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## Minding the Gap in Domestic Violence Legislation: Should States Adopt Course of Conduct Laws?

Teresa Manring

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# COMMENTS

## MINDING THE GAP IN DOMESTIC VIOLENCE LEGISLATION: SHOULD STATES ADOPT COURSE OF CONDUCT LAWS?

Teresa Manring\*

*In the United States, there is a gap between the way that sociologists, psychologists, legal scholars, and advocates define domestic violence and the way that criminal laws define domestic violence. Experts largely agree: domestic violence occurs when a partner exercises continuous power and control over the other. In this view, domestic violence occurs via a pattern of abusive behaviors that unfolds over time, and its manifestations include both physically-violent and emotionally-abusive behaviors. In contrast, criminal statutes throughout the United States continue to conceptualize domestic violence as single acts of physical violence or threats of physical violence. During the past several years, England and Wales, Ireland, and Scotland have passed laws that have attempted to bridge this gap in their own societies. The enactment of these laws abroad—and the fact that legislatures are considering similar laws in other jurisdictions, including the United States—provides a timely opportunity to analyze whether state legislatures should adopt similar laws here.*

*This Comment argues that states should adopt domestic violence laws similar to the ones passed abroad. First, it explains why this gap between the criminal law and other understandings of domestic violence emerged, what it looks like in practice, and what its consequences are for victims throughout*

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*their experience with the criminal justice system. Second, it draws attention to the ways in which both the legislature and the criminal justice system are growing increasingly comfortable with defining and prosecuting crimes as courses of conduct. Based on the conduct covered and the harm addressed under these already existing laws, introducing similar laws in the domestic violence context would be a natural next step. Third, it evaluates course-of-conduct laws recently passed in Scotland, Ireland, and England and Wales that have attempted to close this gap. Finally, it recommends that states pass course-of-conduct domestic violence statutes, using Scotland's law as a model.*

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## INTRODUCTION

In the beginning, Natalie Curtis thought her boyfriend was just extremely attentive.<sup>1</sup> That explained the constant phone calls and the

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<sup>1</sup> I have reconstructed Natalie Curtis's story using quotes and reporting from Jamie Grierson's and Ciara Nugent's respective articles in *The Guardian* newspaper and *TIME* magazine. Jamie Grierson, 'This Is Not Love': Victim of Coercive Control Says She Saw Red Flags from Start, *GUARDIAN* (Jan. 20, 2019, 7:01 PM), <https://www.theguardian.com/society/2019/jan/21/this-is-not-love-victim-of-coercive-control-says-she-saw-red-flags-from-start>

questions: “What did you eat for lunch?” “Who did you see?” But, over time, she noticed his behavior slowly become more alarming. He called her thirty to forty times per day and then became angry when she did not pick up the phone. He commented on what she ate. He took her things and threw them outside the house. He screamed at her in public: “I hate you, fuck off.” And he told her that his behavior was her fault. Eventually, four years into their marriage, he tried to force her to sell her wedding and engagement ring.

In England and Wales, thanks to a “coercive control” law passed in 2015, Natalie’s husband’s controlling behavior during their relationship constitutes a criminal offense.<sup>2</sup> England and Wales’s law—along with similar legislation passed in Scotland and Ireland—has attempted to address the full picture of intimate partner violence.<sup>3</sup> These laws view domestic violence as a pattern of behavior employed to control victims.<sup>4</sup> In contrast, almost all domestic violence laws in the United States still define domestic violence as consisting of only one, isolated act: most often, physical violence or the threat of physical violence.<sup>5</sup>

Outside the legal sphere, the understanding of domestic violence in the United States and these other countries is virtually the same. Sociologists, psychologists, legal scholars, and advocates largely agree, and have for many years: domestic violence occurs when one partner exercises continuous power and control over the other.<sup>6</sup> Yet, despite how well-established this

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[<https://perma.cc/34SZ-8ZFG>]; Ciara Nugent, ‘Abuse Is a Pattern.’ *Why These Nations Took the Lead in Criminalizing Controlling Behavior in Relationships*, TIME (June 21, 2019, 5:00 AM), <https://time.com/5610016/coercive-control-domestic-violence/> [<https://perma.cc/NS2N-LUMU>].

<sup>2</sup> See *infra* Section II.C.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *infra* Sections I.B, II.A. Many state criminal statutes remain narrowly focused on physical harm or threats of physical harm. But as will be explained further *infra*, the type of conduct covered by some other statutes is broader.

<sup>6</sup> See, e.g., *Learn More: What Is Domestic Violence?*, NAT’L COAL. DOMESTIC VIOLENCE, <https://ncadv.org/learn-more> [<https://perma.cc/N97M-VMK9>] (“Domestic violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another.”); AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION: INTIMATE PARTNER VIOLENCE 1 (2012), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Intimate-Partner-Violence> [<https://perma.cc/DL2G-6MQT>] (“Intimate partner violence (IPV) is a pattern of assaultive behavior and coercive behavior that may include physical injury, psychologic abuse, sexual assault, progressive isolation, stalking, deprivation, intimidation, and reproductive coercion.”). Until 2019, The U.S. Department of Justice also defined domestic violence as “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.” *Domestic Violence*, U.S.

premise is, criminal statutes throughout the United States continue to conceptualize domestic violence as single acts of physical violence or threats of physical violence.<sup>7</sup>

More than ten years ago, Professors Burke and Tuerkheimer analyzed this “gap” in American law.<sup>8</sup> In response, they proposed model course of conduct statutes to close the gap.<sup>9</sup> But no state adopted such a statute.<sup>10</sup> The enactment of course-of-conduct laws abroad—and the fact that other jurisdictions, including in the United States, are considering similar laws<sup>11</sup>—provides a timely opportunity to pick up where Professors Tuerkheimer and Burke left off and propose, again, that states define domestic violence in course-of-conduct terms.

This Comment advocates for a change in the way that state criminal laws define domestic violence. Part I explains why this gap between the criminal law and other understandings of domestic violence emerged, what it looks like in practice, and what its consequences are for victims throughout their experience with the criminal justice system. Part II first draws attention to the ways in which both the legislature and the criminal justice system are growing increasingly comfortable with defining and prosecuting crimes as courses of conduct generally. It then suggests that, based on the conduct covered and the harm addressed under these already existing laws, introducing similar laws in the domestic violence context would be a natural next step. Part II proceeds by introducing and evaluating laws recently passed in Scotland, Ireland, and England and Wales that aimed to close this gap by defining domestic violence in course-of-conduct terms. Finally, Part II concludes by recommending that U.S. states pass similar laws, using Scotland’s law as a model. Part III addresses challenges and counterarguments to adopting and implementing course-of-conduct domestic violence laws in the United States. The Comment concludes by emphasizing that U.S. states must address the ways that transactional criminal statutes fail

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DEP’T JUST. (June 16, 2017), <https://www.justice.gov/ovw/domestic-violence> [<https://perma.cc/2SBZ-TCCA>].

<sup>7</sup> See *infra* Sections I.B, II.A.

<sup>8</sup> See *infra* Section I.B.

<sup>9</sup> See *infra* Section I.B.

<sup>10</sup> See *infra* Section I.B.

<sup>11</sup> In April 2019, New York State Senator Kevin Parker introduced a bill that would make coercive control a felony. S.B. S5306, 2019-2020 Leg. Sess. (N.Y. 2019). The law defines coercive control as when someone “engages in a course of conduct against a member of his or her same family or household, without the victim’s consent, . . . which results in limiting or restricting, in full or in part, the victim’s behavior, movement, associations or access to or use of his or her own finances or financial information.” *Id.*

domestic violence victims; the best path forward is to follow the leads of countries that have adopted course-of-conduct laws.

During this analysis, I use the term “domestic violence” to refer to a pattern of abusive and controlling behavior that occurs over time, including, but not limited to, physical violence.<sup>12</sup> I use the word “abuser” to refer to the party attempting to exercise control over his partner. I also refer to the abuser as he/him and the victim as she/her.<sup>13</sup> Finally, I refer to individuals who experience domestic violence as “victims.”<sup>14</sup>

#### I. BACKGROUND: THE SUCCESSES OF THE WOMEN’S MOVEMENT AND THE LIMITATIONS OF CRIMINAL LAW

During the past 200 years, a radical transformation in the legal system’s approach to physical violence in intimate relationships has occurred. Society once viewed physical violence against a partner or spouse as a husband’s prerogative, both legally and culturally. Now, society views physical violence against a partner or spouse as a harm worthy of recourse. Although the battle to make physical intimate relationship violence a crime has been won, the current structure of those same criminal laws hinders prosecutors’ attempts to hold domestic violence perpetrators accountable and prevents victims from seeking and achieving recourse.

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<sup>12</sup> Much research has been devoted to understanding different types of domestic violence. What this paper calls “domestic violence,” other researchers have called coercive controlling violence and intimate terrorism. *See, e.g.*, EVAN STARK, COERCIVE CONTROL (2007); MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE (2008). In a relationship characterized by this type of violence, one partner continuously exercises power and control over the other partner through some combination of emotional, psychological, physical, economic, and sexual abuse. Joan B. Kelly & Michael P. Johnson, *Domestic Violence: Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 481 (2008). Common tactics used by a coercive controller include intimidation, isolation, blaming, and threats. *Id.* While coercive control can occur with or without physical violence, the severity and frequency of violence in these types of relationships tend to exceed that of other types. *Id.* at 483. And, unlike in situational couple violence, the vast majority of coercive controllers are men. *Id.* at 482. In relationships characterized by coercive controlling violence, victims can experience abuse so extreme that some scholars have compared it to torture. *See, e.g.*, LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 115–16 (1986) (“The battered woman’s situation obviously resembles that of a prisoner subject to thought reform” because “[l]ike brainwashed captives, battered women are subject to verbal abuse, beatings, other forms of physical abuse, and to confinement or imprisonment.”).

