id.* at 13-14.

<sup>56</sup> *Id.* at 14.

<sup>57</sup> STARK, COERCIVE CONTROL, *supra* note 5, at 228.

<sup>58</sup> *Id.* at 228-29.

<sup>59</sup> *Id.* at 367.

<sup>60</sup> Evan Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*, in THE ROUTLEDGE HANDBOOK OF GENDER AND VIOLENCE 15 (Nancy Lombard ed., 2018).

enables men move beyond physical abuse into more three-dimensional control, an ability that most women in heterosexual relationships lack.<sup>61</sup>

In 2008, sociologist Michael Johnson proposed the following four domestic violence typologies: intimate terrorism, situational couple violence, violent resistance, and mutual violent control.<sup>62</sup> Intimate terrorism shares much with Pence and Dasgupta's battering and Stark's coercive control: intimate partners — in Johnson's research, predominantly men in heterosexual relationships<sup>63</sup> — use coercive and violent tactics to achieve constant dominance over their partners.<sup>64</sup> Situational couple violence consists of non-coercive violence that is triggered by particular conflicts and is not aimed at exerting long-term dominance.<sup>65</sup> This form of violence has been found to be committed by men and women at similar rates.<sup>66</sup> Violent resistance, while broader than the legal definition of self-defense, is also violence that is meant to defend or respond to violence and is not used to coerce or achieve dominance.<sup>67</sup> Finally, mutual violence consists of a very small set of relationship violence in which both partners are attempting to exert intimate terrorism over the other.<sup>68</sup>

These overlapping theories have proved instrumental in bringing the importance of motive, intent, and impact into the discussion of what does (and does not) constitute domestic violence. In the less than twenty years since these typologies were introduced, much more emphasis has been placed on understanding the nature of violence in relationships and responding to different types of violence differently, specifically taking coercion-based violence more seriously and treating resistive violence more leniently.<sup>69</sup> It is important to note, however, that

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<sup>61</sup> STARK, COERCIVE CONTROL, *supra* note 5, at 105 (observing that “[a]symmetry in sexual power gives men (but rarely women) the social facility to use coercive control to entrap and subordinate partners. Men and women are unequal in battering not because they are unequal in their capacities for violence but because sexual discrimination allows men privileged access to the material and social resources needed to gain advantage in power struggles”).

<sup>62</sup> MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE, INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE (Northeastern Univ. Press 2008).

<sup>63</sup> *Id.* at 105.

<sup>64</sup> *Id.* at 7-10.

<sup>65</sup> *Id.* at 11-12.

<sup>66</sup> *Id.* at 108.

<sup>67</sup> *Id.* at 10-11.

<sup>68</sup> *Id.* at 12.

<sup>69</sup> See, e.g., Debra Poggrund Stark, Jessica M. Choplin & Sarah Elizabeth Wellard, *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform*, 26 MICH. J. GENDER & L. 1, 113 (2019) (recommending differences

not all in the domestic violence field are convinced: not only do the separate typologies reveal a lack of consensus among leading scholars, others have argued that they represent distinctions without differences, arguing that there can be no violence without some undercurrent of coercion.<sup>70</sup>

### C. Gaps in Our Current Understanding

Understanding patterns and trends across abusive relationships is extremely valuable: these insights can help survivors recognize red flags in their relationships and can aid advocates and attorneys in safety planning and exploring the effectiveness of legal and non-legal options with their clients.<sup>71</sup> There is, however, always a tension between clearly defined typologies and the individualized nature of abuse. The evolution of domestic violence typologies has moved in the direction of becoming both more nuanced and inclusive of a wider array of experiences. Increasing attention has rightly been paid to what abuse looks like and what impact it has on members of various vulnerable communities, with ever greater recognition of the challenges faced by survivors with intersectionally marginalized identities. Without denying the value that comes from these heightened understandings, it is also imperative that we not lose sight of individual survivors and the ways their identities interact with and impact the abuse they experience, the injuries it causes, the options they may or may not be able to pursue, and what they need to heal.<sup>72</sup>

Additionally, much of the data that has been used to develop these typologies has involved only straight, cisgender couples. There are far

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in custody determinations and parenting plans depending on the type of domestic violence found between a given party).

<sup>70</sup> See, e.g., Joan S. Meier, *Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation*, 70 RUTGERS U. L. REV. 115, 157-61 (2017) (working to debunk the separation between situational couple violence and coercive control, arguing that violence and abuse does not really exist without some element of coercion and, therefore, situational couple violence should not be treated more leniently than other types of abuse in the custody context).

<sup>71</sup> For example, my students and I extensively discuss how protection from abuse orders may prove to be a more useful and less dangerous tool in situational couple violence scenarios than in relationships involving coercive control.

<sup>72</sup> See, e.g., PRICE, *supra* note 37, at 147 (discussing “such a multifaceted phenomenon as violence against women (Das 2008), as we continue to learn and discern the plight of specific women, groups of women, and particular communities, we must remain pliant enough to adjust our responses, rethink our tactics, reapply our energies, and reconsider our paradigms and assumptions of the world around us”).

fewer studies done examining violence in same sex couples<sup>73</sup> and even less about domestic violence against trans and nonbinary survivors.<sup>74</sup> What domestic violence looks like in relationships involving individuals who do not identify as straight or cisgender is critically important, and current typologies should not be presumed to map onto relationships that are hugely underrepresented in the data that make up our models.

Domestic violence is a complex problem that looks, feels, and harms differently depending on an individual's circumstances — including their proximity to myriad sources of power and oppression.<sup>75</sup> These individualized dynamics, which were recognized by some of the early pioneers of the anti-domestic violence movement, cannot be overlooked. Similarly, those early activists understood how domestic violence could be enmeshed with and within institutional violence, which is another layer of insight that falls away when relying only on patterns within relationships.<sup>76</sup> As long-time domestic violence scholar and professor Janice Ristock observes: “all monolithic understandings of abuse are wrong... ‘Mutual abuse’ is wrong, ‘power and control’ is wrong, ‘effects of patriarchy’ is wrong when indiscriminately applied.”<sup>77</sup>

Domestic violence typologies are incredibly beneficial jumping off points because they can help advocates ask better questions and probe for details that may not be included in a survivor's initial narrative. What's going on beneath the surface of this attack? What dynamics are in play between these major blow ups? What might the survivor not know to offer up as evidence of abuse? They also help advocates think through what options might be more or less effective when counseling a client. The best use for these typologies is thus to learn more about an individual's experience rather than to define it.

Tremendous gains have been made through the more comprehensive modeling of domestic violence that domestic violence typologies provide, but it would be overly simplistic to assume that our

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<sup>73</sup> Shannon Little, *Challenging Changing Legal Definitions of Family in Same Sex Domestic Violence*, 19 HASTINGS WOMEN'S L.J. 259, 260 (2008) (noting the paucity of domestic violence studies involving same sex couples despite the frequent claim that rates of abuse are equal to those in opposite sex relationships).

<sup>74</sup> Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 59-60 (2013) (explaining how trans folk often go unmentioned and unstudied, even within research purporting to focus on the LGBTQ community).

<sup>75</sup> PRICE, *supra* note 37, at 147.

<sup>76</sup> *Id.* at 143; GRUBER, *supra* note 18, at 193.

<sup>77</sup> JANICE L. RISTOCK, NO MORE SECRETS: VIOLENCE IN LESBIAN RELATIONSHIPS XI (2002).



understanding of domestic violence has reached its best or final form. Much remains unknown about why people employ abuse in relationships and how people experience, process, and respond to that abuse. Different typology schemas offer us models through which we can better understand abuse, but they do not and cannot represent the end of the inquiry — nor should they form the basis for a massive expansion of the criminal legal system.<sup>78</sup>

## II. CRIMINAL LAW'S CONCEPTION OF DOMESTIC VIOLENCE

The domestic violence movement initially took the form of shelters created by survivors for other battered women in the late 1960s.<sup>79</sup> These groups rejected the idea of collaborating with the state, which was seen as having protected abusers and ignored survivors for decades if not centuries.<sup>80</sup> However, those advocating for state involvement and legal interventions quickly dominated the mainstream movement.<sup>81</sup> Civil law advocates were successful in both requiring family courts to consider domestic violence when making custody determinations and in creating a new mechanism for relief — domestic violence restraining orders.<sup>82</sup> On the criminal side, advocates demanded that domestic violence be “treated like any other crime,” and brought about the transformation of criminal courts from a rarely utilized tool in the fight against domestic violence to the primary response to such violence.<sup>83</sup>

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<sup>78</sup> See, e.g., GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 10, at 25-26 (arguing that “criminalization may not deter because criminal punishment fails to target the underlying causes of intimate partner violence and therefore cannot change the behavior of those who engage in it. This lack of understanding about why offenders engage in crime is a particular problem in the context of intimate partner violence”).

<sup>79</sup> GOODMAN & EPSTEIN, *supra* note 9, at 31-33.

<sup>80</sup> *Id.* at 36.

<sup>81</sup> *Id.* (noting that “[s]ome activists began to believe that the movement would not achieve full political legitimacy in the absence of government sponsorship. They also felt strongly that the state needed to take responsibility for a problem of such massive proportions. Reluctantly, activists began to look to the state for financial assistance as well as for legal and programmatic interventions”); see also GRUBER, *supra* note 18, at 45 (describing how “there was a powerful and ultimately triumphant group I call ‘legal feminists’ who pursued their antibattering agenda through law reform and litigation. Legal feminists were civil rights lawyers and victims’ advocates, and they analyzed the problem of battering as a failure of the law, specifically the ineffectuality of criminal law”).

<sup>82</sup> GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 10, at 17.

<sup>83</sup> GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 10, at 1 (opening with the argument that “For the last thirty years, the United States has relied primarily on one tool to combat intimate partner violence — the criminal legal system”).

### A. Criminalizing Abuse

The demand by many “carceral feminists”<sup>84</sup> to use criminal law to reign in abusive behavior and redistribute the power of the state to survivors gained traction quickly.<sup>85</sup> Multiple trends arose in the 1980s that have come to define the current domestic violence criminal legal landscape. In 1984, the Attorney General’s Task Force on Family Violence supported strengthening domestic violence criminal laws, emphasizing that criminal interventions were the solution to domestic violence.<sup>86</sup> During this time, states began not just enforcing general criminal laws in situations involving intimate partners but also creating domestic violence specific crimes: “[s]tates enacted laws specifically criminalizing certain behaviors when those behaviors targeted intimate partners and increased sentences for crimes committed against intimate partners.”<sup>87</sup> By the 1990s, states and municipalities began imposing requirements first on police departments and then on prosecutors to ensure that these criminal laws were actually enforced by police and district attorneys.<sup>88</sup> In addition to the rise of domestic violence specific substantive criminal laws, violations of domestic violence restraining orders are treated as both criminal contempt of the order and as a separate, new crime.

In 1984 the United States also saw the federal passage of the Family Violence Prevention and Services Act; this law is widely seen as a precursor to the Violence against Women Act of 1994 (“VAWA”), which refocused federal funding priorities on the legal system with a

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<sup>84</sup> See, e.g., Mimi Kim, *The Coupling and Decoupling of Safety and Crime Control: An Anti-Violence Movement Timeline*, in *THE POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE RESPONSES* 15 (Jane K. Stoeber ed., 2019) (noting that “the term ‘carceral feminism’ was coined to describe the close collaboration between feminist social movements and the carceral arm of the state”).

