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# Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization

Alafair S. Burke\*

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### *Introduction*

Despite the seeming breadth of society's response to domestic violence within the last thirty years,<sup>1</sup> legal reform within the criminal justice system<sup>2</sup> has been concerned primarily with process. To treat domestic violence as a law enforcement problem instead of a private family matter, we have changed the manner and frequency with which we arrest, prosecute, convict, and sentence offenders. We have changed procedural rules to allow—and in some jurisdictions require—arrest for misdemeanors based on probable cause in domestic violence cases, even where the police officer was not present, as was traditionally required at common law.<sup>3</sup> We have altered prosecutorial

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<sup>1</sup> For an overview of legal reforms targeting the problem of domestic violence, see generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000), and EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* (2d ed. 1996). Regarding the public's awareness and understanding of domestic violence, see Allison Morse, *Social Science in the Courtroom: Expert Testimony and Battered Women*, 21 *HAMLINE L. REV.* 287, 314–15 (1998) (summarizing studies measuring public attitudes about domestic violence).

<sup>2</sup> The recognition of domestic violence as a broad social problem has triggered legal reform outside of the criminal justice system, including the use of civil restraining orders, reforms within immigration law and divorce and child custody law, and proposals for tort liability. See 8 U.S.C. § 1227(a)(2)(E) (2000) (making a crime of domestic violence a deportable offense); Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 *OR. L. REV.* 945 (2004) (proposing tort reforms to address domestic violence); Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 *ST. LOUIS U. PUB. L. REV.* 7, 10–13 (2004) (discussing the advent of civil protective orders and changes to child custody law, as well as criminal law reforms). While these noncriminal developments are essential components of the larger picture of the legal response to domestic violence, this Article focuses exclusively on the treatment of domestic violence as a crime. Accordingly, for purposes of descriptive convenience, I use the terms “legal responses” and “legal reforms” to refer to responses and reforms in the criminal context only, without repeating that qualification throughout the Article.

<sup>3</sup> See *infra* notes 36–38 and accompanying text.

discretion in determining whether to pursue criminal charges.<sup>4</sup> We have learned evidence collection and trial techniques that enhance the likelihood of conviction, even when the victim declines to testify.<sup>5</sup> We have created alternative sentencing options that are tailored specifically to domestic violence offenses.<sup>6</sup>

Questions of procedure have likewise dominated the commentary accompanying these legal reforms. For example, substantial disagreement exists regarding the efficacy and appropriateness of “mandatory arrest” statutes, which require police to take a suspect into custody whenever probable cause exists for a domestic violence crime.<sup>7</sup> Similarly, scholars dispute whether the policy of prosecuting batterers over their victims’ objections is empowering or disempowering for women.<sup>8</sup> Another area of the literature takes on the appropriate disposition of convicted offenders, weighing the relative merits and disadvantages of treatment compared with imprisonment.<sup>9</sup> At each turn, the question is whether the criminal justice system should alter its usual processes to treat domestic violence cases differently from other crimes.

As divided as advocates for domestic violence victims can be over issues of criminal process, however, they generally are united in their shared assumption that, substantively, domestic violence can be prosecuted using existing criminal prohibitions that apply regardless of the relationship, if any, between offender and victim. Laws prohibiting harassment, assault, kidnapping, and other forms of physical violence

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<sup>4</sup> See *infra* notes 39–41 and accompanying text.

<sup>5</sup> See *infra* notes 39–40 and accompanying text.

<sup>6</sup> See *infra* notes 66–72 and accompanying text.

<sup>7</sup> See, e.g., Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 WOMEN’S RTS. L. REP. 169, 172–77 (2001) (reviewing research leading to mandatory arrest laws and arguments in opposition); Machaela M. Hctor, Note, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643 (1997) (reviewing criticisms but nevertheless advocating for mandatory arrest).

<sup>8</sup> Compare Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) [hereinafter Hanna, *No Right to Choose*] (advocating “no-drop” prosecution and “mandated participation” of victims where necessary), with Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 586–96 (1999) (arguing that the pursuit of criminal charges without the victim’s consent shares many abusive qualities with domestic violence itself).

<sup>9</sup> Compare Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1542 (1998) [hereinafter Hanna, *The Paradox of Hope*] (“In comparison to other crimes, preferring treatment to incarceration for domestic violence looks like lingering sexism.”), with Mills, *supra* note 8, at 608–09 (“In some cases, strategies such as cultural or community support, shelter stays, or even diversion for the batterer make the most sense.”).

do not contain marital or intimate exceptions.<sup>10</sup> Therefore, the usual argument concludes, violations of these criminal statutes in the context of domestic violence can be prosecuted just like any other violation not involving domestic violence.<sup>11</sup> That argument is correct as far as it goes, but it does not go very far. Significantly, it fails to consider whether the statutory elements of existing crimes accurately describe all of the harms in domestic violence that should give rise to criminal punishment.<sup>12</sup>

Outside the realm of criminal law, social scientists almost universally describe domestic violence as an ongoing pattern of conduct motivated by the batterer's desire for power and control over the victim.<sup>13</sup> In contrast, the criminal statutes used to prosecute domestic violence almost universally describe discrete acts, without reference to the actor's motivation or other culpable acts.<sup>14</sup> Although previous scholars have questioned the fit between domestic violence and the criminal statutes used to prosecute it,<sup>15</sup> only one scholar, Professor Deborah Tuerkheimer, has argued forcefully for "a reconceptualization of the crime of domestic violence."<sup>16</sup> To fill the gap between the criminal law and the realities of domestic violence, she has argued that the criminal law must move beyond its focus on "transaction-based physical violence" and instead address "an ongoing pattern of conduct occurring within a relationship characterized by power and control."<sup>17</sup> Specifically, she has proposed a "battering statute" that would require proof not just of individual acts, but of a "course of conduct" that the

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<sup>10</sup> Although the common law contained a marital exception to rape laws, considerable statutory and constitutional reforms during the last thirty years have abrogated a man's unqualified right to rape his wife. See Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261, 263 (1993).

<sup>11</sup> See, e.g., Hanna, *No Right to Choose*, *supra* note 8, at 1889.

<sup>12</sup> See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 971-72 (2004).

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* notes 31-35, 48-59 and accompanying text.

<sup>15</sup> See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 233 (2003) (criticizing the criminal law's "myopic focus" on individual incidents of violence); Goodmark, *supra* note 2, at 28-29 (noting the gap between the criminal code and the range of abuses found in domestic violence, but assuming limits to the "narrow range of behaviors that the legal system can reach" (emphasis added)); C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 292-94 (2004) (suggesting restorative justice models as an alternative to criminal prosecutions that "fail to account for the ongoing nature of both the violence and, in some cases, the relationship itself").

<sup>16</sup> Tuerkheimer, *supra* note 12, at 962.

<sup>17</sup> *Id.* at 960-62.

defendant “knows or reasonably should know . . . is likely to result in substantial power or control” over the victim.<sup>18</sup>

This Article seeks to build on Professor Tuerkheimer’s work by exploring further the arguments supporting a reconceptualization of the crime of domestic violence and by proposing an alternative reconceptualization that, in my view, presents doctrinal and discursive advantages over Professor Tuerkheimer’s important initial proposal. Specifically, this Article proposes a Coercive Domestic Violence statute that requires proof not that the defendant’s conduct was likely to result in substantial power or control over the victim, as Professor Tuerkheimer’s proposal requires, but instead that the defendant engaged in a pattern of domestic violence with the intent to gain power or control over the victim. By grounding a specialized domestic violence statute in the requirement of intent, this Article’s proposal would bring an important discursive shift in the criminal law’s treatment of domestic violence by turning the focus away from the claimed effects of domestic violence on a victim’s autonomy and instead toward the coercive motivations of the batterer. The proposed Coercive Domestic Violence statute is also doctrinally more consistent with traditional tenets of criminal law than Professor Tuerkheimer’s proposed battering statute and is more likely to withstand judicial scrutiny.

The Article proceeds in five parts. Parts I and II are descriptive and provide the legal and social-science backgrounds necessary to explore a reconceptualization of domestic violence. Part I situates within the context of existing domestic violence reforms Professor Tuerkheimer’s observation that the criminal law has responded to domestic violence by enforcing existing criminal prohibitions, not by reshaping the substantive criminal law to describe domestic violence.<sup>19</sup> Part I summarizes existing reform priorities and demonstrates that by focusing on the processes used to enforce existing criminal prohibitions, rather than on the substantive criminal law, reformists have accomplished meaningful symbolic, procedural, and sentencing goals. With the legal background established, Part II turns to social science to highlight the quantitative and qualitative differences that Professor Tuerkheimer<sup>20</sup> and others<sup>21</sup> have previously identified between domes-

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<sup>18</sup> *Id.* at 1019–20.

<sup>19</sup> *See id.* at 970–71 (noting that prior domestic violence reform efforts were aimed at “forcing police and prosecutors to enforce the laws already on the books”).

<sup>20</sup> *See id.* at 971–74.

<sup>21</sup> *See* Buel, *supra* note 15; Goodmark, *supra* note 2; Hopkins et al., *supra* note 15.

tic violence and the crimes described by the general statutes used to prosecute it.

Part III expands on Professor Tuerkheimer's discussion of the problems created when domestic violence is prosecuted using only general statutes. Part IV then looks more deeply into possible concerns about the criminal law's capacity to define the unique dynamics of domestic violence. Focusing on potential critiques of overcriminalization and the punishment of patterns of behavior and motives, Part IV concludes that the criminal law is capable of addressing domestic violence as a separate crime without abandoning its traditional tenets. Finally, Part V proposes a reconceived statute—"Coercive Domestic Violence"—that differs fundamentally from Professor Tuerkheimer's proposed battering statute in both its act and mental state requirements, is more likely to withstand judicial scrutiny, and accomplishes a critical discursive shift in the focus of domestic violence prosecutions.<sup>22</sup>

### I. *The Resort to Criminal Law*

The treatment of domestic violence as a crime, not just a private family matter, has been a central component of the momentous change in the public's understanding of domestic violence and the government's response to it during the past thirty years.<sup>23</sup> Although men enjoyed no formal right to batter their wives,<sup>24</sup> law enforcement in the 1970s viewed domestic violence at best as a nuisance to be mediated and at worst as a dangerous situation to be avoided.<sup>25</sup>

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<sup>22</sup> See Tuerkheimer, *supra* note 12, at 962 (calling for "a reconceptualization of the crime of domestic violence").

<sup>23</sup> See Hanna, *The Paradox of Hope*, *supra* note 9, at 1539 ("Legal reforms of the last twenty years mark a shift in the characterization of domestic violence from a private to a public problem."); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983-85 (1991) (discussing the ways in which the treatment of domestic violence as "private" perpetuates the problem); see also Lynette Feder & David B. Wilson, *A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behavior?*, 1 J. EXPERIMENTAL PSYCHOL. 239, 254 (2005) (reporting mixed results in a study of the benefits of batterer intervention programs).

<sup>24</sup> See R. EMERSON DOBASH & RUSSEL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 146-73 (1992) (summarizing the history of the criminalization of domestic violence).

<sup>25</sup> Traditionally, police reluctance to intervene in cases of familial violence has been attributed to four police beliefs: (1) that the woman was not a victim if she remained in a violent relationship; (2) that the woman was responsible for triggering the man's violent response; (3) that police intervention is not the best solution; or (4) that domestic violence situations were too dangerous to police. See ALYCE D. LAVIOLETTE & OLA W. BARNETT, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 53-54 (2d ed. 2000). See generally U.S. COMM'N ON CIVIL RIGHTS, *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 20-33 (1978) (early inquiry into

How times have changed. In a landmark 1985 verdict, a jury awarded more than two million dollars to a domestic violence victim who sued her local police department over its pattern of inaction in cases like hers.<sup>26</sup> Public awareness campaigns instruct citizens that “[d]omestic violence is everyone’s business.”<sup>27</sup> Police departments train officers about responding to domestic violence.<sup>28</sup> Internal police guidelines and legislative action have increased the likelihood of arrest in cases where the offender previously would have been sent around the block to “cool off.”<sup>29</sup> Prosecutors use specialized domestic violence units to improve their chances of bringing criminal charges and obtaining convictions.<sup>30</sup>

Despite these reforms to the criminal justice system’s treatment of domestic violence, however, most jurisdictions do not define domestic violence as a separate criminal offense proven with statutory elements unique to domestic violence.<sup>31</sup> Rather, domestic violence is usually prosecuted using general criminal statutes<sup>32</sup> such as assault, harassment, or menacing.<sup>33</sup> As Cheryl Hanna succinctly summarized

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the national problem of domestic violence); U.S. COMM’N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 12–22 (1982) (follow-up report).

<sup>26</sup> See *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (denying municipality’s motion to dismiss); Hoctor, *supra* note 7, at 654 & n.83 (reporting that the plaintiff ultimately accepted a \$1.9 million settlement after a jury awarded her \$2.3 million).

<sup>27</sup> See Family Violence Prevention Fund, *There’s No Excuse for Domestic Violence*, <http://endabuse.org/programs/display.php3?DocID=9903> (last visited Jan. 27, 2007).

<sup>28</sup> See LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE* 25–54 (1992) (discussing the response of modern policing to domestic violence).

<sup>29</sup> *Id.*; see also *infra* notes 36–38.

<sup>30</sup> See BUZAWA & BUZAWA, *supra* note 1, at 175–77 (discussing prosecutorial advancements in domestic violence cases); see also Proclamation No. 7601, 3 C.F.R. § 142 (2002) (presidential proclamation listing specialized domestic violence prosecution units among important reforms).

<sup>31</sup> Throughout this Article, the use of the word “separate” or “specialized” to describe a domestic violence criminal statute means that the statutory elements necessarily restrict the law’s application to domestic violence. In contrast, use of the word “general” to describe a criminal statute means that the statute’s application is not limited specifically to domestic violence.

<sup>32</sup> See Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN’S STUD. 251, 264 (1994) (“Because the criminal codes generally already provide remedies against typical forms of domestic abuse such as battery, property destruction and criminal threat, most states do not designate domestic violence as a separate crime.”); G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of Deshaney*, 29 COLUM. HUM. RTS. L. REV. 641, 672 n.147 (1998) (“Because most jurisdictions do not classify domestic violence as a separate crime, intimate violence is subsumed in general crime classifications, e.g., murders, rapes, larceny.”).

<sup>33</sup> I owe the reader a note on terminology. At common law, physical acts of violence were



the substantive legal landscape, “from a legal perspective, the violence in battering relationships is no different than violence in other situations.”<sup>34</sup> And as Professor Tuerkheimer has noted, domestic violence advocates before her focused reform efforts “on forcing police and prosecutors to enforce the laws already on the books.”<sup>35</sup>

As a result of the assumptions made and the priorities drawn by domestic violence reformists, any differences in treatment between domestic violence and other forms of violence within the criminal justice system have been limited primarily to the procedural aspects of enforcing general criminal laws. For example, state statutes often dictate special arrest procedures when probable cause exists to believe a violent crime has been committed within a domestic relationship. A common-law rule, codified in many states, generally precludes warrantless arrests for misdemeanors unless the misdemeanor was committed in a police officer’s presence.<sup>36</sup> Because many domestic violence incidents constitute only misdemeanor assaults, the traditional in-presence requirement often prohibited police from making arrests at the scene without a warrant. By 1995, however, every state in the country permitted police to make warrantless arrests in all domestic violence cases, despite traditional limitations in other misdemeanor cases.<sup>37</sup> Some states have gone further by enacting “mandatory arrest” statutes that require, rather than merely authorize, arrest whenever probable cause exists in domestic violence cases.<sup>38</sup> These laws, however, are wholly procedural. They define specific police authority and discretion regarding domestic violence arrests, but the existence of probable cause to support the arrest is still measured against the jurisdiction’s general penal code.

District attorneys’ offices throughout the country have also begun to treat domestic violence offenses differently than other crimes

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considered batteries, and conduct creating the apprehension of violence were assaults. See 2 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 16.1 (2d ed. 2003) [hereinafter LAFAYE, *SUBSTANTIVE CRIMINAL LAW*] (distinguishing assault from battery). Many modern penal codes, however, have dispensed with the term “battery” and generally define the infliction of physical injury as some form of “assault,” offensive physical touching that does not inflict injury as “harassment,” and verbal threats as “menacing.” See *id.* at 551 n.2 (discussing changes in names of crimes). I use this modern terminology throughout this Article.

<sup>34</sup> Hanna, *No Right to Choose*, *supra* note 8, at 1889.

<sup>35</sup> Tuerkheimer, *supra* note 12, at 970–71 (noting that domestic violence advocates had been focusing reform efforts on policies aimed at enforcing existing criminal laws better, such as mandatory arrest and aggressive prosecution policies).

<sup>36</sup> See, e.g., *United States v. Watson*, 423 U.S. 411, 418 (1976).

<sup>37</sup> Hanna, *No Right to Choose*, *supra* note 8, at 1859 & n.35.

<sup>38</sup> See Ciraco, *supra* note 7, at 172–75; Hctor, *supra* note 7, at 677.

through changes in strategy and resources. For example, prosecutors have developed strategies for pursuing charges against offenders without the cooperation of their victims, proving cases with physical evidence and hearsay.<sup>39</sup> In Oregon, the legislature modified its rules of evidence to facilitate the admissibility of out-of-court, hearsay statements by domestic violence victims.<sup>40</sup> Some jurisdictions have gone so far as to mandate the victim's in-court cooperation by subpoena.<sup>41</sup>

Procedural reforms have not been limited to police and prosecutors. Courts may also treat domestic violence offenses differently by using specialized courts<sup>42</sup> and by creating alternative sentencing options that focus on treatment or other dispositions specifically designed for batterers.<sup>43</sup> Similarly, legislators have imposed collateral consequences upon domestic violence offenders, such as in the immigration context.<sup>44</sup> Again, however, in prosecutors' offices, courts, and collateral consequences, the defendant's substantive criminal culpability is measured against the jurisdiction's general penal code. The names of the crimes on the charging instruments and the statutory elements defining them do not reflect the intimate nature of the underlying conduct.<sup>45</sup>

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<sup>39</sup> The Supreme Court's recent Confrontation Clause jurisprudence has limited prosecutors' ability to pursue criminal charges without the testimony of the victim-witness. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that the government's use of "testimonial" hearsay in a criminal trial violated a defendant's rights under the Sixth Amendment's Confrontation Clause. *Id.* at 68–69. In *Davis v. Washington*, 126 S. Ct. 2266 (2006), the Court was asked to apply *Crawford's* testimonial standard in two domestic violence cases. The Court held that portions of one victim's 911 call were nontestimonial and therefore admissible because the statements were for the primary purpose of resolving a current emergency. *Id.* at 2277. Another victim's statements in response to in-person police questioning, in contrast, were deemed to be testimonial and therefore inadmissible because they were part of an investigation into past conduct. *Id.* at 2278–79.