<sup>13</sup> *See* Kelly & Johnson, *supra* note 12, at 482.

<sup>14</sup> While I realize the problematic nature of this term compared with “survivor,” the tragic reality is that many women do not survive domestic violence. “Survivor” obscures this reality. “Victim” does not.

Section A briefly recounts the movement to criminalize domestic violence. Section B then explains, drawing on Professors Tuerkheimer's and Burke's scholarship, the ways in which current domestic violence statutes misunderstand domestic violence and inhibit criminalizing domestic violence as it actually occurs.

#### A. HOW DOMESTIC VIOLENCE BECAME A CRIME

Anglo-American common law created a hierarchy in the home, with the husband as the master.<sup>15</sup> His power included the right to “command his wife’s obedience, and subject her to corporal punishment or ‘chastisement’ if she defied his authority.”<sup>16</sup> Thanks to the women’s rights movement, all judges in the United States denounced this practice by the late nineteenth century.<sup>17</sup> However, courts quickly found a new doctrine that enforced male hierarchy in the domestic sphere: privacy.<sup>18</sup> As one example, a North Carolina judge wrote that when it came to violence in the home, except in cases of permanent injury or “dangerous” violence, “it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”<sup>19</sup> In this way, the law defined domestic violence as a place where the criminal law could not—indeed should not—reach.

During the 1970s, the women’s movement sought to reform this area of the law.<sup>20</sup> They argued that physical violence between intimate partners was just as serious as the physical violence that occurred in any other context and sought to compel courts and law enforcement to treat it that way.<sup>21</sup> Although feminists challenged substantive law during this time by, among other strategies, petitioning states to add domestic violence statutes to their civil and criminal codes, many of the movement’s goals and victories were procedural and remedial.<sup>22</sup> For example, in response to police departments’ failures to arrest perpetrators of domestic violence, activists sought to implement pro-arrest mandates and even mandatory-arrest policies.<sup>23</sup>

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<sup>15</sup> Reva B. Siegal, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2122–23 (1996).

<sup>16</sup> *Id.* at 2123.

<sup>17</sup> *Id.* at 2129 (“By the 1870s, there was no judge or treatise writer in the United States who recognized a husband’s prerogative to chastise his wife.”).

<sup>18</sup> *Id.* at 2120.

<sup>19</sup> *Id.* at 2158 (quoting *State v. Oliver*, 70 N.C. 60, 61–62 (1874)).

<sup>20</sup> See CYNTHIA GRANT BOWMAN, LAURA A. ROSENBURY, DEBORAH TUERKHEIMER & KIMBERLY A. YURACKO, *FEMINIST JURISPRUDENCE: CASES AND MATERIALS* 249–50 (5th ed. 2018).

<sup>21</sup> *Id.* at 249–51.

<sup>22</sup> *See id.*

<sup>23</sup> *Id.* at 251.

Within that context, seeking to compel state actors to enforce laws prohibiting physical violence that were already on the books in the domestic context made perfect sense.<sup>24</sup> And thanks to those measures, physical violence against women in the home is now a criminal offense that, when reported, law enforcement and courts take more seriously. However, that tremendous achievement left a problematic legacy: the notion that domestic violence necessarily must involve physical violence. This idea has been entrenched firmly in the law, even while society's understanding of domestic violence's nature has continued to evolve.

#### B. DOMESTIC VIOLENCE IS NOT AN ISOLATED INCIDENT

The traditional framework of criminal law presents its own barrier to criminalizing domestic violence as it actually occurs.<sup>25</sup> Criminal law conceptualizes domestic violence as discrete incidents of physical violence, largely ignoring motivation, history, and context.<sup>26</sup> This is consistent with the traditional tenets of criminal law, which historically viewed crimes as single incidents that occur at discrete moments.<sup>27</sup> Accordingly, criminal law does not naturally lend itself to proscribing harmful behavior that unfolds continuously and repeatedly over time.<sup>28</sup>

Meanwhile, outside of the legal context, domestic violence is commonly defined in terms of its intent or effect—control—and the repetitive, patterned nature of the abuser's conduct.<sup>29</sup> And in the real world, an abuser's pattern of behavior toward his partner is not limited to physical acts of violence or threats of physical violence.<sup>30</sup> Rather, common tactics abusers use also

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<sup>24</sup> Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 970 (2004) [hereinafter Tuerkheimer, *Recognizing and Remediating the Harm of Battering*] (“Confronting a legal apparatus wholly unresponsive to battering, domestic violence advocates focused their reform efforts, quite sensibly, on forcing police and prosecutors to enforce the laws already on the books; that is, to treat crimes ‘equally’ whether the victim and perpetrator were strangers or intimates.”).

<sup>25</sup> *Id.* at 971–74.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 972.

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

<sup>29</sup> See *supra* text accompanying note 6.

<sup>30</sup> The Duluth Model's power and control wheel, which collects common tactics used by abusers, lists controlling what the victim does, who she sees, calling her names, intimidating her through damage and destruction to property, preventing her from getting a job, not allowing her to access income and other resources, and threatening to commit suicide, among other tactics. *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, [hereinafter Duluth, *Power and Control Wheel*], <https://www.theduluthmodel.org/wp-content/uploads/2017/03/PowerandControl.pdf> [<https://perma.cc/NCD3-JQJK>].

include controlling what the victim does and who she sees, verbal abuse and name-calling, intimidation, and economic control and coercion, among others. Trying to use existing criminal laws to prosecute domestic violence is therefore like trying “to fit the square peg of domestic violence into the existing round hole of the penal code.”<sup>31</sup>

Addressing domestic violence with incident-oriented statutes conceals the continuous, patterned reality of abuse as many victims experience it, as well as the psychological and emotional abuse that occurs during the periods between, or in many cases instead of, occurrences of physical abuse.<sup>32</sup> It ignores that physical violence, in the domestic context, occurs more than once the majority of the time.<sup>33</sup> It ignores that domestic violence endures. It does not begin and end in seconds; it progresses, and often escalates, over months and years.<sup>34</sup>

Furthermore, statutes that define domestic violence as isolated incidents of physical violence do not account for what motivates abusers—power and control. They also leave out the many other strategies that abusers use to control their victims. Physical violence may be an infrequent or minor strategy or may not be used at all.<sup>35</sup> In fact, abusers may only become physically violent when they cannot control their victims by other means.<sup>36</sup> These statutes also ignore the root of victims’ suffering, since many victims describe psychological and emotional abuse as more harmful than physical violence.<sup>37</sup> As Professor Tuerkheimer wrote, there is a “vast range of suffering—amidst and beyond the physical abuse . . . where the criminal law ‘does not go.’”<sup>38</sup> Domestic violence statutes do not actually address the reality of domestic violence; instead, they erase both abusers’ perpetration and victims’ experiences of it.

The law’s misunderstanding of domestic violence leads to perverse and absurd consequences. For instance, criminal law, as it stands in many states, sees no difference between an individual who smashed a glass on a stranger one evening during a bar fight and an abuser who, over a period of years, stopped allowing his partner access to her finances, controlled how she

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<sup>31</sup> Alafair Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 566 (2007).

<sup>32</sup> See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 972–74.

<sup>33</sup> See *supra* note 12.

<sup>34</sup> Burke, *supra* note 31, at 567–68.

<sup>35</sup> *Id.* at 570–71.

<sup>36</sup> See STARK, *supra* note 12, at 13–14.

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

<sup>38</sup> Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 966.

dressed, isolated her from her friends and family, verbally abused her, and then smashed a glass over her head when she challenged his authority. If the victims in both cases brought charges, prosecutors might approach the cases practically identically. But they are different. One is an isolated outburst of aggression. It starts and finishes in seconds. The other is only one tactic an abuser uses as part of his broader exercise of power and control over his victim. The smashing of the glass may have started and finished in seconds, but the abuse itself is continuous: it lasts for weeks, months, years.

This misunderstanding of domestic violence creates obstacles for victims from start to finish in a criminal case.<sup>39</sup> It begins with the fact that, after enduring abuse at her partner's hands for years, the criminal justice system is only interested in the most recent incident of abuse or whichever incident brought the victim into the system. As such, a prosecutor may only ask her about that particular incident and not the long cycle of abuse she has suffered through.<sup>40</sup> If the victim volunteers information about prior abusive behaviors, the prosecutor, relying on the laws as written, will see these incidents as distinct, isolated, unconnected, and only relevant if they lend themselves to bringing additional charges. The prosecutor might press her on the details: What date? What time? In which room? Did anyone else see it? What happened before and after? But, for victims whose abusers subject them to repeated, continuous abuse, it may be very difficult, if not impossible, to recall those details.<sup>41</sup>

This focus on a single incident affects the charges the prosecutor can bring, the sentence the court can give the abuser, the evidence and arguments that prosecutors can present at trial, and the likelihood that a jury or judge convicts the abuser.<sup>42</sup> Prosecutors must present a coherent story to persuade a jury.<sup>43</sup> In the domestic violence context, such a story would recount both the continuous, repetitive nature of the abuse the victim has suffered, as well as the perpetrator's motivations: power and control.<sup>44</sup> But when the crime's structure makes this crucial context irrelevant, prosecutors can only present disjointed fragments of the victim's story in court.<sup>45</sup> Without the context that

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<sup>39</sup> *See id.* at 975–89 (describing in detail the ways in which the law's limited definition of domestic violence warps the criminal process for victims).