<sup>85</sup> GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 10, at 16 (“Making domestic violence illegal and actionable sent the message that such abuse was not socially sanctioned and would, in fact, invite the coercive power of the state on behalf of the woman subjected to abuse.”); GRUBER, *supra* note 18, at 62 (observing that “[a]ccordingly, in the legal feminist narrative, the cause of battering was a ‘simple’ matter of law failing to control certain men’s violent nature. Men beat women because society and its institutions encourage and permit woman-assault. The solution to battering was also simple: stronger criminal laws”).

<sup>86</sup> WILLIAM L. HART, JOHN ASHCROFT, ANN BURGESS, NEWMAN FLANAGAN, URSULA MEESE, CATHERINE MILTON, CLYDE NARRAMORE, CHIEF RUBEN ORTEGA & FRANCIS SEWARD, *ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT*, at 11 (1984).

<sup>87</sup> GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 10, at 18.

<sup>88</sup> See *infra* Part IV.

particular emphasis on the criminal legal system.<sup>89</sup> VAWA has come to be seen by many as the moment when the domestic violence movement officially became enmeshed in the larger tough on crime movement that has deeply contributed to the widespread problem of mass incarceration.<sup>90</sup> At its inception, over 60% of VAWA funding was dedicated to the criminal legal system: this number has only increased, with 85% of funding going specifically to policing and punishment by 2013.<sup>91</sup> This expansion of federal dollars funding the criminal legal system has come at the expense of community-based social services, which are currently funded less through VAWA than when it was first passed.<sup>92</sup>

It is critically important to note that the criminal law-minded faction of the domestic violence movement was met with a great deal of opposition both before formal ties were made with the state and while these developments were taking place. Women of color, other marginalized survivors, and their allies who recognized the deleterious impact of state intervention all decried this alliance and predicted many of the far-reaching consequences that resulted from it.<sup>93</sup>

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<sup>89</sup> GOODMAN & EPSTEIN, *supra* note 9, at 36-37; GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 10, at 18-19.

<sup>90</sup> See Kim, *supra* note 84, at 15.

<sup>91</sup> GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 10, at 2-3 (reporting how “[s]ince VAWA’s passage, the Office on Violence against Women has awarded \$5.7 billion in grants. The majority of that funding has been dedicated to the criminal legal system, and over time the disparity in funding between grants to the criminal legal system and those to social services has grown substantially. In 1994, 62 percent of VAWA funds were dedicated to the criminal legal system and 38 percent went to social services. By 2013, social services authorizations made up only about 15 percent of VAWA grants. Fewer total dollars were devoted to social services in the 2013 iteration of VAWA than in the original 1994 legislation”).

<sup>92</sup> *Id.*

<sup>93</sup> GRUBER, *supra* note 18, at 92 (discussing formal opposition to a criminal legal response as early as 1978); see also EMILY L. THUMA, *ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE* 7 (Univ. of Ill. Press 2019) (analyzing primary sources to provide “an alternative history of feminism and the carceral state by shifting the focus to spaces and places at the edges of the mainstream antiviolenence movement: prisoner defense campaigns, women’s prisons, multi-issue coalitions, and radical print culture. Indeed, the various organizing efforts and debates tracked in this book constitute important evidence that the process of state cooptation through ‘liberal law and order’ was neither unchallenged by some activists nor unwitting on the part of others”).

B. *The Violent Incident Model of Criminal Law*

While the criminal legal system has expanded to specifically address the arrest, prosecution, and punishment of those accused of committing domestic violence, it has not evolved. The same basic tools that have long been used to prosecute non-domestic violence crimes were adopted and augmented to fit the expressed needs of the domestic violence movement. Comparing domestic violence to other forms of assault<sup>94</sup> and demanding that the state treat domestic violence like any other crime was far more successful<sup>95</sup> than it was effective.<sup>96</sup> Due to the intimate and intertwined relationship between the complaining witness and the defendant, domestic violence is inherently different from other crimes. Even a domestic violence assault is not the same as a non-domestic violence assault: the players have both a history and a potential future together, and the act is unlikely to be a singular occurrence. Bringing domestic violence within the purview of the criminal legal system did not create new and innovative tools to help survivors, it merely forced an uneasy fit between criminal law and domestic violence.

Criminal law defines domestic violence “primarily as physical violence and threats of physical violence.”<sup>97</sup> Yet, as discussed above, the crux of domestic violence is as much about what happens between these moments of physical violence as it is about what happens during them.

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<sup>94</sup> Hanna, *supra* note 18, at 1889 (noting that “prosecutors should understand that, from a legal perspective, the violence in battering relationships is no different than violence in other situations”).

<sup>95</sup> Stark, *Looking Beyond Domestic Violence*, *supra* note 8, at 200 (describing how “[b]ased on an analogy between partner abuse and assaults by strangers, the advocacy movement demanded that law enforcement provide battered women with the ‘equal protection’ they were guaranteed by the 14th Amendment to the U.S. Constitution. This approach was enormously successful in winning policy reforms”).

<sup>96</sup> See, e.g., BETH RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 12 (1996) (observing that “[b]y likening it to other forms of assault, we believed that the issue would be taken more seriously by criminal justice authorities, social service providers and the general public. While many of us were leery of too much emphasis on criminal justice intervention as a solution, in retrospect we did not pay enough attention to the consequences of adopting the rhetorical that ‘violence against women is a crime’”).

<sup>97</sup> GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 10, at 25; see also GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 10, at 40 (“Despite the development of the social science research, the law continues to define domestic violence largely around physical abuse, assault, threats, sexual abuse, and forcible restraint. The vast majority of state criminal laws define domestic violence as physical injury, battery, or assault: a smaller number also include acts with intent to cause fear of bodily harm in their definitions.”).

The criminal legal system as it is currently structured is incapable of analyzing these highly individualized interstices, and much is lost as incidents of violence are quantified and isolated from the larger context.<sup>98</sup>

Sociologist Evan Stark, a leader in the exploration and analysis of coercive control in abusive relationships, has coined the way criminal law addresses domestic violence as “the violent incident model.”<sup>99</sup> He notes how “[d]omestic violence laws target discrete assaults/threats and carry the implication, only occasionally spelled out in criminal statutes or service protocols, that the severity of abuse can be gauged by applying a calculus of physical harms to these incidents.”<sup>100</sup> He notes that there are three major limits to this model: that partner assaults are rarely isolated incidents and should not be treated as such; that, contrary to research indicating the devastating impact of non-physical abuse, it only gauges severity in terms of injury; and that most survivors seeking help are experiencing non-physical abuse as well as physical abuse, which rarely make their way into police reports let alone criminal prosecutions.<sup>101</sup> To Stark, this model is underinclusive because it cannot address non-physical violence and abuse with minimal physical injury. Prosecutions are only likely when there has been demonstrable physical violence and, even still, these prosecutions won’t include charges encompassing the coercively controlling tactics complaining witnesses are also experiencing. For Stark, this model no doubt results in too few prosecutions and too lenient sentences, made evident by his desire to criminalize coercive control.<sup>102</sup>

The violent incident model is not effective at recognizing and combatting domestic violence solely because of the amount of non-physical abuse that slips through the cracks. It is also overinclusive and inaccurate because it punishes all acts of violence within a relationship as domestic violence. As law professor Tamara Kuennen observed recently:

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<sup>98</sup> See PRICE, *supra* note 37, at 103-04 (noting how “a paradigm that depends on quantifying physical abuse does not admit the full texture of women’s experiences of violence. Studying violence against women requires more than tallying incidents of abuse. Understanding violence requires an exploration of the terror, of the anxiety and apprehension that suffuse an atmosphere”).

<sup>99</sup> Stark, *Looking Beyond Domestic Violence*, *supra* note 8, at 200.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 204-06.

<sup>102</sup> See Stark & Hester, *supra* note 15, at 88 (discussing the United Kingdom’s efforts to criminalize coercive control and describing the law in Scotland as “innovative”).

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Anti-domestic violence advocates' specific message should be that while we take all violence in relationships seriously, we target the subset of relationship violence used by one person to gain power and control over another. Specifically, we believe that the intent of the person defines what is or is not "domestic violence" and that a pattern of behaviors, rather than a one-off incident of violence, demonstrates this intent.<sup>103</sup>

The criminal legal system cannot make this distinction: just as it cannot redress non-violent acts of abuse, so too is it unable to distinguish between a motive to lash out and a motive to control or dominate. Nor can it differentiate between acts committed by a primary aggressor versus acts committed by a survivor that may fall within the typology of reactive/resistance violence but outside the scope of legal self-defense.<sup>104</sup> As such, acts that may take place in the absence of coercive dynamics nonetheless receive the same heightened sentencing as those that do. Kuennen illuminates this contradiction: "In law, one act of violence, regardless of an intimate partner's intent, is domestic violence. Neither a pattern nor a motive is required. At the same time, many acts of coercion that do not rise to the level of physical violence may go unrecognized by law."<sup>105</sup>

Unlike Stark, however, who argues for an expansion of criminal law to resolve this tension, Kuennen urges a more thoughtful evaluation about what is and is not domestic violence and a greater transparency around what these distinctions mean in the legislative reform context.<sup>106</sup> This Article goes further, calling for the scaling back of both the scope of domestic violence criminal laws and overall reliance on the criminal legal system. The first step of this campaign must be to explicitly advocate against any further expansion of criminal law under the guise of protecting survivors. This is not merely an intellectual exercise: proposals that would create new, substantive domestic violence criminal laws exist not just in academic literature but also in several countries' criminal laws. Moreover, states have begun incorporating coercive control into civil statutes and are actively considering criminal legislation as well.

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<sup>103</sup> Kuennen, *supra* note 7, at 69.

<sup>104</sup> GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 10, at 46 ("The incident-based focus of current law often leads to inappropriate punishment for women engaged in violent resistance against their abusive partners.").

<sup>105</sup> Kuennen, *supra* note 7, at 44.

<sup>106</sup> *Id.* at 79.

## III. CURRENT ATTEMPTS TO ADDRESS COERCION IN CRIMINAL LAW

For over twenty years, domestic violence scholars and advocates have proposed and supported policies that would criminalize various forms of coercive control. Since the early 2000s leading domestic violence legal scholars have advocated for the expansion of criminal law to include prohibitions against coercively controlling behavior. While some of those scholars have moved away from their proposals, others have taken up the call: with legislative successes in several British Commonwealth countries, some in the domestic violence movement in the United States have begun to urge for the adoption of similar criminal laws here, a call that has gained traction at the state level.

A. *A Steady Stream of Scholarly Proposals*

Scholars have been debating how to define domestic violence since the earliest days of the movement.<sup>107</sup> For many, this has involved interrogating the goals of the legal response to domestic violence and arguing that preventing physical abuse is insufficient: instead the law must endeavor to prevent or punish the behavior that many see as the crux of domestic violence — coercive control.<sup>108</sup> These calls have been consistent throughout the twenty-first century, even as critiques of criminal legal intervention have become increasingly mainstream.

