

SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL

VOLUME 49 SPECIAL EDITION ISSUE SPRING 2025

Celebrating 30 Years of VAWA: the Violence Against Women Act

ARTICLES

WINNING THE BATTLE, LOSING THE WAR: *RAHIMI*, WOMEN, AND THE SUPREME COURT
Dr. Dana Raigrodski 385

ETHICAL DELIBERATIONS: REPRESENTING THE ACCUSED IN CIVIL CASES INVOLVING INTIMATE PARTNER AND DOMESTIC VIOLENCE
Dana Harrington Conner 425

THE WORDS WE CHOOSE: AN ANALYSIS OF TERMS USED IN DOMESTIC VIOLENCE LAW
Evan Lovell 459

CRIME OR CARE?: INTERNATIONAL LAWS TO ADDRESS “CONTROL” IN VIOLENCE WITHIN DOMESTIC RELATIONSHIPS
Pavithra Rajendran..... 499

CHALLENGING MASCULINITY TO COMBAT GENDER-BASED VIOLENCE IN KENYA
Teresa Jacques Valenzuela et al..... 523

ESSAY

A LABOR OF LOVE: THE INTERSECTION OF DOMESTIC VIOLENCE AND HUMAN TRAFFICKING AND WHY ATTORNEYS HAVE A DUTY TO UNDERSTAND THE DIFFERENCE
Jessica Visage 541

NOTES

CHILD “PROTECTIVE” SERVICES: FAILING TO PROTECT CHILDREN EXPOSED TO DOMESTIC VIOLENCE
Amber M. Alexander 567

“I’M NOT THAT KIND OF LAWYER” NO LONGER CUTS IT: A CALL FOR MANDATORY DOMESTIC VIOLENCE CLEs ACROSS THE LEGAL PROFESSION
Ashley N. Dorsey..... 603

SOUTHERN ILLINOIS UNIVERSITY

LAW JOURNAL

Volume 49

Spring 2025

BOARD OF EDITORS

Editor-in-Chief
ASHLEY N. DORSEY

Managing Editor
AMBER M. ALEXANDER

Summer Survey Editor
EMILY BUIKEMA

Chief Articles Editor
TREVOR JOHNSON

Research Editor
MADELYN HAYWARD

Articles/Notes Editors

HALEY SPIEWAK
ALEXANDER ROBY

PAIGE WRISTON

Staff

CLINT WELLS
RILEY HARRIS
GRACE GRAY
ELIJAH PHILLIPS

NICHOLAS STETLER
SHAILEY PARK
JULIA BARNETT
KYLE PINTER

REAGAN HONN
MATTHEW WELLS
DILLON RUZICH
ELENA SCHAUWECKER

Faculty Advisor
ZVI ROSEN

Business Manager
CYNTHIA HEISNER

STATEMENT OF POLICY

It is the goal of the *Southern Illinois University Law Journal* to produce scholarly publications of the highest quality attainable. It is the belief of this Journal that all members of society hold the potential for contributing to this goal. In recognition of the value of such contributions, the Journal considers all articles submitted for publication without regard to the author's race, color, gender, religion, sexual orientation, age, disability, marital status, or national origin. Furthermore, it is the belief of this Journal that open dialogue and rigorous debate is essential to the development of American law. Thus, the Journal selects an article for publication based on the quality of its content, the thoroughness of its research, and the power of its rhetoric without regard to political orientation. This policy is in effect for all Journal activities, and it is the hope of this Journal that the policy expressed herein should prevail in all human endeavors.

The *Southern Illinois University Law Journal* (ISSN 0145-3432) is published quarterly by students at the Southern Illinois University Simmons Law School. Editorial offices are located at 213 Lesar Law Building, Southern Illinois University Simmons Law School, Carbondale, IL 62901.

Unsolicited manuscripts are welcomed and will be considered for publication. Manuscripts should be submitted to lawjourn@siu.edu and addressed to the Editor-in-Chief. Print copies may be submitted to the Editor-in-Chief, *Southern Illinois University Law Journal*, 213 Lesar Law Building, Southern Illinois University Simmons Law School, Carbondale, IL 62901.

Cite this issue at 49 S. Ill. U. L.J. (2025)

SOUTHERN ILLINOIS UNIVERSITY
SIMMONS LAW SCHOOL
2024-2025

Administrative Officers

DR. AUSTIN A. LANE, B.A., M.A., Ed.D., *Chancellor*
ANGELA UPCHURCH, B.S., J.D., *Acting Dean and Professor of Law*
SHEILA SIMON, B.A., J.D., *Acting Associate Dean and Associate Professor of Law*

Faculty

PETER ALEXANDER, B.A., J.D., *Professor of Law*
DALE ASCHEMANN, B.A., J.D., *Clinical Assistant Professor of Law*
CHRISTOPHER W. BEHAN, B.A., J.D., LL.M., *Professor of Law*
KEITH H. BEYLER, A.B., J.D., *Emeritus Professor of Law*
CINDY BUYS, B.A., M.A., J.D., LL.M., *Professor of Law*
KELLY COLLINSWORTH, B.A., J.D., *Assistant Professor of Practice*
STAN COX, B.A., J.D., M.A.T., H.DIP, *Associate Professor of Law*
WILLIAM DRENNAN, B.A., C.P.A., J.D., LL.M., *Professor of Law*
BRANDY JOHNSON, B.A., J.D., *Assistant Professor of Law*
DOUG LIND, B.A., J.D., M.L.I.S., *Professor of Law*
GREGORY NIES, B.A., B.S., M.A., M.S. J.D., *Assistant Professor of Law*
SHELLY PAGE, B.A., J.D., Ed.D., *Associate Professor of Law*
ANDREW PARDIECK, A.B., J.D., Ph.D., *Professor of Law*
KAITLYN POIRIER, B.A.Sc., J.D., *Assistant Professor of Law*
ZVI S. ROSEN, B.A., J.D. LL.M., *Assistant Professor of Law*
JENNIFER SPRENG, B.A., J.D., LL.M., *Assistant Professor of Law*
CARLY TOEPKE, B.A., J.D. Ph.D., *Assistant Professor of Law*
ANNA VICK, B.A., J.D., *Assistant Professor of Practice*
JOANNA WELLS, B.S., J.D., *Clinical Assistant Professor of Law*
CANDLE WESTER, B.S., J.D., M.S.L.I.S., *Director of Law Library and Associate Professor of Law*

Dear Friends,

Thank you for your interest in the Southern Illinois University Law Journal. We are pleased to offer an issue that celebrates the 30th anniversary of the Violence Against Women Act (VAWA).

Thirty years is more than the lifetime of most of our students. Thirty years ago, Illinois already had a comprehensive domestic violence act. It was a model for other states in terms of the relationships covered and protections offered. But as a state we still had a long way to go. VAWA offered a chance for better coordination among law enforcement agencies and other key parts of the system. And a VAWA grant, through the Carbondale Police Department, funded our school's Domestic Violence Clinic in 1998. I was the first attorney hired for that clinic—a dream job. I got to teach students about domestic violence and the practice of law, and together we got to help survivors get to safety.