<sup>40</sup> *Id.* at 977–80.

<sup>41</sup> *Id.* at 979. Thus, even if the victim describes conduct that is criminal, the criminal justice system may still offer no recourse if she cannot remember enough details about the incident to prove, beyond a reasonable doubt, that the abuse occurred.

<sup>42</sup> *Id.* at 980–81.

<sup>43</sup> *Id.* at 980–82.

<sup>44</sup> *Id.* at 980–87.

<sup>45</sup> *See id.*

connects these incidents, the story may leave the jury confused and unconvinced.<sup>46</sup>

To solve these problems, Professors Tuerkheimer and Burke proposed that legislators replace our current, transactional domestic violence statutes with course-of-conduct domestic violence statutes.<sup>47</sup> Course-of-conduct statutes allow juries to convict when they find that a defendant has engaged in a criminal “course of conduct”—a series of acts committed over a period of time that have continuity of purpose.<sup>48</sup> In the domestic violence context, course-of-conduct statutes possess a number of advantages over transactional statutes. On a general level, because course-of-conduct statutes criminalize a series of acts, they may be better-suited to address crimes like domestic violence, which often occur as a pattern connected of behaviors. And, as I will explain further *infra*,<sup>49</sup> course-of-conduct statutes are also well-suited to address some of the other shortcomings of current domestic violence legislation. Specifically, course-of-conduct statutes could make the relationship between the perpetrator and the victim relevant, reject the notion that physical violence is at the core of domestic violence, recognize that domestic violence stems from abusers’ desire to gain power and control over their victims, and, accordingly, allow victims greater access to justice.<sup>50</sup> Thus, as Professor Tuerkheimer explained, this type of statute would better capture the nature and harm of domestic violence and would represent “the next stage in the evolution of law’s growing responsiveness to harms suffered by women.”<sup>51</sup>

Although Professors Tuerkheimer’s and Burke’s proposed statutes contained significant differences, both models reflected the repetitive, patterned nature of domestic violence and emphasized, in some way, the underlying dynamics of power and control.<sup>52</sup> At the time, however, these proposals did not gain traction.

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

<sup>47</sup> *Id.* at 1019–22; Burke, *supra* note 31, at 601–03.

<sup>48</sup> See, e.g., MD. CODE ANN., CRIM. LAW, § 3-801 (West 2002) (defining “course of conduct” as “a persistent pattern of conduct, composed of a series of acts over time, that shows a continuity of purpose”); MO. REV. STAT. § 565.225 (2017) (defining “course of conduct” as “a pattern of conduct composed of two or more acts . . . over a period of time, however short, evidencing a continuity of purpose”).

<sup>49</sup> See *infra* Sections II.B, II.C, and II.D.

<sup>50</sup> See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 1030–31.

<sup>51</sup> *Id.* at 1019.

<sup>52</sup> See *id.*; see also Burke, *supra* note 31, at 601–02.

## II. CHANGES IN DOMESTIC VIOLENCE LAW

Significant changes have occurred in this area of the law since Professors Tuerkheimer's and Burke's proposals. In recent years, states have started to modify their domestic violence statutes in ways that suggest the extra-legal definition of domestic violence—that is, the view that domestic violence is a pattern of behavior—is finally starting to seep into the legal sphere. At the same time, prosecuting crimes as courses of conduct is becoming increasingly common in the criminal justice system. In particular, many state laws define some crimes that frequently occur between former intimate partners or in otherwise intimate relationships—such as stalking, harassment, and sexual abuse of a child—in course-of-conduct terms. Meanwhile, across the pond, England and Wales, Ireland, and Scotland have passed and implemented legislation that defines “coercive control” of intimate partners as a course-of-conduct crime.

This Part will describe and discuss these changes. Section A will discuss state approaches to domestic violence that, in small ways, break the mold of the transactional, physical-harm-focused domestic violence statutes discussed in Part I. It will also demonstrate how these statutes identify both emotional harm and controlling behavior as worthy of recourse. Section B will discuss course-of-conduct crimes that the criminal justice system already uses to prosecute behavior in contexts that bear important similarities to domestic violence. Section C will discuss recently passed domestic violence legislation in England and Wales, Scotland, and Ireland and analyze the benefits and downsides of each of these approaches. Ultimately, this Comment argues that adopting a domestic violence course-of-conduct statute, modelled after Scotland's law, is the best path forward.

### A. STATE CRIMINAL STATUTES RECOGNIZING EMOTIONAL HARM AND CONTROLLING BEHAVIOR

Although the basic structure of U.S. domestic violence statutes has not changed,<sup>53</sup> the types of conduct these statutes cover has evolved. Although some state criminal statutes are still narrowly focused on conduct that threatens or causes physical harm,<sup>54</sup> others have taken a broader view on the type of behaviors that can constitute domestic violence. Examples include

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<sup>53</sup> See *supra* Part I.

<sup>54</sup> See, e.g., IDAHO CODE § 18-918, <https://legislature.idaho.gov/statutesrules/idstat/title18/t18ch9/sect18-918/> [<https://perma.cc/F8H4-RW9G>] (criminalizing only battery and assault); IOWA CODE § 236.2, <https://www.legis.iowa.gov/docs/code/236.2.pdf> [<https://perma.cc/LCU9-QAGG>] (criminalizing only assault); KAN. STAT. § 60-3102, [https://www.ksrevisor.org/statutes/chapters/ch60/060\\_031\\_0002.html](https://www.ksrevisor.org/statutes/chapters/ch60/060_031_0002.html) [<https://perma.cc/CZU9-5ABJ>] (criminalizing only conduct causing bodily injury or causing fear of bodily injury).

trespass,<sup>55</sup> harassment,<sup>56</sup> theft,<sup>57</sup> interfering with an emergency call,<sup>58</sup> and damaging or destroying property<sup>59</sup> (including harming pets).<sup>60</sup> The inclusion of these crimes that are not physically violent in statutes defining domestic violence suggests that lawmakers are starting to recognize that there are criminal forms of domestic violence that do not cause physical harm to victims but that perpetrators instead intend to control and intimidate victims. Killing and cruelty to animals, in particular, are common techniques used by abusers to establish control over their victims.<sup>61</sup>

A small number of state laws make the connection between domestic violence and controlling behavior even more explicit. One example is Colorado, which defines domestic violence as any “crime against a person, or against property, including an animal . . . when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.”<sup>62</sup> And in Missouri, a person commits a misdemeanor when he or she “knowingly attempts to cause or causes the isolation of such domestic victim by unreasonably and substantially restricting or limiting his or her access to other persons, telecommunication devices or transportation for the purpose of isolation.”<sup>63</sup>

Similarly, New York recently amended its domestic violence statute to include forms of economic abuse.<sup>64</sup> The statute now includes identity theft,

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<sup>55</sup> See, e.g., GA. CODE ANN. § 19-13-10 (LEXIS through 2019 Legis. Sess.).

<sup>56</sup> See, e.g., ALA. CODE § 30-5-2 (LEXIS through 2019 Legis. Sess.).

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., ILL. COMP. STAT. § 720 5/12-3.5 (2011); MINN. STAT. § 518B.01 (2016).

<sup>59</sup> See, e.g., COLO. REV. STAT. § 18-6-800.3 (LEXIS through 2019 Legis. Sess.).

<sup>60</sup> *Id.*

<sup>61</sup> Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L.J. 1163, 1164 (2014) (“Abusers frequently threaten or harm an animal as a method of harming a human victim, or as a method of establishing control, gaining revenge, or coercing compliance with a particular demand.”).

<sup>62</sup> COLO. REV. STAT. § 18-6-800.3.

<sup>63</sup> MO. REV. STAT. § 565.076(1)(6) (2014).