<sup>40</sup> OR. REV. STAT. § 40.460(26) (2005) (admitting hearsay statements of domestic violence victims to police or other official personnel made within twenty-four hours of the reported incident so long as they are determined to have sufficient indicia of reliability); see also Tom Linger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 800–03 (2005) (advocating broader adoption of a domestic violence exception to the bar against hearsay).

<sup>41</sup> See Hanna, *No Right to Choose*, *supra* note 8, at 1862–64 (describing various prosecutorial policies in domestic violence cases).

<sup>42</sup> See BUZAWA & BUZAWA, *supra* note 1, at 174–75.

<sup>43</sup> *Id.* at 206–15; see also SHELLY JACKSON ET AL., U.S. DEP'T OF JUSTICE, BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE? 13 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/195079.pdf>.

<sup>44</sup> See 8 U.S.C. § 1227(a)(2)(E) (2000) (making a crime a deportable offense if it took place within an intimate relationship).

<sup>45</sup> See Tuerkheimer, *supra* note 12, at 970–71 (noting that mandatory arrest and "no drop" prosecutions seek merely to enforce existing laws).

Even when states have gone so far as to define domestic violence separately in their criminal codes,<sup>46</sup> there is little that is truly “separate” about the defined offenses.<sup>47</sup> Instead, the statutes might incorporate existing general crimes by explicit reference, and then add one additional element that requires an intimate relationship between the defendant and victim.<sup>48</sup> The only meat to statutes using the incorporation-by-reference method is in the selection of predicate crimes and the establishment of the scope of the covered relationships.<sup>49</sup> For example, in Alabama, a defendant commits the separate crime of domestic violence in the third degree when he commits the general crimes of assault in the third degree, menacing, reckless endangerment, criminal coercion, or harassment, defined elsewhere in the code,<sup>50</sup> against a person with the required domestic relationship.<sup>51</sup> The requirement of a domestic relationship is satisfied if the victim is a “current or former spouse, parent, child, any person with whom the defendant has a child in common, a present or former household

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<sup>46</sup> See *United States v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002) (“Fewer than half of the states currently have a ‘domestic assault’ statute that expressly includes as elements both the use of force and a specific relationship between the offender and victim. Most states . . . charge domestic violence offenders under general assault statutes.” (footnote omitted)).

<sup>47</sup> Even when a state’s statutes define “domestic violence” separately, these provisions often do not create separate substantive crimes, but instead merely dictate separate procedures or sentencing enhancements for general crimes. See NEV. REV. STAT. § 200.485 (2005) (providing a sentence enhancement for batteries that constitute domestic violence); *State v. Goodman*, 30 P.3d 516, 519 (Wash. Ct. App. 2001) (holding that a state statute defining domestic violence did not create a separate crime, but rather “signal[ed] the court that the law is to be equitably and vigorously enforced”).

<sup>48</sup> See, e.g., ALA. CODE §§ 13A-6-130 to -132 (2006) (defining domestic violence in the first, second, and third degrees by incorporating by reference the crimes of assault in the first, second, and third degrees, respectively); IDAHO CODE ANN. § 18-918 (2004) (defining felony domestic battery, misdemeanor domestic assault, and misdemeanor domestic battery, respectively, as battery causing traumatic injury, assault, and battery committed against domestic partners); MISS. CODE ANN. § 97-3-7(3) (1972) (providing that a person commits simple domestic violence by committing the general crime of simple assault within listed intimate and familial relationships).

<sup>49</sup> The statutes typically include not only current and former spouses, cohabitants, and shared participants in procreation, but other family members as well. See, e.g., MISS. CODE ANN. § 97-3-7(3) (providing that a person commits simple domestic violence by committing the general crime of simple assault “against a family or household member who resides with the defendant or who formerly resided with the defendant, a current or former spouse, a person who has a current dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child”).

<sup>50</sup> For the respective definitions of these crimes, see ALA. CODE §§ 13A-6-22 to -6-25, -11-8 (2006).

<sup>51</sup> *Id.* § 13A-6-132.

member, or a person who has or had a dating or engagement relationship with the defendant.”<sup>52</sup>

Alternatively, “separate” statutes sometimes avoid expressly incorporating general criminal statutes by reference, but the definitions of domestic violence nevertheless merely include combinations of acts and mental states already found in general criminal statutes, along with an additional element requiring the specified relationship between victim and offender.<sup>53</sup> For example, in Nebraska, prosecutors may convict a defendant of the separate offense of domestic assault in the third degree by proving that the defendant either intentionally and knowingly caused bodily injury to an intimate partner or placed, “by physical menace,” an intimate partner in fear of imminent bodily injury.<sup>54</sup> The general statute defining assault in the third degree, however, already criminalizes both causing bodily injury, either intentionally, knowingly, or recklessly, and threatening another “in a menacing manner.”<sup>55</sup> Accordingly, other than requiring that the victim be the defendant’s “intimate partner,”<sup>56</sup> the domestic violence statute adds nothing substantive to the Nebraska criminal code.

Similarly, in Ohio, prosecutors may convict a defendant of the separate offense of domestic violence by proving that the defendant knowingly caused or attempted to cause physical harm, recklessly caused serious physical harm, or threatened to cause imminent physical harm to family or household members.<sup>57</sup> The general Ohio assault

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<sup>52</sup> *Id.*; see also *id.* §§ 13A-6-130, -6-131 (defining domestic violence in the first and second degrees by incorporating the crimes of assault in the first and second degrees, respectively).

<sup>53</sup> See, e.g., CAL. PENAL CODE § 273.5 (West Supp. 2006) (providing that a person who “willfully inflicts . . . corporal injury resulting in a traumatic condition” on a protected party commits the felony of willful infliction of corporal injury); MO. REV. STAT. §§ 565.072–565.074 (2000) (defining domestic violence in the first, second, and third degrees through traditional criminal elements plus a familial, household, or intimate relationship with the victim); MONT. CODE ANN. § 45-5-206 (2005) (providing that a person commits “partner or family member assault” by purposely or knowingly causing bodily injury to, negligently causing bodily injury with a weapon to, or purposely or knowingly causing reasonable apprehension of bodily injury in a partner or family member); NEB. REV. STAT. ANN. § 28-323 (LexisNexis Supp. 2005) (defining domestic assault in the first through third degrees); OHIO REV. CODE ANN. § 2919.25 (LexisNexis 2006) (defining domestic violence as knowingly causing or attempting to cause physical harm, recklessly causing serious physical harm, or threatening imminent physical harm to family or household members).

<sup>54</sup> NEB. REV. STAT. ANN. § 28-323(1).

<sup>55</sup> NEB. REV. STAT. § 28-310(1) (1995).

<sup>56</sup> NEB. REV. STAT. ANN. § 28-323(7) (LexisNexis 2006) (defining “intimate partner” as “a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship”).

<sup>57</sup> OHIO REV. CODE ANN. § 2919.25.

statute already criminalizes knowingly causing or attempting to cause physical harm and recklessly causing serious physical harm.<sup>58</sup> The general menacing statute covers the remaining offense by punishing a person for knowingly causing another to fear serious physical harm.<sup>59</sup>

Regardless of whether the statute expressly incorporates general crimes by reference or simply reiterates statutory elements found elsewhere in the general criminal code, “separate” offenses defined by nothing more than a general crime plus a domestic relationship do not seek to punish the unique and unaddressed forms of culpability found in domestic violence. Perhaps, however, the failure of these so-called separate statutes to bring substantive legal reform is not surprising. Even a superficial look at the laws reveals that they were not enacted to change the substantive legal definition of domestic violence, but instead were adopted to accomplish a combination of symbolic, procedural, and sentencing goals.

To serve the expressive function of punishment, legislatures have enacted specialized domestic violence statutes to symbolize social changes in the treatment of domestic violence.<sup>60</sup> In the past, the lenient treatment of domestic violence was construed as an indication that society viewed women as worthless.<sup>61</sup> Enacting a specialized statute helps to remedy the harm of that prior message by expressly condemning batterers and reaffirming the value of women.<sup>62</sup> For example, the Rhode Island and Washington legislatures determined that the states’ general criminal statutes were sufficient to punish domestic violence, but both states nevertheless enacted separate domestic violence legislation “to recognize the importance of domestic violence as a serious crime against society and to assure victims of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.”<sup>63</sup>

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<sup>58</sup> *Id.* § 2903.13 (defining “assault”).

<sup>59</sup> *Id.* § 2903.21 (defining “aggravated menacing”).

<sup>60</sup> See JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970); Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY* 111, 130 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 621–23 (1996); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 351–53 (1996). See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (explaining how legal statements can be designed to change social norms).

<sup>61</sup> See Kahan & Nussbaum, *supra* note 60, at 352.

<sup>62</sup> See Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691, 695 (1998).

<sup>63</sup> R.I. GEN. LAWS § 12-29-1(a) (2002); see also WASH. REV. CODE § 10.99.010 (2004).

As a matter of process, distinguishing general criminal violations that are domestic in nature from those that are not may enhance the ability to enforce, prosecute, and track the prevalence of such crimes. In conjunction with the creation of separate crimes for domestic violence, legislatures can articulate the procedures to be used in such cases, such as warrantless arrest, mandatory arrest, or specialized prosecution policies.<sup>64</sup> Moreover, compared to a system in which domestic violence incidents are processed as general crimes, defining domestic violence as a separate crime can facilitate the collection of crime data specifically regarding domestic violence.<sup>65</sup>

Perhaps the largest practical impact of separate domestic violence statutes has been in the sentencing context. Typically, legislatures that have created separate crimes of domestic violence have attached higher penalties to the statute than the offender would receive under the general criminal code.<sup>66</sup> Moreover, legislatures have been able to address recidivism by requiring enhanced penalties for multiple domestic violence convictions.<sup>67</sup> Legislatures have also provided heightened penalties for domestic violence committed in front of children,<sup>68</sup>

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<sup>64</sup> See, e.g., Act of Apr. 25, 2000, No. 266, 2000 Ala. Laws 411 (creating a separate crime of domestic violence and setting forth procedures relating to arrests in domestic violence cases); NEV. REV. STAT. § 200.485(7) (2005) (limiting a prosecutor's ability to plea bargain cases constituting domestic violence).

<sup>65</sup> BUZAWA & BUZAWA, *supra* note 1, at 124 (noting that one advantage of a separate domestic violence crime is the ease of retaining "accurate records of the occurrence of reported domestic violence and the case disposition"). To facilitate such records, for example, Alabama requires that incidents constituting violations of the state's separate domestic violence statute be written up under that charge, not just as general crimes. ALA. CODE § 13A-6-133 (2006).

<sup>66</sup> See, e.g., ALA. CODE § 13A-6-132 (2006) (defining domestic violence in the third degree as a Class A misdemeanor even when committed through harassment, an offense constituting only a Class C misdemeanor under section 13A-11-8 absent the required relationship between victim and offender); GA. CODE ANN. § 16-5-20(d) (2003) (providing that simple assault committed against a past or present spouse, a co-habitant, or other protected party "shall be punished for a misdemeanor of a high and aggravated nature").

<sup>67</sup> See, e.g., MISS. CODE ANN. § 97-3-7(3) (1972) (defining what would otherwise be a misdemeanor as a felony on a third or subsequent conviction within five years); MO. REV. STAT. § 565.063(2) (2000) (prohibiting courts from suspending sentences or permitting fines in lieu of imprisonment for "persistent domestic violence offenders"); MONT. CODE ANN. § 45-5-206(3) (2005) (providing increased penalties for subsequent convictions for "partner or family member assault"); NEV. REV. STAT. § 200.485(1) (2005) (providing mandatory minimum sentences and increased penalties for repeated convictions); OHIO REV. CODE ANN. § 2919.25(D) (LexisNexis 2006) (raising the level of the offense and the resulting penalties for multiple convictions of what would otherwise be the misdemeanor of domestic violence).

<sup>68</sup> See Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205, 222-23 (1997) (proposing a model statute criminalizing the commission of domestic violence in the presence of a child); Laurel A. Kent, Comment, *Addressing the Impact of Domestic Violence on Children: Al-*

either through sentence enhancements<sup>69</sup> or by creating a separate crime including a statutory element requiring proof of a child witness.<sup>70</sup> Specialized domestic violence statutes can also authorize tailored sentences requiring counseling<sup>71</sup> or intervention with affected children.<sup>72</sup>

Activists opposed to domestic violence may very well have made a conscious decision to focus on procedural rather than substantive reforms. Because general criminal statutes are often violated in the course of an abusive intimate relationship, meaningful reform could be had simply by calling on police and prosecutors to enforce existing laws, rather than by pursuing the more politically difficult—and arguably less pragmatic—step of enacting additional criminal prohibitions. By emphasizing the enforcement of existing criminal law within intimate relationships, reformists shaped society's understanding of domestic violence as a crime, not just a private family matter. Without undermining the important symbolic, procedural, and sentencing goals accomplished through past reforms, the purpose of my analysis is simply descriptive: to establish, as Professor Tuerkheimer has previously noted,<sup>73</sup> that reforms to date have not explored substance.<sup>74</sup> Because legal reformists have taken the substantive criminal law as

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*ternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337, 1347–48.

<sup>69</sup> *E.g.*, ALASKA STAT. § 12.55.155(18)(C) (2004); ARIZ. REV. STAT. ANN. § 13-702(C)(17) (2001); ARK. CODE ANN. § 5-4-702 (2006); CAL. PENAL CODE § 1170.76 (West 2004); FLA. STAT. § 921.0014(1)(b) (2001); HAW. REV. STAT. § 706-606.4 (Supp. 2005); IDAHO CODE ANN. § 18-918(4) (2004); MISS. CODE ANN. § 97-3-7(3); MONT. CODE ANN. § 45-5-206(3)(a)(v); OKLA. STAT. ANN. tit. 21, § 644(E) (West Supp. 2006); WASH. REV. CODE ANN. § 9.94A.535(3)(h)(ii) (West Supp. 2007).

<sup>70</sup> *See, e.g.*, DEL. CODE ANN. tit. 11, § 1102(a)(4) (2001) (defining such conduct as a form of the crime of endangering the welfare of a child); GA. CODE ANN. § 16-5-70(c) (2003) (defining such conduct as a form of the crime of cruelty to children); OR. REV. STAT. § 163.160(3)(c) (2005) (defining such conduct as a separate and more serious form of assault); UTAH CODE ANN. § 76-5-109.1 (2003) (defining domestic violence in front of a child as a separate crime).

<sup>71</sup> MONT. CODE ANN. § 45-5-206(4) (requiring counseling for persons convicted of “partner or family member assault”); NEV. REV. STAT. § 200.485(2) (requiring counseling for persons convicted of battery constituting domestic violence).

<sup>72</sup> *See* NEV. REV. STAT. § 200.485(6) (permitting courts to refer an affected child to a child welfare agency in cases of battery constituting domestic violence).

<sup>73</sup> Tuerkheimer, *supra* note 12, at 970–71.

<sup>74</sup> One exception to this trend has been the criminalization of the violation of a civil restraining order. *See* BUZAWA & BUZAWA, *supra* note 1, at 124; Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 55–58 (1989). *See generally* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1102–42 (1993) (reviewing criminal contempt proceedings).

given, and played only with process, the criminal law's understanding of the defining elements of domestic violence has gone unchallenged.

## II. Why Domestic Violence Is Different

Relying on general criminal statutes, charging instruments and jury instructions define the elements of domestic violence as they would define the elements of a crime committed between strangers. The assumptions have been either that existing general criminal laws are sufficient to address domestic violence,<sup>75</sup> or that the only option is to fit the square peg of domestic violence into the existing round hole of the penal code.<sup>76</sup> However, the elements used to define general crimes—although satisfied in many domestic violence cases—do not accurately describe the elements that define domestic violence as a real-world phenomenon.<sup>77</sup> As Professor Tuerkheimer has noted, “[t]he disconnect between battering as it is practiced and battering as it is criminalized is vast and it is significant.”<sup>78</sup>

This Part summarizes the social science literature underlying Professor Tuerkheimer's claim. An extensive social science literature<sup>79</sup>

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<sup>75</sup> Hanna, *No Right to Choose*, *supra* note 8, at 1889 (arguing against a criminal defense based on the existence of an intimate relationship by recognizing that, “from a legal perspective, the violence in battering relationships is no different than violence in other situations”).

<sup>76</sup> See, e.g., Goodmark, *supra* note 2, at 28–30 (noting the gap between the criminal code and the range of abuses used in domestic violence, but assuming limits to the “narrow range of behaviors that the legal system can reach” and concluding that “the legal system will be largely useless for the untold numbers of women for whom physical abuse is a secondary issue” (emphasis added)); Hopkins et al., *supra* note 15, at 292 (suggesting restorative justice models as an alternative to criminal prosecutions that “fail to account for the ongoing nature of both the violence and, in some cases, the relationship itself”).

<sup>77</sup> See Tuerkheimer, *supra* note 12, at 962–69, 971–80.

<sup>78</sup> *Id.* at 959.

<sup>79</sup> No single article, and certainly not this one, can fully reflect the vast and diverse literature that studies and describes abuse and violence within intimate relationships. I have attempted to keep my discussion of the social science literature brief, highlighting the quantitative and qualitative aspects that are critical to the remainder of my argument. For more comprehensive and detailed discussions of the variously described phenomena of battering, domestic violence, and domestic abuse, see generally LUNDY BANCROFT, *WHY DOES HE DO THAT?: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN* (2002); BUZAWA & BUZAWA, *supra* note 1; NEIL S. JACOBSON & JOHN H. GOTTMAN, *WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS* (1998); LAVIOLETTE & BARNETT, *supra* note 25; SCHNEIDER, *supra* note 1; LENORE E.A. WALKER, *THE BATTERED WOMAN SYNDROME* 126–35 (2d ed. 2000) [hereinafter WALKER (2000)]; LENORE E. WALKER, *THE BATTERED WOMAN* 55–70 (1979) [hereinafter WALKER (1979)]; Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 24–34 (1991); DEFENDING OUR LIVES (Cambridge Documentary Films, Inc. 1993). Professor Tuerkheimer also highlights the repetitive and controlling nature of domestic



describes domestic violence, unlike assaults on strangers or passing acquaintances, as a *pattern* of harm in both a quantitative and qualitative sense. Quantitatively, domestic violence, as a term of art at least, consists not just of a single incident, but of repeated acts by the same offender against the same victim. Qualitatively, the intention of the defendant is not solely to engage in the violent conduct with which he is charged. Rather, his intention is to exercise power over and restrict the autonomy of his victim.<sup>80</sup>

A. *Quantitative Factors: Frequency and Duration*

Compared to assaults between strangers or nonintimate acquaintances, violence between intimates is more likely to involve repeated assaults over a period of time, rather than a one-time incident of violence.<sup>81</sup> One quantitative aspect of domestic violence is its frequency. One expert estimates that sixty-three percent of men who assault their wives repeat the behavior.<sup>82</sup> That estimate is consistent with the results of the National Violence Against Women Survey,<sup>83</sup> which found that more than sixty-five percent of the women who reported being physically assaulted by an intimate partner said they were victimized multiple times by that same person.<sup>84</sup> Nearly twenty percent of the assaulted women recalled ten or more incidents, and the average number of assaults by the same partner was nearly seven.<sup>85</sup>

Domestic violence is quantitatively distinct from nonintimate violence not only in its frequency, but also in its duration. The same sur-

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violence in criticizing the gap between domestic violence and the statutes used to prosecute it. See Tuerkheimer, *supra* note 12, at 962–69.