Many cases were challenging. Many judges were challenging. The students learned through it all, and every year SIU produced new lawyers who knew how dangerous domestic violence is and, at the same time, how hard it can be to leave such a situation. Those SIU-trained lawyers are out working across the state and the nation. They may not be practicing in the area of domestic violence, but they know how to get help for their clients, their co-workers, and their community.

The clinic continued under the direction of attorneys Lori Crenshaw Bryant and Gail Thomas. After Gail's retirement, the school has been assessing the best way to continue serving both students and survivors. Current students Ashley Dorsey, Amber Alexander, and Jessica Visage each have publications in this issue that continue the tradition of SIU having an impact in that area.

All of this comes at a time when services provided to survivors of domestic violence are under threat. As I write this letter, it is unclear whether federal funding will continue to help shelters across the state and nation, and whether those shelters and programs will be able to continue to serve all people, not just those who fit into two rigid gender categories. Despite these challenges, I am optimistic. I know that advocates trained by our school, and advocates reading this journal, will be fighting for those in need.

Sheila Simon
Associate Professor and Acting Associate Dean

SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL

Volume 49

Spring 2025

ARTICLES

WINNING THE BATTLE, LOSING THE WAR: *RAHIMI*, WOMEN, AND THE SUPREME COURT

Dr. Dana Raigrodski 385

Domestic violence and DV-related firearm use are a grave and persistent issue in the United States and have an extensive harmful and deadly impact in the lives of many women. In its 2024 *Rahimi* decision, the United States Supreme Court held that, as applied to the facts of the case, 18 U.S.C. § 922(g)(8), which bans firearms possession by those subject to a DV protective order, is facially constitutional under the Second Amendment. The Court upheld § 922(g)(8) under *Bruen*'s "Nation's historical tradition of firearm regulations" test, finding that founding era laws included provisions preventing individuals who threaten physical harm to others from misusing firearms. Yet, this Article argues, a close read of *Rahimi* reveals that women and their lived experiences continue to be erased in the Court's recent jurisprudence, in a manner that undermines efforts to address gender-based violence and perpetuates women's structural marginalization and ultimately the dynamics that feed the IPV epidemic. Except for scant mention when invoking historical surety laws to prevent spousal abuse, the Court's analysis does not discuss either IPV in general or the specific role of firearms within IPV. This Article uses a feminist IPV-centered lens to suggest that the *Rahimi* Court could have and should have stayed true to its history and tradition analytical framework, while nonetheless centering women's voices and highlighting the severe and unique threat of harm posed to mostly women by their abusers, especially when firearms are present. In doing so, the Court could have enriched its analysis of the historical dangerousness analogues, could have engaged in a more nuanced and inclusive discussion of the two proclaimed anchors of the Second Amendment—the home and self-defense, and, to contextualize and explain some of the perceived historical gaps, could have sent a strong message by explicitly acknowledging that our history and our laws were built on various forms of gendered bigotry and exclusion of women from the polity.

ETHICAL DELIBERATIONS: REPRESENTING THE ACCUSED IN CIVIL CASES INVOLVING INTIMATE PARTNER AND DOMESTIC VIOLENCE

Dana Harrington Conner 425

This Article explores the representation of those accused of committing acts of intimate partner violence (IPV) and domestic violence (DV) in the civil context and the professional duties that flow from the lawyer-client relationship. Resolving ethical questions that arise in the representation of the accused demands an understanding of how the two prevailing responses to intimate partner violence—criminal prosecution and civil protection—differ in purpose and outcome. Although ethical practice in these two distinct areas requires that the lawyer observe diverse legal protocols, one must also acknowledge the co-occurrence of criminal prosecution and civil protection that arises in cases involving intimate partner violence.

This Article examines the generally accepted principle that the lawyer, as a fiduciary, owes a duty of loyalty and fidelity to the client, while underscoring the magnitude and range of the duty of loyalty, as well as the limits imposed upon it by other ethical duties are, at times, difficult to reconcile. Throughout history, legal experts have debated the role of the lawyer as both representative of the client and officer of the legal system. This historical debate reveals fundamentally different ways in which an attorney might view their role. It is not difficult to

understand why a great divergence in the way lawyers view their duty to the client continues to exist given that the law on lawyering suggests an attorney has several different functions as a legal professional. For the lawyer whose primary obligation involves acting as a client representative, managing these competing duties is no easy task.

This Article considers the special requirements that a lawyer must observe in civil protection from abuse cases when representing the accused, as well as how civil and criminal representation are dissimilar in important respects. The subject of the Article is the representation of a client, in a civil case, who has committed an act or acts of IPV, not the innocent client. The examination is limited to circumstances in which there is no legal justification for the act of abuse. Additionally, this Article narrows the focus to representation involving knowledge on the part of the attorney that the client has committed an act of IPV which forms the basis for a petition for civil protection.

Although there are many rules that regulate the practice of law, this Article focuses on a select few guidelines that control legal practice when a lawyer represents the accused in a civil case. In addition, this Article applies these guidelines to particularized civil practice settings, such as protection from abuse matters and how the lawyer's ethical duties in civil cases differ from the representation of the accused in the criminal context. Moreover, the Article provides practical solutions and guidance to practicing lawyers who encounter these ethical dilemmas while representing the accused in civil cases involving IPV.

THE WORDS WE CHOOSE: AN ANALYSIS OF TERMS USED IN DOMESTIC VIOLENCE LAW

Evan Lovell 459

In the field of domestic violence law, there is a lack of uniformity in the terms used to refer to those who harm others and those who experience that harm. This Article examines the meaning and cultural and legal prevalence of the terms: Victim, Survivor, Victim-Survivor, and Battered Wife/Spouse; and Abuser, Batterer, Perpetrator, and People who have Caused Harm, as well as Offender, Respondent, and Defendant. As an essential tool of persuasion, an analysis of these terms reveals that understanding the impact of these words is tantamount to respectful and empathetic advocacy.

CRIME OR CARE?: INTERNATIONAL LAWS TO ADDRESS “CONTROL” IN VIOLENCE WITHIN DOMESTIC RELATIONSHIPS

Pavithra Rajendran 499

Violence within domestic relationships remains a persistent form of discrimination against women. Initially characterized by overt acts such as wife-beating, contemporary manifestations include various strategies employed by men to assert dominance over their partners. In the early twenty-first century, scholars like Evan Stark sought to understand this issue through the concept of coercive control, which was later recognized as a criminal offense in the United Kingdom in 2015. Today, as digital tools and diverse relationship dynamics have become commonplace, controlling behaviors have evolved to operate independently within domestic relationships, sometimes without overt coercion. This phenomenon is currently under scrutiny by contemporary social scientists. Despite progress in some jurisdictions that have successfully incorporated coercive and controlling behavior into legislation to combat violence within domestic relationships, many regions, particularly in the Global South, have yet to adopt such measures. Addressing this disparity between the Global North and South and recognizing the urgent need to protect women from discrimination, this Article aims to: first, examine how various jurisdictions have incorporated or overlooked coercive and controlling behavior in their legislation to combat violence within domestic relationships; and second, propose “baseline best practices” derived from international and regional legal frameworks. These guidelines are intended to assist states lacking effective measures in adopting strategies to address controlling behaviors within domestic relationships.