<sup>64</sup> N.Y. S.B. 2625. Leg. Sess. 2019-2020 (N.Y. 2019), <https://legislation.nysenate.gov/pdf/bills/2019/S2625> [<https://perma.cc/58Z7-NNQ4>]. Economic abuse occurs when one partner limits the other’s access to financial resources. Arianne Renan Barzilay, *Power in the Age of In/Equality: Economic Abuse, Masculinities, and the Long Road to Marriage Equality*, 51 AKRON L. REV. 323, 329 (2017). Examples include preventing or forbidding the victim to work, sabotaging her employment, making unilateral financial decisions, providing the victim with an allowance when the couple is wealthy, not allowing the victim to have her own credit card or bank account, stealing money, liquidating joint accounts, signing up for a credit card in the victim’s name, and forcing the victim to take out loans on behalf of the abuser, among many others. *Id.*; see also Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 954 (2012).

grand larceny, and coercion as domestic violence crimes.<sup>65</sup> The inclusion of economic crimes in domestic violence statutes makes the power and control aspect of domestic violence clear because financial abuse makes victims dependent on their abusers in such a direct, cognizable way. While there may still be some confusion in the popular imagination about “why she doesn’t just leave” in situations where an abuser is physically violent, where an abuser financially abuses a woman, the answer is clear: she does not leave because she cannot.<sup>66</sup> The abuser controls the finances, making the victim financially dependent on the abuser, and, accordingly, she lacks the necessary resources to leave.<sup>67</sup>

The bill’s history demonstrates that the New York legislature recognizes that power and control motivate abusers. In fact, members of the New York assembly justified the bill in part because “economic abuse frequently accompanies other forms of domestic abuse perpetrated by abusers, in the family violence context, to exercise power and control over their victims and their finances.”<sup>68</sup> The statute itself, though, says nothing about power or control, and the statute’s incident-oriented structure continues to isolate economic abuse from other abusive behaviors.<sup>69</sup> Extending domestic violence’s definition to reach behaviors such as economic abuse and harm to pets suggests that legislators are willing to acknowledge the reality that abusers use a wide range of techniques to control their victims. But without recognizing the patterned, repetitive nature of domestic violence and the underlying intent connecting these techniques, prosecutors will continue to handle these individual crimes in a way that ignores the larger context in which abuse occurs.

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<sup>65</sup> N.Y. S.B. 2625.

<sup>66</sup> Appropriately, one of the stated justifications for the bill was that “[e]conomic abuse is a tactic commonly used by abusers to control their victim’s finances and prevent them from leaving an abusive relationship.” New York State Assembly Memorandum in Support of Legislation, N.Y. A.B. A07400 (N.Y. 2019) [hereinafter N.Y. State Assembly Memorandum in Support of Legislation], [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A07400&term=2013&Memo=Y&Text=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07400&term=2013&Memo=Y&Text=Y) [<https://perma.cc/8QE6-2RG4>].

<sup>67</sup> See Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 357 (2014) (“Financial impediments play a major role in restricting a woman who experiences intimate partner violence from initially gaining freedom from the abusive relationship. Moreover, financial instability is one of the greatest reasons why, after gaining freedom, a woman has limited choices and may ultimately acquiesce to an abuser’s attempts at reconciliation.”).

<sup>68</sup> N.Y. State Assembly Memorandum in Support of Legislation, *supra* note 66.

<sup>69</sup> See *supra* Part I.B.

There is, however, one state criminal statute that does recognize that domestic violence can occur as a pattern of connected behaviors.<sup>70</sup> Washington state’s sentencing guidelines allow for more severe sentencing of domestic violence perpetrators where an ongoing pattern of physical, sexual, or psychological abuse is part of their criminal conduct.<sup>71</sup> The guidelines also allow for harsher sentencing when the defendant’s conduct is “deliberately cruel.” Although this language relates to sentencing and does not define domestic violence itself, it may be the closest any state law gets to acknowledging how abusers carry out domestic violence and what motivates them.

First, the sentencing guidelines recognize that domestic violence—in its view, more severe iterations—involves more than a single incident, or even a series of one-off, unconnected, transactional offenses. The choice of the word “pattern” in the guidelines implies that what drives the higher sentencing is not only the number of incidents, but also that these incidents are connected. Furthermore, the guidelines reject the notion that domestic violence is limited to physical violence and open the door for courts to consider evidence of abuse that courts would not otherwise consider relevant or admissible. They do this by defining the pattern to include not just physical and sexual abuse, but also psychological abuse, and by allowing for harsher sentences when the defendant is deliberately cruel.

For example, in *State v. Durall*,<sup>72</sup> the Washington Court of Appeals upheld a trial court’s finding of an ongoing pattern of psychological abuse where Durall treated his wife of twelve years, Carolyn, in ways that were “controlling and extremely jealous.”<sup>73</sup> Durall took Carolyn’s credit card, went through her wallet, forbade her from opening a separate bank account,

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<sup>70</sup> Although this Comment focuses specifically on the criminal law, it is worth mentioning that the definition of domestic violence as a pattern of behavior appears to be making its way into noncriminal statutes. As one example, in September 2020, Hawaii passed a law adding “coercive control” to its definition of “domestic abuse.” Melena Ryzik & Katie Benner, *What Defines Domestic Abuse? Survivors Say It’s More than Assault*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/22/us/cori-bush-fka-twigs-coercive-control.html?referrerSource=articleShare> [https://perma.cc/ZR47-AH9U]. The law defines “[c]oercive control” as “a pattern of threatening, humiliating, or intimidating actions, which may include assaults, or other abuse that is used to harm, punish, or frighten an individual [including] a pattern of behavior that seeks to take away the individual’s liberty or freedom and strip away the individual’s sense of self . . . .” H.B. 2425, 30th Legis. Sess. (Haw. 2020). But the new definition only applies to laws pertaining to insurance policies and domestic abuse protective orders—not the criminal law. *See id.*

<sup>71</sup> WASH. REV. CODE § 10.99.100(1)(b) (2010), <https://app.leg.wa.gov/RCW/default.aspx?cite=10.99.100> [https://perma.cc/X3Q2-63G3].

<sup>72</sup> No. 47928-8-I, 2003 Wash. App. LEXIS 711 (Wash. Ct. App. May 5, 2003).

<sup>73</sup> *Id.* at \*10.

monitored her phone calls and email account, and did not let her leave his side during social events.<sup>74</sup> At the sentencing hearing, the trial court admitted into evidence letters Carolyn had written describing Durall's behavior and testimony from Carolyn's friends and coworkers.<sup>75</sup> Carolyn herself could not testify; Durall had murdered her.<sup>76</sup>

Similarly, in *State v. Zatkovich*,<sup>77</sup> the Washington Court of Appeals upheld the trial court's finding of an ongoing pattern of psychological abuse where Zatkovich engaged in a number of "assaultive, harassing, and stalking" behaviors that caused "fear and mental torment" in the victim—his ex-wife Christy.<sup>78</sup> His abusive behaviors included, on various occasions, visiting Christy's house at three o'clock in the morning, turning off her home's heating, forcing her car off the road, and threatening to cut her throat and watch her bleed to death.<sup>79</sup> Additionally, in considering whether Zatkovich's behavior was deliberately cruel enough to justify an aggravated sentence, the court noted that, on one occasion, Zatkovich left Christy on the side of the road and then told her son that she was dead.<sup>80</sup> The court also emphasized that Zatkovich hit Christy while she was pregnant and told her that he wished that she and her baby were dead.<sup>81</sup> Then, shortly after she gave birth, he threatened to kill himself and her children.<sup>82</sup>

The Washington Court of Appeals' analyses in *Durall* and *Zatkovich* make clear that the degree of an abuser's criminal culpability does not have to be rooted in physical violence. Furthermore, the range of evidence introduced at the sentencing hearings in *Durall* and *Zatkovich* provides a glimpse into the type of story a prosecutor could tell at trial if domestic violence laws made the periods before, between, and after incidents of physical violence relevant. The details about Durall taking Carolyn's credit card and not allowing her to leave his side at parties, and Zatkovich's abandoning of Christy on the side of the road and threatening to kill himself point directly to their respective attempts to control their victims. But

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at \*1. In the days after Durall murdered Carolyn, he told their children that their mother had suddenly and deliberately abandoned them. *Id.* at \*12. On appeal, Durall contested the trial court's ongoing pattern of psychological abuse finding, arguing that his behavior was "merely indicative of a dysfunctional relationship." *Id.* at \*10. The court rejected this defense. *Id.*

<sup>77</sup> 52 P.3d 36 (Wash. Ct. App. 2002).

<sup>78</sup> *Id.* at 38.

<sup>79</sup> *Id.* at 41–42.

<sup>80</sup> *Id.* at 42.

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

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

ultimately, like transactional domestic violence statutes, Washington's sentencing statute omits this crucial context from the trial stage.

There is an additional problem with the sentencing statute. A finding of "deliberate cruelty" requires that "the cruelty must be of a kind not usually associated with the commission of the offense in question."<sup>83</sup> However, in *Zatkovich*, the instances the court mentioned as examples of "excessive cruelty" were, in fact, part and parcel of domestic violence. Threatening to kill oneself and threatening to take the children are common techniques abusers use to control their victims.<sup>84</sup> Furthermore, some research suggests that, rather than being exceptional, pregnant women are at least as likely to experience domestic violence than women who are not pregnant, if not more likely.<sup>85</sup> This is not to suggest that this behavior was not deplorable, or that the harm to the victim was not severe, but rather that the abuser's behavior is not exceptional given how common these types of abusive tactics are. A domestic violence statute that makes context relevant would reveal this, since it would become apparent at the trial stage that domestic violence frequently includes the type of cruelty the *Zatkovich* court found to be exceptional.

Overall, the statutes above represent a step in the right direction. They constitute a formal, legal recognition that domestic violence is not confined to the physical, and, in the Washington example, even that domestic violence's "patterned" nature makes it unlike some other forms of violence. Additionally, they suggest that messages from social scientists and others may be slowly getting through to lawmakers. But, functionally, because they largely do not integrate intent and repetition into the definition of the crimes, these statutes continue to omit the dynamics of power and control that are central to domestic violence. Accordingly, having seen that traditional, transactional crimes do not adequately describe or remedy domestic violence's harm, I will next consider course-of-conduct crimes, which might provide a solution.