In 2004, Deborah Tuerkheimer proposed a crime of battering that aimed to address coercive control.<sup>109</sup> She proposed language that made it illegal for a defendant to engage in a pattern of behavior that the defendant “knows or reasonably should know that such conduct is likely to result in substantial power or control” over the survivor.<sup>110</sup> She further proposed that at least two acts within the course of conduct must constitute a crime in the prosecuting jurisdiction.<sup>111</sup> This proposal

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<sup>107</sup> See *supra* Part I.

<sup>108</sup> GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 10, at 45 (“[D]omestic violence law could have more ambitious goals: to prevent or alleviate coercive control, to stop psychological intimidation and degradation, and to protect the liberty and autonomy of women. To achieve these broader goals, current definitions of domestic violence must be expanded.”).

<sup>109</sup> Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1019 (2004) (“Bringing law into alignment with social reality requires a statutory definition of battering that encompasses a course of conduct characterized by power and control. Unless we are willing to concede that battering lies beyond the reach of the law, domestic violence must be reconceptualized.”).

<sup>110</sup> *Id.* at 1020.

<sup>111</sup> *Id.*

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all but required at least two acts of physical violence or threats, but introduced a course of conduct proposal in which non-physical acts of abuse could explicitly be considered. While she notes in a candid discussion of potential critiques of her proposal that “concerns about too radically expanding criminal law boundaries should not be dismissed,” she concludes that “unless we are prepared to consign battered women to a place beyond the reach of criminal justice, a law that truly condemns domestic violence is better than one that does not.”<sup>112</sup>

In 2007, Alafair Burke explicitly built off of Tuerkheimer’s proposal in offering her own: that of coercive domestic violence.<sup>113</sup> She described this crime as any attempt “to gain power or control over an intimate partner through a pattern of domestic violence,” defining gaining power or control as “restrict[ing] another’s freedom of action” and defining a pattern of domestic violence as “two or more incidents of assault, harassment, menacing, kidnapping, or any sexual offense, or any attempts to commit such offenses, committed against the same intimate partner.”<sup>114</sup> Here, motive and impact are critical, although the underlying prohibited acts remain rather traditional. Burke also noted how the over-criminalization critique might cut against the passage of her proposal but argued that passage would express the societal condemnation of domestic violence while also filling an important legislative gap caused by an earlier lack of recognition around the expansive nature of domestic violence.<sup>115</sup>

In 2012, Leigh Goodmark — currently a leading scholar in the movement against carceral responses to domestic violence<sup>116</sup> — also explored this possibility, observing that “[o]ne way to address many of

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<sup>112</sup> *Id.* at 1028-30.

<sup>113</sup> Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 601 (2007).

<sup>114</sup> *Id.* at 601-02.

<sup>115</sup> *Id.* at 585-88.

<sup>116</sup> GOODMARK, A TROUBLED MARRIAGE, *supra* note 10. While Goodmark’s 2018 book described “complete decriminalization of domestic violence as unlikely and probably unwise,” GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 10, at 142, she has since embraced decriminalizing domestic violence crimes, saying in an interview about that line in her book that “I would no longer say that I think it’s unwise. I think that my views on a lot of things have changed significantly in the last two years [when the book was published]. . . . I wouldn’t say that anymore because I do believe that the criminal legal system does so much more harm than any potential benefit that it could give, that I don’t think it’s unwise anymore.” For Harriet, *What Should Happen to Abusers if We Don’t Lock Them Up? With Professor Leigh Goodmark*, YOUTUBE (July 8, 2020), <https://www.youtube.com/watch?v=vmZqyYFudVg&t=3339s> [<https://perma.cc/67R3-7Q38>]. Her Twitter handle is currently “Recovering Carceral Feminist- Ask Me How!”



these concerns is to define coercion around the experience of the targeted woman, rather than around the intent of the perpetrator. Defining coercion from the woman's perspective acknowledges just how contextual and subjective abuse can be and that the amount of coercion needed to exert control varies depending upon the woman involved.<sup>117</sup> While she recognized the potential for due process concerns, at the time she suggested that careful statutory drafting could allow for such a shift in definitions within both criminal and civil law.<sup>118</sup> For Goodmark, as for Tuerkmeier and Burke, the goal for this proposal was to push the criminal legal system away from the violent incident model and toward a model that more accurately reflected and encompassed what is known about the complexities of domestic violence, particularly the ways in which abuse exists across time and often occurs through multiple non-physical tactics.<sup>119</sup>

While these particular scholars may no longer be actively advocating for these measures, their arguments are not obsolete. Domestic violence advocates have continued arguing for the adoption of similar proposals as well as measures that go further in expanding the criminal definition of abuse to include acts that are not currently illegal. As recently as 2021, law professor Erin Sheley analyzed the constitutionality of adopting the United Kingdom's legislation and proposed her own mechanism similar to common law fraud by which she argues it would be possible to criminalize coercive control in the United States.<sup>120</sup> Laws passed outside of the United States that criminalize coercively controlling behavior have inspired and amplified the continuation of these conversations.

### *B. Comparative Legislative Approaches*

In 2015, the United Kingdom passed Section 76 of the Serious Crimes Act, which created a new criminal offense outlawing coercively controlling behavior in England and Wales.<sup>121</sup> The language of the law is simple:

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<sup>117</sup> GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 10, at 49.

<sup>118</sup> *Id.* at 52.

<sup>119</sup> *See id.* at 151.

<sup>120</sup> Sheley, *supra* note 11, at 1321 (while also acknowledging "that it is risky for legislatures to punish gender-correlated offenses with specialized legal solutions, rather than recognizing the interrelationship between such offenses and other well-established crimes").

<sup>121</sup> Serious Crime Act 2015, c.9, § 76(1) (UK); *see also* Serious Crime Act 2015, c.9, § 87(1)(e) (UK) (stating that Section 76 only applies to England and Wales).

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- (1) A person (A) commits an offense if--
    - (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
    - (b) At the time of the behaviour, A and B are personally connected,
    - (c) The behaviour has a serious effect on B, and
    - (d) A knows or ought to know that the behaviour will have a serious effect on B.<sup>122</sup>

Alongside the Act, the British Home Office also issued a Statutory Guidance<sup>123</sup> and a Prosecution Guidance,<sup>124</sup> which provide information on coercive control generally, on the new criminal offense, and — for police and prosecutors — on how to build and prove such a case. While the statute itself defines most of the terms therein, it left both prongs of subsection 1(a) undefined, both of which were addressed in the government-issued guides rather than within the statute itself. The Domestic Abuse Act of 2021 expanded the personal connection requirement from requiring current cohabitation of persons A and B to no longer requiring cohabitation, significantly expanding the scope of the law, which has been enforced with greater frequency every year since its passage in 2015.<sup>125</sup>

In 2018, Ireland followed suit, making it illegal to “knowingly and persistently engage in behavior that a) is controlling or coercive, b) has a serious effect on a relevant person, and c) a reasonable person would

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<sup>122</sup> Serious Crime Act 2015, c.9, § 76(1) (UK).

<sup>123</sup> HOME OFF., CONTROLLING OR COERCIVE BEHAVIOR IN AN INTIMATE OR FAMILY RELATIONSHIP: STATUTORY GUIDANCE FRAMEWORK (2015), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482528/Controlling\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf) [<https://perma.cc/XY39-W2DL>].

<sup>124</sup> CROWN PROSECUTION SERV., CONTROLLING OR COERCIVE BEHAVIOR IN AN INTIMATE OR FAMILY RELATIONSHIP (2017), <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship> [<https://perma.cc/WS7E-UM36>].

<sup>125</sup> Domestic Abuse Act 2021, c.17, § (2)(1) (UK); Kingsley Napley, *Controlling and Coercive Behaviour: Widening the Net*, LEXOLOGY (May 7, 2021), <https://www.lexology.com/library/detail.aspx?g=0f65919d-4eb0-8e39-5a1017922299> [<https://perma.cc/Y34Q-DFKR>] (describing the process and noting that while the law has received Royal Assent, it is not yet enforceable); *Policy Paper: Amendment to the Controlling or Coercive Behavior Offence*, GOV.UK, <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/amendment-to-the-controlling-or-coercive-behaviour-offence> (last updated July 11, 2022) (noting significant increases in cases charged under the act every year).

consider likely to have a serious effect on a relevant person.”<sup>126</sup> That same year, Scotland criminalized the offense of “engaging in course of abusive behavior,” and included in its definition of abusive behavior not just violent, threatening, or intimidating behavior but also behavior that involves “making [person] B dependent on or subordinate to [person] A, isolating B from friends, relatives, or other sources of support, controlling, regulating, or monitoring B’s day-to-day activities, depriving B of or restricting B’s freedom of action, [or] frightening, humiliating, degrading, or punishing B.”<sup>127</sup> Australia has also witnessed significant developments in the criminalization of coercive control with Tasmania criminalizing economic abuse and emotional abuse, and other jurisdictions across Australia actively considering similar criminal laws.<sup>128</sup>

Similar control legislation has also recently been introduced in Canada. In 2020<sup>129</sup> and again in 2021,<sup>130</sup> Randall Garrison, an MP from British Columbia, introduced a private member’s bill to the House of Commons proposing amendments to Canada’s Criminal Code that would outlaw controlling or coercive conduct.<sup>131</sup> Pending as of March 2022, this legislation makes it a crime punishable by up to five years for when someone “repeatedly or continuously engages in controlling or coercive conduct towards a person with whom they are connected that they know or ought to know could, in all the circumstances, reasonably

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<sup>126</sup> Domestic Violence Act 2018 (Act No. 6/2018) (Ir.), <https://www.irishstatutebook.ie/eli/2018/act/6/section/39/enacted/en/html#sec39> [https://perma.cc/7DR5-594W].

<sup>127</sup> Domestic Abuse (Scotland) Act 2018, (ASP 5) § 1, ¶ 2.

<sup>128</sup> See H.R. STANDING COMM. ON SOC. POL’Y & LEGAL AFFS., PARLIAMENT OF AUSTL., INQUIRY INTO FAMILY, DOMESTIC AND SEXUAL VIOLENCE, NON-PHYSICAL FORMS OF VIOLENCE 111-28 (2021), [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024577/toc\\_pdf/Inquiryintofamily,domesticandsexualviolence.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024577/toc_pdf/Inquiryintofamily,domesticandsexualviolence.pdf;fileType=application%2Fpdf) [https://perma.cc/Y6TD-BJ34].

<sup>129</sup> An Act to Amend the Criminal Code (Controlling or Coercive Conduct), B. C-247, 43d Parl., 2d Sess. (Can. 2020).

<sup>130</sup> An Act to Amend the Criminal Code (Controlling or Coercive Conduct), B. C-202, 44th Parl., 1st Sess. (Can. 2021).

<sup>131</sup> Pursuant to Canadian parliamentary procedure, the bill was taken off of Parliament’s agenda due to the 2021 federal election but was re-introduced by Garrison in late 2021 for the next parliamentary session. Shaina Luck, *Coercive Control, the Silent Partner of Domestic Violence, Instills Fear, Helplessness in Victims*, CBC NEWS (Dec. 7, 2021, 5:00 AM), <https://www.cbc.ca/news/canada/nova-scotia/relationships-domestic-violence-control-1.6271236> [https://perma.cc/5PTX-UUAR].

be expected to have a significant impact on that person and that has such an impact on that person.”<sup>132</sup>

These laws and legislation go further than the earlier American proposals by allowing acts of non-physical abuse to be prosecuted based on an abusive partner’s intent and the impact the behavior had on the survivor. Respected voices in the domestic violence movement have advocated for the state level adoption of similar criminal statutes within the United States,<sup>133</sup> and multiple state legislatures are now actively working to pass similar legislation.