<sup>80</sup> WALKER (2000), *supra* note 79, at 6; Mahoney, *supra* note 79, at 53–60.

<sup>81</sup> See PATRICK A. LANGAN & CHRISTOPHER A. INNES, U.S. DEP'T OF JUSTICE, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN, SPECIAL REPORT 3 (1986); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 388 (1996) (noting that “domestic violence usually escalates in frequency and severity”); Dutton, *supra* note 79, at 1208 (“Abusive behavior does not occur as a series of discrete events.”); Hanna, *No Right to Choose*, *supra* note 8, at 1889 (describing batterers as “repeat criminal offenders”).

<sup>82</sup> DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 112 (rev. & expanded ed. 1995).

<sup>83</sup> The National Violence Against Women (NVAW) Survey was co-sponsored by the National Institute of Justice and the Centers for Disease Control and Prevention. See NAT'L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1 (2000) [hereinafter NVAW FINDINGS]. The researchers interviewed a representative sample of 16,000 Americans about their victimization by various forms of violence, including violence by intimate partners. *Id.*

<sup>84</sup> *Id.* at 39.

<sup>85</sup> *Id.*

vey found that nearly seventy percent of women who had been assaulted by an intimate partner reported that their victimization lasted more than one year.<sup>86</sup> For more than a quarter of the women, the victimization occurred over more than five years, and the average duration of the violence was four and a half years.<sup>87</sup> Indeed, even the language used to describe the experience of domestic violence reflects its frequent and prolonged character. We say that a woman who has been assaulted by her husband is “battered” or “beaten,” or has been subjected to “domestic violence,” suggesting a general status or a continued phenomenon.<sup>88</sup> In contrast, when a person has been assaulted by a stranger or casual acquaintance, we say he has been “attacked” or “assaulted,” or has gotten into a “fight,” suggesting a one-time act of violence, not violence more generally.<sup>89</sup>

### B. *Qualitative Factors: Power and Control*

The frequency and duration of domestic violence distinguish it quantitatively from other examples of criminal violence, but they also give rise to a qualitative distinction. Social scientists universally speak of domestic violence in terms that transcend the physical injuries from individual incidents of assault.<sup>90</sup> Instead, they speak of domestic violence as a pattern of conduct that uses physical battering as just one method of inflicting emotional trauma.<sup>91</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Of the six definitions that *The American Heritage Dictionary* provides for the word “violence,” only one refers to an individual incident of violence. The others refer to continuous states of force or abuse:

1. Physical force exerted for the purpose of violating, damaging, or abusing: crimes of violence.
2. The act or an instance of violent action or behavior.
3. Intensity or severity, as in natural phenomena; untamed force: the violence of a tornado.
4. Abusive or unjust exercise of power.
5. Abuse or injury to meaning, content, or intent: do violence to a text.
6. Vehemence of feeling or expression; fervor.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1921 (4th ed. 2000) (emphasis omitted).

<sup>89</sup> *The American Heritage Dictionary* describes, for example, an “assault” as “[a] violent physical or verbal attack,” *id.* at 107–08, and an “attack” as “[t]he act or an instance of attacking; an assault,” *id.* at 115.

<sup>90</sup> See, e.g., BUZAWA & BUZAWA, *supra* note 1, at 11 (“The impact of domestic violence is far higher than the individual acts.”).

<sup>91</sup> See *id.* (“Victims become emotionally traumatized.”); WALKER (2000), *supra* note 79, at 126–27 (setting forth Walker’s cycle theory of violence); LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 102 (1989) (describing a battered woman as “subjected repeatedly to coercive behavior (physical, sexual, and/or psychological) by a man attempting to force her to do what he wants her to do”).

Although social scientists caution that there is no singular profile of a domestic abuser's psychology,<sup>92</sup> they commonly use a framework of power and control to explain the coercive nature of domestic violence, emphasizing that the intended harm goes beyond physical injury.<sup>93</sup> Empirical evidence supports the theory that domestic violence is often driven by a desire to control. For example, men who are jealous, controlling, or verbally abusive are statistically more likely to assault, rape, or stalk their partners.<sup>94</sup> Many domestic violence offenders suffer from low self-esteem and little self-control, and may physically retaliate against exercises of independence by their intimate partners.<sup>95</sup> Some researchers suggest that men batter because they have power in the relationship and use it to control,<sup>96</sup> while others suggest that men batter because they feel powerless and are seeking to have more control.<sup>97</sup> The consensus from either perspective is that domestic violence is about gaining control over another person:

[S]ome researchers have suggested that men use violence as a form of controlling their wives. Because they have power, they can use violence. This violence induces fear in their wives, and therefore *they can use violence to invoke psychological and social control*. Indeed, higher levels of *need* for power among men [are] associated with violence. The finding that men with less power in their relationships are more likely to use violence may instead suggest that husbands

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<sup>92</sup> See JACOBSON & GOTTMAN, *supra* note 79, at 55 ("There are many competing theories among social scientists, legal experts, and advocates about what causes battering.").

<sup>93</sup> See, e.g., Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985-86 (1995).

<sup>94</sup> NVAW FINDINGS, *supra* note 83, at iv ("These findings support the theory that [domestic] violence . . . is often part of a systematic pattern of dominance and control.").

<sup>95</sup> BUZAWA & BUZAWA, *supra* note 1, at 15. Regarding retaliation, see also Diane H. Coleman & Murray A. Straus, *Marital Power, Conflict, and Violence in a Nationally Representative Sample of American Couples*, 1 VIOLENCE & VICTIMS 141, 148 (1986) (finding that domestic violence is more prevalent in couples with low consensus over the balance of power in their relationship).

<sup>96</sup> Neil S. Jacobson et al., *Affect, Verbal Content, and Psychophysiology in the Arguments of Couples with a Violent Husband*, 62 J. CONSULTING & CLINICAL PSYCHOL. 982, 986-87 (1994) (finding that "[o]nly husband violence," not violent behavior by wives, produces fear in the victim spouse, which "largely . . . accounts for the unique ability of husbands to use violence as a means of psychological and social control"); Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283, 286 (1995) (describing "patriarchal terrorism" as "rooted in patriarchal traditions, adopted with a vengeance by men who feel that they must control 'their' women by any means necessary").

<sup>97</sup> Julia C. Babcock et al., *Power and Violence: The Relation Between Communication Patterns, Power Discrepancies, and Domestic Violence*, 61 J. CONSULTING & CLINICAL PSYCHOL. 40 (1993) (hypothesizing that husbands may compensate for their lack of power in other aspects of the marriage by committing violence against their wives); Jacobson et al., *supra* note 96, at 982.

compensate for their lack of power or need for power by engaging in violence against their wives as a form of control. Such use of violence to control suggests that *violence serves as a coercive means of influence*.<sup>98</sup>

Neil Jacobson and John Gottman reported similar results in their seminal research that relied on first-hand observations of nonviolent interactions between people in abusive relationships.<sup>99</sup> Through their research, they found that men in abusive relationships were unwilling to accept the influence of their female partners, regardless of how gently it was presented or how sensible the suggestion.<sup>100</sup> Instead, any attempt by the women to assert themselves triggered aggression, often starting with emotional abuse.<sup>101</sup> Jacobson and Gottman concluded that the men they observed, unlike typical husbands or boyfriends who might thank a partner for advice or negotiate a compromise in response to a request, treated the attempt of a partner to influence as “a loss of face, an assault to their sense of honor.”<sup>102</sup> They also found that displays of belligerence, contempt, and domination often signaled that the batterer was close to “crossing the line” into physical violence,<sup>103</sup> whereas violent episodes stopped once the batterer had regained control.<sup>104</sup>

To obtain or maintain control over their intimate partners, batterers do not limit themselves to physical abuse.<sup>105</sup> They also resort to emotional abuse that is not itself criminalized and is therefore not considered in a prosecution brought under a general criminal statute.<sup>106</sup> The violence itself might be relatively minor, but it is used as

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<sup>98</sup> Lynda M. Sagrestano et al., *Perceived Power and Physical Violence in Marital Conflict*, 55 J. SOC. ISSUES 65, 67, 75–76 (1999) (finding that men’s perceived power is inversely correlated with violence) (first and third emphases added) (internal citations omitted).

<sup>99</sup> Most research in this area relies on self-reports by people involved in abusive relationships, which are susceptible to distortion and bias. See JACOBSON & GOTTMAN, *supra* note 79, at 20–21 (setting forth the advantages of their research protocol over self-reports).

<sup>100</sup> *Id.* at 63–64.

<sup>101</sup> *Id.* at 63.

<sup>102</sup> *Id.* at 63–64.

<sup>103</sup> *Id.* at 65–66.

<sup>104</sup> *Id.* at 67.

<sup>105</sup> Psychologists have long recognized that batterers use verbal threats to kill as part of a coercive campaign to maintain control over their partners. See Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3, 3 (1993) (noting that, along with “sublethal” physical violence, “threats to kill can be interpreted as coercive tactics that terrorize wives and thus keep them under their husbands’ control”).

<sup>106</sup> Goodmark, *supra* note 2, at 29 (noting that the daily realities of domestic abuse involve more than physical violence, “a reality not reflected in the narrow range of behaviors that the legal system can reach”). This Article does not seek to extend the reach of criminal law to

part of an “ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children, and friends; and work.”<sup>107</sup> The well-known “Power and Control Wheel,” used nationwide to demonstrate the dynamics of domestic violence, describes a common typology of abuse in which physical and sexual violence is accompanied by intimidation; emotional abuse; isolation; minimization, denial, and blaming; using the children against the victim; use of male privilege; economic abuse; and coercion and threats, all for the purpose of obtaining and maintaining power and control.<sup>108</sup> As one expert has described the intentions of a batterer:

I began to learn that intimate abuse was not just about hits and punches. It was about psychologically and physically trying to control their victims’ use of time and space in order to isolate them from all social connection, both past and present. It was an all-out attempt to annihilate their wives’ self-esteem, to enslave them psychologically.<sup>109</sup>

The collective toll of this broader picture of domestic violence, which goes beyond individual incidents of physical violence, has been recognized by some legal scholars, most notably in the context of defending battered women who are charged with murder after killing their abusers. The standard argument has been that a continuous and repetitive pattern of abuse causes “battered woman syndrome,”<sup>110</sup> which leaves battered women in a heightened and perpetual state of fear that may lead them to self-protection that is reasonable from the perspective of a “reasonable battered woman.”<sup>111</sup> I, in contrast, have

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emotional abuse. Rather, it questions the adequacy of the substantive criminal law’s current response to the physical abuse that is unquestionably within the criminal law’s reach.

<sup>107</sup> Stark, *supra* note 93, at 986 (emphasis omitted).

<sup>108</sup> Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 59, 88 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). The Domestic Abuse Intervention Project in Duluth, Minnesota, developed the “Power and Control Wheel” based on descriptions of domestic violence by battered women. See *Power and Control Wheel*, <http://www.duluth-model.org/documents/PhyVio.pdf> (last visited Jan. 27, 2007).

<sup>109</sup> DONALD G. DUTTON & SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 13 (1995).

<sup>110</sup> See generally WALKER (2000), *supra* note 79, at 167–69 (describing the symptoms of battered woman syndrome, and characterizing the syndrome as a subcategory of post-traumatic stress disorder).

<sup>111</sup> See *State v. Kelly*, 478 A.2d 364, 377 (N.J. 1984) (holding that expert testimony regarding battered woman syndrome, “if accepted by the jury, would have aided it in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to [the defendant’s] life”); *State v. Kelly*, 685 P.2d 564, 570 (Wash. 1984) (explaining that

argued that battered women are just as “reasonable” as other actors, but they must be permitted to present evidence that situates their defensive acts in the broader context of the violent relationship.<sup>112</sup> Perhaps no legal scholar has done more to call attention to the nonphysical abuse inherent in domestic violence than Charles Ewing, who has argued that extremely serious psychological injury is itself an immediate harm that should entitle domestic violence victims to a right of defense.<sup>113</sup>

All of these discussions regarding domestic violence’s true picture, however, have occurred in considering criminal *defenses*. Meanwhile, the substantive criminal law used to *prosecute* batterers continues to punish only individual incidents of threatening or violent behavior. As Professor Tuerkheimer has noted, this myopic focus prevents existing law from capturing either the frequency and duration of domestic violence, or the underlying motivation to control another person.<sup>114</sup>

### III. *The Failure of Existing Law to Reflect the Realities of Domestic Violence*

The general criminal law’s failure to capture the quantitative and qualitative differences between domestic violence and other crimes of violence is not merely a descriptive imperfection. The gap between general criminal statutes and the realities of domestic violence affects the evidence used to prosecute batterers, the criminal justice system’s discursive focus when describing and responding to domestic violence,

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expert testimony regarding battered woman syndrome was “offered to aid the jury in understanding the reasonableness of [the defendant’s] apprehension of imminent death or bodily injury”); *Ibn-Tamas v. United States*, 407 A.2d 626, 634 (D.C. 1979) (recognizing that testimony regarding battered woman syndrome arguably “would have supported [the defendant’s] testimony that on the day of the shooting her husband’s actions had provoked a state of fear which led her to believe she was in imminent danger . . . and thus responded in self-defense”).

<sup>112</sup> Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman*, 81 N.C. L. REV. 211, 273–95 (2002) (arguing that the rules of self-defense should be replaced with a standard that applies to all necessary uses of force).

<sup>113</sup> CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 62 (1987); Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 585–90 (1990); see also Stark, *supra* note 93, at 1019–26 (proposing a new legal theory of battering).

<sup>114</sup> Tuerkheimer, *supra* note 12, at 971–72 (“Laws applied to prosecute domestic violence are generally characterized by a narrow temporal lens and a limited conception of harm. Together these paradigms obscure defining aspects of battering: ongoing patterns of power and control are not addressed; nor is the full measure of injury that these patterns inflict redressed.” (citations omitted)).

the experiences of domestic violence victims within the criminal justice system, and the level of punishment imposed upon conviction.

Professor Tuerkheimer has previously noted some of the ways in which the criminal law's failure to describe the realities of domestic violence impairs the criminal justice system's ability to respond to and remedy domestic violence. She has been particularly insightful in setting forth the evidentiary and narrative limitations presented when batterers are judged and domestic violence victims are questioned only through a lens of existing criminal law. This Part summarizes and expands on Professor Tuerkheimer's discussion of the problems created as a result of prosecuting domestic violence using only general statutes.

First, this Part summarizes the evidentiary limitations previously noted by Professor Tuerkheimer. Second, it summarizes Professor Tuerkheimer's observations about the narrative limitations presented when domestic violence victims must describe their experiences in comparison to general criminal law statutes, and it argues that a specialized domestic violence statute might increase victim satisfaction and participation in the criminal justice process. Third, it argues that a specialized domestic violence statute focusing on the intentions of the batterer would accomplish a long-desired discursive shift in the criminal law's discussion of domestic violence, which has traditionally focused only on the psychology of victims and rarely on the psychology of batterers. Finally, this Part concludes that existing criminal statutes not only ignore harms unique to domestic violence, as Professor Tuerkheimer has argued,<sup>115</sup> but actually disfavor the punishment of domestic violence relative to comparable forms of nonintimate violence that are punished more severely.

#### A. *Evidentiary Limitations*

As an evidentiary matter, Professor Tuerkheimer's earlier work thoroughly explores the ways in which the substantive criminal law leaves jurors in domestic violence cases with an inadequate basis for understanding the true "story" of the parties and for assessing the defendant's guilt.<sup>116</sup> When a single act of violence is viewed outside of the broader pattern of abuse in which it occurred, jurors lack the context necessary for determining credibility and the truth.<sup>117</sup> They may

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<sup>115</sup> *Id.* at 975–88 (illustrating the failings of existing statutes through a hypothetical relationship, adopted from ANGELA BROWN, *WHEN BATTERED WOMEN KILL* (1987)).

<sup>116</sup> *Id.* at 980–88.

<sup>117</sup> *See id.* at 979–80 (describing how the focus on isolated incidents cripples prosecutors'

treat the case with apathy if they assume that a relatively minor confrontation was an isolated incident in an otherwise nonviolent relationship.<sup>118</sup> They may write it off as the product of a rare instance of excessive intoxication<sup>119</sup> or as an act of self-defense against an out-of-control wife or girlfriend.<sup>120</sup> Most importantly, Professor Tuerkheimer has noted how difficult it can be to establish a victim's credibility with a jury when the law forces her to focus only on a single incident.<sup>121</sup> Without the ability to provide a coherent narrative about the dynamics between her and the offender in their intimate relationship, a victim's allegations about a single incident may sound irrational or far-fetched.<sup>122</sup>

Although courts may permit evidence of prior bad acts to prove the defendant's motive or to rebut claims of self-defense,<sup>123</sup> Professor

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ability to portray the true facts in a credible fashion); *see also* Buel, *supra* note 15, at 233 ("If the batterer is arrested after an incident, it is only that one incident to which the courts attend. Such a myopic focus fails to convey a comprehensive understanding of the batterer's dangerous conduct, making the victim's fear appear exaggerated.").

<sup>118</sup> Tuerkheimer, *supra* note 12, at 987-88.

<sup>119</sup> Depending on the jurisdiction, evidence of voluntary intoxication can be used to negate at least some mental states. For example, the Model Penal Code generally permits proof of voluntary intoxication to negate allegations of knowledge and purpose. MODEL PENAL CODE § 2.08(1) cmt. 1, at 354 (1985) ("When purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). Similarly, the common law permitted evidence of voluntary intoxication to rebut specific intent, but not general intent. *Id.* § 208(1) cmt.1, at 353. Of course, even if a trial court instructs the jury that intoxication is no defense, jurors may nevertheless nullify if they find the defendant's claim sympathetic. *See* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 433 & n.2 (1998) (observing that jurors exercise their "unreviewable nullification power" when they believe that criminal punishment is unwarranted, such as when the defendant was intoxicated at the time of the offense).