## B. COURSE OF CONDUCT CRIMES

Recall that the criminal law has a clear preference for defining crimes as discrete, singular incidents.<sup>86</sup> There are some crimes that break this mold. Course-of-conduct crimes allow juries to convict when they find that a

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<sup>83</sup> *Id.* (citations omitted).

<sup>84</sup> See Duluth, *Power and Control Wheel*, *supra* note 30.

<sup>85</sup> Beth A. Bailey, *Partner Violence During Pregnancy: Prevalence, Effects, Screening, and Management*, 2 INT'L J. WOMEN'S HEALTH 183, 184 (2010).

<sup>86</sup> See *supra* Section I.B.

defendant has engaged in a criminal “course of conduct”—a series of acts over a period of time that have continuity of purpose.<sup>87</sup>

The justifications for defining crimes in a course-of-conduct manner are various and crime-specific. Generally, though, legislatures create course-of-conduct crimes to fill gaps left between the criminal code’s collection of discrete, separate crimes. For example, when Congress passed the Racketeer Influenced and Corrupt Organizations Act (“RICO”), it addressed a gap in the enforcement of enterprise or group crime.<sup>88</sup> Although RICO may be the most well-known course-of-conduct crime, framing criminal offenses in this way has become a fairly common way to define crimes that occur within the context of familial and intimate relationships. Stalking, harassment, sex trafficking, private torture, and sexual abuse of a child are all examples. This Section will demonstrate that domestic violence bears important similarities to other course-of-conduct crimes that the law already recognizes, both in terms of the problems they were passed to address, and in terms of the nature of the crimes themselves. The existence of these crimes suggests that prosecutors are familiar enough with course-of-conduct crimes that the creation of another would not be problematic or confusing to apply. Stalking and sexual abuse of a child statutes are particularly important to this analysis, as they address “gaps” in the law that are most similar to the gap that exists in the domestic violence context.

### 1. Stalking

Stalking laws differ state by state, but, generally speaking, they criminalize a course of conduct directed at a specific person that would cause a reasonable person to feel fearful, intimidated, or suffer serious emotional distress.<sup>89</sup> The statutes generally do not specify the precise type of conduct that the perpetrator must engage in, nor do they focus on the stalker’s intent. In addition, no state stalking statute requires that the victim suffer physical harm, and the vast majority reject the notion that fear of physical violence is the only type of fear that deserves recourse.<sup>90</sup> Prosecutors generally do not

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<sup>87</sup> See, e.g., M.D. CODE ANN., CRIM. LAW, § 3-801 (West 2002) (defining “course of conduct” as “a persistent pattern of conduct, composed of a series of acts over time, that shows a continuity of purpose”); MO. REV. STAT. § 565.225 (2017) (defining “course of conduct” as “a pattern of conduct composed of two or more acts . . . over a period of time, however short, evidencing a continuity of purpose”).

<sup>88</sup> See Burke, *supra* note 31, at 589–90; see also Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 1020–21, 1021 n.329.

<sup>89</sup> See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 210-A (1995), <http://www.mainelegislature.org/legis/statutes/17-a/title17-asec210-a.html> [<https://perma.cc/BVD2-7PMX>].

<sup>90</sup> *But see* VA. CODE ANN. § 18.2-60.3(A) (West 2016) (requiring that the victim fear death, sexual assault, or bodily injury to herself or to a family member).

bring stalking charges when the case involves current intimate partners.<sup>91</sup> Nonetheless, of the two crimes analyzed in this Section, stalking is the most similar to domestic violence. Stalking and domestic violence are similar in terms of conduct, context, the involved parties' identities, and the distinct type of harm they cause. Most importantly, they are similar in that transactional criminal statutes cannot cover the full extent of their conduct or the harms they cause.<sup>92</sup>

The rationale and context behind passing stalking laws apply in full force in the domestic violence context. Until the early 1990s, prosecutors prosecuted stalking behaviors that now constitute part of a course of conduct of stalking individually, usually as misdemeanors.<sup>93</sup> These included harassment, menacing, loitering, trespassing, and terroristic threatening.<sup>94</sup> As one scholar wrote at the time, there was a "gap in the law, leaving victims of stalking without an adequate legal recourse against their pursuers. Stalking laws represent a new attempt to fill this void."<sup>95</sup> Scholars additionally observed that criminalizing these offenses separately—even when they occurred repeatedly and offenders directed them at a particular person—demonstrated that "legislators failed to recognize the commonality between the behaviors . . ."<sup>96</sup> Similarly, as we have seen, domestic violence statutes treat incidents where one partner threatens or physically harms the others as isolated, when in fact, because these incidents are rooted in one intimate partner's attempt to control the other, they are inherently connected to a range of other harmful behaviors.<sup>97</sup>

Before legislatures enacted stalking laws, the law did not recognize that repeated stalking behaviors, directed at a particular person, triggered harm that was both greater than and distinct from the harm caused by the isolated perpetration of these individual crimes.<sup>98</sup> Similarly, as Evan Stark has written in the domestic violence context, "sheer repetition is not the issue."<sup>99</sup> Instead, the issue is that the abuser is harming the same person over and over again,

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<sup>91</sup> See Deborah Tuerkheimer, *Breakups*, 25 YALE J.L. & FEMINISM 51, 55–58 (2013) [hereinafter Tuerkheimer, *Breakups*].

<sup>92</sup> See *id.* at 52 ("In its approach to stalking, the law adopts a model of crime that, nomenclature aside, seems more closely aligned with the realities of domestic violence.").

<sup>93</sup> Kathleen G. McAnaney, Laura A. Curliss & C. Elizabeth Abeyta-Price, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 824 (1993).

<sup>94</sup> *Id.* at 821 (citations omitted).

<sup>95</sup> Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 1000 (1993) (footnotes omitted).

<sup>96</sup> *Id.* at 906.

<sup>97</sup> See *supra* Sections I.B, II.A.

<sup>98</sup> McAnaney, Curliss & Abeyta-Price, *supra* note 93, at 883.

<sup>99</sup> STARK, *supra* note 12, at 94.

“giving abuse a cumulative effect that is far greater than the mere sum of its parts.”<sup>100</sup> Furthermore, “minor” stalking behaviors can culminate in acts of horrendous violence against victims. But when the law viewed those behaviors as isolated and unconnected, it could not intervene in any protective way until an attack actually occurred.<sup>101</sup> Similarly, laws that conceptualize domestic violence as isolated incidents rather than patterns of behavior fail to recognize that abuse escalates, and, accordingly, that the danger to victims grows.

Stalking and domestic violence are also similar in terms of the parties’ identities, the conduct perpetrators engage in, and the effects that conduct has on victims. Stalkers are often their victims’ former intimate partners, seeking to establish or reestablish control over their victims.<sup>102</sup> Although states prosecute stalking as if it cannot occur between current intimate partners, in fact, stalking behaviors can begin at the start of a relationship, and domestic violence can continue during and after the breakup.<sup>103</sup> Thus, stalkers are often abusers and vice versa.

Examining the behaviors and tactics that stalkers and abusers employ makes this clear.<sup>104</sup> Unwanted telephone calls and communications, spreading rumors, threats, spying, and following victims all occur in both the stalking and domestic violence contexts. For instance, an abuser may follow the victim throughout the house and demand to know what she is doing, or, when she is outside the home, demand to know her whereabouts.<sup>105</sup> Recent innovations in surveillance technology have further conflated these two crimes, as both abusers and stalkers use surveillance and tracking devices to pursue, intimidate, and control their victims.<sup>106</sup>

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

<sup>101</sup> Guy, *supra* note 95, at 999.

<sup>102</sup> See Tuerkheimer, *Breakups*, *supra* note 91, at 54.

<sup>103</sup> *Id.* at 55–58.

<sup>104</sup> A 2009 report from the U.S. Department of Justice notes that common stalking behaviors include making unwanted phone calls and communicating with victims in other unsolicited ways, spreading rumors, and following or spying on victims. KATRINA BAUM, SHANNAN CATALANO, MICHAEL RAND & KRISTINA ROSE, BUREAU JUST. STATS., STALKING VICTIMIZATION IN THE UNITED STATES, U.S. DEP’T JUST. 1 (2009), <https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf> [<https://perma.cc/4VRZ-APDZ>].

<sup>105</sup> See Tuerkheimer, *Breakups*, *supra* note 91, at 60–61.

<sup>106</sup> See, e.g., Kate Lyons, *Stalkers Using Bugging Devices and Spyware to Monitor Victims*, GUARDIAN (Feb. 13, 2018, 1:00 PM), <https://www.theguardian.com/uk-news/2018/feb/13/stalkers-using-bugging-devices-and-spyware-to-monitor-victims> [<https://perma.cc/D2XD-JDK5>] (reporting that stalkers are using apps and other bugging devices to monitor their victims); Aarti Shahani, *Smartphones Are Used to Stalk, Control Domestic Abuse Victims*, NPR (Sept. 15, 2014, 4:22 PM), <https://www.npr.org/sections/alltechconsidered/2014/09/15/346149979/smartphones-are-used-to-stalk-control-domestic-abuse-victims> [<https://perma.cc/4VRZ-APDZ>].