CHALLENGING MASCULINITY TO COMBAT GENDER-BASED VIOLENCE IN KENYA

Teresa Jacques Valenzuela et al. 523

Gender-based violence (GBV) remains a pervasive issue in Kenya, significantly affecting women and girls, particularly in rural areas. This Article examines the importance of involving men and boys in GBV prevention efforts, using insights from Pamoja, a community-based organization in Kisumu, Kenya. Drawing on community-based participatory research, this study highlights the need to address restrictive masculinity norms that perpetuate GBV. The findings underscore the potential of engaging men as allies to foster long-term behavioral change and promote gender equality. By analyzing Pamoja's intervention strategies, this Article advocates for comprehensive, gender-transformative approaches that challenge entrenched societal norms.

ESSAY

A LABOR OF LOVE: THE INTERSECTION OF DOMESTIC VIOLENCE AND HUMAN TRAFFICKING AND WHY ATTORNEYS HAVE A DUTY TO UNDERSTAND THE DIFFERENCE

Jessica Visage 541

The majority of human trafficking victims are obtained by someone they know, and frequently that person is an intimate partner. While education on human trafficking spreads, what remains is a very thin line between domestic violence and human trafficking, leaving victims, law enforcement, and legal professionals in the dark about how to identify the difference. With a massive overlap in how traffickers and abusers operate and the tools they use to maintain control over their victims, it is not surprising that many trafficking victims are unaware that they are being trafficked. Attorneys, regardless of what field of law they practice in, have an obligation to identify human trafficking when the signs present so that their clients can access legal remedies and obtain services available for victims. This Essay explains why it can be difficult to identify human trafficking when a victim is presenting as a victim of domestic violence, provides information on how attorneys can differentiate between the two, and explains why attorneys should inquire about human trafficking when their client presents with signs of domestic violence.

NOTES

CHILD “PROTECTIVE” SERVICES: FAILING TO PROTECT CHILDREN EXPOSED TO DOMESTIC VIOLENCE

Amber M. Alexander 567

This Note addresses the critical gaps in child welfare systems regarding domestic violence safety threat criteria. Although extensive research highlights the damaging effects of exposure to violence on children, many state laws fail to recognize this exposure as a safety threat unless there is physical harm. Drawing from real-world investigative cases, this Note examines how narrow safety threat criteria hinder the protection of children in homes plagued by domestic violence. It calls for urgent reform to broaden these criteria to include emotional harm and exposure to violence, arguing that children who witness domestic violence endure psychological trauma that can lead to long-term emotional and behavioral issues. By advocating for the implementation of universal domestic violence screenings and expanding the scope of safety assessments, this Note proposes a nationwide shift in child welfare policy that prioritizes the holistic well-being of children in these dangerous environments.

Furthermore, it underscores the need for federal encouragement, through existing frameworks such as the Child Abuse Prevention and Treatment Act (CAPTA), to standardize safety protocols and ensure children’s safety and emotional security.

“I’M NOT THAT KIND OF LAWYER” NO LONGER CUTS IT: A CALL FOR
MANDATORY DOMESTIC VIOLENCE CLEs ACROSS THE LEGAL PROFESSION
Ashley N. Dorsey 603

All attorneys should know about domestic violence. The misconception that it appears only in family law matters is not only mistaken, it is downright fatal. Domestic violence is a pervasive, stigmatized crime, affecting more than twelve million people annually. The nature of this hidden crime invites myriad crossover legal issues with nearly every area of the law. Because of this, every attorney should be familiar with domestic violence and know how to recognize the warning signs. While there are the more obvious indications, such as bruises and unexplainable injuries, education is necessary to recognize the numerous subtle signs that often go undetected. Some of these subtle signs include clients canceling or failing to show to scheduled appointments or meetings, a nearly-always-present partner, or the client’s phone receiving frequent notifications when the partner is not present. While each of these subtle signs is not absolute proof that domestic violence is occurring, a lawyer must recognize them as warning signs and adjust his response accordingly. Failure to recognize such subtle signs results in ill advice on the subject matter of representation, which could cause serious harm to the client, up to and including the client’s death. Attorneys have an ethical obligation to become familiar with domestic violence and to recognize that it is more than physical violence; it is a pattern of coercive control over the victim with physical violence being just one component. This Note proposes implementing a requirement that all attorneys complete annual CLEs on domestic violence topics to learn how to spot this legal issue within their practice so as to comply with their ethical duty of competence to spot crossover legal issues and to protect their clients’ best interests.

WINNING THE BATTLE, LOSING THE WAR: *RAHIMI*, WOMEN, AND THE SUPREME COURT

Dr. Dana Raigrodski*

INTRODUCTION

“[A]ll too often,” as one senator noted during the debate over § 922(g)(9), “the only difference between a battered woman and a dead woman is the presence of a gun.”¹

On June 21, 2024, when the U.S. Supreme Court handed down its long-awaited decision in *United States v. Rahimi*,² Intimate Partner Violence (IPV) and women’s rights advocates breathed a sigh of relief. Despite this country’s long tradition and history of leaving women and other vulnerable individuals to fend for themselves from their intimate partner’s violence—violence all too often committed and enhanced using firearms—the Court left 18 U.S.C. § 922(g)(8) in its place.³ In *Rahimi*, the Court held eight to one that § 922(g)(8) is facially constitutional under the Second Amendment.⁴ In so holding, it found that banning Rahimi from possessing firearms was appropriate because he was subject to a domestic violence restraining order that was issued based on a finding that he posed a credible threat to the physical safety of an intimate partner.⁵ Yet, this Article suggests that a critical read of the *Rahimi* decision should give DV/IPV⁶ and women’s rights advocates pause.

* Associate Teaching Professor, University of Washington School of Law. Commissioner, The Washington State Supreme Court Gender and Justice Commission. This Article represents my opinion only, and any and all mistakes are mine. I want to thank Ashley Dorsey, Trevor Johnson, Madelyn Hayward, Alexander Roby, and the entire staff of *SIU Law Journal* for their dedication and hard work, which invariably made this Article better.

¹ *United States v. Castleman*, 572 U.S. 157, 160 (2014) (citing 142 CONG. REC. 22986 (1996) (statement of Sen. Wellstone)).

² *United States v. Rahimi*, 602 U.S. 680, 680 (2024).

³ See generally *id.*; see also *id.* at 702–08 (Sotomayor, J. concurring) (supporting the opinion about the nation’s history and traditions).

⁴ *Id.* at 686–89, 690–92.