<sup>120</sup> Claims of self-defense by alleged batterers can be surprisingly difficult to overcome when the violence in an individual incident is relatively minor, such as slapping or pushing, especially in jurisdictions that require the prosecution to disprove self-defense beyond a reasonable doubt. *See generally* 1 LAFAYETTE, SUBSTANTIVE CRIMINAL LAW, *supra* note 33, § 1.8(c), at 89 & n.63 (listing state statutes that allocate to the government the burden of disproving defenses).

<sup>121</sup> Tuerkheimer, *supra* note 12, at 981-84; *see also* Hanna, *No Right to Choose*, *supra* note 8, at 1899-900 (emphasizing the importance of extrinsic evidence to enhance the credibility of victim testimony in domestic violence cases).

<sup>122</sup> *See* Tuerkheimer, *supra* note 12, at 983-84 (discussing the inability of victims to provide a persuasive narrative when testifying about individual events); Hanna, *No Right to Choose*, *supra* note 8, at 1899 ("[S]tories about being battered are often disregarded as a product of the victim's psyche, rather than seen as a retelling of the truth.").

<sup>123</sup> *See, e.g.,* Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1493-97 (1996). *See generally* FED. R. EVID. 404(b) (prohibiting evidence of past wrongs to prove propensity, but permitting it "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").



Tuerkheimer has argued that prior bad acts litigation should not be the sole “terrain on which the battle over context is enacted,”<sup>124</sup> because “domestic violence ‘history’ is not in fact history; it is, rather, an integral part of the batterer’s continuing effort to control his victim.”<sup>125</sup> Moreover, even when such evidence is admitted, the defendant’s guilt is still judged—and a conviction still imposed—based entirely on the occurrence of an individual event. When evidence of the broader context is admitted solely for the purpose of proving a single incident, the overarching pattern of abuse is relegated to a secondary position and has limited relevance to the consideration of jurors and the court.<sup>126</sup> Finally, because the evidence is admitted only for indirect and limited purposes, courts may properly limit the breadth of the evidence in order to preserve judicial resources and to prohibit “unfair” prejudice to a defendant accused in only a single incident.<sup>127</sup> Accordingly, the usefulness of prior bad acts evidence is limited as one attempts to overcome the difficulties of prosecuting domestic violence as isolated occurrences under the general criminal law.

### *B. Effects on Victim Satisfaction and Participation*

The criminal law’s sole focus on individual incidents of physical violence within abusive relationships, as Professor Tuerkheimer has noted, may also hinder the level of victim satisfaction with and participation in the criminal justice system.<sup>128</sup> The reluctance of domestic violence victims to cooperate in the prosecutions of their batterers is well documented.<sup>129</sup> Researchers estimate that approximately eighty percent or more of domestic violence victims decline to cooperate as

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<sup>124</sup> Tuerkheimer, *supra* note 12, at 991.

<sup>125</sup> *Id.* at 997–98.

<sup>126</sup> *See id.* at 990 (“Because domestic violence is criminalized as a discrete act or acts, the pattern itself—and all conduct manifesting it that is not specifically charged—lies outside the domain of the prosecution. Pieces of a whole fragmented by substantive criminal statutes become further unmoored from their context by evidentiary doctrine.”).

<sup>127</sup> *See generally* FED. R. EVID. 403 (permitting courts to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

<sup>128</sup> *See* Tuerkheimer, *supra* note 12, at 1016–17 (noting that existing criminal law fails battered women, both individually and collectively).

<sup>129</sup> *See* Hanna, *No Right to Choose*, *supra* note 8, at 1853, 1873–77; Lininger, *supra* note 40, at 768–71.

complaining witnesses in the criminal prosecutions against their abusers,<sup>130</sup> while only ten to twenty percent choose to participate.<sup>131</sup>

The myriad reasons why victims choose not to cooperate with the prosecution are equally familiar. Fears of retaliation,<sup>132</sup> distrust of criminal punishment, economic dependency, emotional attachments, and concerns for joint children all help to distinguish a victim of domestic violence from the ordinary crime victim who might readily press charges and testify.<sup>133</sup>

Redefining domestic violence as a separate crime certainly will not change any of these factors that are external to the criminal justice system. It may, however, increase the benefits flowing from a victim's cooperation, which she must weigh against any countervailing considerations. For domestic violence victims in particular, participating in the prosecution of a batterer can be a kind of "coming out," providing confirmation of her experiences.<sup>134</sup> Using general criminal statutes to prosecute the unique phenomenon of domestic violence, however, limits the ability of criminal courtrooms to serve as validation.<sup>135</sup> Vic-

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<sup>130</sup> See *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004) (citing expert testimony that approximately eighty to eighty-five percent of domestic violence victims recant prior statements at some point during prosecution); BUZAWA & BUZAWA, *supra* note 1, at 87 (summarizing research on case attrition due to victim noncooperation); Lininger, *supra* note 40, at 751.

<sup>131</sup> De Sanctis, *supra* note 81, at 367; see also Lininger, *supra* note 40, at 768–69 (reporting that ninety-one percent of surveyed prosecutors "believed victims of domestic violence are generally more likely to be noncooperative than cooperative when subpoenaed by the prosecution").

<sup>132</sup> Lininger, *supra* note 40, at 769 ("[D]ata show that the time when a victim decides to break free [from] a violent relationship is the most dangerous time . . ."); Mahoney, *supra* note 79, at 5–7 (identifying the phenomenon of "separation assault"); see also Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, CT. REV., Spring 2000, at 28, 33 (reporting that up to half of all batterers charged criminally threaten retaliatory violence against their victims).

<sup>133</sup> See BUZAWA & BUZAWA, *supra* note 1, at 86–89 (summarizing research on why domestic violence victims may not cooperate with prosecution); see also Burke, *supra* note 112, at 268–73 (discussing why domestic violence victims stay in relationships with batterers).

<sup>134</sup> David A. Ford & Mary Jean Burke, *Victim-Initiated Criminal Complaints for Wife Battery: An Assessment of Motives 5* (July 1987) (unpublished paper, presented at the Third National Conference for Family Violence Researchers, University of New Hampshire, Durham, New Hampshire, on file with *The George Washington Law Review*) ("The typical battered woman filing charges against her conjugal partner does so as a declaration that she will not be silent over her abuse.").

<sup>135</sup> Professor Tuerkheimer noted,

A prosecutor who has handled domestic violence cases has in all likelihood heard but *this* (the crime formally charged) is not the worst that he did to me, usually followed by a painful story of what is. She calls for understanding at the very least and, beyond, for remediation, a fuller measure of justice.

Tuerkheimer, *supra* note 12, at 1016.

tims who finally come forward with their stories of frequent and enduring abuse, despite so many reasons not to, are forced to focus for prosecution purposes on individual incidents of physical abuse. Cognizant of the statutory elements of the offense that must be proven, police and prosecutors hone in on only the severity of the physical contact involved in the discrete incident.<sup>136</sup> They do not ask her about the ways in which he tried to limit her agency, restrict her options, and make her feel small. If she offers these anecdotes anyway, no one will make note of them because the current law renders them unimportant.<sup>137</sup> If she tells her story the way she perceives it, and continues to talk about legally irrelevant aspects of her relationship, she might be reprimanded as a bad witness.<sup>138</sup>

In contrast, a specialized statute criminalizing domestic violence could make the victim's view of her relationship with the batterer legally relevant. To prove their case, prosecutors would have to listen to the victim's account of not only individual incidents, but also the broader context. To determine guilt, jurors would have to focus not only on the predicate crimes, but also on the defendant's reasons for committing them.

Empirical evidence demonstrates that citizens are more likely to cooperate with law enforcement when they recognize it as legitimate<sup>139</sup> and believe they have been listened to and treated fairly and respectfully.<sup>140</sup> While procedural reforms have sought to improve the

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<sup>136</sup> See *id.* at 977.

<sup>137</sup> See *id.* at 978–99.

<sup>138</sup> Because of patterns in abusive relationships, victims do not perceive and store acts of violence as individual incidents. Indeed, they may not even recognize each incident as a separate criminal offense because they view each incident as part of the larger situation. See MAYOR'S OFFICE TO COMBAT DOMESTIC VIOLENCE, NEW YORK CITY MAYOR'S OFFICE, KEEPING OUR HOMES SAFE: ADDRESSING DOMESTIC VIOLENCE IN NEW YORK CITY 5 (2004), available at [http://www.nyc.gov/html/ocdv/downloads/pdf/safe\\_home.pdf](http://www.nyc.gov/html/ocdv/downloads/pdf/safe_home.pdf) (reporting that domestic violence victims sometimes do not report sexual assault "because they perceive it to be part of a generally abusive situation and not a separate crime").

<sup>139</sup> Tom R. Tyler & Jeffrey Fagan, *Building a Law-Abiding Society: Taking Public Views About Morality and the LEGITIMACY of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 714–17 (2000) (discussing the connection between legitimacy and law abidingness); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?* 26 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 06-99, 2005), available at <http://ssrn.com/abstract=887737> ("[P]eople are more willing to cooperate with the police when they view the police as legitimate social authorities.").

<sup>140</sup> Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 469 (2003). See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (concluding that people obey the law if they believe it is legitimate, not because they fear

treatment of domestic violence victims by the criminal justice system, the substantive criminal law still “treats” them shabbily by using as the sole tools of prosecution statutes that do not accurately describe domestic violence. Although no statutory change can persuade all victims to testify against their batterers, a specialized statute that accurately describes the dynamics of domestic violence would at least permit a victim who chooses to testify to tell her complete story.

### C. Discursive Limitations

The prosecution of domestic violence using only general provisions of the criminal code affects not only the lens used to determine relevance at trial, but the entire discursive focus of the criminal justice system’s response to domestic violence. Because the criminal law prosecutes batterers for offenses defined only by the actor’s conduct, and not by his underlying motivation, the criminal law’s discourse about domestic violence omits any consideration of the psychological make-up of batterers. In contrast, as a discursive matter, the criminal law remains obsessed with the psychological impairments of battered women.

Although the trend of domestic violence reform has been to shift the focus from the victim to the batterer,<sup>141</sup> those shifts have taken place only in procedural contexts. For example, because of mandatory arrest laws, the victim no longer chooses whether her batterer is arrested or warned when police have probable cause of a domestic abuse incident.<sup>142</sup> Because of changes in prosecutorial policies, she no longer determines whether criminal charges are filed, or whether they are dropped once they have been initiated.<sup>143</sup> Because of changes in trial tactics, she may not even be asked or required to testify if the state can prove the charges based on other evidence, such as independent eyewitness testimony, hearsay, and physical evidence.<sup>144</sup> But in terms of *substance*, when the dynamics of battering

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punishment); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103 (1988) (suggesting that people are most satisfied with legal processes when they perceive that they have been treated fairly).

<sup>141</sup> See Hanna, *No Right to Choose*, *supra* note 8, at 1898 (subtitled one section of her seminal article on mandated victim participation in battering prosecutions: “Shifting the Focus Away from the Victim”).

<sup>142</sup> See *supra* notes 36–38 and accompanying text for a discussion of changes in the policies and statutes that govern the decision whether to arrest in domestic violence cases.

<sup>143</sup> See *supra* notes 39–41 and accompanying text for a discussion of changes in prosecutorial policies regarding the initiation and continuation of domestic violence cases.

<sup>144</sup> See Hanna, *No Right to Choose*, *supra* note 8, at 1901–06 (discussing the types of evi-

relationships are discussed, courts and commentators remain preoccupied by the psyche of the battered woman, especially the familiar question, "Why doesn't she leave?"

The obsession with women's decisions to remain in abusive relationships has led to numerous explanations. Advocates of the "battered woman syndrome" theory turn to the concept of "learned helplessness," arguing that, in response to repeated and random acts of abuse, at least some women develop a cognitive inability to recognize escape options.<sup>145</sup> Others reject or deemphasize theories of psychological impairment or cognitive incapacity by pointing to the objective circumstances that can limit a woman's ability to leave an abuser:<sup>146</sup> fear of retaliation;<sup>147</sup> economic hurdles due to a lack of money, employment, housing, or child care;<sup>148</sup> social isolation;<sup>149</sup> fear of losing custody of their children;<sup>150</sup> religious or moral opposition to divorce;<sup>151</sup> and continued feelings of love for the batterer.<sup>152</sup>

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dence and strategies that can assist the prosecution in domestic violence cases pursued without the victim's testimony).

<sup>145</sup> WALKER (2000), *supra* note 79, at 116–25. The theory of learned helplessness is based upon Martin Seligman's classic research using dogs. See Martin E.P. Seligman et al., *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256 (1968). Seligman found that caged dogs that were subjected to inescapable electrical shock began to submit without resistance once they realized the futility of their attempts to escape. *Id.* at 260. Once they were rendered "helpless," the dogs failed to escape their cages even when given the opportunity to escape. *Id.*

<sup>146</sup> See generally Burke, *supra* note 112, at 267–73 (summarizing the many reasons why rational women might remain in an abusive relationship).

<sup>147</sup> Women have good reason to fear leaving more than staying. The risks of a battered woman being seriously injured or killed by her batterer are highest within the first two months of separation from the batterer. Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3, 10 (1993). See generally Mahoney, *supra* note 79, at 65–93 (defining "the assault on the woman's separation as a specific type of attack that occurs at or after the moment she decides on a separation or begins to prepare for one").

<sup>148</sup> See De Sanctis, *supra* note 81, at 368–69 (noting that half of battered women fall beneath the poverty line when they leave their batterers); Debra S. Kalmuss & Murray A. Straus, *Wife's Marital Dependency and Wife Abuse*, 44 J. MARRIAGE & FAM. 277, 279, 284–85 (1982) ("The primary group of women who tolerate severe violence are those highest in objective dependency [i.e., economic dependency]. . . . They have virtually no alternatives to their marriages and, therefore, 'must' tolerate the conditions of those marriages."); Michael J. Strube & Linda S. Barbour, *Factors Related to the Decision to Leave an Abusive Relationship*, 46 J. MARRIAGE & FAM. 837, 842 (1984) (finding that a woman's decision to remain in an abusive relationship is correlated with whether she is employed and whether she views herself as economically dependent).

<sup>149</sup> See Joyce McCarl Nielsen et al., *Social Isolation and Wife Abuse: A Research Report*, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 49, 55–59 (Emilio C. Viano ed., 1992) (finding that isolation both precedes and results from battering).

<sup>150</sup> See BUZAWA & BUZAWA, *supra* note 1, at 88; Mahoney, *supra* note 79, at 63.

<sup>151</sup> See Michael B. Frisch & Cynthia J. MacKenzie, *A Comparison of Formerly and Chroni-*

My purpose here is not to explore fully all of the diverse reasons offered for why individual women might remain in abusive relationships. Instead, my purpose is to point out that we continue to ask that same question, focusing only on the victims of domestic violence instead of on the batterers. Elizabeth Schneider has eloquently described the problem with the law's current absorption with only the victims of domestic violence:

Instead of focusing on the batterer, we focus on the battered woman, scrutinize her conduct, examine her pathology and blame her for not leaving the relationship, in order to maintain that denial and refuse to confront the issues of power. Focusing on the woman, not the man, perpetuates the power of patriarchy.<sup>153</sup>

To belabor the alleged psychological abnormalities in domestic violence victims hints that they may somehow play a role in their victimization, a suggestion that would not be made lightly of other crime victims.<sup>154</sup> Martha Minow has suggested that perhaps we focus on the choices of battered women because it is easier to blame them for the abuse than to ask why it could not happen to people like us and in families like ours.<sup>155</sup>

Perhaps another reason why courts and scholars have been consumed by the motivations of women is that, to the extent that the substantive criminal law permits inquiry at all into the dynamics of abusive relationships, it is only when battered women are prosecuted for crimes committed either against or in cooperation with their abusers. Once charged with such crimes, the women claim either self-defense or duress, as the case may be, and juries must then determine whether the defendants acted "reasonably."<sup>156</sup> These inquiries into

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cally Battered Women on Cognitive and Situational Dimensions, 28 *PSYCHOTHERAPY* 339, 342 (1991); Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 *FORDHAM URB. L.J.* 953, 960 (2000).

<sup>152</sup> *People v. Price*, 15 Cal. Rptr. 3d 229, 236 (Ct. App. 2004) (describing expert testimony that "some [women who do not leave an abusive relationship] love the battering person and want to try to make the relationship work").

<sup>153</sup> Schneider, *supra* note 23, at 983.

<sup>154</sup> BUZAWA & BUZAWA, *supra* note 1, at 17 (noting that others have focused on the psychology of battered women at the expense of discussing patriarchal traditions that contribute to domestic violence).

<sup>155</sup> Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 *VAND. L. REV.* 1665, 1681-82 (1990) ("Perhaps in the face of intimate brutality, observers feel a need to blame someone as well as a need to explain why it could not happen in their own home; perhaps these needs produce a tendency to blame victims.").

<sup>156</sup> When a battered woman kills her abuser and claims self-defense, her reasonableness is at issue because traditional self-defense law provides that an actor's force is justified if she *rea-*

reasonableness then invite questions about whether the women were *unreasonable* simply for being in the relationships that supposedly necessitated self-help. Those questions, in turn, invite explanations for why the women stayed.<sup>157</sup>

In contrast, the substantive criminal law currently used to prosecute batterers renders the dynamics of the abusive relationship largely irrelevant.<sup>158</sup> When men are charged with acts of domestic violence, the focus is on whether they assaulted, threatened, or harassed on individual occasions,<sup>159</sup> not on the underlying reasons for their abusive actions. Martha Mahoney previously noted, “Recognizing the batterer’s attempt at domination as the key to battering relationships allows a focus on his motivations rather than the psychology of the victim.”<sup>160</sup> Moreover, as Professor Tuerkheimer previously argued, a specialized statute tailored to the dynamics of domestic violence could be a move in the right direction of talking less about the psyches of battered women and more about the psyches of battering men.<sup>161</sup> Specifically, a criminal charge that requires proof that the defendant engaged in a pattern of domestic violence with the intention of gaining power or control over his victim would render the psychological impact of the abuse on the victim less relevant than the motivations of the defendant. In a desirable shift in the dialogue about domestic violence, we finally would be asking not why women stay, but instead why men batter.<sup>162</sup>

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*sonably* believes that the force is necessary to prevent an imminent threat of unlawful physical force. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01, at 221–23 (3d ed. 2001); WAYNE R. LAFAVE, CRIMINAL LAW § 5.7, at 491 (3d ed. 2000) [hereinafter LAFAVE, CRIMINAL LAW]. When a battered woman is charged with committing crimes in cooperation with her abuser and claims that he compelled her to do it, her reasonableness is at issue because the traditional law of duress excuses only those crimes committed under circumstances in which a *reasonable* person would have been similarly compelled. See, e.g., MODEL PENAL CODE § 2.09(1) (1985) (providing that the defense of duress applies only if the defendant’s conduct was coerced by a threat of unlawful force that a “person of reasonable firmness in his situation would have been unable to resist”).