However, even though the two crimes bear clear similarities, stalking laws cannot perfectly fill the gaps in domestic violence law. For one thing, prosecutors generally do not use stalking laws to prosecute domestic violence.<sup>107</sup> For another, stalking laws may not reach all types of abuse that domestic violence victims experience. As an example, stalking laws likely would not cover economic abuse—one of the most common strategies abusers employ. And finally, one important function of the criminal law is that it expresses and codifies what society condemns.<sup>108</sup> Using stalking laws to prosecute domestic violence, especially given those laws' stranger and post-breakup connotations, leaves a question as to whether society also condemns abuse that occurs between persons in a relationship.

Accordingly, in stalking laws, the criminal law already recognizes a crime that features conduct and harms similar to those in the domestic violence context. The introduction of a course-of-conduct domestic violence statute would therefore not introduce a type of crime with which the criminal justice system is not already familiar.

## 2. *Sexual Abuse of a Child*

A second crime that bears important similarities to domestic violence is sexual abuse of a child. California's legal treatment of this crime is particularly relevant since it criminalizes "continuous" sexual abuse of a child, defined as three or more acts of sexual conduct with a child under the age of fourteen during a three month period or more.<sup>109</sup> Prosecuting child molesters presents evidentiary challenges that are similar to those faced by prosecutors of domestic violence.<sup>110</sup> The California statute, in particular, addresses the specific problem of children who have been sexually abused

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/35DG-J9NS] (reporting that abusers are using apps and other digital tools to follow and monitor their victims).

<sup>107</sup> See Tuerkheimer, *Breakups*, *supra* note 91, at 71. Professor Tuerkheimer made this observation in 2007, but I have found no evidence that prosecutors have started using stalking laws to prosecute domestic violence since then.

<sup>108</sup> See Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) ("What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.").

<sup>109</sup> CAL. PENAL CODE § 288.5(a) (1872) (amended 2006), [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=288.5.&lawCode=PEN](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=288.5.&lawCode=PEN) [<https://perma.cc/X6FT-3SZL>].

<sup>110</sup> See Brian Bah, *Jury Unanimity and the Problem with Specificity: Trying to Understand What Jurors Must Agree About by Examining the Problem of Prosecuting Child Molesters*, 91 TEX. L. REV. 1203, 1205 (2013) ("[Child sexual abuse] statutes are meant to battle a difficulty in convicting child molesters: many of these cases revolve around alleged repeated sexual abuse with only generic evidence available since the child in question has difficulty providing event-specific evidence.").

repeatedly by adults but cannot remember the specific dates on which the assaults occurred or recall other significant details related to the assaults. In response to this problem, the statute does not require the jury to unanimously agree on the same three predicate acts.<sup>111</sup> Instead, the jury must only agree that three acts of sexual abuse occurred.<sup>112</sup>

California courts have also applied this logic to domestic violence cases, reasoning that both involve repetitive conduct, “[b]oth the victim of spousal and of child abuse are likely to be unwilling to report their abuse to the authorities due to fear of physical and/or emotional retaliation on the part of the attackers[,]” and “[b]oth patterns of behavior are based on controlling another individual through violence.”<sup>113</sup> Although the California Court of Appeals in that case did not mention it, domestic violence victims face similar difficulties in recalling specific incidents of abuse.<sup>114</sup> Accordingly, conceptualizing domestic violence as a course-of-conduct crime may help to address this common evidentiary obstacle.

### C. RECENTLY PASSED INTERNATIONAL LAWS

The United States is, of course, far from the only country where a gap in domestic violence law exists. In recent years, though, other countries and jurisdictions have introduced and passed legislation to fill this gap. Specifically, England and Wales, Ireland, and Scotland have all passed criminal laws to address the limitations of transactional, physical-harm focused statutes. In advocating for and passing these laws, government officials and law enforcement have explicitly cited a number of the concerns discussed in this Comment. In particular, the goals of these new laws included linking the government’s definition of domestic abuse to the

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<sup>111</sup> § 288.5(b).

<sup>112</sup> *Id.*

<sup>113</sup> *People v. Thompson*, 160 Cal. App. 3d 220, 222 (Cal. Ct. App. 1984).

<sup>114</sup> See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 979 (“The patterned, on-going nature of domestic violence makes [recalling specific incidents of abuse] an often insurmountable obstacle. Given the dynamics of what has been endured, it is not surprising that domestic violence victims tend to blend, generalize and summarize when narrating a history of abuse.”).

criminal law's,<sup>115</sup> recognizing that emotional abuse can be as harmful or more harmful than physical abuse,<sup>116</sup> and closing a perceived gap in the law.<sup>117</sup>

### *1. English Law*

As in the United States, the English criminal justice system historically criminalized domestic violence through general criminal offenses that prosecutors and courts applied in the domestic violence context.<sup>118</sup> Accordingly, a similar gap existed under English law in 2014, when lawmakers floated the idea of new domestic violence legislation.

Before passing the new law, the Government consulted with voters to determine the public's thoughts on the potential law.<sup>119</sup> Initially, there was some question of whether an offense specifically focused on domestic violence was necessary.<sup>120</sup> Some survey respondents suggested that the legislature should instead adapt harassment and stalking laws for domestic violence purposes.<sup>121</sup> Ultimately, though, the British Parliament decided to create a separate offense, specifically tailored to address coercive controlling violence.<sup>122</sup>

Important to the lawmakers' approach to crafting the new legislation was their separation of physical violence from other forms of domestic

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<sup>115</sup> HOME OFFICE, STRENGTHENING THE LAW ON DOMESTIC ABUSE—A CONSULTATION 11 (2014) [hereinafter STRENGTHENING THE LAW ON DOMESTIC ABUSE—A CONSULTATION], [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/344674/Strengthening\\_the\\_law\\_on\\_Domestic\\_Abuse\\_-\\_A\\_Consultation\\_WEB.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/344674/Strengthening_the_law_on_Domestic_Abuse_-_A_Consultation_WEB.PDF) [<https://perma.cc/G7EC-V5N7>].

<sup>116</sup> JUST. COMM., SCOTTISH PARLIAMENT, STAGE 1 REPORT ON THE DOMESTIC ABUSE (SCOTLAND) BILL 11 (2017) [hereinafter STAGE 1 REPORT ON THE DOMESTIC ABUSE (SCOTLAND) BILL], [https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill/Stage%201%20Report%20on%20the%20Domestic%20Abuse%20\(Scotland\)%20Bill.pdf](https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill/Stage%201%20Report%20on%20the%20Domestic%20Abuse%20(Scotland)%20Bill.pdf) [<https://perma.cc/3FZX-3P6Z>].

<sup>117</sup> *Id.* at 3–4.

<sup>118</sup> See Vanessa Bettinson & Charlotte Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?*, 66 N. IR. LEGAL Q. 179, 185 (2015) (“The primary legislation used to prosecute perpetrators of domestic violence and/or abuse remains the Offences Against the Person Act 1861 and the common law offences of assault and battery.”).

<sup>119</sup> HOME OFFICE, STRENGTHENING THE LAW ON DOMESTIC ABUSE—A SUMMARY OF RESPONSES 6 (2014), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf) [<https://perma.cc/5NEB-W2PE>].

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 7.

<sup>122</sup> *Id.* at 11.

abuse.<sup>123</sup> A report from the Home Office stated that there was “no need for greater clarity around violent behaviours, which are effectively criminalised through existing offenses.”<sup>124</sup>

The 2015 law—passed as a section of the “Serious Crime Act 2015”—reads as follows:

A person (A) commits an offence if –

A repeatedly or continuously engages in behavior towards another person (B) that is controlling or coercive,

At the time of the behavior, A and B are personally connected

The behavior has a serious effect on B, and

A knows or ought to know that the behaviour will have a serious effect on B.<sup>125</sup>

The statute specifies that A and B are personally connected if they are in an intimate relationship, live together and are family members, or live together and have previously been in an intimate relationship.<sup>126</sup> A “serious effect” means that it “causes B to fear, on at least two occasions, that violence will be used against B,” or that, “it causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities.”<sup>127</sup> A person convicted of the offense will receive a fine, up to five years in prison, or both.<sup>128</sup>

What the law chooses not to define, or leaves out altogether, is just as important as these definitions. The law does not define “controlling” or “coercive.”<sup>129</sup> It does not specify gender, nor does it include a statute of

<sup>123</sup> See STRENGTHENING THE LAW ON DOMESTIC ABUSE—A CONSULTATION, *supra* note 115, at 11.

<sup>124</sup> *Id.*

<sup>125</sup> Serious Crime Act 2015, c. 9, § 76 (U.K.), [http://www.legislation.gov.uk/ukpga/2015/9/pdfs/ukpga\\_20150009\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/9/pdfs/ukpga_20150009_en.pdf) [<https://perma.cc/3DLL-W2L9>].

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *id.* Statutory guidance from the Home Office, however, states that “[c]ontrolling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.” HOME OFFICE, CONTROLLING OR COERCIVE BEHAVIOUR IN AN INTIMATE OR FAMILY RELATIONSHIP: STATUTORY GUIDANCE FRAMEWORK 3 (2015), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482528/Controlling\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf) [<https://perma.cc/YC96-U47A>]. It further defines “coercive behaviour” as “a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.” *Id.* But the guidance also emphasizes that this is “not a legal definition.” *Id.*

limitations.<sup>130</sup> Finally, as already mentioned, although one could interpret the statute to cover physical violence because “behavior” is such a broad term, the Act’s history suggests that Parliament did not intend for it to do so.<sup>131</sup> I will analyze the English law below, alongside my analysis of Ireland and Scotland’s laws.