⁵ *Id.*

⁶ This Article uses “Domestic Violence” and “Intimate Partner Violence” interchangeably. The terms Domestic violence (DV) and Intimate Partner Violence (IPV) are often used interchangeably and describe a pattern of abusive behaviors through which a current or former partner or spouse exerts power and control over another person. *What is Domestic Abuse?*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse> (last visited Jan. 31, 2025). IPV is the most prevalent type of adult family or household member violence, and often includes physical harm, bodily injury, assault, or the infliction of fear of physical harm, bodily injury, or assault; nonconsensual sexual conduct or nonconsensual sexual penetration; coercive control; unlawful

18 U.S.C. § 922(g)(8), a crucial form of contemporary protection afforded to IPV victims, was enacted in 1994 as an amendment to the Gun Control Act of 1968,⁷ as part of the Omnibus Crime Bill of 1994.⁸ The Gun Control Act specifically prohibits any person convicted of any felony, a crime punishable by imprisonment for a term exceeding one year, from possessing firearms.⁹ Recognizing the extreme risk posed to DV/IPV victims from firearms in the hands of their abusers long before a conviction (if any), Congress added § 922(g)(8). Section 922(g)(8) states that it shall be unlawful to ship, transport, receive, or possess firearms or ammunition for a person who:

is subject to a court order that-- (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child[,] [except that this paragraph shall only apply] to a court order that-- (A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate . . . [and] (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury¹⁰

A key part of the comprehensive 1994 Crime Bill was The Violence Against Women Act (VAWA).¹¹ Congressional findings based on substantial research and data underscored the grim scope and severity of violence against women in the United States, including domestic and dating violence, sexual assault, and stalking.¹² The enactment of VAWA highlighted not only the gravity of IPV but also the need to restrict firearm possession by individuals

harassment; or stalking of one intimate partner by another intimate partner. *About Intimate Partner Violence*, U.S. CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/intimate-partner-violence/about/index.html> (last visited Jan. 31, 2025).

⁷ The Gun Control Act prohibits certain individuals from possessing firearms. See 18 U.S.C. § 922.

⁸ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C.).

⁹ 18 U.S.C. §§ 921(a)(20), 922(g)(1). § 922(g)(1) did not initially account for the fact that domestic violence can be a misdemeanor or a felony depending on the circumstances and the jurisdiction. Consequently, in 1996, the Lautenberg Amendment added 922(g)(9) expanding the scope of the prohibition to convictions in misdemeanors for DV since felony convictions proved hard and few. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009.

¹⁰ § 922(g)(8).

¹¹ Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 of the U.S.C.).

¹² See *infra* Part I.

under domestic violence protective orders.¹³ Data from the thirty years since the passage of VAWA reaffirms that not only do firearms occupy a unique place within patterns of IPV and abuse, but the presence of a firearm in a domestic violence situation substantially increases the risk of intimate partner homicide.¹⁴ As Justice Sotomayor pointed out in *Rahimi*, “[w]ith over 70 people shot and killed by an intimate partner each month in the United States, the seriousness of the problem can hardly be overstated.”¹⁵

At first glance, the *Rahimi* decision aligns with the goals of VAWA and § 922(g)(8) and reiterates this nation’s current commitment to end violence against women. In fact, even under *Bruen*’s “Nation’s historical tradition” test,¹⁶ the *Rahimi* Court held that § 922(g)(8) fits comfortably within our nation’s tradition of firearm regulation because, “[s]ince the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.”¹⁷

This Article argues, however, that a close read of *Rahimi* reveals that women and their lived experiences continue to be erased in the Court’s recent jurisprudence, in a manner that undermines efforts to address gender-based violence and perpetuates women’s structural marginalization and, ultimately, the dynamics that feed the IPV epidemic.¹⁸ Except for scant mention when invoking historical surety laws to prevent spousal abuse, the Court’s analysis does not discuss either IPV in general or the specific role of firearms within IPV.¹⁹ Instead, this Article suggests that the Court could and should have contextualized and emphasized the severe and unique threat of harm posed to mostly women by their abusers, especially when firearms are present. Moreover, it could have done so while faithfully applying *Bruen*’s standard of the nation’s historical tradition of regulating firearms, particularly those in the hands of dangerous individuals.²⁰

Part I provides an alarming picture of the scope of IPV in the United States and of firearm use in DV/IPV. It also highlights data showing that disarming abusers can save lives and reduce the harm of IPV. Part II examines the surprisingly limited role IPV-related gun violence has played in the U.S. Supreme Court Second Amendment cases leading to *Rahimi*. It

¹³ See *id.*

¹⁴ See *id.*

¹⁵ United States v. Rahimi, 602 U.S. 680, 707 (2024) (Sotomayor, J. concurring) (citing *Nat. Violent Death Reporting System, Violent Deaths Report 2020*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://wisqars.cdc.gov/nvdrs>) (showing that 863 people were killed with a firearm by a spouse or other intimate partner in 2020).

¹⁶ *Id.* at 689 (“In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction ‘is consistent with the Nation’s historical tradition of firearm regulation.’”) (internal citation omitted).

¹⁷ *Id.* at 690.

¹⁸ See *infra* Part II.B.

¹⁹ See generally *Rahimi*, 602 U.S. at 680.

²⁰ See *infra* Part IV.

then closely examines the various judicial opinions in *Rahimi*, and suggests that they continue to marginalize women, IPV, and IPV-related gun violence. Part III draws on feminist critique of recent Supreme Court cases to explain why women's voices are mostly absent from the Court's jurisprudence. As with *Bruen* and *Dobbs*, it suggests that the *Rahimi* Court pays little attention to women in line with the Court's gendered standards and jurisprudence of masculinity. In doing so, the Court is complicit in further perpetuating harm and discrimination against women and other vulnerable people, the outcome in *Rahimi* notwithstanding.

Part IV expands on the feminist IPV-centered lens to suggest that the *Rahimi* Court could have and should have stayed true to its history and tradition analytical framework while nonetheless centering women's voices and highlighting the severe and unique threat of harm posed to mostly women by their abusers, especially when firearms are present. First, the Court could have substantially enriched its analysis of the historical dangerousness analogues, discussion of surety laws, and "going armed" affray laws with the wealth of data about the dangerousness of IPV abusers and the heightened risk of the use of firearms in IPV. Second, the Court could have similarly used what we know about IPV, firearms, and dangerousness for a more nuanced and inclusive discussion of the two proclaimed anchors of the Second Amendment—the home and self-defense. Lastly, to contextualize and explain some of the perceived historical gaps, the Court could have explicitly acknowledged that our history and laws are built on various forms of gendered bigotry and exclusion of women from the polity and send an important message that we should not rely, "on the history that the Constitution left behind."²¹

I. VIOLENCE AGAINST WOMEN AND FIREARMS

18 U.S.C. § 922(g)(8) was enacted in 1994 as an amendment to the Gun Control Act of 1968, as part of the Omnibus Crime Bill of 1994.²² A key part of the comprehensive Crime Bill was The Violence Against Women Act (VAWA).²³ Violence against women has been and continues to be a pervasive problem in the United States.²⁴ Historically, however, violence against women has not been taken as seriously, but VAWA aimed to change that. The enactment of VAWA was meant to address the severity of violence against women in the United States, including domestic and dating violence,

²¹ *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring).

²² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C.).

²³ Violent Crime Control and Law Enforcement Act of 1994, § 110401.

²⁴ See generally *Victims of Sexual Violence: Statistics*, RAINN, <https://rainn.org/statistics/victims-sexual-violence> (last visited Feb. 1, 2025).

sexual assault, and stalking.²⁵ During four years of congressional hearings, Congress found that gender-based violence against women is widespread and escalating throughout the United States.²⁶ It was deemed “a national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street.”²⁷

The 1994 landmark enactment of VAWA and its subsequent reauthorizations have led to “a paradigm shift in how the issue of violence against women is addressed.”²⁸ They have been key to providing and facilitating protections and resources for survivors of domestic and dating violence, sexual assault, and stalking at both the federal and state levels.²⁹ Despite all these efforts, and even with substantial progress, violence against women, including intimate partner violence, which mostly affects women, persists.³⁰ This section offers a sobering picture of the scope of IPV and firearm use in DV/IPV, and highlights data showing that disarming abusers can save lives and reduce the harm of IPV.

²⁵ S. Rep. No. 103-138, at 37–38 (1993).

²⁶ See, e.g., *id.* (“Violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined. As many as 4 million women a year are the victims of domestic violence. Three out of four women will be the victim of a violent crime sometime during their life.”); see, e.g., *id.* at 41 (“We spend \$5 to \$10 billion a year on health care, criminal justice and other social costs of domestic violence.”). See also, e.g., H.R. Rep. No. 103-395, at 26 (1993) (“Since 1988, the rate of incidence of rape has risen four and a half times as fast as the total crime rate.”); S. Rep. No. 102-197, at 39 (1991) (explaining it was deemed “a national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street.”).

²⁷ S. Rep. No. 102-197, at 39 (1991).

²⁸ Lynn Hecht Schafran, *The Violence Against Women Act at 25*, LEGAL MOMENTUM, <https://www.legalmomentum.org/sites/default/files/reports/A%20Short%20History%20of%20VAWA.pdf> (last visited Feb. 2, 2025); LISA N. SACCO & EMILY J. HANSON, CONG. RSCH. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION (2019).

²⁹ See generally *id.* VAWA 1994 was the first comprehensive federal legislative legislation addressing violence against women. SACCO & HANSON, *supra* note 28, at 1. The protections and provisions of VAWA 1994 were subsequently expanded and improved in the Violence Against Women Act of 2000 (VAWA 2000), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), and the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). *Id.* at 1–2. After being reauthorized three times since its original enactment, the legislation lapsed in 2018 and stalled in Congress, although funding remained in place. See generally *id.* Finally, in March 2022, President Joe Biden signed the VAWA reauthorization into law as part of the Appropriations Act of 2022. See generally *id.*

³⁰ *Devastatingly Pervasive: 1 in 3 Women Globally Experience Violence*, WORLD HEALTH ORG. (Mar. 9, 2021), <https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence#:~:text=Violence%20against%20women%20remains%20devastatingly,unchanged%20over%20the%20past%20decade>.

A. Intimate Partner Violence Remains Widespread

Despite significant progress, domestic violence and intimate partner violence continue to be a persistent gendered problem in the United States.³¹ The most recent national data was published in 2022 and reported findings from a 2016-2017 population survey.³² That data showed that almost one in two women in the United States experienced contact sexual violence, physical violence, and/or stalking by an intimate partner during their lifetime,³³ and more than three-quarters of female victims reported IPV-related impact as a result of these experiences.³⁴ Among men, more than two in five men in the United States experienced contact sexual violence, physical violence, and/or stalking by an intimate partner during their lifetime,³⁵ and more than half of male victims reported IPV-related impact because of these experiences.³⁶ Almost half of all women and over two in five men experienced psychological aggression by an intimate partner during their lifetime, including expressive aggression and coercive control.³⁷ Almost three-quarters of female victims and two-thirds of male victims of IPV reported that they were first victimized before the age of twenty-five.³⁸

DV/IPV disproportionately affects communities of color and other marginalized populations.³⁹ In the same 2016-2017 population survey, U.S. women across different racial and ethnic groups reported experiencing IPV victimization during their lifetimes: almost two-thirds of non-Hispanic

³¹ See, e.g., RUTH W. LEEMIS ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE 1 (2022); SHARON G. SMITH ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF - UPDATED RELEASE 7 (2018); JENNIFER L. TRUMAN & RACHEL E. MORGAN, NONFATAL DOMESTIC VIOLENCE, 2003-2012 1 (2014) (highlighting that the majority of domestic violence was committed against females (76%) compared to males (24%)). See generally Beverly Balos, *A Man's Home Is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 SAINT LOUIS U. PUB. L. REV. 77 (2004).

³² See LEEMIS ET AL., *supra* note 31, at 2. See also SMITH ET AL., *supra* note 31, at 8; MICHELE C. BLACK ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (2011).

³³ LEEMIS ET AL., *supra* note 31, at 5. Earlier data reported that “over 1 in 3 women experienced contact sexual violence, physical violence, and/or stalking by an intimate partner during their lifetime.” SMITH ET AL., *supra* note 31, at 8.

³⁴ LEEMIS ET AL., *supra* note 31, at 13. IPV-related impact includes experiencing any of the following: being fearful, being concerned for safety, any post-traumatic stress disorder symptoms, injury, need for medical care, need for help from law enforcement, missing at least one day of work, or missing at least one day of school, and, for the purpose of lifetime estimates only, specific types of physical or mental injuries, need for housing, need for victim advocate services, need for legal services, and contacting a crisis hotline. *Id.* at 2.

³⁵ *Id.* at 5.

³⁶ *Id.* at 13.

³⁷ *Id.* at 6.

³⁸ *Id.* at 8–9.

³⁹ *Id.* at 14.

multiracial women (63.8%), more than half of non-Hispanic American Indian or Alaska Native women (57.7%), more than half of non-Hispanic black women (53.6%), about half of non-Hispanic white women (48.4%), two-fifths of Hispanic women (42.1%), and more than one-quarter of non-Hispanic Asian or Pacific Islander women (27.2%).⁴⁰ Young women, especially young women of color, experience domestic violence at higher rates than any other group.⁴¹ While men and women of all sexual identity groups report experiencing sexual violence, stalking, intimate partner contact sexual violence, physical violence, and/or intimate partner-perpetrated psychological aggression, LGBTQ+ individuals “bore a substantial weight of the violence.”⁴²

The most severe form of IPV is intimate partner homicide (IPH). Of the women who are murdered in the United States, most are killed by an intimate partner.⁴³ Findings from a study of female homicides between 2003 to 2014 indicate that over half of female homicides for which circumstances were known were IPV-related, with over ninety percent of these women being killed by their current or former intimate partner.⁴⁴ Again, young women, particularly young women of color, were disproportionately affected.⁴⁵

Data also shows that “past abuse in a relationship is [both] the best predictor of future abuse and . . . the leading risk factor associated with [intimate partner homicide].”⁴⁶ As one scholar observed, “[w]e therefore know who is likely to abuse an intimate partner and the circumstances that

⁴⁰ *Id.* at 7. Researchers have pointed out the need for better data on diverse populations. *See, e.g.,* Lisa Clemons-Cope et al., *How Better Data Can Reduce Domestic Violence*, URBAN INSTITUTE, <https://apps.urban.org/features/domestic-violence-data/> (last visited Feb. 2, 2025).