### C. *An Emerging Legislative Trend in the United States*

Despite calls for criminalization, historically, nearly every state law that addressed abuse without physical violence or a threat thereof did so in the civil protection order context.<sup>134</sup> This trend has been gaining momentum and has spread to the domestic relations context as well: since 2020, two states passed laws that make coercive control itself a ground for obtaining a civil protection order,<sup>135</sup> one incorporated

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<sup>132</sup> Can. B. C-202. In addition to defining “connected” and “significant impact,” the legislation provides an affirmative defense for when such behavior was done in the best interest of the other person. *Id.*

<sup>133</sup> After the passage of Section 76, Barbara Hart advocated for “activists to engage in serious consideration of the what and how of incorporating the grievously wrongful and life-imperiling conduct of batterer acts of coercive control into state and federal law.” Barbara Hart, *DV and the Law*, NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION, Nov. 2015, at 1, 4. At this point in her career, Hart had spent well over two decades advocating for reform of the criminal legal system to make it more accessible and effective for survivors. See, e.g., Barbara Hart, *Battered Women and the Criminal Justice System*, 36 AM. BEHAV. SCIENTIST 624 (1993) (arguing for concrete changes to the prosecution process that would enable survivors to pursue criminal intervention).

<sup>134</sup> As of 2009, about one-third of states included some coercively controlling behaviors as the basis for obtaining a domestic violence restraining order. Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 UC DAVIS L. REV. 1107, 1138 (2009) (finding through a 50-state survey “only one-third of the states recognize emotional, psychological, or economic abuse without a threat of physical violence as domestic violence worthy of a civil law remedy”).

<sup>135</sup> In 2020, Hawaii’s governor signed a bill adding coercively controlling tactics similar to those in the Scottish law as grounds for issuing a civil protection order. H.B. 2425, 30th Leg., Reg. Sess. (Haw. 2020) (defining coercive control as “a “pattern of threatening, humiliating, or intimidating actions [that] . . . take away the individual’s liberty or freedom and strip away the individual’s sense of self, including bodily integrity and human rights”). In 2021, Connecticut passed Jennifer’s Law, which among other things expanded its definition of domestic violence to include coercive control for the purposes of obtaining a civil protection order. S.B. 1091, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021) (providing an expansive definition of coercive control as “a pattern of

analyses of coercive control into child custody proceedings,<sup>136</sup> and another did both.<sup>137</sup> While some recent attempts to incorporate coercive control into civil statutes have failed,<sup>138</sup> as of March, 2022, several similar state-level bills are currently pending.<sup>139</sup> Coercive control can

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behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty).

<sup>136</sup> Washington enacted legislation in 2020 that explicitly acknowledges how, particularly in family court, abusive individuals may use court processes to harass survivors and provides a framework for judges to dismiss or deny abusive litigation. WASH. REV. CODE § 26.51.010 (2020).

<sup>137</sup> In 2020, California also added coercive control as a ground for receiving a protection order and updated the state's family code to allow family court judges to consider coercive control in custody and visitation decisions. S.B. 1141, 2019-2020 Leg., Reg. Sess. (Cal. 2020) (defining coercive control as a "pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty" and including a lengthy list of non-exhaustive examples).

<sup>138</sup> In 2020, the Maryland House Judiciary Committee considered but ultimately did not pass a bill that would make coercive control a ground for obtaining a civil protection order. H.B. 1352, 2020 Leg., Reg. Sess. (Md. 2020). Similarly, Connecticut rejected a bill that would have incorporated coercive control into custody and visitation determinations. S.B. 1060, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

<sup>139</sup> Florida is considering Greyson's Law, named after a murder-suicide involving a young child, which would among other things include coercive control in the definition of domestic violence used by judges in custody disputes. S.B. 1106, 2022 Leg., Reg. Sess. (Fla. 2022). Florida does not currently have any laws requiring judges to consider domestic violence or threats of domestic violence against a co-parent when making a best interest determination: this law would address that considerable omission. *Id.*; see also Jesse Scheckner, *Michael Grieco Files 'Greyson's Law' to Add Protection for Children at Risk of Parental Harm*, FLA. POL. (Dec. 1, 2021), <https://floridapolitics.com/archives/476818-michael-grieco-files-greysons-law-to-add-protections-for-children-at-risk-of-parental-harm/> [<https://perma.cc/2AK3-XB84>] (providing context regarding the current custody determination landscape). In January 2022, a bill was introduced to the New Jersey legislature that would add coercive control to the definition of domestic violence in the state's Prevention of Domestic Violence Act, which is located within New Jersey's criminal code. Assemb. B. 1475, 220th Leg., Reg. Sess. (N.J. 2022) (defining coercive control as "a pattern of behavior against a person protected under this act that in purpose or effect unreasonably interferes with a person's free will and personal liberty" and including nine non-exhaustive examples including but not limited to threats to kill, threats to make police reports, isolation, monitoring movements, and frequent name calling). This definition of domestic violence in New Jersey is also used in criminal sentencing so, without creating a substantive coercive control crime, could nonetheless have some impact in criminal proceedings. Massachusetts has legislation pending that would include coercive control in its definition of domestic violence within the civil protection order statute. S.B. 1123, 192d Gen. Ct., Reg. Sess. (Mass. 2022) (defining coercive control as "a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty" and providing a short list of non-exhaustive examples including isolation, deprivation, controlling or monitoring movements, and using threats to compel specific behavior). Washington state is also considering legislation that would include coercive control within the

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obviously impact family law disputes.<sup>140</sup> Despite being highly flawed itself, family court may provide a venue that is more able to analyze and respond to claims of coercive control than criminal court.<sup>141</sup>

Nevertheless, some states are heeding domestic and international advocates' calls to consider legislation that would make engaging in coercively controlling behaviors illegal. During their 2021-22 legislative session alone, New York, South Carolina, and Washington each introduced bills that would criminalize coercive control.

If passed, New York's legislation would create the felony offense of coercive control, defined as when a person:

engages in a course of conduct against a member of his or her same family or household [. . .] without the victim's consent,

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definition of domestic violence provided in their civil protection order statute. H.B. 1901, 67th Leg., Reg. Sess. (Wash. 2022); S.B. 5845, 67th Leg., Reg. Sess. (Wash. 2022) (both defining coercive control as "a pattern of behavior that is used to cause another to suffer physical, emotional, or psychological harm, and in purpose or effect unreasonably interferes with a person's free will and personal liberty"). The proposed Washington legislation included an extensive list of examples of coercive control, including damaging property, using technology to threaten or humiliate, driving recklessly, exerting control over identification documents, threatening to make private personal information public, engaging in vexatious litigation, and engaging in psychological aggression. This legislation notes that "coercive control' does not include protective actions taken by a party in good faith for the legitimate and lawful purpose of protecting themselves or children from the risk of harm posed by the other party." Wash. H.B. 1901; Wash. S.B. 5845. Hawaii is considering legislation to add both coercive control and litigation abuse by a parent to the factors a judge considers in making custody and visitation. S.B. 2395, 31st Leg., Reg. Sess. (Haw. 2022) (requiring a court to consider "any history of coercive control of the child or a parent of the child by the other parent; and any history of litigation abuse by a parent of the child against the other parent").

<sup>140</sup> Gillian Chadwick & Steffany Sloan, *An Evidence-Based Approach to Coercive Control in "High-Conflict" Custody Litigation*, FAM. L.Q. (manuscript at 5-6) (forthcoming 2022) (describing how "in the family context, domestic violence most commonly does not include direct physical violence, but most often includes a myriad of coercive controlling strategies such as financial and economic abuse, stalking, sexual coercion, psychological manipulation, and threats of violence").

<sup>141</sup> While it is beyond the scope of this Article to evaluate different civil proposals and laws, it should be noted that family courts may provide a forum that is better suited to assess these dynamics and tactics. Divorce, custody, and protection order cases often involve consideration of multiple instances of physical and emotional abuse spanning months, years, and even decades. Unlike criminal judges who typically trade only in single events, family court judges are already hearing all the facts that would amount to a finding of coercive control, albeit with varying levels of insight into domestic violence dynamics. Creating an ability to make findings based on information family court judges are already hearing could represent a more measured venture into synthesizing what we know about coercive control into a legal framework but doing so is not without its own systemic challenges. I will explore this nexus in a future article dedicated to the topic.

which results in limiting or restricting, in full or in part, the victim's behavior, movement, associations or access to or use of his or her own finances or financial information. For the purposes of this section, lack of consent results from forcible compulsion [. . .] or from fear that refusal to consent will result in further actions limiting or restricting the victim's behavior, movement, associations, or access to or use of his or her own finances or financial information.<sup>142</sup>

The legislation specifies that it does not apply to "actions taken pursuant to a legal arrangement granting one person power or authority over another person," including power of attorney arrangements, guardianships over people or property, or parental control of a minor.<sup>143</sup>

The South Carolina legislation would also create a coercive control felony. The law would make it illegal for someone to

repeatedly or continuously engage in a course of behavior towards another person that is coercive or controlling when both persons are personally connected and which results in a person causing the victim to fear, on at least two occasions, that violence will be used against the victim or which results in mental distress to the victim resulting in a substantial adverse effect on the victim's day-to-day activities.<sup>144</sup>

The law would define coercive behavior and controlling behavior as:

'Coercive behavior' means an act or pattern of acts of assault, threats, humiliation, manipulation, and intimidation or other abuse, including emotional abuse, that is used to harm, punish, or frighten the victim by fraudulent representations.

'Controlling behavior' means a range of acts designed to make a person subordinate or dependent by isolating the person from sources of support, exploiting the person's resources and capacities for personal gain, depriving the person of the means needed for independence, resistance, or escape, or regulating the person's everyday behavior.<sup>145</sup>

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<sup>142</sup> S.B. 5650, 2021-2022 S., Reg. Sess. (N.Y. 2021-2022); H.B. 8904, 2019-2020 Gen. Assemb., Reg. Sess. (N.Y. 2019-2020) (internal references omitted) (the text of these two bills, which are both currently in committee, is identical).

<sup>143</sup> N.Y. S.B. 5650; N.Y. H.B. 8904.

<sup>144</sup> H.B. 5271, Gen. Assemb., 123d Sess. (S.C. 2019-2020).

<sup>145</sup> S.C. H.B. 5271.

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The legislation then provides a non-exclusive list of examples of sixteen types of behavior that would constitute coercive control ranging from rape, assault, and threats to kill to isolation, monitoring, and repeatedly putting a person down.<sup>146</sup>

Washington also has legislation pending that would criminalize coercive control.<sup>147</sup> By comparison to New York's criminal statute, South Carolina's criminal statute, and Washington's own pending criminal statute, the language for this, which would constitute a gross misdemeanor, is short:

A person is guilty of coercive control if he or she engages in a course of conduct against a family or household member or intimate partner [. . .] without his or her consent in order to limit or restrict, in full or in part, his or her behavior, movement, associations, or access to or use of his or her own finances or financial information.<sup>148</sup>

The proposed legislation does not include examples but does note that “lack of consent results from forcible compulsion or from fear that refusal to consent will result in further actions limiting or restricting the family or household member or intimate partner's behavior, movement, associations, or access to or use of his or her own finances or financial information.”<sup>149</sup> Many of the types of behaviors identified as coercive control in the family law legislation would not amount to criminal coercive control if both laws are passed.