## 2. Irish Law

Three years after the British Parliament passed the Serious Crime Act, Ireland passed the Domestic Violence Act 2018. In addition to expanding access to protection orders and introducing protections to domestic violence victims during court proceedings, the Act introduced a new criminal offense, which, like England and Wales’s, was called “coercive control.”<sup>132</sup> The first section of the offense reads:

- (1) A person commits an offence where he or she knowingly and persistently engages in behaviour that—
- (a) is controlling or coercive,
  - (b) has a serious effect on a relevant person, and
  - (c) a reasonable person would consider likely to have a serious effect on a relevant person.<sup>133</sup>

The Irish offense is very similar to the English version that preceded it, but it features at least three significant differences. The first is that the mens rea requirement differs significantly from England and Wales’s Serious Crime Act, which considers what the defendant knew *or ought to have known* with regard to the effect of his or her behavior. The Domestic Violence Act, however, raises the mens rea requirement to “knowingly.”<sup>134</sup> Additionally, what perpetrators must know differs between the two laws. Under the English law, the perpetrator must either have known or ought to have known that his behavior would “have a serious effect on” his victim. On the other hand, although the Domestic Violence Act’s wording is somewhat ambiguous, it appears to require that the prosecutor prove that an offender *actually* knows

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<sup>130</sup> *See id.*

<sup>131</sup> *See* STRENGTHENING THE LAW ON DOMESTIC ABUSE—A CONSULTATION, *supra* note 115, at 11 (explaining that English law does not require “greater clarity around violent behaviours, which are effectively criminalised through existing offences”).

<sup>132</sup> Domestic Violence Act 2018, (Act. no. 6/2018, § 39) (Ir.).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

that his behavior is controlling or coercive.<sup>135</sup> This requirement places a high burden of proof on prosecutors.<sup>136</sup>

The second difference is that, unlike England and Wales's Serious Crime Act, Ireland's Domestic Violence Act explicitly incorporates physical violence into the offense. Section 40 of the Act stipulates that where an offender's "coercive control" involves violence or a threat of violence, courts shall treat that fact as an aggravating factor and the sentence will increase accordingly.<sup>137</sup> In this way, Ireland's Domestic Violence Act improves the English law because it acknowledges that abusers may seek to gain control over their victims through both physically violent and nonphysically violent behaviors as part of the same course of conduct. Still, by providing for greater sentencing where physical violence exists, Ireland's law also sends a clear message that physical violence is more blameworthy, more harmful, or both than other controlling behavior. This conflicts with many victims' experiences.<sup>138</sup>

Finally, Ireland's Domestic Violence Act does not stipulate how many acts it requires to prove the offense, only that the offender must engage in "persistent" behavior.<sup>139</sup> Although leaving room for interpretation and prosecutorial discretion is not necessarily a bad thing, without at least a minimum number of acts, it is difficult to understand how prosecutors can bring these cases with certainty that they have gathered sufficient evidence.

### 3. *Scottish Law*

The third and most recently passed law is the Domestic Abuse (Scotland) Act 2018 ("Domestic Abuse Act"). Leading up to the Act's passage, a Committee Report noted that the drafters intended the law to address concerns that the criminal law did not cover the lived experiences of many domestic violence victims.<sup>140</sup> The committee sought to address these concerns "by recognising . . . domestic abuse as a course of conduct taking place over a period of time, rather than the focus being on a single incident,

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<sup>135</sup> *See id.*

<sup>136</sup> *See* Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 1022 ("[P]rosecutors would understandably balk at a requirement that intentional mens rea be proven with respect to the exercise of power and control. The difficulty of convincing jurors beyond a reasonable doubt that a batterer consciously intended to dominate his victim may be practically insurmountable.").

<sup>137</sup> Domestic Violence Act 2018, (Act. no. 6/2018, § 40) (Ir.).

<sup>138</sup> *See* STARK, *supra* note 12, at 13–14.

<sup>139</sup> *Id.*

<sup>140</sup> STAGE 1 REPORT ON THE DOMESTIC ABUSE (SCOTLAND) BILL, *supra* note 116, at 3.

as is ordinarily the case with the criminal law.”<sup>141</sup> Furthermore, in contrast to the drafters of the English and Irish statutes, the drafters of Scotland’s Domestic Abuse Act intentionally used a “gendered analysis” of domestic violence in framing the law.<sup>142</sup> The drafters’ starting point was, in essence, “the view that women and girls are at increased risk of violence and abuse by nature of their gender, from men.”<sup>143</sup> The law itself, however, uses gender neutral terms. The law reads:

- (1) A person commits an offence if—
  - (a) the person (“A”) engages in a course of behaviour which is abusive of A’s partner or ex-partner (“B”), and
  - (b) both of the further conditions are met.
- (2) The further conditions are—
  - (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
  - (b) that either—
    - (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
    - (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.<sup>144</sup>

The law further stipulates that “psychological harm” includes fear, alarm, and distress.<sup>145</sup> It defines “behaviour which is abusive” as including violent, threatening, or intimidating behavior, as well as behavior that “has as its purpose (or among its purposes)” one or more of the following effects: “(a) making B dependent on, or subordinate to, A, (b) isolating B from friends, relatives or other sources of support, (c) controlling, regulating or monitoring B’s day-to-day activities, (d) depriving B of, or restricting B’s, freedom of action, [or] (e) frightening, humiliating, degrading or punishing B.”<sup>146</sup>

Abusive behavior under the law includes behavior that “would be considered by a reasonable person to be likely to have one or more” of the above effects.<sup>147</sup> The law defines behavior broadly as “behaviour ‘of any

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Domestic Abuse (Scotland) Act 2018, (ASP 5) § 1, ¶¶ 1–2, <https://www.legislation.gov.uk/asp/2018/5/part/1/enacted> [<https://perma.cc/PDS3-4XBW>].

<sup>145</sup> *Id.* § 1, ¶ 3.

<sup>146</sup> *Id.* § 2, ¶¶ 2–3.

<sup>147</sup> *Id.* § 2, ¶ 2(b)(ii).

kind' that may include communicating something . . . or failing to communicate or do something."<sup>148</sup> Additionally, "[b]ehaviour directed at a person" includes both conduct toward that person's property and conduct that makes use of a third party.<sup>149</sup>

#### 4. *The Scottish Law as a Model for State Legislation*

Scotland's Domestic Abuse Act provides the best model for states to use when drafting their own laws because the Scottish law solves a number of the problems presented by the English and Irish laws. One important feature of the Scottish law is that, like the Irish law, Scotland's Domestic Abuse Act explicitly incorporates physical harm into the offense.<sup>150</sup> This is significant because including physical harm along with other controlling behaviors represents a more accurate and complete understanding of how abusers abuse their victims, as well as how domestic violence victims experience that abuse.<sup>151</sup>

Furthermore, the Scottish statute does not require that the prosecutor prove that the victim suffered any harm, nor does it require proof that abusers gained control over their victims.<sup>152</sup> This means that, rather than proving the victim's suffering, the prosecutor—and the jury—must focus on the alleged abuser's behavior. In contrast, requiring prosecutors to prove the abuse's "effect" on the victim, as the Irish law does, is problematic because the degree of agency that domestic violence victims retain in the face of abuse should not diminish the abuser's culpability.<sup>153</sup> Instead, the Domestic Abuse Act requires the prosecutor to prove that a reasonable person would view the

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<sup>148</sup> *Id.* § 10, ¶ 2.

<sup>149</sup> *Id.* § 10, ¶ 3.

<sup>150</sup> *Id.* § 2, ¶ 4. Drafters explained this decision in a report released before the law's passage: "The Scottish Government took the decision to include both physical and psychological abuse within the new offence in order to enable prosecutors to include all acts of abuse in a single charge as evidence of a course of conduct, rather than having to bring a separate charge for the physical aspect of the abuse." STAGE 1 REPORT ON THE DOMESTIC ABUSE (SCOTLAND) BILL, *supra* note 116, at 6.

<sup>151</sup> *See supra* Section I.B.

<sup>152</sup> Domestic Abuse (Scotland) Act 2018, (ASP 5) § 4, ¶ 1. ("The commission of an offence . . . does not depend on the course of behaviour actually causing B to suffer harm of the sort mentioned in section 1(2).").

<sup>153</sup> *See* Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 1022 ("[Requiring proof that the victim was controlled] is problematic from an evidentiary perspective, as it suggests (or at least does not preclude) that the victim must be completely subordinated for the defendant to be convicted. It is also troubling phenomenologically, since a focus on the victim's domination will tend to obscure evidence of agency.").

abuser's behavior as likely to cause the victim to suffer physical or psychological harm.<sup>154</sup>

The Scottish law's scienter requirement is also less burdensome on prosecutors than the English law's. Though the English law appears to require the prosecutor to prove that an offender knew that his behavior was controlling or coercive,<sup>155</sup> the Scottish law requires that the prosecutor prove that an abuser intentionally or recklessly caused the victim to suffer physical or psychological harm.<sup>156</sup> As mentioned above, the specificity of the English law's scienter requirement will likely make it far more difficult for prosecutors to prove the crime and perhaps deter them from bringing charges at all.<sup>157</sup> This difficulty stems from the fact that abusers may not actually know that their behavior is controlling or coercive. And, even if abusers do understand the precise nature their behavior, it is not obvious what sort of evidence a prosecutor could present to prove this knowledge, particularly when most other criminal statutes do not require such a specific showing of scienter. Proof of an intention to cause harm, on the other hand, is already required under various existing criminal statutes.<sup>158</sup> And the Scottish law's requirement that the offender must only be "reckless" as to whether his conduct causes the victim to suffer physical or psychological harm reduces the burden of proof on prosecutors even further.