⁴¹ Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence - United States, 2003-2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741 (July 2017); *see also* BLACK ET AL., *supra* note 32, at 2–3.

⁴² *See generally* JIERU CHEN ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON VICTIMIZATION BY SEXUAL IDENTITY 23 (2023).

⁴³ Petrosky et al., *supra* note 41; *see also* Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 313 (2006) (“Approximately 1 in 3 female homicide victims and 1 in 20 male homicide victims are killed by current or former spouses or boyfriends each year.”).

⁴⁴ Petrosky et al., *supra* note 41. Another study found that in 2014, about forty-nine percent of female homicide victims, compared to just six percent of male homicide victims, were killed by intimate partners, in cases with known perpetrators. *See* Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1278 n.109 (2017) (internal citations omitted).

⁴⁵ Petrosky et al., *supra* note 41.

⁴⁶ Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL’Y REV. 559, 606–07 (2020) (citing April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers’ Access to Guns*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 53, 56 (Daniel W. Webster et al. eds., 2013)).

exist when abuse escalates to murder. We also know that guns are the most likely weapon to result in death.”⁴⁷

B. Firearms Substantially Exacerbate Intimate Partner Violence

Firearms often make domestic violence, especially intimate partner violence, that much more dangerous and frequently deadly. Not only do firearms occupy a unique place within patterns of IPV and abuse, but the presence of a firearm in a domestic violence situation substantially increases the risk of intimate partner homicide.⁴⁸

There is ample evidence from the thirty years since the passage of VAWA that guns can exacerbate intimate partner violence.⁴⁹ The presence of a firearm in a domestic violence situation increases the risk of homicide by eleven times.⁵⁰ Domestic violence and IPV-related firearm use mostly occur at or near the victim’s home.⁵¹ Data shows that “nearly half of all firearms-related homicides . . . [take place] in the home,”⁵² as do almost eighty percent of nonfatal acts of intimate partner violence.⁵³ Women who live in a house with a domestic abuser are five times more likely to be murdered if the abuser has access to a gun,⁵⁴ and the risk of multiple victims increases by seventy percent.⁵⁵ Perpetrators are more likely to use a gun than

⁴⁷ *Id.* at 607.

⁴⁸ Chelsea M. Spencer & Sandra M. Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis*, 21 TRAUMA, VIOLENCE, ABUSE 527, 535–36 (2020).

⁴⁹ See, e.g., Vivian H. Lyons et al., *Firearms and Protective Orders in Intimate Partner Homicides*, 36 J. FAM. VIOLENCE 587 (2021); see also Nanasi, *supra* note 46, at 562–63 (“[T]he evidence is clear: when a woman is killed, it is most likely to be at the hands of an intimate partner with a gun.”) (quoting April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers’ Access to Guns*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 53, 53 (Daniel W. Webster et al. eds., 2013)).

⁵⁰ Spencer & Stith, *supra* note 48, at 535–36 (“The perpetrator’s direct access to guns increased the likelihood of IPH [intimate partner homicide] compared to IPV [intimate partner violence] by 11 times.”).

⁵¹ A woman is in nine times greater danger of being a victim of assault in her own home than on the streets. TRUMAN & MORGAN, *supra* note 31, at 1; see also Angela J. Hattery, INTIMATE PARTNER VIOLENCE 14 (2008).

⁵² Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 165–66 (2015).

⁵³ See TRUMAN & MORGAN, *supra* note 31, at 1.

⁵⁴ See Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090–92. See also Aaron J. Kivisto & Megan Porter, *Firearm Use Increases Risk of Multiple Victims in Domestic Homicides*, 48 J. AM. ACAD. PSYCHIATRY & L. 26, 26 (2020) (explaining that incidents of domestic violence where a gun is present are five times as likely to end in a fatality as incidents with no gun present); Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTATIVE MED. 311, 312 (2019).

⁵⁵ Kivisto & Porter, *supra* note 54, at 26.

all other means combined to murder their intimate partners.⁵⁶ Of those women killed by an intimate partner, more than half of those murders involve a firearm.⁵⁷

Abusers, moreover, “need not fire a single shot to effectuate harm.”⁵⁸ Perpetrators of IPV who have access to guns use them against their victims with alarming frequency, and the presence of a firearm increases the severity of non-lethal abuse. Roughly one million women in the United States have reported being shot or shot at by intimate partners, and over 4.5 million have been threatened with a gun by an intimate partner.⁵⁹ Firearms are frequently used to facilitate a broader pattern of coercive control, i.e., the “intentional pattern of repeated behavior by an abuser to control, denigrate, intimidate, monitor, and restrict an intimate partner.”⁶⁰ Abusers who use guns (versus another type of weapon) against their intimate partners intend to intimidate, coerce, and frighten their victims, as opposed to inflicting physical harm.⁶¹ The experience of many IPV survivors illustrates as much.⁶²

We know that the guns are out there and in the hands of IPV perpetrators. According to a 2021 National Firearms Survey, about a third of adults in the United States report owning a firearm (81.4 million).⁶³ Close to sixty percent of those gun owners were male.⁶⁴ Therefore, “it is safe to extrapolate that many abusers are in possession of firearms” given “the prevalence of guns in the U.S. male population”⁶⁵ In fact, research found that “it is relatively common for an abusive partner to have access to a gun and for there to be a gun in the home where abuse is occurring.”⁶⁶ However, we do not really know who owns the guns and where they are, despite estimates that the number of guns in civilian hands surpasses the size of the

⁵⁶ Leonard J. Paulozzi et al., *Surveillance for Homicide Among Intimate Partners – United States, 1981-1998*, 50 MORBIDITY & MORTALITY WKLY. REP. 1, 9 tbl. 4 (2001).

⁵⁷ Petrosky et al., *supra* note 41; *see also* Vigdor & Mercy, *supra* note 43, at 313 (stating that roughly 60 percent of intimate-partner homicides are committed with a firearm).

⁵⁸ Imagine, for example, a man who has previously abused or threatened his wife and now sleeps with a loaded weapon on his bedside table. In such situations, “a gun is a great intimidator—the ultimate power tool in the arsenal of a batterer.” Nanasi, *supra* note 46, at 564.

⁵⁹ Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA, VIOLENCE, & ABUSE 431, 431 (2018).

⁶⁰ *Id.* at 431–32.

⁶¹ Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN’S HEALTH 249, 255 (2017).