These pieces of pending legislation are based off both the scholarly proposals from over the early 2000s and the legislative successes from the United Kingdom and Ireland. They intend to make the criminal legal system more accessible and responsive to survivors by creating criminal charges that include patterns of repeated non-physical abuse to better reflect the realities of domestic violence. Yet, despite the difficult and even deadly trajectory of these behaviors, state legislatures in the United States should not pass criminal laws prohibiting coercive control. In order to understand just how deleterious and dangerous an idea this is, we need only look to the last major expansion of domestic violence criminal law: mandatory arrest and no-drop prosecution policies.

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<sup>146</sup> *Id.*

<sup>147</sup> H.B. 1449, 67th Leg., Reg. Sess. (Wash. 2021).

<sup>148</sup> Wash. H.B. 1449 § 2(1).

<sup>149</sup> *Id.* § 2(2).



## IV. DOMESTIC VIOLENCE MANDATORY POLICIES — A CAUTIONARY TALE

State-level adoption of proposals to criminalize coercive control would constitute a genuine attempt to incorporate the realities of domestic violence into the criminal response to it. It would not, however, be the first attempt. Many jurisdictions have already tried employing criminal law solutions aimed at addressing coercion in the form of mandatory arrest and no-drop prosecution policies. Like the proposals at issue today, those policies were meant to keep survivors safer by making the criminal legal system more responsive to their perceived needs. Instead, those measures — which widely remain in place — have proven to be dangerous and alienating for many survivors.

A. *Removing Discretion and Disempowering Survivors*

Before the 1970s, law enforcement and courts had often declined to take domestic violence seriously: if they responded, police officers often attempted to de-escalate or mediate after calls about domestic violence and typically made no arrest, leaving the parties together in the home.<sup>150</sup> Even as legislation was being passed in the 1970s and 1980s that explicitly criminalized domestic violence, arrest and prosecution rates of abusive individuals remained low. For example, a 1990 study in Washington, D.C. found that only 5% of domestic violence 911 calls resulted in arrest and 85% of domestic violence calls where the survivor had serious and visible injuries went without arrest, and only a very small number of these abusive individuals were charged with violating the law.<sup>151</sup>

Requiring law enforcement to be more responsive to victims' needs was thus an appealing advocacy platform.<sup>152</sup> This advocacy focused primarily on implementing mandatory arrest laws and no-drop prosecution policies in order to equalize the state's response to domestic violence with its response to stranger violence.<sup>153</sup> These mandatory

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<sup>150</sup> See U.S. COMM'N ON C.R., UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 12-22 (1982); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 YALE J.L. & FEMINISM 3, 14 (1999); Joan Zorza, *Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47-48 (1992); see also GRUBER, *supra* note 19, at 67-70 (acknowledging this tendency but suggesting that this model of intervention based on officer discretion was not necessary ineffective).

<sup>151</sup> GOODMAN & EPSTEIN, *supra* note 9, at 72.

<sup>152</sup> See *id.* at 71-74.

<sup>153</sup> *Id.* at 37.

policies focused on removing discretion from both state actors and survivors themselves, who were viewed as coerced into not pressing charges or pursuing cases.<sup>154</sup> This resulted in widespread adoption of mandatory arrests and prosecutions of all individuals accused of committing domestic violence.<sup>155</sup>

While officers were portrayed as unsympathetic toward survivors or sympathetic toward abusive partners, survivors who did not seek out or consent to law enforcement involvement in their lives were characterized as non-cooperative<sup>156</sup> and even as perpetrating their own abuse against the state.<sup>157</sup> Rather than attributing their disinterest to the negative impact of state intervention on survivors and their families, vocal supporters of mandatory policies instead insisted that it was because survivors were “subject to controlling behaviors that hinder her ability to understand the consequences of her decisions.”<sup>158</sup> Many advocates of mandatory policies saw these policies as necessary because they believed that survivors were unable to “mak[e] rational choice[s] in moments of trauma.”<sup>159</sup> Moreover, it was argued that giving

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<sup>154</sup> For an in-depth discussion of the goals and mechanisms of mandatory arrests and no-drop prosecutions, see generally Hanna, *supra* note 18 (discussing the consequences of mandated victim participation).

<sup>155</sup> Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (1987), reprinted in *BATTERED WOMEN AND THE LAW* 10, 10-16 (Clare Dalton & Elizabeth M. Schneider eds., 2001); Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 *HAMLIN L. REV.* 115, 149-54 (1991).

<sup>156</sup> GRUBER, *supra* note 18, at 107; Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 *W. ST. U. L. REV.* 297, 298 (1992).

<sup>157</sup> Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 865 (1994).

<sup>158</sup> Hanna, *supra* note 18, at 1885; see also Asmus et al., *supra* note 155, at 130 (claiming that some survivors ask that cases be dismissed based on their own concerns about the criminal system or the case itself while others seek dismissal of the charges at the demand of their abusive partners).

<sup>159</sup> G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 *HOUS. L. REV.* 237, 243 (2005) (critiquing this phenomenon and noting that “rational is a proxy for good — with good ultimately defined as leaving the relationship and cooperating with police and prosecutors”); see also Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 *N.Y.U. REV. L. & SOC. CHANGE* 281, 290 (1997) (arguing that “allowing the woman to decide whether the batterer should be arrested leaves too much room for him to pressure her not to have him arrested”); Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is it Enough?*, 1996 *U. ILL. L. REV.* 533, 547-48 (positing that “due to the inherent imbalance of power in an abusive relationship, isolation, and fear, all of which

survivors a choice in whether and how a case is prosecuted represents false empowerment and only served to embolden their abusive partners at survivors' expense.<sup>160</sup>

Professor Kris Miccio connects this view of survivors to Leonore Walker's popular yet contentious theory of learned helplessness, which described how survivors were conditioned to stay in abusive relationships.<sup>161</sup> Just as learned helplessness came to stand for the proposition that survivors were too worn down by their abusive partners to leave, here the logic is that survivors need mandatory criminal policies because they are so caught up in a web of coercion that they are unable to determine what is in their best interest and instead simply do their abusers' bidding. As Professor Miccio observed, survivors' experiences were pathologized and their lack of commitment to pursuing criminal legal interventions was thus written off as a psychological condition that could only be remedied with more criminal law and less room for survivors to make their own decisions.<sup>162</sup> A former domestic violence prosecutor and outspoken supporter of no-drop policies, law professor Cheryl Hanna observed that "the batterer has less incentive to try to control or intimidate his victim once he realizes that she no longer controls the process."<sup>163</sup> Some even saw these policies as not going far enough, suggesting instead that adult survivors experiencing coercive control should have guardians appointed to represent their best interests since they were unable to do so themselves.<sup>164</sup>

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are present in domestic violence situations, the victim is often incapable of making an independent, informed decision about arrest").

<sup>160</sup> Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 *STAN. L. REV.* 205, 218 (1999); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 *UCLA WOMEN'S L.J.* 173, 180 (1997).

<sup>161</sup> Miccio, *supra* note 159, at 303-05; *see also* Corsilles, *supra* note 157, at 870 (describing the "common phenomenon of 'recapture' — women being assaulted and coerced back into relationships that they had previously chosen to leave — reveals most convincingly the limited avenues of escape available to battered women").

<sup>162</sup> *See* Miccio, *supra* note 159, at 303-05.

<sup>163</sup> Hanna, *supra* note 18, at 1865.

<sup>164</sup> Ruth Jones, *Guardianship for Coercively Battered Women: Breaking the Control of the Abuser*, 88 *GEO. L.J.* 605, 609 (2000) (arguing that "in extreme cases of abuse . . . the state-sanctioned intervention of guardianship is necessary because an abuser has brutally and systematically deprived a woman of her ability to exercise independent judgment. Existing resources available to a battered woman such as restraining orders, shelters, and support groups presuppose an ability to avail herself of assistance. But when a battered woman is so controlled that she has lost her autonomy, these resources are not genuine options. A battered woman incapacitated by mental and physical abuse must be empowered by forcible removal from the control of an abuser").

Mandatory arrest and no-drop prosecution policies were thus seen as one way of saving helpless, hapless survivors from the coercive power of abusers.<sup>165</sup> Remarks from a supervising city attorney and a police sergeant in San Diego in the early 1990s illuminate this concern. They described this dynamic from their perspective when discussing the impetus for implementing mandatory policies in San Diego: “[t]he batterer’s control over the victim is generally so complete that he was able to dictate whether she talked to the prosecutor, what she said, and whether she appeared in court.”<sup>166</sup> Additionally, police and prosecutors were seen as unsympathetic and dismissive of survivors — in part because they had seen so many refuse to cooperate or recant. The officer and prosecutor touched on this as well: “officers felt their efforts were wasted and many, throughout the system, saw the victim as the reason for the never-ending cycle of violence, police intervention, and violence again.”<sup>167</sup>

Mandatory arrest policies were designed to remove this discretion from both law enforcement and survivors: these policies typically say that when “police responded to a ‘domestic violence’ call and there was probable cause to believe that a crime between intimates existed, they were mandated to arrest the offending party,” regardless of the wishes of the survivor qua complaining witness.<sup>168</sup>

To increase the number of actual prosecutions that arose out of these arrests, many prosecutors adopted no-drop prosecution policies in which “[o]nce charges are brought, a case proceeds regardless of the victim’s wishes as long as sufficient evidence exists to prove criminal conduct.”<sup>169</sup> This means cases can proceed even if survivors recant their stories, are uncooperative in trial preparation or on the stand, or do not even come to trial.<sup>170</sup> While “soft” no-drop policies provide resources and support to participating survivors and may allow survivors to drop their cases under certain conditions, hard no-drop policies are focused

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<sup>165</sup> Wanless, *supra* note 159, at 572 (arguing that “only by removing the decision to prosecute from the victims’ control will they be protected during the time their abusers’ cases are pending. Removing the decision from the victims’ control will also eliminate the influence batterers exert over the prosecutorial decision”).

<sup>166</sup> Gwinn & O’Dell, *supra* note 156, at 310.

<sup>167</sup> *Id.* at 298.

<sup>168</sup> Miccio, *supra* note 159, at 265.

<sup>169</sup> GOODMAN & EPSTEIN, *supra* note 9, at 74.

<sup>170</sup> *Id.*

on prevailing at trial, even if it means subpoenaing a survivor and forcing them to testify against their wishes.<sup>171</sup>

Many domestic violence advocates were initially pleased with the outcome of these policies. Returning to the Washington, D.C. example, mandatory arrest and no-drop prosecution policies ushered in much higher rates of both arrest and prosecution — similar to rates in non-domestic violence 911 calls and prosecutions.<sup>172</sup> This parity, however, is not the only metric of success by which to judge these policies.