<sup>157</sup> See Burke, *supra* note 112 (discussing how the dynamics of domestic violence relationships can be relevant to self-defense and duress claims).

<sup>158</sup> See Tuerkheimer, *supra* note 12, at 971–74; *supra* Part I.

<sup>159</sup> See Tuerkheimer, *supra* note 12, at 972.

<sup>160</sup> Mahoney, *supra* note 79, at 57.

<sup>161</sup> See Tuerkheimer, *supra* note 12, at 1022. However, as discussed further in Part V, *infra*, I question whether Professor Tuerkheimer’s proposed battering statute actually accomplishes the discursive shift she seeks.

<sup>162</sup> See Minow, *supra* note 155, at 1682 (“It seems easier—less frightening—to ask why battered women stay in relationships with their abusers than to ask why men batter.”); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1103 (2006) (arguing for a discursive shift in the

#### D. Severity of Punishment

A final problem with using general criminal statutes as the sole vehicle for prosecuting domestic violence concerns sentencing. With all of the recent emphasis on arresting, prosecuting, and punishing batterers,<sup>163</sup> most domestic violence cases are still classified as misdemeanors.<sup>164</sup> Accordingly, even if the defendant is convicted of violating the general criminal law, that conviction may not reflect the severity of the defendant's pattern of conduct, thereby understating his true culpability.<sup>165</sup>

Perhaps the failure to punish domestic violence adequately should be no surprise. Just as the criminal law's current harm conceptions do not map well the realities of domestic violence, neither do its traditional assumptions about which criminalized acts of violence to treat most seriously. The factors that lawmakers have traditionally considered aggravating are well suited to grade the severity of nonintimate violence, but they are less apt when applied to domestic violence offenses. In this respect, existing criminal law—although facially neutral—actually disfavors the punishment of domestic violence offenders compared to other perpetrators of nonintimate violence.<sup>166</sup>

Consider, for example, the existing criminal law's emphasis upon the extent of the victim's physical injuries on a single occasion. In most jurisdictions, an assault without a weapon is a felony only if the injury is "serious."<sup>167</sup> Forms of physical touching that do not inflict concrete injury, such as slapping, shoving, and restricting a person's

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description of battered women from victimization to survival, a narrative that casts the battered woman "in a more positive light, and places the emphasis on the violence of the man").

<sup>163</sup> See *supra* Part I.

<sup>164</sup> See BUZAWA & BUZAWA, *supra* note 1, at 86 (suggesting that the misdemeanor classification may "be another product of the relatively low esteem given such cases"); Lininger, *supra* note 40, at 790 (reporting that a survey of West Coast prosecutors found that more than half of all domestic violence charges were filed as misdemeanors in eighty-two percent of surveyed jurisdictions).

<sup>165</sup> Tuerkheimer, *supra* note 12, at 1015–16 (noting the failure of current criminal law sanctions to reflect the scope of domestic violence's harms).

<sup>166</sup> This is a variant of a phenomenon I have previously noted: the potentially discriminatory impact of facially neutral criminal law doctrine on women. See Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1057–59, 1062 (2005) (discussing the gendered advantages that the imminence requirement for self-defense, the rejection of a duty to retreat, and the provocation doctrine convey upon men); cf. Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 260–61 (2006) (noting that despite a "fiction of objective standards," many assumptions of criminal law are premised on "the dominant Anglo-American culture").

<sup>167</sup> See MODEL PENAL CODE § 211.1(2)(a) (1980); 2 LAFAYE, SUBSTANTIVE CRIMINAL LAW, *supra* note 33, § 16.2(d), at 563.



movement, are treated as even lower offenses than misdemeanor assault, typically harassment.<sup>168</sup> Because batterers use physical violence in an attempt to control their victims, not primarily to subject them to serious physical harm or death, a lengthy and severe pattern of domestic violence may never involve the commission of a felony. Individual incidents may be low-level<sup>169</sup> under existing definitions, while no single charge enables the criminal law to reflect the cumulative harm.<sup>170</sup>

Even when physical injury is not serious, an assault will constitute a felony if the offender uses a weapon<sup>171</sup> or, in a few states, if it is committed by multiple perpetrators against a single victim.<sup>172</sup> Again, however, these conceptions of aggravating factors do not appear to contemplate domestic violence. In other forms of violence, the use of a weapon and the existence of multiple assailants are sensible aggravating factors because both increase the risk of serious physical injury or death.<sup>173</sup> In the context of domestic violence, however, physical harm is often secondary to the harms to agency that are a domestic batterer's primary intent.<sup>174</sup> Accordingly, the likelihood of inflicting serious physical injury is a misplaced measure of the level of a domestic violence defendant's culpability.

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<sup>168</sup> See MODEL PENAL CODE § 250.4 (defining "offensive touching" as a form of harassment, a petty misdemeanor); 2 LAFAYETTE, SUBSTANTIVE CRIMINAL LAW, *supra* note 33, § 16.2(a) (contrasting noninjurious touching that once constituted "assault" with "batteries" that inflict injury). See *supra* note 33 for an explanation of the changes in terminology used to describe these categories of misdemeanor offenses.

<sup>169</sup> See Stark, *supra* note 93, at 985–86 ("Much of the assaultive behavior in battering relationships involves slapping, shoving, hair-pulling, and other acts which are unlikely to prompt serious . . . police concern.")

<sup>170</sup> See Tuerkheimer, *supra* note 12, at 1015 ("In the domestic violence context, the severity of available criminal law sanctions does not reflect the scope of the harm perpetrated.")

<sup>171</sup> See MODEL PENAL CODE § 211.1(2)(b); 2 LAFAYETTE, SUBSTANTIVE CRIMINAL LAW, *supra* note 33, § 16.2(d), at 560.

<sup>172</sup> See CONN. GEN. STAT. §§ 53a-59(a)(4) (2003) (defining what would otherwise be a Class D felony assault under section 53a-60(a)(1) as a Class B felony assault if it was aided by two or more other persons actually present); N.Y. PENAL LAW § 120.06 (McKinney 2004) (defining "gang assault in the second degree" as requiring that the defendant have been "aided by two or more other persons actually present"); OR. REV. STAT. § 163.165(1)(e), (2) (2005) (defining what would otherwise be a misdemeanor assault under section 163.160(1)(a) as a felony if committed with the aid of another person actually present).

<sup>173</sup> See Bart H. Rubin, Note, *Hail, Hail, the Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute*, 66 FORDHAM L. REV. 2033, 2042 (1998) (citing legislative history to New York's gang assault statutes to argue that multiple assailants, like deadly weapons, increase the likelihood of death or serious physical injuries).

<sup>174</sup> See Part II.B, *supra*, for the role that physical violence plays as a means for the batterer to gain power and control over his victim, rather than as an end in and of itself.

One might also view weapons and multiple assailants as aggravating factors because they deprive the victim of a level playing field on which to defend himself.<sup>175</sup> Even absent a weapon, however, inequities in size and strength will frequently create a playing field tilted in favor of a man assaulting his wife or girlfriend.<sup>176</sup> Accordingly, batterers do not need to resort to weapons or cooperation with others to gain an upper hand physically, which they in turn use in an attempt to gain an upper hand emotionally. As such, the current law's allocation of punishment, although facially neutral, assumes male-on-male violence, or at least nonintimate violence between parties equally capable of self-defense.

Another factor that lawmakers have used to aggravate what would otherwise be a misdemeanor assault is the status of the victim. Adopting this approach, states have punished assaults against law enforcement officers, public officials, teachers, the elderly, and the young, for example, more seriously than other assaults.<sup>177</sup> With few exceptions,<sup>178</sup> however, these statutes have not been amended to include assaults against intimate partners.

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<sup>175</sup> See Roger D. Scott, *Looting: A Proposal to Enhance the Sanction for Aggravated Property Crime*, 11 J.L. & POLITICS 129, 147 (1995) (noting that group criminal activity, "by its very nature, manufactures vulnerability").

<sup>176</sup> The substantive law under which uses of force are prosecuted does not take into account strength differences between men and women, choosing instead to aggravate assaults only when dangerous weapons are used. The physical imbalance involved in domestic violence, however, is frequently discussed in the context of self-defense. It is precisely because of disparities in size and strength that women may resort to weapons when using proportional self-defense against unarmed men. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 416–19 (1991) (explaining that the majority rule regarding proportionality does not preclude use of a weapon against an unarmed attacker if reasonable under the circumstances); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 38 (1986) (describing efforts by feminist lawyers to overcome traditional self-defense theory by persuading the fact-finder to accept that a "woman's perception of danger will be affected by her smaller size, socialization regarding passive attributes of femininity, and poor physical training" and that "[a] woman may reasonably feel the need to use a weapon to protect herself from an unarmed assailant"); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 631–32 (1980) (observing the disadvantage of women in responding with physical force alone when confronted with physical force by a male assailant); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 157 (1978) (describing how traditional self-defense theory ignores the plight of the "woman who feels ill-equipped to defend herself with her fists" and calling for incorporation of "the woman's perspective into the deadly force standard").

<sup>177</sup> See generally 2 LAFAYE, SUBSTANTIVE CRIMINAL LAW, *supra* note 33, § 16.2(d), at 562 (collecting statutes).

<sup>178</sup> See *supra* notes 46–59 and accompanying text.

One might argue that legislation could remedy concerns about adequate punishment by creating sentencing factors that would require a higher sentence for a general crime if it was part of a pattern of domestic violence. The Supreme Court's recent sentencing jurisprudence, however, has limited the legislature's ability to mandate higher sentences through sentencing factors rather than offense elements.<sup>179</sup> More important, a mere sentencing factor would fail to remedy the evidentiary, narrative, and victim-validation limitations of using general statutes to prosecute domestic violence.<sup>180</sup>

#### IV. *Threshold Considerations in Enacting a Separate Offense*

I have joined Professor Tuerkheimer in arguing that existing criminal law fails to consider the realities of domestic violence, and that this failure hinders the criminal justice system's ability to respond to and properly punish domestic violence.<sup>181</sup> Criticizing these failures, however, is a separate task from establishing that the criminal law is *capable* of describing the unique attributes of domestic violence that distinguish it from nonintimate violence. This Part considers two threshold concerns that I believe must be addressed prior to turning to my proposal of a Coercive Domestic Violence statute: (1) overcriminalization and (2) the criminal law's ability to punish patterns of conduct and motives.

##### A. *Concerns About Overcriminalization*

Before turning to the details of a proposal to define domestic violence as a separate crime, a threshold question is whether domestic violence in fact warrants the enactment of a new criminal statute. As part of more general concerns about the phenomenon of "overcriminalization,"<sup>182</sup> scholars have criticized the redundancy in the

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<sup>179</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that, other than prior convictions, any fact that increases the penalty beyond the statutory maximum sentence must be pled and proven to the jury beyond a reasonable doubt); see also *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (holding that, under *Apprendi*, the maximum sentence is that which may be imposed "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" (emphasis omitted)); *United States v. Booker*, 543 U.S. 220, 226–27, 244 (2005) (holding that *Blakely* applies to the Federal Sentencing Guidelines).

<sup>180</sup> See *supra* Parts III.A–C.

<sup>181</sup> See Tuerkheimer, *supra* note 12, at 1014–19 (arguing that the criminal law's failure to describe accurately the realities of domestic violence detrimentally affects the fair punishment, victim vindication, and societal understanding of domestic violence).

<sup>182</sup> See John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988) (examining overcriminalization in the context of insider trading); Sanford H.

criminal code that results from the legislative inclination to enact specialized statutes in response to every newfangled way of committing old crimes.<sup>183</sup> For example, Congress enacted a federal statute prohibiting carjacking,<sup>184</sup> even though the underlying conduct could already be prosecuted with existing state laws against, for example, robbery, assault, and kidnapping.<sup>185</sup>

The critique of redundancy might arguably be raised against existing domestic violence criminal statutes. As discussed in Part I, states that have enacted specialized statutes prohibiting domestic violence have defined those offenses using the same acts and mental states used in existing provisions of the general criminal code.<sup>186</sup> Despite the redundancy, one might justify these specialized statutes by their social meaning: they express the message that society condemns domestic violence and values women.<sup>187</sup> Nevertheless, so long as the crime of domestic violence is defined with respect to the identical conduct and accompanying mens rea used to define existing general crimes, the redundancy critique remains.

To avoid redundancy, any statute prohibiting domestic violence must do more than simply recriminalize in a new section of the code conduct that is already illegal. Instead, by incorporating the unique aspects of domestic violence discussed in Part II, such a statute should seek to identify, define, and punish a unique wrong: the attempt to limit the autonomy of another person through specified means. Although the statute might refer to existing general crimes in defining the prescribed means of accomplishing the defendant's objective, the heart of the statute should be qualitatively distinct, criminalizing the purposeful attempt to gain power and control over an intimate partner.

Despite scholarly concerns about overcriminalization and redundancy in criminal codes, sometimes the criminal law must change to address newly recognized or newly prioritized harms and dangers.

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Kadish, *The Crisis of Overcriminalization*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1967, at 157; Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

<sup>183</sup> Luna, *supra* note 182, at 708; see also Ellen S. Podgor, *Do We Need a "Beanie Baby" Fraud Statute?*, 49 AM. U. L. REV. 1031 (2000) (criticizing Congress's tendency to enact new statutes to address each novel method of fraud).

<sup>184</sup> 18 U.S.C. § 2119 (2000) (criminalizing the taking of a motor vehicle by force and violence or intimidation, with the intent to cause death or serious physical injury).

<sup>185</sup> Luna, *supra* note 182, at 708 (criticizing the federal carjacking statute as superfluous).

<sup>186</sup> See Part I, *supra*, for a summary of existing domestic violence statutes.

<sup>187</sup> See *supra* notes 60–63 and accompanying text for a discussion of the expressive function that even redundant specialized domestic violence statutes serve.

Sometimes these changes are appropriate even when the new concerns potentially overlap existing criminal prohibitions. Consider, for example, the relatively recent criminalization of “identity theft”: the theft of identifying information such as names, birth dates, and social security and credit card numbers.<sup>188</sup> One might argue that identity theft statutes are redundant because existing theft and larceny statutes already prohibit taking the property of another. Prosecuting identity theft under the general theft and larceny statutes, however, is difficult (if not impossible) because the severity of those crimes is generally determined by the monetary value of the property stolen.<sup>189</sup> Financial statements, mail, identification cards, and other instrumentalities of identity theft have no current value. Indeed, one might argue that the removal of such documents from the garbage, a common method of identity theft, does not even constitute theft or larceny because the documents, once discarded, are no longer the property of their original owner.<sup>190</sup>

Identity theft statutes filled a legislative gap by recognizing that identifying information, unlike the “property” envisioned in general theft and larceny statutes, has value that transcends its current fair market value. From this perspective, the statutes can be seen as partially inchoate. Although the information may be worthless in and of itself, the use of the stolen identity information to obtain fraudulent credit costs the banking and credit card industries hundreds of millions of dollars each year.<sup>191</sup> Victims also suffer substantial, even devastating, noneconomic consequences as they work to repair the damage done to their credit.<sup>192</sup> Specialized statutes for identity theft were necessary because the types of material stolen in this new form

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<sup>188</sup> Congress and most states have enacted statutes specifically criminalizing identity theft. See 18 U.S.C. § 1028; Sean B. Hoar, *Identity Theft: The Crime of the New Millennium*, 80 OR. L. REV. 1423, 1437 n.74 (2001) (citing forty-two states that had already enacted identity theft statutes as of 2001).

<sup>189</sup> See, e.g., N.Y. PENAL LAW §§ 155.25–.42 (McKinney 2004) (defining degrees of petit larceny and grand larceny mainly by reference to the value of the stolen property).

<sup>190</sup> See *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (holding that individuals do not retain reasonable expectations of privacy in their garbage for Fourth Amendment purposes, in part because “respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector”).

<sup>191</sup> See FED. TRADE COMM’N, FRAUD AND IDENTITY THEFT COMPLAINTS RECEIVED BY THE FEDERAL TRADE COMMISSION FROM CONSUMERS AGE 50 AND OVER, at 3 (2005), available at <http://www.ftc.gov/reports/concomps50andover/050727concomps50andover.pdf> (reporting consumer losses of more than \$565 million attributable to identity theft in 2004).

<sup>192</sup> Lance M. Davis, Comment, *With or Without Authorization, It’s Still Identity Theft*, 33 MCGEORGE L. REV. 231, 232 (2002) (suggesting that a typical victim of identity theft might spend 175 hours over two years reestablishing their prior credit histories).

of theft were far more valuable—and the harm created by their loss far more destructive—than as defined by existing criminal law.

Just as identity theft involves unique harms beyond those described by general theft or larceny statutes, domestic violence has quantitative and qualitative aspects that are not captured in existing assault statutes.<sup>193</sup> Accordingly, the enactment of a specialized statute accomplishes precisely what critics of overcriminalization have reserved as the proper function of criminal law: to sanction “specific behaviors and mental states that are so wrongful and harmful to their direct victims or the general public as to justify the official condemnation and denial of freedom that flow from a guilty verdict.”<sup>194</sup> By defining domestic violence accurately, a specialized statute will better serve the interests of deterrence by responding with appropriate severity to what otherwise might appear to be isolated incidents of low-level violence. A specialized statute will also further the interests of retribution by accurately reflecting the scope and severity of the past wrong.

### *B. The Ability of Criminal Law to Reflect the Quantitative and Qualitative Aspects of Domestic Violence*

Even if it is appropriate to criminalize domestic violence separately, a further issue remains as to whether the criminal law is equipped to reflect the unique dynamics that define domestic violence. One might argue that the quantitative and qualitative gaps between current criminal law and domestic violence are inherent in the criminal law itself, which generally responds only to individual incidents and does not punish an offender’s motives. This Part discusses the criminal law’s ability to punish patterns of conduct and motives.

#### *1. Moving Beyond Individual Incidents*

The claim that “the criminal justice system generally responds to troubling *incidents*, not to courses of conduct over time,”<sup>195</sup> is undoubtedly true as a matter of description.<sup>196</sup> Nevertheless, as Professor Tuerkheimer noted,<sup>197</sup> the criminalization of a course of conduct

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<sup>193</sup> See *supra* Part II.

<sup>194</sup> Luna, *supra* note 182, at 714.

<sup>195</sup> Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *YALE L.J.* 1165, 1176 (emphasis added) (discussing crackdown ordinances’ targeting of chronic low-level nuisances).

<sup>196</sup> See Buel, *supra* note 15, at 233–34 (explaining that courts address only individual incidents of violence, rather than the pattern of abuse).