⁶² *See, e.g.*, Maryclaire Dale, *Abuse victims say gun surrender laws save lives. Will the Supreme Court agree?*, AP NEWS (Oct. 31, 2023), <https://apnews.com/article/gun-violence-civil-liberties-domestic-abuse-6ad4e2ca8677a2ce68bc2ecc39f267c9>.

⁶³ WILLIAM ENGLISH, 2021 NATIONAL FIREARMS SURVEY 1, 7 (2021), available at: <https://ssrn.com/abstract=3887145> or <http://dx.doi.org/10.2139/ssrn.3887145>.

⁶⁴ *Id.*

⁶⁵ Nanasi, *supra* note 46, at 588.

⁶⁶ Sorenson & Schut, *supra* note 59, at 431.

U.S. population.⁶⁷ Neither the federal government nor most states have a comprehensive gun registry or complete and timely records of firearm purchases.⁶⁸ Matters are more complicated by the fact that many perpetrators possess weapons illegally.⁶⁹

C. Disarming Abusers Can Save Lives and Reduce the Harm of IPV

VAWA highlighted not only the gravity of IPV, but also the need to restrict firearm possession by individuals under domestic violence protective orders,⁷⁰ which the enactment of § 922(g)(8) aimed to accomplish. The most dangerous time for a victim of domestic violence is when they leave their abuser,⁷¹ when the likelihood of the victim being killed by their abuser sharply increases by an estimated seventy-five percent.⁷² Unfortunately, many cases of IPV do not make it into the criminal legal system until it is too late.⁷³ Research found that a substantial number of perpetrators who committed IPV in the month before escalating to killing their intimate partner had not yet entered the criminal legal system.⁷⁴ Thus, “[w]ithout a conviction or at least a protection order, potentially dangerous individuals evade legal screens meant to disarm the dangerous.”⁷⁵

Domestic violence-related firearm restrictions reduce the number of intimate-partner homicides and save lives.⁷⁶ A study looking at IPV-related firearm laws and intimate partner homicide rates over a twenty-five-year period concluded that “state laws restricting firearm possession by persons

⁶⁷ In 2017, there was estimated to be over 393 million guns in civilian hands—more than the U.S. population. *Global Firearms Holdings*, SMALL ARMS SURVEY (2017), <http://www.smallarmssurvey.org/weapons-and-markets/tools/global-firearms-holdings.html> (last visited Feb. 2, 2025); see also *How Many Guns are in the US?*, AMERICAN GUN FACTS (Jan. 22, 2024), <https://americangunfacts.com/gun-ownership-statistics/> (“In 2024, the number of firearms in America is likely over 466 million due to record breaking sales during the pandemic.”).

⁶⁸ See generally *Registration*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/owner-responsibilities/registration/> (last visited Feb. 2, 2025).

⁶⁹ See generally *The Effects of Firearm Sales Reporting, Recording, and Registration Requirements*, RAND (Jul. 16, 2024), <https://www.rand.org/research/gun-policy/analysis/firearm-sales.html>.

⁷⁰ See generally SACCO & HANSON, *supra* note 28.

⁷¹ Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 869 (2009) (“[D]ata show that the time when a victim decides to break free of a violent relationship is the most dangerous time; this is the time when the majority of domestic violence homicides take place.”); see also ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 54 (2d ed. 2008).

⁷² Sarah M. Buel, *A Lawyer’s Understanding of Domestic Violence*, 62 TEX. BAR J. 936, 937–38 (1999) (citing Barbara Hart, *National Estimates and Facts About Domestic Violence*, NCADV Voice, p. 12 (Winter 1989)).

⁷³ Fan, *supra* note 52, at 172.

⁷⁴ *Id.* at 172–73.

⁷⁵ *Id.* at 172.

⁷⁶ Jennifer Paruk & Esprene Liddell-Quintyn, *Firearms and Intimate Partner Violence: A Dangerous Intersection*, ROCKEFELLER INST. GOV’T (Oct. 12, 2023), <https://rockinst.org/blog/firearms-and-intimate-partner-violence-a-dangerous-intersection/>.

deemed to be at risk for perpetrating intimate-partner abuse may save lives.”⁷⁷ The expansion of the federal ban on possession to domestic violence misdemeanors led to seventeen percent fewer gun-related homicides among female intimate partner victims.⁷⁸ States with laws that limited access to firearms for individuals subject to domestic violence protective orders had significantly lower rates of IPH than states without these laws.⁷⁹ Similarly, data from forty-six cities from 1979 to 2003 found that prohibiting both those convicted of DV misdemeanors and those subject to DV protective orders from possessing firearms resulted in a nineteen percent reduction in total intimate partner homicides and twenty-five percent fewer intimate partner homicides committed with guns.⁸⁰ Moreover, when IPH committed with firearms did decrease due to possession-prohibition laws in place, there was no “substitution” increase in non-gun homicides.⁸¹

It is with this understanding of the prevalence and severity of IPV and IPV-related use of firearms, as well as the understanding that disarming IPV perpetrators can save lives and reduce harm, that we turn next to examine the Court’s recent Second Amendment jurisprudence and *Rahimi* in particular. Notably, this data was also in front of the *Rahimi* Court.⁸²

⁷⁷ Carolina Diez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS INTERNAL MED. 536, 536 (2017). However, evidence suggests that only prohibiting gun possession, without also requiring relinquishment of the firearms, is not enough. *Id.* The same study also determined that state gun surrender laws are linked to lower rates of fatal domestic violence. *Id.* Specifically, that study found that states with relinquishment law saw 9.7% lower IPH rate and a 14% lower firearm-related IPH rate. *Id.* at 539–41. Laws that did not explicitly require relinquishment of firearms saw a non-statistically significant 6.6% reduction in IPH rates. *Id.* As of 2024, federal law still does not require surrender for people prohibited from having firearms. *See generally Domestic Violence, EVERYTOWN FOR GUN SAFETY*, https://maps.everytownresearch.org/navigator/trends.html?dataset=domestic_violence (last visited Feb. 2, 2025).

⁷⁸ Nanasi, *supra* note 46, at 566 (citing Kerri M. Raissian, *Hold Your Fire: Did the 1996 Federal Gun Control Act Expansion Reduce Domestic Homicides?*, 35 J. POL’Y ANALYSIS & MGMT. 67, 69 (2016)).

⁷⁹ *See, e.g.,* Vigdor & Mercy, *supra* note 43, at 332.

⁸⁰ April M. Zeoli & Daniel M. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large U.S. Cities*, 16 INJ. PREVENTION 90, 92 (2010).

⁸¹ Nanasi, *supra* note 46, at 561 (citing Kerri M. Raissian, *Hold Your Fire: Did the 1996 Federal Gun Control Act Expansion Reduce Domestic Homicides?*, 35 J. POL’Y ANALYSIS & MGMT. 67, 67 (2016)).

⁸² The data was included in both the government brief and in scores of amici briefs. *See, e.g.,* Brief for the United States at 30, *United States v. Rahimi*, 602 U.S. 680 (2024).