### B. *Assessing the Harm of Mandatory Policies*

The logic behind the movement for mandatory policies may appear reasonable. Lawrence Sherman and his colleagues' initial research examining mandatory arrests indicated that survivors appeared to be safer when their partners were arrested rather than just warned by the police.<sup>173</sup> Sherman's subsequent research called this conclusion into question, finding that being arrested makes some people "more frequently violent" toward their partners than others.<sup>174</sup> More

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<sup>171</sup> See DAVID A. FORD & SUSAN BREALL, NAT'L INST. OF JUST., VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR PROSECUTORS 8 (2000), <https://www.ojp.gov/pdffiles1/nij/grants/199660.pdf> [<https://perma.cc/6HEH-G9F6>] (describing how "[v]ariations in no-drop policies fall along a continuum of victim coercion. At the extremes, a 'hard' no-drop policy requires a victim to participate under threat of legal sanctions should she fail to appear or testify at the trial. A 'soft' no-drop policy permits but does not require victim input in the decision to pursue a case"); Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 CALIF. L. REV. 1223, 1231 (2001) (stating that hard policies entail survivors being subpoenaed and forced to testify against their abusers even if against their wishes); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: Critical Review*, 4 BUFF. CRIM. L. REV. 801, 843 (2001) [hereinafter *Crime Control and the Feminist Law Reform*] (stating that survivors are allowed to drop charges under certain conditions like watching domestic violence videos, seeing a counselor, or explaining to a judge why they want to drop the domestic violence charges); Hanna, *supra* note 18, at 1863.

<sup>172</sup> GOODMAN & EPSTEIN, *supra* note 9, at 73.

<sup>173</sup> Lawrence Sherman & Richard Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOCIO. REV. 261 (1984) (finding that arrest and initial incarceration alone may produce a deterrent effect).

<sup>174</sup> Lawrence W. Sherman, Janell D. Schmidt, Dennis P. Rogan & Douglas A. Smith, *The Variable Effect of Arrests on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 139 (1992) [hereinafter *The Milwaukee Domestic Violence Experiment*]; see Lawrence Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RSCH. CRIME & DELINQ. 445, 465 (1993) (finding an offender's anger likely to be "displaced onto their present or future romantic partners"); see also PATRICIA ENG & SHAMITA DAS DASGUPTA, MS. FOUND. FOR WOMEN, SAFETY AND JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL JUSTICE AND PROSECUTION SYSTEM

specifically, Sherman found that arrest affects people differently, particularly depending on the class and race of the abusive partner: low-income and Black men were more likely to re-abuse if they were arrested than were higher-income white men.<sup>175</sup> This information is particularly concerning given the higher levels of police contact in low-income neighborhoods, especially those where people of color reside.<sup>176</sup>

Beyond immediate safety concerns,<sup>177</sup> these policies have also proven harmful to survivors who are victims in the criminal process, despite survivors being the intended beneficiaries. If prosecutors persist in moving forward, survivors may lose a relationship that they were uninterested in ending due to pre-trial or post-conviction requirements that the defendant and victim no longer cohabit and stay physically separated.<sup>178</sup> They may also lose financial support from their abusive partners that they rely on for their and their children's survival.<sup>179</sup>

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6 (2003) (“Those most critical of the legal system express concerns over the unintended negative consequences of a powerful and perhaps over-zealous law enforcement presence, particularly in poor, immigrant, and communities of color. They posit that the very policies advocates worked hard to implement have had unintended, negative consequences . . .”).

<sup>175</sup> Sherman et al., *The Milwaukee Domestic Violence Experiment*, *supra* note 174, at 168 (finding that “[e]mployed, married, high school graduate and white suspects are all less likely to have any incident of repeat violence reported to the domestic violence hotline if they are arrested than if they are not. Unemployed, unmarried, high school dropouts and black suspects, on average, are reported much more frequently to the domestic violence hotline if they are arrested than if they are not”).

<sup>176</sup> Angela Davis, *The Color of Violence Against Women*, COLORLINES (Oct. 10, 2000), <https://www.colorlines.com/articles/color-violence-against-women> [<https://perma.cc/CRP3-JE7U>] (“Other analyses emphasize a greater incidence of misogynist violence in poor communities and communities of color, without necessarily acknowledging the greater extent of police surveillance in these communities — directly and through social service agencies.”).

<sup>177</sup> One study showed a 22% re-assault rate within three months of arrest. Lisa A. Goodman, Mary Ann Dutton & Lauren Bennett, *Predicting Repeat Abuse Among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System*, 15 J. INTERPERSONAL VIOLENCE 63, 69-70 (2000).

<sup>178</sup> Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 56-60 (2006). Suk notes that “state-imposed de facto divorce is so class-contingent that it could be called poor man’s divorce.” *Id.* at 59.

<sup>179</sup> Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 UC DAVIS L. REV. 1009, 1017-18 (2000) (“Separation threatens women’s tenuous hold on economic viability . . .”); Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. J. GENDER, SOC. POL’Y & L. 465, 477 (2003) (“A victim who takes overt steps to address the violence runs the risk that her partner will cut off financial support or remove her or the children from his health care policy.”).

Should a survivor decide to not to attend the trial, they may find themselves detained and incarcerated pursuant to material witness warrants — a controversial practice that remains in surprisingly frequent use today.<sup>180</sup>

Mandatory arrest policies have also resulted in a significant increase of women arrested for domestic violence.<sup>181</sup> While some of these arrests are of women who abused their partners, in many of these cases, abusive men have exploited the criminal legal system, causing their female partners to be arrested.<sup>182</sup> Professor Susan Miller conducted in-depth research on the topic of women arrested under mandatory policies: she found that, despite increasing rates of arrest, social, legal, and correctional service providers did not believe that women were becoming increasingly violent.<sup>183</sup> These providers indicated that this difference was because male abusive partners were “self-inflicting wounds so that police would view the woman as assaultive and dangerous; men being the first ones to call 911...; and men capitalizing on the outward calm they display once police arrive.”<sup>184</sup> A supervisor in the state’s family court’s domestic violence project reported that survivors tell him their abusers are threatening to have them arrested.<sup>185</sup> The director of a treatment facility shared his experiences with abusive men using women’s criminal court cases to manipulate them: “They will threaten the women with it[...] — ‘I’m going to call 911; I’m gonna call your probation officer; so you better do what I say.’”<sup>186</sup> Miller also recounts ways in which abusers manipulate survivors facing criminal

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<sup>180</sup> GRUBER, *supra* note 18, at 106; Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 DICK. L. REV. 627, 638-40 (2019). For several recent examples of this phenomenon, see Jessica Pishko, *The Defund Movement Aims to Change the Policing and Prosecution of Domestic Violence*, APPEAL (July 28, 2020), <https://theappeal.org/the-defund-movement-aims-to-change-the-policing-and-prosecution-of-domestic-violence/> [<https://perma.cc/2QH9-R754>].

<sup>181</sup> GRUBER, *supra* note 18, at 89 (discussing how male arrests for assaults have dropped while female arrests have increased and observing that “the decision whether a woman was a primary or equal aggressor often depending on the woman’s minority status or lack of conformity with gender norms”).

<sup>182</sup> Sue Osthoff, *But, Gertrude, I Beg to Differ, a Hit Is Not a Hit Is Not a Hit: When Battered Women Are Arrested for Assaulting Their Partners*, 8 VIOLENCE AGAINST WOMEN 1521, 1533 (2002).

<sup>183</sup> SUSAN MILLER, VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN’S VIOLENCE IN RELATIONSHIPS 77 (2005).

<sup>184</sup> *Id.* at 80.

<sup>185</sup> *Id.* at 81.

<sup>186</sup> *Id.*

charges by lying to them about the case or the way the system operates.<sup>187</sup>

If prosecuted pursuant to no-drop prosecution policies, survivors as defendants also experience significant harm including the public nature of the charges and trial, pre-trial detention for those who cannot make bond, and the negative impact of charges on employment, housing, and family court cases,<sup>188</sup> in addition to the barriers created by a conviction<sup>189</sup> and the dangers of incarceration<sup>190</sup> and community supervision.<sup>191</sup>

These challenges, injuries, and barriers do not impact all survivors equally. In the debate over mandatory policies, non-carceral activists recognized that focusing on criminalization would result in more survivors of color being arrested and assaulted.<sup>192</sup> Yet mainstream domestic violence activists nevertheless championed these policies as though mandatory state intervention could be universally beneficial.<sup>193</sup> As a result of this inaccurate assumption, women of color and low-income women are even more “subject to a dual vulnerability: the private coercion and violence of abusive men and the public coercion and violence of the state.”<sup>194</sup> Women of color, especially Black women, bear the brunt of the downsides of mandatory policies: they are more likely to experience negative outcomes from skepticism to violence during police interactions.<sup>195</sup>

These outcomes were foreseeable when contemplating an alliance with the state over 30 years ago. Attempts to use criminal procedures to remedy coercion have resulted in very real injuries to survivors, their families, and their communities — especially survivors in over-policed and under-resourced relationships and neighborhoods. These same concerns are amplified in the context of substantive criminal law, which would significantly expand the corpus of domestic violence criminal law. Coercive control criminal laws would create very real problems for survivors — especially given the reality that, in many jurisdictions,

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<sup>187</sup> *Id.* at 82.

<sup>188</sup> Cross, *Reentering Survivors*, *supra* note 21, at 66-72.

<sup>189</sup> *Id.* at 73-78.

<sup>190</sup> *Id.* at 70-73.

<sup>191</sup> *Id.* at 78-82.

<sup>192</sup> Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 *UCLA L. REV.* 1418, 1453 (2013).

<sup>193</sup> Miccio, *supra* note 159, at 296.

<sup>194</sup> Coker, *Crime Control and the Feminist Law Reform*, *supra* note 171, at 858.

<sup>195</sup> Pishko, *supra* note 180.



these laws would operate in tandem with mandatory arrest and no-drop prosecution policies.

#### V. EVALUATING COERCIVE CONTROL CRIMINALIZATION IN THE U.S.

Coercive control is a dangerous phenomenon: not only does it undermine survivors' liberty and sense of selves, but it is also associated with high rates of severe separation violence.<sup>196</sup> At first blush, the desire to criminalize coercive control makes sense: passing legislation outlawing coercive control would theoretically enable courts to punish some of the worst abusers, who are currently beyond the purview of criminal law. As seen in the pursuit of mandatory criminal interventions, however, reality is far more complicated.

In addition to obvious extrapolation of lessons from the domestic violence movement's foray into mandatory policies, there are several reasons why coercive control criminal laws should not be passed. As a threshold matter, there is little reason to believe that new criminal laws will have a positive impact on curbing domestic violence when studies show that existing criminal laws have not had this affect. Additionally, legislation like the bills currently pending in four states is likely to suffer from constitutional challenges as well as barriers to enforcing them. Even if passed and enforced, these laws would counterproductively be used against survivors, especially those whose identities do not resonate with the image of helplessly coerced victims.

##### A. *Criminal Law's Impact on Domestic Violence*

It is widely recognized that criminalization is not an effective tool for deterring proscribed behavior.<sup>197</sup> Evidence that criminal law has had a deterrent effect in the domestic violence context is at best inconclusive.<sup>198</sup> Between 1994 and 2000, rates of domestic violence arrests decreased proportionately to rates of all crime decreasing; between 2000 and 2010, rates of domestic violence arrests "fell less than the decrease in the overall crime rate, suggesting that those who commit intimate partner violence were less deterred than criminals committing

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<sup>196</sup> STARK, COERCIVE CONTROL, *supra* note 5, at 130-31 (discussing the lengths coercively controlling partners go to in order to prevent survivors from leaving abusive relationships).

<sup>197</sup> Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 956 (2003).