One additional benefit of Scotland's Domestic Abuse Act is that it is far more detailed and specific than the English and Irish laws. The law's specific definition of "abusive behavior," as well as its specific enumeration of the

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<sup>154</sup> Domestic Abuse (Scotland) Act 2018, (ASP 5) § 2, ¶ 2. The drafters explain: "It is the Scottish Government's view that proving a crime was committed should not hang on demonstrating in court that the complainant suffered harm. The Scottish Government considers that this reduces the likelihood of the trial process being traumatic for the victim (by forcing them to 're-live' the experience of the abuse in order to establish that the crime was committed). It also means that the fact that a particular individual was resilient in the face of the abuse is of no relevance to the prosecution case. Instead, the focus is on what the accused actually did (or failed to do), on whether they had the requisite mental element of recklessness or intent, and on an objective assessment of what the outcome for the victim would likely have been." STAGE 1 REPORT ON THE DOMESTIC ABUSE (SCOTLAND) BILL, *supra* note 116, at 7.

<sup>155</sup> See Serious Crime Act 2015, c. 9, § 76 (U.K.), [http://www.legislation.gov.uk/ukpga/2015/9/pdfs/ukpga\\_20150009\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/9/pdfs/ukpga_20150009_en.pdf) [<https://perma.cc/3DLL-W2L9>].

<sup>156</sup> Domestic Abuse (Scotland) Act 2018, (ASP 5) § 1, ¶ 2(b).

<sup>157</sup> See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 1022 ("[P]rosecutors would understandably balk at a requirement that intentional mens rea be proven with respect to the exercise of power and control. The difficulty of convincing jurors beyond a reasonable doubt that a batterer consciously intended to dominate his victim may be practically insurmountable.").

<sup>158</sup> One example is battery. In Wisconsin, for instance, an offender can be convicted of battery if they "cause[] bodily harm to another by an act done with intent to cause bodily harm to that person or another . . ." Wis. Stat. § 940.19(1) (2020).

relevant effects on the victim, give Scottish citizens—including police, prosecutors, defense attorneys, and judges—a much clearer picture as to who this law is meant to protect and from what it is meant to protect them.<sup>159</sup> In contrast, the Irish and English laws do not elaborate on “behavior” at all.

Finally, the Scottish law also makes clear how many incidents of abuse prosecutors must demonstrate to prove the crime occurred: two.<sup>160</sup> As mentioned above, providing prosecutors with clear guidelines about what the offense involves as well as the number of incidents the law requires them to prove is crucial to the crime’s implementation and success. Accordingly, the Scottish law provides the best model for states to use when drafting course-of-conduct domestic violence legislation.

### III. COUNTERARGUMENTS AND CHALLENGES

Although the Scottish law is the best solution, it is not perfect. Important and valid questions about the intersection of domestic violence and the criminal justice system remain. More specifically, one might question whether the criminal justice system is the most appropriate way to address domestic violence in our society at all. This Part will address this concern.

In recent years, many scholars have questioned both the efficacy and the morality of relying on the criminal law to address domestic violence. Some point to the system’s continued reliance on incarceration in the domestic violence context as a feminist failure.<sup>161</sup> In particular, scholars point to mandatory arrest laws,<sup>162</sup> no-drop policies,<sup>163</sup> and other practices designed to increase enforcement of domestic violence laws as having the unanticipated and unfortunate effect of undermining the victim’s autonomy.<sup>164</sup>

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<sup>159</sup> See Domestic Abuse (Scotland) Act 2018, (ASP 5) §§ 1–2, ¶ 4.

<sup>160</sup> *Id.* § 10, ¶ 4.

<sup>161</sup> See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 748 (2007) (“By embracing harsh criminalization policies, domestic violence reformers actually strayed from the underlying values of the feminist movement.”); LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 1–6 (2012) (criticizing dominance feminists’ strategy of relying on the state to address and protect women from domestic violence and arguing that the legal system’s response to domestic violence “has proven problematic for many women”); Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 70–88 (2017) (detailing critiques of the criminalization of domestic violence and arguments for decriminalization).

<sup>162</sup> Mandatory arrest laws require law enforcement to arrest alleged abusers. Justine A Dunlap, *Soft Misogyny: The Subtle Perversion of Domestic Violence “Reform,”* 46 SETON HALL L. REV. 775, 793 (2016).

<sup>163</sup> No-drop policies require prosecutors to pursue charges against abusers without consideration for whether survivors support the bringing of these charges. *Id.* at 797–98.

<sup>164</sup> See, e.g., *id.* at 792–809 (chronicling ways these and other criminal justice policies have had negative consequences for domestic violence survivors).

Furthermore, in a country that is currently struggling under the burden of mass incarceration, calling for legislatures to create new criminal offenses—particularly ones that may lead to higher sentencing—may be rightly met with skepticism.

But while feminist concerns about mass-incarceration generally and criminalizing domestic violence specifically are well-taken, there are important reasons to criminalize domestic violence, and there could be serious consequences if legislatures do not. The first reason is that domestic violence in its patterned, ongoing forms, involves the subjugation of another person. It is a sustained deprivation of another person's agency and liberty.<sup>165</sup> This feature of domestic violence makes it different from other conduct our laws define as criminal, such as drug possession, which, in theory, only directly injures the possessor and could only indirectly injure others.<sup>166</sup> It seems uncontroversial to say that crimes perpetrators commit to subjugate and control other individuals cause greater social harm and are therefore more worthy of retribution and deterrence than crimes that do not. Thus, domestic violence is distinct from other criminal behaviors—such as drug possession—that have been rightly criticized for both excessive sentencing and over-criminalization.

Second, while some critics of the criminal justice system and criminal law in general might find its underlying goals of retribution and deterrence misguided, even ignoring these justifications, the goals of incapacitation and isolation are highly important in the domestic violence context. If the system does not separate abusers from victims, victims remain at risk.<sup>167</sup> This is particularly true given abusers' tendency to repeatedly abuse a particular victim in a way that escalates over time.<sup>168</sup>

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<sup>165</sup> See STARK, *supra* note 12, at 15 (“What is taken from [victims] . . . is the capacity for independent decision making in the areas by which we distinguish adults from children and free citizens from indentured servants. [Domestic violence] entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity . . . , denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control).”).

<sup>166</sup> See Alexandra Michelle Ortiz, *Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee*, 71 VAND. L. REV. 681, 711 (2018).

<sup>167</sup> *Id.* at 712. (“Incarceration also allows a victim adequate time to escape safely, both physically and mentally. In short, incarceration is the best way to ensure that the abuse stops, contributing significantly to the goal of saving women's lives.”).

<sup>168</sup> *Id.* (“Because domestic violence by its nature is cyclical and repetitive—marked by continued violence by the same offender—these concerns [about reoffending and escalating abuse] are perhaps more relevant in the domestic violence context than many other crimes, making the case for incarceration in this context particularly strong.”).

Finally, as long as domestic violence statutes remain on the books, they should accurately capture both abusers' conduct and victims' harm.<sup>169</sup> Current domestic violence statutes do not. These statutes' accuracy is important because of the criminal law's expressive function: our criminal statutes not only reflect behavior that society already condemns, but also prescribe behavior that society should condemn. In this way, criminal statutes shape societal understandings of what is and is not permissible conduct and communicate to victims that the harm they have suffered is real and of the kind that society will not tolerate.<sup>170</sup> A consequence of the law incorrectly defining domestic violence, then, is that society continues to misunderstand what domestic violence is, how it occurs, and why it is harmful. These omissions in our current laws, therefore, have real consequences for both victims and society at large. Said differently, "what the law quietly calls legal becomes, or remains, socially legitimate."<sup>171</sup> Accordingly, though criminal justice reforms are important and necessary, this is not the area reformists should target.

### CONCLUSION

Domestic violence statutes in the United States are changing in ways that suggest the legal field is ready to grapple with a more realistic understanding of domestic violence and its perpetration. Despite these improvements, however, the structure of U.S. domestic violence statutes, which still define domestic violence as an isolated event, remains flawed. Accordingly, the United States should follow the lead of countries that are addressing the ways that transactional criminal statutes fail domestic violence victims. The best path forward is for states to pass legislation defining domestic violence as a course of conduct, using Scotland's law as a model.

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<sup>169</sup> See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 1019. ("Failure to outlaw the pattern of violence and power that is experienced by battered women distorts communal understandings of the abuse that is inflicted in intimate relationships. We do not see battering for what it truly is. We do not see ourselves as victims or perpetrators of it. We cannot grapple honestly with its root causes or our own societal complicity in its perpetuation.")

<sup>170</sup> Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407 (2009).

<sup>171</sup> See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 24, at 1019.