<sup>197</sup> Tuerkheimer, *supra* note 12, at 1004–13, 1021 n.329.

finds precedent in both stalking laws and the federal Racketeer Influenced and Corrupt Organizations (“RICO”) statute.<sup>198</sup> In both instances, the criminal law resorted to criminalizing a continuing course of conduct because it was necessary to reach distinctive harms not captured by the general criminal code.<sup>199</sup>

Lawmakers determined that existing criminal law was insufficient to punish stalking after the murder of actress of Rebecca Schaeffer called attention to the phenomenon.<sup>200</sup> Assault statutes were inapplicable because most stalking occurs prior to any physical violence.<sup>201</sup> Even statutes prohibiting verbal threats, such as menacing, proved insufficient because stalking behavior often involves conduct that is not expressly threatening. Indeed, it was impossible to target stalking conduct with any statute focusing on individual incidents because the individual acts of a stalker, such as love notes, phone calls, gifts, and unannounced visits, seem innocuous—perhaps even flattering—when viewed in isolation.<sup>202</sup> As Professor Tuerkheimer noted, stalking statutes demonstrate “the profound importance of framing crime as other than transactional in nature.”<sup>203</sup> Only through defining a crime by a pattern of conduct was the criminal law able to respond to the unique harms of stalking, where the cumulative effect of seemingly innocuous individual incidents can cause severe emotional distress and fear.<sup>204</sup>

The criminalization of a course of conduct beyond isolated incidents also finds precedent in RICO.<sup>205</sup> Although the purpose, scope, and mechanics of RICO are subjects far too complex to warrant complete discussion here,<sup>206</sup> RICO was intended to fill a perceived gap in

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<sup>198</sup> Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2000).

<sup>199</sup> See Tuerkheimer, *supra* note 12, at 1020–21.

<sup>200</sup> Gera-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J., Nov. 1992, at 35; see also Tuerkheimer, *supra* note 12, at 1004–13 (citing stalking legislation as an example of “a legal recognition of crime that is neither coterminous with a discrete incident nor the sum of isolated constituent parts”).

<sup>201</sup> See BUZAWA & BUZAWA, *supra* note 1, at 230 (discussing the difficulties of prosecuting stalking under general criminal statutes).

<sup>202</sup> See *id.*

<sup>203</sup> Tuerkheimer, *supra* note 12, at 1004–05.

<sup>204</sup> See generally Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991 (1993) (examining the nature of stalking behavior and the stalking statutes enacted by certain states “to remedy past failures of the legal system”); see also Tuerkheimer, *supra* note 12, at 1004–13 (providing a comprehensive discussion of how stalking statutes “partly bridge the distance between life and law’s construction of it”).

<sup>205</sup> Tuerkheimer, *supra* note 12, at 1021 n.329.

<sup>206</sup> RICO has been the subject of considerable academic commentary and several Supreme Court decisions. See, e.g., Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985);

the criminal justice system's enforcement efforts against organized crime by moving beyond a view of crime as discrete incidents.<sup>207</sup> The most commonly enforced provision of RICO, 18 U.S.C. § 1962(c), prohibits conducting or participating in the conduct of an interstate enterprise's affairs through a "pattern of racketeering activity"<sup>208</sup> that can be proven through the continued commission of related predicate crimes, including a myriad of both state and federal offenses.<sup>209</sup> RICO's conspiracy provision criminalizes a conspiracy to violate any of RICO's other subsections, including § 1962(c).<sup>210</sup>

RICO has been seen as transformative because it enables prosecutors to tie together multiple offenses of a different nature, committed by different people.<sup>211</sup> Traditional conspiracy law requires the government to prove that alleged co-conspirators shared a single agreement, which can be difficult to infer from the commission of diverse criminal offenses.<sup>212</sup> RICO, in contrast, has been called a "super-conspiracy" statute because it focuses not on individual acts, nor even on individual agreements.<sup>213</sup> Instead, it uses the concept of an "enterprise" to tie together diverse parties and schemes by punishing the participation in, or even agreement to participate in, the affairs of an enterprise through a *pattern* of criminal acts.<sup>214</sup> The criminal law's tendency to define prohibitions by reference to individual incidents is not, therefore, universal.

Nor does it appear to serve any obvious normative purposes. Instead, as Robert Ellickson offered in a very different context,<sup>215</sup> the

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Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III and IV*, 87 COLUM. L. REV. 920 (1987); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988).

<sup>207</sup> See Goldsmith, *supra* note 206, at 775.

<sup>208</sup> 18 U.S.C. § 1962(c) (2000).

<sup>209</sup> See *id.* § 1961(1) for a complete list of predicate crimes.

<sup>210</sup> *Id.* § 1962(d).

<sup>211</sup> See, e.g., *United States v. Elliot*, 571 F.2d 880, 902 (5th Cir. 1978) (observing that RICO created "a substantive offense which ties together . . . diverse parties and crimes").

<sup>212</sup> See *id.* (noting doubt that a single conspiracy could be proven under pre-RICO conspiracy law because the activities alleged were "simply too diverse to be tied together on the theory that participation in one activity necessarily implied awareness of others").

<sup>213</sup> Lynch, *supra* note 206, at 949 (citing *Elliot* as the case that "popularized the notion of RICO as a super-conspiracy statute"); David Vitter, Comment, *The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View*, 62 TUL. L. REV. 1419, 1443-44 (1988).

<sup>214</sup> See Goldsmith, *supra* note 206, at 797.

<sup>215</sup> Ellickson discussed the criminal law's tendency to target only individual incidents in proposing a response to chronic low-level nuisances. See Ellickson, *supra* note 195, at 1176. Nevertheless, his observations about the practical reasons that motivate criminal law's focus on discrete incidents are helpful in this context as well.



criminal law tends to target individual incidents rather than chronic conduct merely for “practical reasons.”<sup>216</sup> The practical reasons he identifies as justifying the norm in criminal law do not, however, apply in the context of domestic violence. First, Ellickson correctly observes that, in most cases, individual incidents are more likely to produce a complaining witness.<sup>217</sup> By its nature, however, domestic violence is a pattern of conduct committed against a single victim-witness. Indeed, redefining domestic violence to reflect more accurately the experiences of battered women may enhance their willingness to cooperate with an investigation of their case.<sup>218</sup>

Second, Ellickson notes that evidence is easier to gather for individual incidents.<sup>219</sup> While that observation is true in the domestic violence context as well, limiting the criminal justice system’s focus to isolated incidents ultimately hinders the efficacy of law enforcement by creating a disjoint between a domestic violence victim’s perceptions and the criminal law’s response, by preventing the jury from considering the broader picture of domestic violence, and by understating the extent of the defendant’s culpability.<sup>220</sup>

Finally, and more substantively, Ellickson notes that attempts to target chronic criminal behavior instead of isolated incidents may be defined vaguely, providing insufficient notice of their prohibitions and inviting discriminatory enforcement.<sup>221</sup> Indeed, both RICO and stalking statutes have been harshly criticized on vagueness grounds.<sup>222</sup> As explained further in Part V, however, a proposed statute prohibiting domestic violence could avoid vagueness concerns by requiring proof of the defendant’s specific intent to gain power or control over an intimate partner through conduct that is already defined elsewhere as criminal. Accordingly, the criminal law’s general tendency to use incident-based definitions of culpable behavior does not prohibit a specialized domestic violence statute from targeting a pattern of conduct.

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> See Part III.B, *supra*, for a discussion of the effect of the substantive criminal law on the likelihood of victim participation in prosecution.

<sup>219</sup> Ellickson, *supra* note 195, at 1176.

<sup>220</sup> See Part III, *supra*, for a discussion of the ways in which using the general criminal code to address domestic violence hinders the efficacy of the criminal justice system.

<sup>221</sup> Ellickson, *supra* note 195, at 1176 & n.43.

<sup>222</sup> See *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255–56 (1989) (Scalia, J., concurring in the judgment) (suggesting that RICO may be unconstitutionally vague); Guy, *supra* note 204, at 1017 (suggesting that a portion of Florida’s stalking statute that prohibited “malicious following,” without a showing of harm and without a standard for distinguishing malicious from innocent following, is void for vagueness).

## 2. *Inculpatory Motives*

A separate concern is whether the substantive criminal law is equipped to consider the desire to control that underlies a batterer's abusive conduct. According to Jerome Hall, "hardly any rule of penal law is more definitely settled than that motive is irrelevant."<sup>223</sup> That familiar maxim could present problems for a specialized domestic violence statute reflecting the offender's underlying intent to gain power or control over the victim. If a man's desire for money does not determine his punishment for murder, one might argue, why should his desire for power or control affect his punishment for assault?

To argue that the law *cannot* punish a batterer's underlying intent to gain power or control, however, is to overread both the accuracy and importance of the claim that motive is irrelevant. As an initial matter, the distinction between an actor's allegedly irrelevant motive and his legally relevant intent is itself troubling for scholars.<sup>224</sup> Moreover, even when a consideration is conceded to be a "motive" rather than an "intent," the relevance of motive to criminal punishment has sparked considerable debate.<sup>225</sup> Regardless of motive's exact definition and precise role in criminal law, a consensus has emerged that criminal law often does reflect a defendant's reasons for acting, despite the well-known maxim suggesting the contrary.<sup>226</sup>

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<sup>223</sup> JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 153 (1947); see also ALAN NORRIE, *CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW* 37 (1993) ("It is as firmly established in legal doctrine as any rule can be that motive is irrelevant to responsibility . . .").

<sup>224</sup> See, e.g., Douglas N. Husak, *Motive and Criminal Liability*, *CRIM. JUST. ETHICS*, Winter/Spring 1989, at 3, 5 ("The concept of motive . . . is unclear and imprecise."); LAFAVE, *CRIMINAL LAW*, *supra* note 156, § 3.6(a), at 241–42 (noting that the distinction between intent and motive is "a matter which has caused the theorists considerable difficulty for years").

<sup>225</sup> See, e.g., Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 *UTAH L. REV.* 635 (arguing that the role of motive in the definition of offense elements is properly limited, but that motives play a vital role in defining criminal defenses); Husak, *supra* note 224, at 3 (criticizing the orthodox view that motive is "material to sentencing, but not to liability"); Whitley R.P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 *CRIM. JUST. REV.* 317 (2003) (arguing that a defendant's motive is strictly irrelevant to liability). Guyora Binder provides an especially thorough overview of the commentary on motive. See generally Guyora Binder, *The Rhetoric of Motive and Intent*, 6 *BUFF. CRIM. L. REV.* 1 (2002).

<sup>226</sup> See, e.g., DRESSLER, *supra* note 156, at 121 ("A defendant's motive is often relevant in the criminal law."); LAFAVE, *CRIMINAL LAW*, *supra* note 156, § 3.6(a), at 244 ("[T]he substantive criminal law takes account of some desired ends but not others."); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 48–49 (2d ed. 1961) (differentiating intention as relating to "means" and motive as relating to "ends," but recognizing that "the end may be the means to another end"); Binder, *supra* note 225, at 45–94 (critiquing the "irrelevance of motive" maxim); Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 *BUFF. CRIM. L. REV.* 653, 668

For example, several scholars have used the exculpatory relevance of motive to explain the criminal law's recognition of defenses.<sup>227</sup> From this perspective, the law of self-defense justifies force when the actor is motivated by a desire for self-protection.<sup>228</sup> The defense of necessity applies when an actor's motivation for a crime is to avoid a greater harm.<sup>229</sup> The law of provocation provides a partial defense to intentional homicide because the actor's motivation distinguishes him from other murderers.<sup>230</sup>

Motive also serves inculpatory purposes in criminal law, albeit with more controversy.<sup>231</sup> Consider, for example, legislation against hate crimes.<sup>232</sup> Because these statutes enhance punishment based on the defendant's reasons for committing the predicate conduct, some state courts initially struck them down as violations of free speech, relying in part on the maxim that criminal law could not constitutionally punish motive.<sup>233</sup> The Supreme Court, however, reversed the

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(2005) (discussing the ways "motive already influences the criminal law . . . under special limited circumstances").

<sup>227</sup> See, e.g., LAFAYE, *CRIMINAL LAW*, *supra* note 156, § 3.6(a), at 243–44 (discussing certain defenses in which a defendant's motive is relevant); Gardner, *supra* note 225, at 737–43 (same).

<sup>228</sup> See Chiu, *supra* note 226, at 667 (explaining self-defense in terms of motive).

<sup>229</sup> See *id.*

<sup>230</sup> See Kahan & Nussbaum, *supra* note 60, at 320 (using an "evaluative conception of emotion" to explain the role that motive plays in mitigating a killing to voluntary manslaughter through the partial defense of provocation).

<sup>231</sup> See Gardner, *supra* note 225, at 694–749 (arguing that motive's relevance should be limited to exculpatory purposes, except for certain limited evidentiary uses and at sentencing); Jeremy Horder, *On the Irrelevance of Motive in Criminal Law*, in *OXFORD ESSAYS IN JURISPRUDENCE* 173, 174 & n.5 (Jeremy Horder ed., 4th Series 2000) (advocating that inculpatory motives be considered only in discretionary sentencing, not in defining criminal liability, and noting that identifying "particular motives for special treatment may also involve the law in needless controversy").

<sup>232</sup> Although individual jurisdictions differ in their approaches, hate crime statutes either define criminal liability or enhance applicable penalties based on a finding that the defendant acted out of prejudice against a protected characteristic. These characteristics can include race, color, national origin, religion, ethnicity, sexual orientation, sex/gender, age, or disability. See Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 *BUFF. CRIM. L. REV.* 389, 389 n.2 (2002); Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence?: Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 *UCLA L. REV.* 333, 333–34 (1991).

<sup>233</sup> See *State v. Wyant*, 597 N.E.2d 450, 453, 457 (Ohio 1992) (observing that "motive, in criminal law, is not an element of the crime," and striking down statute because it "criminalizes the underlying thought"), *vacated*, 508 U.S. 969 (1993); *State v. Mitchell*, 485 N.W.2d 807, 813 n.11 (Wis. 1992) (distinguishing intent from motive and observing that "[c]riminal law is not concerned with a person's reasons for committing crimes"), *rev'd*, 508 U.S. 476 (1993).

state courts' decisions, holding that states could lawfully enhance punishment for conduct based on disfavored motives.<sup>234</sup>

In contrast to the controversy surrounding hate crime legislation, the criminal law's use of motive in defining offense liability often goes undisputed when other terms are used to obfuscate the role of motive.<sup>235</sup> For example, without ever speaking of motive, the criminal law imposes inchoate liability upon attempted criminals because their otherwise lawful conduct was accompanied by a purpose to commit a crime.<sup>236</sup> Crimes like robbery and burglary aggravate what would otherwise be less serious assaults or trespasses based on the defendant's accompanying purpose to commit an additional crime.<sup>237</sup> Indeed, any so-called "specific intent" crime—which requires proof that the underlying conduct was committed with the intention of committing another harm—could be recast as a crime defined by motive.<sup>238</sup>

Although inchoate crimes like attempt and partially inchoate crimes like robbery and burglary require proof that the defendant intended to commit a further *crime*, some specific intent crimes require proof only of the defendant's intention to bring about some other wrong that is not itself criminal. Forgery, for example, requires intent merely to defraud or deceive.<sup>239</sup> Accordingly, giving relevance to a batterer's intention to limit his victim's autonomy reflects motive no differently than the way in which criminal law already responds to motive.

Moreover, punishing a pattern of domestic violence conduct accompanied by an intention to gain power or control is consistent with the normative purposes that have been offered for the criminal law's recognition of an actor's reasons for acting. One justification for recognizing motive is to serve the expressive function of the criminal law.<sup>240</sup> By responding to motive, the criminal law can reflect society's views of not only the actor's acts, but also the underlying *values* that

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234 *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993).

235 See Chiu, *supra* note 226, at 668–69 (noting that “much of the controversy has surrounded the flagrant use of motive” in stalking and hate crime statutes).

236 See Walter Harrison Hitchler, *Motive as an Essential Element of Crime*, 35 DICK. L. REV. 105, 113 (1931).

237 See *id.*

238 See DRESSLER, *supra* note 156, § 10.04(A)(2), at 121 (including specific intent crimes as an example of when the criminal law treats motive as relevant); WILLIAMS, *supra* note 226, at 48–49 (recasting specific intent crimes in terms of motive).

239 WILLIAMS, *supra* note 226, at 49.

240 An expressive theory has been used to explain the proper role and limits of punishment. See *supra* notes 60–63 and the accompanying text for a discussion of the social meaning of specialized domestic violence statutes that are not defined by motive.

motivate his acts.<sup>241</sup> From this perspective, a specialized statute defining domestic violence as a crime motivated by a desire to gain power or control over another person would make clear society's condemnation of those values.

Another reason offered for punishing motives is that some motives render the underlying conduct more harmful than it would otherwise be. For example, the most common argument in favor of hate crime legislation is that conduct motivated by discrimination inflicts more harm than identical conduct without a discriminatory motive.<sup>242</sup> Similarly, low-level assaults and threats are made worse when their purpose is not just to injure or harass, but to deprive the victim of agency.<sup>243</sup>

In sum, determining criminal liability by patterns of conduct and by reasons for acting is consistent with current punishment theory. Moreover, reframing domestic violence as a crime defined by pattern and intent serves the normative purposes that have been offered for moving beyond individual incidents and for recognizing motive. Nevertheless, the criminal justice system continues to arrest, prosecute, and punish domestic violence offenders in comparison to general criminal law statutes that do not accurately describe the phenomenon. Accordingly, the next Part proposes a model statute that redefines domestic violence as a crime of pattern and intent.

### V. *Defining Domestic Violence as a Separate Crime*

To remedy the practical and discursive problems associated with the use of only general criminal statutes to punish domestic violence,<sup>244</sup> legislatures should draft a specialized domestic violence statute with an eye toward accomplishing three necessary doctrinal shifts. First, the statute should reflect the recurrent nature of domestic violence by describing a crime committed over time through repeated

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<sup>241</sup> Expressive punishment theorists advocate the use of criminal law not only to affirm the worth of victims, but also to express society's condemnation of the values that motivate the wrongdoer's conduct. See Hampton, *supra* note 60, at 141–42; Kahan, *supra* note 60, at 603–04; Kahan & Nussbaum, *supra* note 60, at 351–53.

<sup>242</sup> See *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993) (“[B]ias-inspired conduct . . . is thought to inflict greater individual and societal harm.”); see also Danner, *supra* note 232, at 393–95 (summarizing the arguments in favor of bias crime legislation).

<sup>243</sup> See Part II.B, *supra*, for a discussion of the desire for control that defines domestic violence.

<sup>244</sup> See Part III, *supra*, for an argument that the gap between general criminal statutes and the quantitative and qualitative realities of domestic violence affects the admissibility of evidence against batterers, the experiences of domestic violence victims with police and prosecutors, the criminal law's discursive focus, and the adequacy of punishment at sentencing.

acts, rather than in a one-time incident. Second, the statute should emphasize the coercive dynamics that animate domestic violence by prohibiting the attempt to gain power or control over another person in a domestic relationship, and by treating physical violence as a means used to accomplish that prohibited end. Third, the statute should permit consideration of the defendant's underlying mental state, thereby increasing the relevance of emotional abuse that is not itself criminal but which is probative of the coercive intentions that are a uniquely defining aspect of domestic violence.