<sup>198</sup> GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 10, at 24; GRUBER, *supra* note 18, at 90-91.

other types of crimes.”<sup>199</sup> Today, despite the general decline in arrests and violent crimes, “domestic assaults are more likely to result in arrest, prosecution, and incarceration than nondomestic assaults.”<sup>200</sup>

Explanations for why these laws are failing to deter domestic violence may include a lack of credible consequences: because these laws are inconsistently enforced at the arrest, prosecution, and conviction stages, individuals may be more willing to take on the risk if they perceive a low likelihood of intervention.<sup>201</sup> Domestic violence criminal laws may also fail to have a deterrent effect because they do not “target the underlying causes of intimate partner violence and therefore cannot change the behavior of those who engage in it. This lack of understanding about why offenders engage in crime is a particular problem in the context of intimate partner violence.”<sup>202</sup>

Moreover, the impact of incarceration itself may be leading to increased domestic violence and violence more generally. The effects of mass incarceration align very closely with some of the root causes of violence: “dehumanization of inmate, destruction of communities, and prevention of structural investment.”<sup>203</sup> Incarceration itself also instills and exacerbates internal triggers of violence:

Decades of research about the individual-level causes of violence (as opposed to community conditions like poverty and disenfranchisement) has demonstrated four key drivers: shame, isolation, exposure to violence, and a diminished ability to meet one’s economic needs. At the same time, prison is characterized by four key features: shame, isolation, exposure to violence, and a diminished ability to meet one’s economic needs. As a nation, we have developed a response to violence that is characterized by precisely what we know to be the main drivers of violence.<sup>204</sup>

Substantive domestic violence criminal laws already on the books have not been effective at deterring violence and have created both internal and external conditions that may in fact cause more violence. There is nothing about coercive control criminal laws that would disrupt either of these deficiencies; rather, adding yet another pathway to

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<sup>199</sup> GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 10, at 24; GRUBER, *supra* note 18, at 91.

<sup>200</sup> GRUBER, *supra* note 18, at 45.

<sup>201</sup> GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 10, at 25.

<sup>202</sup> *Id.* at 26-27.

<sup>203</sup> *Id.* at 26; *see also* GRUBER, *supra* note 18, at 193 (noting “the reality that criminal law is also a primary driver of social harms”).

<sup>204</sup> SERED, *supra* note 36, at 67.

incarceration would only further them. We must be especially wary here when, if passed and enforced, these laws would not only contribute to mass incarceration but would create an unacceptable risk for the most marginalized survivors.

### B. *Legal Challenges and Problems of Proof*

While it is hard to imagine coercive control criminal laws deviating from the patterns described above, it is similarly challenging to envision them surviving serious legal challenges. In her recent analysis of the United Kingdom's coercive control crime, Erin Sheley noted that adoption of similar legislation in the United States would run the risk of violating the Due Process Clause of the Fifth and Fourteenth Amendments.<sup>205</sup> She notes specifically that this course of conduct law would encounter “problems of vagueness and overbreadth and may impermissibly criminalize thought.”<sup>206</sup> For a statute to be unconstitutionally vague, it must be so unclear that “men of common intelligence must necessarily guess at its meaning.”<sup>207</sup> The vagueness critique here is grounded in both the lack of specific definitions within the law and the ambiguity around what specific conduct between partners could be considered a violation of the law.<sup>208</sup> She also finds the United Kingdom law overbroad, which occurs when a law prohibits “a substantial amount of constitutionally protected conduct.”<sup>209</sup> She analogizes coercive control statutes of this ilk to course of conduct statutes criminalizing stalking, which have consistently been challenged on overbreadth grounds, and have prevailed typically when they have required credible threats in conjunction with stalking conduct.<sup>210</sup>

A United Kingdom-style statute risks an overbreadth challenge because it “lacks a requirement of threatened physical violence, as it defines ‘serious effects’ on the victim to include not only fear of violence but also mere ‘distress’ that has a ‘substantial effect’ on day-to-day activities.”<sup>211</sup> A broad array of behavior could trigger such a response, which creates the potential for the statute to be overly broad. Such a statute in the United States might also implicate the First Amendment’s prohibition against punishing thoughts — here, punishing the intent to

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<sup>205</sup> Sheley, *supra* note 11, at 1338.

<sup>206</sup> *Id.*

<sup>207</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>208</sup> Sheley, *supra* note 11, at 1340.

<sup>209</sup> *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 (1982).

<sup>210</sup> Sheley, *supra* note 11, at 1342-43.

<sup>211</sup> *Id.* at 1343.

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exert power and control that would turn a non-criminal act into a crime.<sup>212</sup>

It is also worth noting that, were these laws able to get passed and withstand constitutional challenges, they would prove remarkably challenging to enforce due to these same breadth and vague language issues. In the United Kingdom, the Home Office issued a Statutory Guidance alongside their coercive control legislation that provide a great deal of information on coercive control and why the law was deemed necessary.<sup>213</sup> In light of remaining hesitance and uncertainty from law enforcement, two years later the Crown Prosecution Service issued a Legal Guidance that provides in depth details for police and prosecutors on how to investigate and enforce potential violations.<sup>214</sup> However, these are not typical documents that would accompany new criminal legislation in the United States. Further, since states would be enacting these laws via their vastly differing legislatures, these laws and any interpretations thereof would likely differ significantly based on location. A patchwork of distinct and differently enforced coercive control criminal laws would only create heightened confusion about what kind of behavior is allowed where, and who is afforded protection.

Were it possible to design a statute that would not succumb to legal challenges in court, such a statute would still prove challenging to enforce because of the criminal legal system's inability to adequately make sense of domestic violence dynamics that are both highly individualized to each specific couple and often steeped in trauma that is similarly personal. Problems of proof would arise for police officers and prosecutors since these accusations and cases would likely involve almost no corroboration in the form of injuries or physical evidence and could thus be easy for abusive partners to levy against their victims. Additionally, genuine survivors of coercive control are likely to be experiencing trauma from their prolonged abuse, which typically undermines one's effectiveness and credibility as a victim or witness, whereas abusive partners may be able to make out a more cohesive narrative due to their lack of genuine trauma.<sup>215</sup>

Sorting through these cases to highlight non-violent and even unspoken tactics of abuse and responses to them would require expert evaluations and testimony and the ability for judges and juries to

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<sup>212</sup> *Id.* at 1344-45.

<sup>213</sup> HOME OFF., *supra* note 123.

<sup>214</sup> CROWN PROSECUTION SERV., *supra* note 124.

<sup>215</sup> *See, e.g.*, Sheley, *supra* note 11, at 1345-46 (discussing the challenges trauma can create for witnesses of abuse, especially in this context that may lack other corroboration).

synthesize and consider such information in the context of someone else's intimate relationship. These additions would render investigations and prosecutions time-consuming and expensive and could easily result in either a he said, she said impasse or a battle of dueling experts.

Even with this kind of statutory expansion, a new domestic violence criminal law would prove difficult to implement and would usher in more harm than good for the very people it is designed to protect.

### C. *Predictable and Preventable Patterns*

If implemented and enforced, these laws will only further harm already marginalized survivors, their families, and their communities. Female and femme survivors are already vulnerable to both arrest and police violence when law enforcement responds to a domestic disturbance. They are being arrested individually and along with their abusive partner at significantly higher rates than before mandatory policies were put in place.<sup>216</sup> These arrests are occurring with law enforcement looking for evidence of physical violence: if police were able to make arrests without even that indicia of violence, far more survivors could be arrested when their abusive partners call the police and make claims of coercive controlling abuse, which would not require any physical proof.<sup>217</sup>

The crux of coercive control laws lies in criminalizing behavior that is hard to corroborate and thus ripe for bias to creep into decision-making by judges and juries. Absent sufficient expertise, coercive control may be a label attributed to behavior that is seen as nagging, bossy, and domineering. As such, women and femmes — particularly women and femmes of color — may be most at risk of having these accusations levied against them by abusive partners.<sup>218</sup> Survivors who

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<sup>216</sup> GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 10, at 19 (noting that these rates are not attributable to an increase in actual violence by women); GRUBER, *supra* note 18, at 88-89; see Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 76 (2013).

<sup>217</sup> Greater law enforcement interventions also open up women and gender-nonconforming people — especially when they are Black — to acts of violence by the police themselves. BHATTACHARJEE, *supra* note 16; RITCHIE, *supra* note 24. Further, state intervention often begets state intervention, with law enforcement responses triggering child welfare investigations and the insertion of family regulation systems into the lives of survivors. GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 10, at 20; GRUBER, *supra* note 18, at 108.

<sup>218</sup> See ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 82 (2000) (discussing gender expectations and presentations in the battered women's syndrome

do not fit cleanly into the image of a “good victim” may find it hard to obtain protection from these laws; instead, they may find their liberty threatened by them.

Historically, the archetypical victim of domestic violence is the “passive, middle-class, white woman cowering in the corner.”<sup>219</sup> This image is an outgrowth of the popular American conception of the good woman, “the devoted, submissive middle-class wife.”<sup>220</sup> To understand how a good woman might find herself in an abusive relationship, victims are often portrayed as mentally ill and helpless<sup>221</sup> as well as “meek and distraught, innocent of provoking their victimization, and possessing a body that symbolizes these qualities.”<sup>222</sup>

Survivors of color, especially Black survivors, face significant barriers when it comes to accessing the credibility afforded to white victims.<sup>223</sup> A white woman is seen as the “essential battered woman because society imagines that she is who needs protection,”<sup>224</sup> despite the fact that mixed race, Black, and Native women experience higher levels of victimization than white women.<sup>225</sup> Moreover, society remains inundated by “controlling images of women of color or working-class women who were defined as highly sexual, physically strong, and impure.”<sup>226</sup> Black women, who are so often viewed and assessed through the lens of misogynoir,<sup>227</sup> are often viewed as “too powerful or

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context and noting how “racial stereotypes of cultural aggression or passivity” create additional challenges for women of color).

<sup>219</sup> Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 77 (2008).

<sup>220</sup> KATHLEEN J. FERRARO, NEITHER ANGELS NOR DEMONS 2 (2006) (“Historically, the Madonna-whore binary in the United States defined heterosexual, monogamous, and sexually modest women as good women. Bad women were identified by transgressions of sexual propriety, and were considered impure.”).

<sup>221</sup> *Id.* at 19.

<sup>222</sup> *Id.* (continuing “[y]oung, white, middle-class, attractive (but not overly sexy) women embody cultural notions of deserving victims”).

<sup>223</sup> GOODMARK, A TROUBLED MARRIAGE, *supra* note 10, at 70-71 (noting that “[v]ictimhood is intimately tied to traditional notions of womanhood, notions that have been largely defined by a white norm. . . . The word implies whiteness, a connotation that deprives women of color of victim status and its associated protections”).

<sup>224</sup> Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 UC DAVIS L. REV. 1061, 1079 (2005).

<sup>225</sup> Tameka L. Gillum, *African American Survivors of Intimate Partner Violence: Lived Experience and Future Directions for Research*, 30 J. AGGRESSION, MALTREATMENT & TRAUMA 731, 733 (2019).

<sup>226</sup> FERRARO, *supra* note 220, at 2.

<sup>227</sup> Moya Bailey coined and popularized the portmanteau misogynoir in her 2008 thesis and, shortly thereafter, during her time blogging for the Crunk Feminist Collective. MOYA BAILEY, MISOGYNOIR TRANSFORMED: BLACK WOMEN’S DIGITAL

too uncontrollable to be dominated by anyone. Therefore they cannot be victims.”<sup>228</sup> Had she attempted to seek help while in the relationship, FKA twigs would no doubt have encountered these stereotypes due to her blackness, her bold sex positivity, and her interracial relationship with a wealthier and more famous white man. Her status as foreign born may have also resulted in additional skepticism and suspicion that she had made these claims up in order to access a path to U.S. citizenship.

These stereotypes and assumptions will continue to be relied on in the coercive control context, where it is hard for people looking in from the outside to understand how someone would have let themselves get to a point of living with extreme levels of degradation and other forms of emotional abuse. To a layperson, strength and even presence of mind may well be incompatible with experiencing the pervasive abuse that constitutes coercive control. Since Black women are more likely to fight back than call the police,<sup>229</sup> they may find it even harder to access victim status in the coercive control context when police, prosecutors, judges, and juries will be expecting stereotypical powerless, downtrodden victims that are frequently at odds with stereotypes that continue to pervade the legal system.<sup>230</sup> Others in the movement have this same

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RESISTANCE, at xiii (2021). In her recent book, she defined it as “the uniquely co-constitutive racialized and sexist violence that befalls Black women as a result of their simultaneous and interlocking oppression at the intersection of racial and gender marginalization.” *Id.* at 1.

<sup>228</sup> Morrison, *supra* note 224, at 1084-85; *see also* Gillum, *supra* note 225, at 734 (describing the “matriarch” stereotype as “a woman who is overly aggressive, unfeminine, and who emasculates black men”).

<sup>229</sup> *See* MILLER, *supra* note 183, at 9; RICHIE, *supra* note 96, at 119 (“The African American battered women acted in a more aggressive, self-protective manner, and therefore they were not considered ‘real’ battered women or treated as ‘victims of crimes.’”); Crenshaw, *supra* note 192, at 1454-55 (discussing how “research suggests that women of color are more likely to be arrested themselves for behavior that may be consistent with self-defense but interpreted through the lens of stereotypes as overly aggressive”); Gillum, *supra* note 225, at 734-35 (observing how “African American survivors have reported general feelings of unwelcome from formal services as well as outright discrimination, maltreatment, and racism. Hence, African American survivors are less likely to seek assistance from formal resources, many only doing so when the abuse becomes severe”).

<sup>230</sup> A 2005 study exemplifies this concern: 288 “European Americans” were randomly assigned stories about domestic violence, one in which the couple was white and one in which the couple was Black. Cynthia Esqueda & Lisa Harrison, *The Influence of Gender Role Stereotypes, the Woman’s Race, and Level of Provocation and Resistance on Domestic Violence Culpability Attributions*, 53 *SEX ROLES* 821, 825 (2005). Within each story, there were differing levels of provocation and resistance by the victim; the participants were given various sets of facts and were asked a series of questions about the incident, including questions about the seriousness of the incident and the injuries, whose actions were justified, who was to blame, and who was believable. *Id.* at 825-26.

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concern as well. In November 2021, the Battered Women’s Justice Project created a guide for advocates and domestic violence coalitions considering codifying coercive control: when discussing criminalization of coercive control, the guide notes that survivors and advocates who oppose doing so “are confident that criminalization will lead to the arrest and incarceration of survivors, particularly survivors of color and survivors from other historically marginalized and overpoliced groups.”<sup>231</sup>

These are the same communities that have been the hardest hit by the mandatory arrest and no-drop prosecution policies that were implemented in part to protect survivors from the effects of coercion 30 years ago. The same doubt and disbelief that have caused these policies to backfire for so many years would only have a more devastating impact if encoded into substantive criminal law. Rather than being protected by these laws, survivors who could not prove their proximity to idealized victimhood would risk not just a lack of state intervention on their behalf but also state intervention against them. Abusive partners have long coopted the power of law enforcement and creating a coercive control criminal charge would only further their ability to do so.

If coercive control is criminalized, marginalized survivors may face a double bind: they may be unable to convince a police officer, prosecutor, judge, or jury that they have been the victim of coercive control while also being more likely to be viewed as engaging in coercively controlling behavior themselves. Especially given the criminal legal system’s inability to distinguish between acts of abuse by a primary abuser and acts that would be categorized as resistive violence, strategic or protective behavior by historically mistrusted survivors runs the risk as being viewed — and charged — as abuse.

If enacted, these laws would operate in conjunction with already existing mandatory policies to create a tool that is ineffective at best and

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A few key findings include that African American women found “more culpable in general than the European American woman” and that participants “with traditional beliefs perceived the European American couple to be more truthful.” *Id.* at 829-30. The study notes that “African American women’s complaints may not be considered as seriously as European American women’s complaints by legal actors (e.g., police, prosecutors, judges, juries). This finding may have implications for legal outcomes, given that most police, attorneys and judges are European American men.” *Id.* at 831. Overall, this study lends credibility and insight to the concern that African American women are unlikely to receive protection through coercive control criminal laws and would risk being seen as blameworthy instead.

<sup>231</sup> BATTERED WOMEN’S JUST. PROJECT, COERCIVE CONTROL CODIFICATION: A BRIEF GUIDE FOR ADVOCATES AND COALITIONS 4 (2021), <https://www.bwjp.org/assets/documents/pdfs/cc-codificationbrief.pdf> [<https://perma.cc/VWM2-KS3P>].



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dangerous at worst. Rather than expand the criminal legal system in the name of survivors who may ultimately be harmed by it, the domestic violence movement should instead look for ways to mitigate and minimize criminal interventions and pivot instead to programs and policies that can have a positive impact on survivors' lives without the same potential risks.

#### CONCLUSION

During the peak of the mandatory arrest and no-drop prosecution adoption period in the late 1990s, one advocate of these policies vehemently asserted:

Some critics of aggressive prosecution ... argue that “jail doesn’t do the batterer any good.” However, arrest and prosecution of batterers does not endanger victims; batterers who attempt to control their mates through threats and violence endanger victims. Sentencing batterers to jail does not endanger victims; batterers who believe there is no higher authority than themselves endanger victims. ... Even if jail does not guarantee rehabilitation, we would certainly rather incarcerate batterers than continue to “intern” their victims by forcing them into shelters to be safe.<sup>232</sup>

Almost 25 years later, we know that this dichotomy is false — and many knew it then as well. Abusive partners can endanger survivors, as can criminal legal intervention. We must apply this same lesson in the context of coercive control criminalization. Yes, coercive control is an absolutely devastating and debilitating form of abuse that can wreak havoc on a person’s liberty and safety. But criminal legal interventions on behalf of a survivor can also have destabilizing and dangerous effects. And these consequences compound exponentially when the criminal legal system is leveraged by an abusive partner against a survivor; something that happens regularly in jurisdictions with and without mandatory policies. This, then, is the second lesson we must take from our attempt to force a fit between domestic violence and the criminal legal system: the very tools we might hope will help instead will be used against survivors, and the vulnerable and already marginalized within our movement will be the hardest hit. To attempt again to bend the criminal legal system to meet the needs of domestic violence survivors would be a flagrant flouting of these lessons — lessons that had been

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<sup>232</sup> Wills, *supra* note 160, at 180.

clearly predicted by women of color since the earliest days of the movement.

Returning to another rallying cry in favor of mandatory policies is also illuminating: “Incarceration may be the only effective way to relieve the victim of the batterer’s control, as it at least incapacitates him for a while.”<sup>233</sup> This logic, whether explicitly stated or not, underpins the logic behind coercive control criminalization. But it again relies on the false binary of either incarcerating an abusive partner or doing nothing for a survivor.<sup>234</sup> There are so many ways that we can help survivors more effectively than incarcerating their abusive partners. Much has been written about the kinds of direct social services and resources that would support survivors as they identify and achieve their goals — subsidies for housing, transportation and childcare; access to culturally competent behavioral health services, and direct cash assistance to name just a few.<sup>235</sup> While initially a taboo concept within the mainstream domestic violence movement, more voices are calling for these same services to be made available to abusive individuals as well in order to reduce violence within relationships and polyvictimization.<sup>236</sup>

Broadly, the domestic violence movement must pivot away from our longstanding alliances with tough on crime advocates and instead join the chorus of voices calling for significant criminal legal reform.<sup>237</sup> We

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<sup>233</sup> Robbins, *supra* note 160, at 214.

<sup>234</sup> This also presupposes that incarceration is a likely outcome of a domestic violence conviction as opposed to the common sentence of time served or probation.

<sup>235</sup> See, e.g., Cross, *Reentering Survivors*, *supra* note 20, at 118-19 (discussing the value of shifting focus from criminal legal intervention to meeting survivors’ material needs). Increasing attention has been paid to gaps in survivors’ safety net during the COVID-19 pandemic. For a discussion of both services and resource-oriented policy changes in light of this dynamic, see generally ROBIN BLEWEIS & OSUB AHMED, CTR. FOR AM. PROGRESS, *ENSURING DOMESTIC VIOLENCE SURVIVORS’ SAFETY: THE NEED FOR ENHANCED STRUCTURAL SUPPORTS DURING AND AFTER THE CORONAVIRUS PANDEMIC* (2020), <https://www.americanprogress.org/article/ensuring-domestic-violence-survivors-safety/> [<https://perma.cc/R8XH-2DP4>].

<sup>236</sup> Deborah M. Weissman, *In Pursuit of Economic Justice: The Political Economy of Domestic Violence Laws and Policies*, 2020 UTAH L. REV. 1, 56 (observing how “economic crisis and the resulting loss of employment must be addressed as a means to mitigate domestic violence. Nonetheless, addressing the economic circumstances of an abusive partner is often not considered a strategy to mitigate domestic violence”); see, e.g., Courtney Cross, *Harm Reduction in the Domestic Violence Context*, in *THE POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE RESPONSES*, *supra* note 84, at 332 (arguing that providing services to abusive partners constitutes a critically important shift toward harm reduction for survivors).

<sup>237</sup> See, e.g., Beth E. Richie, *Keynote — Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIA. RACE & SOC. JUST. L. REV. 257, 272 (2015) (speaking at the

must not only oppose expansion of the criminal legal apparatus that has endangered and ensnared so many survivors, but we must also advocate for the repeal of mandatory policies and other practices that have caused a great deal of harm to individuals and communities since their implementation decades ago.<sup>238</sup> To continue to forge on toward an expanded criminal law corpus and increased law enforcement intervention would be beyond naïve. It would be an outright repudiation of the insights we've gained through this crucible and a blatant refusal to protect those survivors our very movement has put at risk. No survivor is expendable and no more should be sacrificed to the carceral state.

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Converge! Reimagining the Movement to End Gender Violence conference and urging those in the domestic violence movement to adopt a more imaginative and less traditional approach to addressing violence against women); *see also* Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIA. RACE & SOC. JUST. L. REV. 585, 618 (2015) (concluding that those in the anti-domestic violence movement “have a unique opportunity to make the connection for the public and for policy makers between the devastating violence of mass incarceration and the interpersonal violence that affects so many”); Pishko, *supra* note 180 (arguing against letting domestic violence stand in the way of the criminal legal reform movement and that non-carceral approaches should be considered more seriously).

<sup>238</sup> GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 10, at 143; GRUBER, *supra* note 18, at 18.