To meet these three broad goals, this Part proposes a statute prohibiting Coercive Domestic Violence. First, however, it turns in more detail to Professor Tuerkheimer's prior proposal to create a specialized domestic violence statute.

#### *A. Professor Tuerkheimer's Proposal*

Professor Deborah Tuerkheimer has previously called for a "battering" statute that would require proof of a "course of conduct" that the defendant "knows or reasonably should know . . . is likely to result in substantial power or control" over the victim.<sup>245</sup> Professor Tuerkheimer's work identified previously ignored flaws in the criminal law's response to domestic violence; in it, she criticized the law's failure either to look beyond individual incidents of violence or to consider the desire for power and control that underlies domestic violence.<sup>246</sup> Moreover, in its suggestion of a "course of conduct" requirement, her proposed normative solution encompassed important changes by looking beyond individual incidents and focusing instead on the underlying dynamics of domestic violence.

In its execution, however, Professor Tuerkheimer's proposal suffers from both doctrinal and discursive problems. As a doctrinal matter, in its zeal to describe domestic violence as social scientists understand it, Professor Tuerkheimer's proposed battering statute too readily departs from established tenets of criminal law. As a discursive matter, her proposal may encourage prosecutors—as narrators of domestic violence stories—to deprive women in abusive relationships of agency and to rely instead on stereotypes of helplessness to obtain convictions.

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<sup>245</sup> Tuerkheimer, *supra* note 12, at 1019–20.

<sup>246</sup> *Id.* at 971–88.

### 1. Doctrine

In its eagerness to accomplish needed reforms, Professor Tuerkheimer's proposal abandons traditional criminal law approaches to inchoate liability, mens rea, and specificity.

#### a. Inchoate Liability and Mens Rea

The first doctrinal flaw in Professor Tuerkheimer's proposed battering statute is its use of a negligence standard to impose a form of inchoate liability. Although Professor Tuerkheimer does not expressly acknowledge the inchoate nature of her proposal, the suggested battering statute punishes a defendant's course of conduct when it is merely "likely to result"<sup>247</sup> in control over his victim. Professor Tuerkheimer resolves any question about the inchoate nature of her proposal when she expressly rejects any requirement that the government prove that the victim was "in fact dominated and controlled."<sup>248</sup>

My criticism of Professor Tuerkheimer's proposal is not regarding her choice to impose inchoate liability, but rather her decision to impose it upon actors who merely "know or reasonably should know" of the likelihood of gaining power or control. If the statute's aim is to punish actors who fall short of their goal to gain power and control, it should conform to traditional rules of inchoate liability for attempted crimes by requiring the prosecution to prove that the defendant's *purpose* was to engage in the contemplated behavior or result.<sup>249</sup> For example, to punish a defendant as an attempted murderer, the law requires proof of an intent to kill.<sup>250</sup> If instead the defendant simply creates a heightened *risk* of death, without intent, he is at most a reckless endangerer.<sup>251</sup> His reckless mental state attaches to his endanger-

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<sup>247</sup> *Id.* at 1020 (emphasis added).

<sup>248</sup> *Id.* at 1022 (emphasis added).

<sup>249</sup> See 2 LAFAYE, SUBSTANTIVE CRIMINAL LAW, *supra* note 33, § 11.3(a), at 211 (describing the mental state requirement for attempt as "intent to perform acts and attain a result").

<sup>250</sup> See *id.* § 11.3(a), at 212. For example, consider *State v. Lyerla*, 424 N.W.2d 908 (S.D. 1988), in which the defendant fired three bullets at an automobile carrying three people, killing one. *Id.* at 908. The jury convicted the defendant of second-degree (i.e., reckless) murder and two counts of attempted second-degree murder, the latter convictions requiring "inten[t] to have a criminally reckless state of mind . . . but without a design to kill any particular person." *Id.* at 912. Noting that the second-degree murder conviction meant that the jury found no intent to kill the deceased, the appellate court overturned the attempt convictions, agreeing that "[o]ne may not intentionally attempt to cause the death of another by a reckless act." *Id.* at 913.

<sup>251</sup> See, e.g., MODEL PENAL CODE § 211.2 (1980) (providing that a person commits the crime of recklessly endangering another person if he "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury").

ing conduct, not to the unachieved, unintended result of murder. By using “reasonably should know,” Professor Tuerkheimer seeks to punish defendants as batterers even when they only *negligently* cause a *likelihood* of the coercion that underlies battering.<sup>252</sup> This approach severs the traditional union between act and mind. One cannot attempt what he does not intend.

Admittedly, the criminal law routinely punishes actors simply for creating a heightened risk of harm, even absent intent. Drunken driving laws, for example, can be seen as a method of punishing a person for increasing the likelihood of a fatal car accident, even though the defendant lacks the intent to cause injury, let alone death. When the criminal law adopts such an approach, however, it generally does not label the actor’s culpability with reference to the feared harm. In other words, we call the drunken driver precisely that. We do not refer to him—or convict and punish him—as a “vehicular manslaughterer,” attempted or otherwise. Rather, we label, punish, and convict defendants with reference to unachieved harms only when they have the required intent to cause the feared harm. To label a defendant a batterer when he is *not* motivated by a desire for power or control deprives a specialized domestic violence statute of its expressive importance. It undermines the message that domestic violence is a pattern of conduct defined by the intent to gain power and control.<sup>253</sup>

Conceding that this aspect of her proposal is “particularly thorny,” Professor Tuerkheimer rejects a requirement of intent simply because “prosecutors would understandably balk at a requirement that intentional mens rea be proven,” a showing that Professor Tuerkheimer discards as “practically insurmountable.”<sup>254</sup> As an initial matter, and as discussed further in Part V.B, proving that an offender’s purpose was to gain power or control over the victim may not be as troublesome as she estimates. More important, however, the perceived difficulty of proof, without more, is no justification for departing from established tenets of criminal law. By punishing a defendant for negligently causing a likelihood of the contemplated harm,

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<sup>252</sup> See Tuerkheimer, *supra* note 12, at 1020 (proposing guilt if a defendant “*reasonably should know*” that his or her conduct “*is likely* to result in substantial power or control” (emphasis added)). To be sure, the mens rea of purpose appears to play some role in Professor Tuerkheimer’s proposal, which defines the required “course of conduct” as “a pattern of conduct comprised of a series of acts over a period of time, however short, evidencing a *continuity of purpose*.” *Id.* (emphasis added). This continued purpose, however, could be the defendant’s desire to cause physical injury to the victim, not to gain power or control over her.

<sup>253</sup> This point is explored further in Part V.A.2, *infra*.

<sup>254</sup> Tuerkheimer, *supra* note 12, at 1022.



Professor Tuerkheimer adopts an approach that, if applied in another context, would presumably treat as an attempted murderer a person who increases the likelihood of a person's death by engaging in merely negligent conduct.

*b. Specificity*

Professor Tuerkheimer's proposal is also flawed in its conception of the prohibited "course of conduct," which the government could prove through any two crimes, misdemeanor or felony, committed over any period of time, as long as they evidenced a continuity of purpose.<sup>255</sup> The problem with this approach is that it includes not only domestic battering, but all sorts of other criminal acts, like theft of a girlfriend's money, or even drug distribution that is "directed at"<sup>256</sup> a domestic partner. Any application of a specialized domestic violence statute to crimes that do not actually "look" like domestic violence will undermine the statute's expressive and educational value and leave the statute vulnerable to the challenge that it is unconstitutionally vague.<sup>257</sup>

Although Professor Tuerkheimer presumably did not intend to reach such conduct with her proposed statute, these cases clearly fall within the proposed statutory definition of a "course of conduct"—language that will likely control a court's construction of the statute.<sup>258</sup>

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<sup>255</sup> The proposed statute requires that "[a]t least two acts comprising the course of conduct constitute a crime in [the] jurisdiction." *Id.* at 1020. It defines a "course of conduct" as "a pattern of conduct comprised of a series of acts over a period of time, however short, evidencing a continuity of purpose." *Id.*

<sup>256</sup> *Id.* at 1019.

<sup>257</sup> To fulfill due process requirements, a criminal statute must provide sufficient notice to enable ordinary citizens to understand what conduct is prohibited and to establish minimal guidelines to law enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (stating that vague laws fail to provide notice to the citizenry and can invite arbitrary and discriminatory enforcement by the government); *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (explaining the "requirement that a legislature establish minimal guidelines to govern law enforcement"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63 (1972) (striking down a vagrancy law as unconstitutionally vague); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966) (noting that a law violates due process "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits").

<sup>258</sup> RICO again provides a useful analogy. Although RICO was enacted to address organized crime, it has since been applied to all manner of cases that fall within the statutory language but which bear no resemblance to the concerns that motivated Congress's enactment of the statute. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256–62 (1994) (holding that an antiabortion group could be considered an "enterprise" under RICO based on the statutory language, despite the absence of an economic motive underlying the alleged pattern of racketeering activity); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249 (1989) (rejecting the requirement of an organized crime nexus because "plaintiffs' ability to use RICO against busi-

Moreover, the remainder of Professor Tuerkheimer's statute does little to prevent such a construction. The statute requires evidence of a "continuity of purpose" to link a series of predicate acts together in a "course of conduct."<sup>259</sup> However, the required "continuity of purpose" can be any type of purpose, not necessarily a purpose to gain power or control. Accordingly, multiple predicate acts of theft against a domestic partner would satisfy this requirement, as would predicate acts of distributing drugs.

Such cases would also satisfy the statute's mens rea element, which requires only that the defendant "know [ ] or reasonably should know" that his course of conduct "is likely to result in substantial power or control" over the victim.<sup>260</sup> Crimes that do not constitute domestic violence can foreseeably result in a substantial loss of power and control. For example, poverty induced by theft and addiction induced by drug dealing are powerful controllers indeed—powerful enough that thieves and drug dealers "reasonably should know" their crimes' potential consequences to autonomy. However, neither theft nor drug dealing should be treated as domestic violence whenever it happens to involve an intimate partner.

At the very least, Professor Tuerkheimer's proposed battering statute is vulnerable to a vagueness challenge because of its broad array of predicate crimes, its prohibition against creating a mere *likelihood* of control, and its use of the low mental state of negligence.<sup>261</sup> In combination, these three doctrinal choices potentially result in insufficient notice of the statute's scope.

## 2. Discourse

Professor Tuerkheimer's proposal also fails to achieve the desired discursive shift away from the psyche of the victim and onto the motivations of the batterer. Under her proposal, prosecutors would have to prove that a defendant's course of conduct was "*likely to result in*

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nesses engaged in a pattern of criminal acts is a defect . . . 'inherent in the statute as written' and hence beyond [the Court's] power to correct" (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985))).

<sup>259</sup> Tuerkheimer, *supra* note 12, at 1020.

<sup>260</sup> *Id.*

<sup>261</sup> Professor Tuerkheimer acknowledges that a specialized statute could be subject to a vagueness challenge. *Id.* at 1023–24. Her response is that "a carefully drafted statute" can avoid a vagueness problem. *Id.* at 1024. The benefit of multiple proposals seeking to address the same common concerns is to build upon prior ideas and create a dialogue about potential reforms. Ultimately, an ideal "carefully drafted" model statute might combine different aspects of diverse proposals to achieve desired practical, doctrinal, and discursive changes while meeting anticipated legal challenges.

substantial power or control over” an intimate partner.<sup>262</sup> Professor Tuerkheimer rightly defends the approach because it deprives the offender of his success by omitting any requirement of proof that the victim was in fact controlled.<sup>263</sup> The proposed statute, however, does require the government to concede—in fact, prove beyond a reasonable doubt—that the defendant’s conduct was “likely” to succeed.

Professor Tuerkheimer acknowledges some discomfort with this aspect of her proposal, recognizing that it is in tension with the agency of battered women.<sup>264</sup> Indeed, she goes still further and worries that any specialized statute that requires examination of a long-term pattern of abuse might actually encourage jurors to dwell on that old familiar question of why the victim failed to leave.<sup>265</sup> Despite her concerns about the traditional discursive focus upon victims, however, Professor Tuerkheimer nonetheless adopts an approach that perpetuates this focus. In making that choice, Professor Tuerkheimer forgoes a critical opportunity to deliver a discursive advantage: placement of the law’s focus solely on the defendant’s mental state and accompanying conduct, rather than on the likely psychological effects of domestic violence on women.

### B. *An Alternative Reconceptualization: Coercive Domestic Violence*

I turn finally to an alternative proposal to address the concerns that Professor Tuerkheimer and I share about shortcomings in the criminal law’s current approach to punishing domestic violence. A statutory prohibition against Coercive Domestic Violence should provide as follows:

- (1) A person commits the crime of Coercive Domestic Violence if the person attempts to gain power or control over an intimate partner through a pattern of domestic violence.
- (2) As used in this Section,
  - (a) “intimate partner” means a spouse; a former spouse; persons who have a child in common, whether or not they have been married or lived together at any time;

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<sup>262</sup> *Id.* at 1020 (emphasis added); *see also id.* at 1022.

<sup>263</sup> *See id.* at 1022–23. The controversy over the description of the psychology of battered women is discussed further in Part V.B.1, *infra*.

<sup>264</sup> *See* Tuerkheimer, *supra* note 12, at 1022–23 & n.332.

<sup>265</sup> *See id.* at 1025–27 (addressing a potential critique that the proposed battering statute might have the “paradoxical effect” of causing jurors to blame the victim for “ongoing, patterned abuse” that the statute is intended to reach).

and persons who are or were involved in a dating relationship;<sup>266</sup>

(b) “to gain power or control” means to restrict another’s freedom of action;

(c) “pattern of domestic violence” means the commission of two or more incidents<sup>267</sup> of assault, harassment, menacing, kidnapping, or any sexual offense, or any attempts to commit such offenses, committed against the same intimate partner.

The proposed statute addresses the broad concerns about shortcomings in existing criminal law in three ways: by looking beyond individual incidents, by emphasizing the coercive dynamics that underlie domestic violence, and by increasing the probative value of emotional abuse that accompanies physical violence and reveals the defendant’s required state of mind.<sup>268</sup> Beyond those broad accomplishments, the proposed statute makes more nuanced choices regarding its use of an inchoate theory of liability, its mens rea, and its definition of pattern. The remainder of this Part explains those choices.

### *1. The Act: An Inchoate Crime of Attempting to Gain Power or Control*

To redefine domestic violence as a crime of power and control, one possible statutory approach would be to conceptualize the prohibited actus reus as causing the undesired result—a limitation on an inti-

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<sup>266</sup> This definition of “intimate partner” is borrowed from NEB. REV. STAT. ANN. § 28-323(7) (LexisNexis Supp. 2005), and includes not only married heterosexual couples, but all dating partners. Individual jurisdictions could, of course, adopt alternative conceptions of the necessary relationship.

<sup>267</sup> I do not attempt in this Article to sort through the myriad ways in which a legislature could define the word “pattern,” other than to say that it should involve more than one incident against the same person. A legislature considering the proposed statute would be wise to consider the morass of case law that has plagued courts as a result of Congress’s failure to define a “pattern” of racketeering activity under RICO. See 18 U.S.C. § 1961(5) (2000) (providing that a pattern “requires” as a necessary but not necessarily sufficient condition at least two predicate racketeering acts within a ten-year period). The Supreme Court attempted to fill the legislative gap by holding that a pattern requires both “continuity” and “relationship.” See *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). These dual concepts are helpful guideposts in this context as well. The proposed statute’s requirement that the acts be committed against the same person and with the common purpose to control ensures relatedness. The legislative drafting process, however, should address whether continuity should also be required, and, if so, how the required continuity should be defined. I remain agnostic for purposes of this Article about the details of continuity because they do not affect the doctrinal and discursive goals of my normative proposal.

<sup>268</sup> See *infra* notes 289–91 and accompanying text for a further discussion of the role that emotional abuse would play in proving the required mental state.

mate partner's autonomy—through the prohibited means of domestic violence. For example, a specialized statute might prohibit the gaining of power or control through a specified pattern of abusive conduct. To require such a showing, however, would force testifying victims to concede that their batterers had “succeeded” in dominating them, and would force prosecutors to depict domestic violence victims as subordinated. Defense attorneys would cross-examine victims about every trivial act that might demonstrate autonomy—driving to the store, going to work, or choosing what to eat for dinner. The narrative necessary for a conviction would in effect revictimize women and empower their abusers.<sup>269</sup>

In contrast, the proposed Coercive Domestic Violence statute relies on principles of inchoate liability by prohibiting the mere *attempt* to gain power or control over an intimate partner through a pattern of domestic violence. By relying on an attempt theory of liability, the proposed statute relieves the prosecution of the burden of showing that the defendant *actually* gained substantial power and control over the victim, thereby depriving the accused batterer of his “win” over the victim.

Moreover, the use of an inchoate theory permits the substantive criminal law to focus on the dynamics of domestic violence without talking solely about the psychological harm to victims. Currently, the substantive criminal law acknowledges the dynamics of battering primarily by permitting women who have killed their abusers to invoke the well known “battered woman syndrome” theory to support their self-defense claims. By their very nature, these cases generally omit consideration of a batterer's psychology. Instead, the cases and the battered woman syndrome theory they invoke focus solely on the psychology of domestic violence victims, describing a psyche marked by diminished response motivations, cognitive disability, and generalized feelings of helplessness.<sup>270</sup> Despite the syndrome's claimed usefulness in supporting the defense claims of battered women,<sup>271</sup> many advo-

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<sup>269</sup> See Tuerkheimer, *supra* note 12, at 1022 (identifying evidentiary and agency problems with requiring proof of actual domination).

<sup>270</sup> Consider, for example, the following explanation by Dr. Lenore Walker:

[I]n applying the learned helplessness concept to battered women, the process of how the battered woman becomes victimized grows clearer. Repeated batterings, like electrical shocks, diminish the woman's motivation to respond. . . . She says, “No matter what I do, I have no influence.” She cannot think of alternatives. She says, “I am incapable and too stupid to learn how to change things.”

WALKER (1979), *supra* note 79, at 49–50.

<sup>271</sup> See generally Burke, *supra* note 112 (discussing the use of battered woman syndrome in

cates for battered women have criticized the theory for creating a homogenous stereotype<sup>272</sup> that lacks empirical support.<sup>273</sup> Some researchers have questioned the accuracy of the battered woman syndrome's depiction of helpless and pathologic women, instead describing battered women as survivors, "resourceful, heroic, and consistently h[olding] their ground."<sup>274</sup>

The proposed Coercive Domestic Violence statute permits the substantive criminal law to take into account the power and control dynamics of domestic violence, without depicting women in abusive relationships as psychologically impaired. By requiring only an attempt, the statute permits conviction without requiring the victim or the government to allege or concede the defendant's success, or even his *likely* success, as Professor Tuerkheimer's proposed statute requires.<sup>275</sup> This model is consistent with the view that some (if not most) women do not lose their autonomy to domestic violence, regardless of their batterers' best attempts.

As an expressive matter, the proposed statute's use of an attempt model to define the *completed* offense of Coercive Domestic Violence says something important about society's focus on, and condemnation of, batterers. By treating the mere attempt to gain power or control through a pattern of domestic violence as the completed crime, this statute emphasizes that the psychological impact to the victim is wholly irrelevant to the culpability of a batterer. Rendering the vic-

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a self-defense case but proposing an alternative approach that treats battered defendants as rational actors engaged in necessary use of force).

<sup>272</sup> See Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. WOMEN & L. 1, 7–11 (2001) (describing stereotypes that disadvantage battered women); Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1249–50 (2001) (explaining that the battered woman syndrome describes a "narrowly defined persona" that does not represent all battered women); Dutton, *supra* note 79, at 1196 ("The psychological realities of battered women do not fit a singular profile—in fact, they vary considerably from each other.").

<sup>273</sup> See David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 107–11 (1997) (concluding that evidence of the battered woman syndrome theory lacks legally required reliability); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 53–64 (criticizing research on battered woman syndrome theory); David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 636–43 (1986) (criticizing the research methods used to test the battered woman syndrome theory).

<sup>274</sup> JACOBSON & GOTTMAN, *supra* note 79, at 63; see also EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 17–18 (1988) (offering as an alternative to learned helplessness a "survivor hypothesis," which posits that battering increases, rather than decreases, "helpseeking").

<sup>275</sup> See *supra* Part V.A (critiquing Professor Tuerkheimer's proposed battering statute).

tim's psychology irrelevant, in turn, removes any temptation to resort to stereotypes of battered women to prove the charge.

Victims of domestic violence can respond in unique and diverse ways: some will leave; some will stay and fight back; others will stay and try their best to avoid future violence through strategic passivity. Whether they succumb to attempted coercion or not, their batterers are equally culpable and similarly labeled. The batterers are joined together—and separated from other assaulters—by patterns of conduct and common motivations that criminal law currently ignores, but which are reflected in the proposed Coercive Domestic Violence statute.

## 2. *The Mental State: Intent to Gain Power or Control*

The proposed Coercive Domestic Violence statute is framed expressly as a form of inchoate liability, requiring that the government prove an “*attempt*[ ] to gain power or control.” By expressly requiring proof of an attempt, the proposed statute imposes a concomitant requirement upon the government to prove that the defendant engaged in a pattern of domestic violence with the purpose of gaining power or control over an intimate partner. This high mental state requirement not only brings doctrinal advantages, but reflects important normative choices about the statute's proper scope.

### a. *Doctrinal Advantages*

From a doctrinal perspective, the requirement of the defendant's purpose to gain power or control comports with established tenets of criminal law that require proof of purpose before imposing inchoate liability.<sup>276</sup> Another doctrinal advantage of the statute's intent requirement is its protection against a vagueness challenge. A requirement that the government prove specific culpable intent can salvage an otherwise unconstitutionally vague statute. For example, laws banning all forms of loitering are unconstitutionally vague,<sup>277</sup> but courts have consistently upheld statutes that prohibit loitering with the intent to commit a crime such as drug distribution or prostitution.<sup>278</sup>

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<sup>276</sup> See Part V.A.1.a, *supra*, for a discussion of the necessity of proving purpose before imposing inchoate liability.

<sup>277</sup> *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999).

<sup>278</sup> See, e.g., *People v. Superior Court*, 758 P.2d 1046, 1050–52 (Cal. 1988) (en banc) (upholding ordinance criminalizing loitering for the purpose of engaging in or soliciting a lewd act, and noting the “value that a specific intent requirement plays in overcoming the potential vagueness of a statute”); *People v. Smith*, 378 N.E.2d 1032, 1035–36 (N.Y. 1978) (upholding against a vagueness challenge a law prohibiting loitering for the purposes of prostitution); *City of Tacoma*

Although the proposed statute's mens rea element requires purpose to gain power or control over the victim, not purpose to commit an independent crime, the Supreme Court has suggested that even a requirement of a "harmful purpose" can suffice to provide adequate notice to citizens and rein in arbitrary exercises of police discretion. In *City of Chicago v. Morales*,<sup>279</sup> the U.S. Supreme Court struck down an ordinance prohibiting loitering by suspected gang members as unconstitutionally vague.<sup>280</sup> The Court noted, however, that the ordinance would be lawful if it required the government to show a "harmful purpose."<sup>281</sup> According to dicta endorsed by a majority of Justices, this harmful purpose could be simply an intention "to publicize the gang's dominance of certain territory."<sup>282</sup>

The proposed Coercive Domestic Violence statute requires a comparable (if not more) harmful purpose—the intent to gain control over another person. Moreover, the underlying predicate activity, unlike ill-defined conduct such as loitering, is itself defined clearly by reference to existing criminal prohibitions.<sup>283</sup> If a law prohibiting loitering with the purpose of gaining control over neighborhood turf can pass constitutional muster, then so should the Coercive Domestic Violence statute.

### b. Normative Choices

In defining the object of the defendant's attempt—to gain power or control—the statute looks to the Model Penal Code's definition of "criminal coercion": a threat with the purpose "to restrict another's freedom of action."<sup>284</sup> As the Model Penal Code commentary explains, the phrase "freedom of action" is "expansive" and encom-

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v. Luvone, 827 P.2d 1374, 1384–86 (Wash. 1992) (en banc) (upholding against a vagueness challenge a law prohibiting loitering with a purpose to engage in drug-related activities).

<sup>279</sup> *City of Chicago v. Morales*, 527 U.S. 41 (1999).

<sup>280</sup> *Id.* at 64.

<sup>281</sup> *Id.* at 62 (noting that an unconstitutionally vague anti-gang loitering ordinance would pass muster if it applied only "to loitering that had an apparently harmful purpose or effect").

<sup>282</sup> *Id.* at 63 (citing to findings that the "most harmful" loitering targeted had "an apparent purpose to publicize the gang's dominance of certain territory"); see also *id.* at 68 (O'Connor, J., concurring) (noting that harmful purpose includes an intention "to establish control over identifiable areas").

<sup>283</sup> Although individual jurisdictions would, of course, tailor this aspect of the statute to conform to their respective criminal codes, the proposed statute includes common statutes prohibiting assault, harassment, menacing, kidnapping, and sexual offenses.

<sup>284</sup> See MODEL PENAL CODE § 212.5(1) (1980) (defining the offense of criminal coercion as threatening to perform certain predicate acts "with purpose unlawfully to restrict another's freedom of action to his detriment").



passes “anything which the other person does not wish to do or to refrain from doing.”<sup>285</sup> As a normative matter, potential concerns about the statute’s mens rea element are that it is at once both overbroad and underbroad.

Concerned about overbreadth, one might argue that the intent to persuade another not to abuse alcohol, not to watch too much television, or to make spaghetti for dinner instead of hamburgers are all intentions to restrict the person from doing what she wishes to do, thereby falling within the “power and control” definition of the statute. Such concerns about the potential overbreadth of the proposed statute’s mens rea requirement, however, overlook the statute’s requirement that the defendant attempt to restrict an intimate partner’s freedom of action “through a pattern of domestic violence.” The statute defines the pattern of domestic violence by reference to existing predicate crimes. Accordingly, attempts to alter an intimate partner’s actions in seemingly benign or insignificant ways are punishable as Coercive Domestic Violence if and only if the defendant uses a pattern of unlawful violence as the means.<sup>286</sup>

A trickier concern is the statute’s potential underbreadth.<sup>287</sup> Proving that the defendant engaged in a pattern of violence *for the purpose* of gaining power or control over an intimate partner will not be an easy task, a hurdle that persuaded Professor Tuerkheimer to reject this mental state as a requirement of her proposal.<sup>288</sup> It is precisely because of this difficulty, however, that the statute would produce a desirable shift in the way we think about and discuss the crime of domestic violence. By delving into the defendant’s underlying purpose in cases brought under the proposed statute, prosecutors would call attention not only to the batterer’s predicate crimes, but also any nonphysical conduct demonstrating his intent to limit the victim’s autonomy, such as emotional abuse that is not itself criminal.<sup>289</sup> The criminal justice system might also look to social scientists to help po-

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<sup>285</sup> *Id.* § 212.5 cmt. 2, at 265.

<sup>286</sup> By defining “pattern of domestic violence” through a list of existing crimes, the proposed statute also protects against a challenge for vagueness. No defendant could reasonably argue that he lacked notice that his conduct was illegal.

<sup>287</sup> See *supra* Part V.A (discussing the mental state requirement of Professor Tuerkheimer’s proposed statute).

<sup>288</sup> See Tuerkheimer, *supra* note 12, at 1022.

<sup>289</sup> See *supra* notes 101–09 and accompanying text for a discussion of the relevance of all abusive acts, both physical and emotional. See generally FED. R. EVID. 404(b) (prohibiting evidence of past wrongs to prove propensity, but providing that it may be admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”).

lice officers, prosecutors, and jurors tie the pieces of the pattern together to infer intent.<sup>290</sup> An expert could help explain the roles that emotional abuse, isolation, and control play in the dynamics of abusive intimate relationships.<sup>291</sup> With an expanded ability to present a complete picture of domestic violence, prosecutors would be able to satisfy their burden of proof regarding the defendant's intent to gain power and control in cases involving a pattern of coercive domestic violence.

Even if the government did not fully investigate and prosecute every incident of abuse within intimate relationships as a pattern of Coercive Domestic Violence, the very existence of a specialized domestic violence statute would alter the criminal justice system's response to domestic violence. As an initial matter, in a plea bargaining world,<sup>292</sup> a charge of Coercive Domestic Violence would increase the likelihood of a guilty plea to one of the predicate offenses.<sup>293</sup> Perhaps more importantly, a doctrinal reason to look at a complete picture of

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<sup>290</sup> See generally FED. R. EVID. 702 (providing that expert witnesses may testify if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," and if certain specified principles of reliability are met); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–95 (1993) (providing factors for determining the admissibility of expert testimony under Rule 702).

<sup>291</sup> See Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 816 (1996) (advocating the use of expert testimony, other than on the battered woman syndrome theory, by prosecutors in domestic violence cases). See generally Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 78–91 (1998) (describing the circumstances under which courts have permitted prosecutors to use expert testimony in domestic violence cases).

<sup>292</sup> Stephanos Bibas has demonstrated the importance of analyzing the effects of doctrinal change in a world of guilty pleas where trials are the exception. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001).

<sup>293</sup> Implicit in my analysis has been the premise, made explicit here, that the severity of punishment under the proposed Coercive Domestic Violence statute should be higher than under the predicate crimes triggering it. Of course, many scholars are offended by precisely this effect of plea bargaining—the ability of prosecutors to leverage guilty pleas from defendants who fear prosecution for more serious charges for which probable cause exists but for which conviction is less likely. See generally Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) ("[T]he greatest pressures to plead guilty are brought to bear on defendants who may be innocent."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2469–526 (2004) (identifying the structural influences and cognitive biases that skew plea bargaining); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14 (1978) (criticizing the coercive nature of plea bargaining); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2003–09 (1992) (advocating the abolition of plea bargaining). I do not seek to resolve these weighty concerns here. Rather, I take the current plea bargaining system as a given and simply offer the likely effects of a specialized domestic violence statute upon plea bargaining as a response to skeptics who might question the frequency of trials under such a statute.

domestic violence would shape the way police questioned victims and batterers, and the way that prosecutors and judges viewed the resulting cases. Viewing domestic violence as a purposeful attempt to control would place pressure on traditional excuses like intoxication and bad days at work. Police, prosecutors, judges, and jurors would be asked *why* the batterer turns to violence against an intimate partner for relief in those circumstances.

Inquiry into the defendant's underlying purpose would bring the discursive focus of the criminal law's treatment of domestic violence in line with empirical realities. The emphasis of past reforms on enforcing existing laws within intimate relationships has had the unintended consequence of falsely shaping and restricting the criminal justice system's understanding of domestic violence as a societal phenomenon.<sup>294</sup> Simply to bring domestic violence within the purview of the criminal law, early reformers understandably called out: "An assault is an assault, even between intimates." In the ensuing years, the criminal justice system has inverted that mantra, now treating domestic violence as if it were *only* an assault between intimates. Introducing a focus on intent to gain power and control as part of a second wave of substantive legal reform would turn the criminal justice system's attention not only to violent conduct that society has always condemned outside of intimate relationships, but to culpabilities that are found uniquely within them.

Another potential and difficult concern related to the statute's mental state requirement is how the law should treat the defendant who acts out of a desire to control, but who does not *know* his own reasons for acting. Usually, when the criminal law speaks of intent, it refers to an actor who knows precisely why he is acting: he seeks to kill, to steal, or to deceive. A batterer, however, may not be conscious of his reasons for hitting. For example, a defendant might honestly believe that he hits his wife out of frustration, without knowing that his frustration is triggered by her autonomy.<sup>295</sup>

Whether to include the actor who is oblivious to his own motives within the scope of the statute presents a difficult choice. On the one hand, it would not be wholly unprecedented for the law to reach actors with unconscious motivations.<sup>296</sup> Moreover, a rich literature de-

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<sup>294</sup> See Tuerkheimer, *supra* note 12, at 1016–17.

<sup>295</sup> See Part II.B, *supra*, for a discussion of the social science evidence indicating that a victim's assertion of autonomy can trigger violence.

<sup>296</sup> See Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2120–21 (1994) (criticizing crimes of motive in part because they have been construed to

bates whether mental states used in contemporary criminal law give too much weight to states of awareness, at the expense of considering other culpable mental states, such as desire.<sup>297</sup> Jurors could be asked to determine an actor's intent not with respect to his awareness of intent, but using a causal model, asking themselves whether the defendant would have acted but for his desire to limit the intimate partner's freedom of action.<sup>298</sup>

On the other hand, as a matter of pragmatism, the proposed Coercive Domestic Violence statute can bring meaningful domestic violence reform without having to rock a second boat about the law's conception of intent and its application to unconscious motives. Criminal dockets across the country are filled with domestic violence cases replete with evidence of intent to gain power or control. For example, the verbal statements that accompany violence are often unambiguous. *How many times have I told you not to call your mom? I said to have dinner ready by six. You are not going to take that job. If you would just . . .* In other cases, jurors can infer consciousness of intent from the context surrounding the abuse.<sup>299</sup> Using a specialized domestic violence statute in these "easy" cases brings sufficient practical, doctrinal, and discursive reform to make unnecessary—at least at this

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include unconscious motives). Indeed, many have argued, particularly in the context of discrimination, that the law should focus less on conscious intent and more on unconscious motivations. In his seminal article, for example, Charles Lawrence criticized the requirement that plaintiffs demonstrate intent because most racial discrimination is unconscious. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>297</sup> Compare, e.g., Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992) (arguing for an increased role of states of desire and belief to assess culpability), and Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953 (1998) (criticizing the law's focus on knowledge, and arguing for "acceptance" as a new mental state between knowledge and recklessness), with Kimberly Kessler Ferzan, *Don't Abandon the Model Penal Code Yet!: Thinking Through Simons's Rethinking*, 6 BUFF. CRIM. L. REV. 185 (2002) (arguing against the use of desire states to measure culpability), and Adam Candebub, *Consciousness & Culpability*, 54 ALA. L. REV. 113 (2002) (arguing that consciousness is required for culpability).

<sup>298</sup> But see Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1017–18 (1982) (observing that "[s]peculations based on psychodynamic psychology," which proposes unconscious determinants of human actions, "judged as scientific causal accounts of behavior, are not 'informed' but idle").

<sup>299</sup> For example, a reasonable jury might infer the required intent if the defendant committed the various predicate acts constituting the pattern of domestic violence in response to his victim's autonomous acts, such as getting a job, changing her hairstyle, or seeing her friends and family without him.

stage—the more controversial step of punishing actors who are honestly unaware of their reasons for battering.<sup>300</sup>

Indeed, the arguable underbreadth of the proposed Coercive Domestic Violence statute ultimately serves its precise purpose—to carve out a category of violence that is qualitatively and quantitatively distinctive. To label and punish every assault, even between intimates, as “domestic violence” is to water down stigma and punishment that should be reserved for conduct that truly constitutes the phenomenon described by social scientists as domestic violence.

### *Conclusion*

The tremendous improvement in the criminal justice system’s response to domestic violence could not have occurred without the accompanying legal and policy reforms addressing the processes used to arrest, investigate, charge, prosecute, and punish offenders. This focus on procedure, however, has arguably distracted reformers from taking a close look at whether existing substantive criminal law is sufficient to serve the goals of criminal punishment in the context of domestic violence.

Professor Deborah Tuerkheimer brought attention to this question by calling for “a reconceptualization of the crime of domestic violence.”<sup>301</sup> I have attempted to amplify and expand on her proposal by providing a model statute that defines Coercive Domestic Violence as a crime of pattern and intent, while hewing more closely to established criminal law doctrine regarding inchoate liability, mens rea, and vagueness. The focus on pattern permits the criminal law to respond to the severity of an ongoing course of conduct marked by multiple incidents that might appear relatively trivial if viewed in isolation. The focus on an offender’s intent to gain power or control permits the criminal law to condemn the underlying values that motivate domestic violence. The focus on pattern and intent, in combination, permits prosecutors and victims to tell judges and jurors a complete story about the realities of domestic violence, and it allows the criminal law to reflect an appropriate punishment.

I have not, however, attempted to predict whether these reform suggestions will find support. To redefine domestic violence as a crime of pattern and intent would require not only resources, but also real changes in the way the criminal law views violence. Prior reforms

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<sup>300</sup> Of course, these actors, with unconscious motives to gain power and control, would still be punishable under the general criminal code for individual incidents of violence.

<sup>301</sup> Tuerkheimer, *supra* note 12, at 962.

that focused on process simply called upon the institutions of the criminal justice system to treat domestic violence cases equally—to put them through the system like every other case. Even when procedural reforms like mandatory arrest policies treated domestic violence cases differently, it was with the aim of moving the cases into the system where they could be judged under the criminal law like every other case. This Article, in contrast, calls upon the criminal justice system to do more than incorporate domestic violence into existing harm conceptions. It asks the criminal law to recognize that its current conceptions of harm are insufficient to describe the unique phenomenon of domestic violence, and to change accordingly. Whether the social concern that motivated the first wave of reform is sufficient to create a second wave of more transformative reform is a question I am not able, or ready, to answer.