II. SECOND AMENDMENT GUN RIGHTS AND IPV PROTECTIONS ON A COLLISION COURSE

A. IPV and Gun Rights Discourse in U.S. Supreme Court Cases Leading to *Rahimi*

Despite the continued prevalence of IPV and IPV-related gun violence in the United States, it has played a surprisingly limited role in the U.S. Supreme Court's Second Amendment cases leading to *Rahimi*. Instead of contextualizing and emphasizing the severe and unique threat of harm posed to mostly women by their abusers, especially when firearms are present, women and their lived experiences continue to be erased in the Court's recent jurisprudence. This erasure in the Court's cases undermines efforts to address gender-based violence and perpetuates women's structural marginalization and the dynamics that feed the IPV epidemic.⁸³ *Rahimi* is no different. Except for scant mention when invoking historical surety laws to prevent spousal abuse, the Court's analysis does not discuss either IPV in general or the specific role of firearms within IPV.⁸⁴

Up until 2008, the majority of challenges to firearm regulations, including under § 922, were unsuccessful because the Second Amendment was not yet recognized as granting an individual right to bear arms.⁸⁵ After *District of Columbia v. Heller*,⁸⁶ *McDonald v. City of Chicago*,⁸⁷ and *N.Y. State Rifle & Pistol Association v. Bruen*,⁸⁸ it is clear that the Second Amendment protects “an individual right to possess and carry weapons in case of confrontation,” with self-defense being a “*central component* of the [Second Amendment] right itself.”⁸⁹

The shift began in 2008, when the Supreme Court decided *District of Columbia v. Heller*.⁹⁰ In *Heller*, the Court struck down the District of Columbia's handgun law banning the possession of handguns in the home, holding that the text of the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation” in the home⁹¹—

⁸³ See Elizabeth Tobin-Tyler, *A Grim New Reality – Intimate-Partner Violence after Dobbs and Bruen*, 387 NEW ENG. J. MED. 1245, 1247–48 (2022) (explaining that pregnancy is “associated with both the initiation of IPV and an increase in IPV severity”).

⁸⁴ See generally *Rahimi*, 602 U.S. at 680.

⁸⁵ Raven Peña, *Bruen's Effect on 18 USC § 922(g)(8) and (9): A Major Threat to the Safety of Domestic Violence Victims*, 48 T. MARSHALL L. REV. 133, 140 (2023).

⁸⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁸⁷ *McDonald v. Chicago*, 561 U.S. 742 (2010) (striking down the municipalities of Chicago and Oak Park's handgun bans).

⁸⁸ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

⁸⁹ *Id.* at 32–33 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592, 599 (2008)) (emphasis in original).

⁹⁰ *Heller*, 554 U.S. 570 (2008).

⁹¹ *Id.* at 592.

“the place where the importance of the lawful defense of self, family, and property is most acute”⁹² The Court emphasized that the Amendment protects the right of all law-abiding citizens to keep and bear arms that are in common use for traditionally lawful purposes, including self-defense.⁹³ Like any other right, the protections afforded by the Second Amendment are not absolute.⁹⁴ The Second Amendment right is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁹⁵ Hence, some limitations, such as prohibiting the carrying of weapons in a concealed manner or in sensitive locations, do not offend the Constitution.⁹⁶ Some laws that more broadly divest individuals, such as felons or the mentally ill, of their Second Amendment rights may also be constitutional.⁹⁷ Two years after *Heller*, in *McDonald v. City of Chicago*,⁹⁸ the Court extended its recognition of the right to keep and bear arms as a fundamental individual right, and held that the Second Amendment fully applies to the states under the Fourteenth Amendment.⁹⁹ Neither *Heller* nor *McDonald* offered clarity on the proper test to analyze whether a law unconstitutionally violated Second Amendment rights.¹⁰⁰

While the *Heller* Court clarified, and *McDonald* reiterated, that the opinions do not undermine laws that prohibit dangerous persons, including felons and the mentally ill, from having arms,¹⁰¹ neither case addressed domestic violence and firearms. To the contrary, the *Heller* Court emphasized both the right to self-defense and the sanctity of the home:

[T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of

⁹² *Id.*

⁹³ *Id.* at 624, 627, 635.

⁹⁴ *Id.* at 626–27.

⁹⁵ *Id.* at 626.

⁹⁶ *Id.* at 626–27.

⁹⁷ *Id.*

⁹⁸ *McDonald v. Chicago*, 561 U.S. 742 (2010).

⁹⁹ *Id.* at 791.

¹⁰⁰ Following *Heller* and *McDonald*, lower courts engaged in a two-step analysis. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17–18 (2022). First, courts conducted a historical analysis to decide whether the conduct regulated by the law fell outside the scope of the Second Amendment right “as originally understood.” *Id.* at 18. If the history clearly showed that the regulated conduct fell outside the original scope of the right, the conduct was not protected under the Second Amendment, and the analysis stopped there. *Id.* If the history was *not* clear, coverage was generally assumed, and courts moved to the next step. *Id.* The second step involved interest balancing and “means-end scrutiny,” looking at how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right. *Id.* Burdening a “core” Second Amendment right was subject to strict scrutiny; if not, intermediate scrutiny was used. *Id.* at 17–18.

¹⁰¹ *Heller*, 554 U.S. at 626; *accord McDonald*, 561 U.S. at 786.

the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster.¹⁰²

As the dissent in *Heller* observed, however, “firearms are more frequently involved in deaths and violence among relatives and friends . . .”¹⁰³ and particularly noted that “[i]f a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to . . . engage in acts of domestic violence.”¹⁰⁴

The Court directly weighed in on domestic violence and firearm restrictions in *United States v. Hayes* (2009),¹⁰⁵ *United States v. Castleman* (2014),¹⁰⁶ and *Voisine v. United States* (2016).¹⁰⁷ These three cases raised statutory interpretation questions concerning 18 U.S.C. § 922(g)(9), which prohibits any person convicted of a “misdemeanor crime of domestic violence[.]” from possessing a firearm.¹⁰⁸ In *Hayes*, the Court held that a domestic relationship need not be a discrete element of the predicate domestic violence offense (as long as the offense is “committed by” a person who has a specified domestic relationship with the victim) to trigger § 922(g)(9) and support a conviction for possession of a firearm by a person convicted of a misdemeanor crime of domestic violence.¹⁰⁹ In *Castleman*, the issue before the Court was the interpretation of “use, or threatened use of physical force” for the purpose of defining “misdemeanor crime of domestic violence” under § 922(g)(9).¹¹⁰ The Court first held that the word “force” as a required element for a “misdemeanor crime of domestic violence” bears its common-law meaning (i.e., the degree of force that supports a common-law battery conviction) and is broad enough to include offensive touching.¹¹¹ Next, the Court held that the knowing or intentional application of such force is a “use of force.”¹¹² Two years later, in *Voisine*, the Court held that a conviction for reckless (as contrasted to knowing or intentional) domestic

¹⁰² *Heller*, 554 U.S. at 628–29.

¹⁰³ *Id.* at 694 (Breyer, J., dissenting).

¹⁰⁴ *Id.* at 711 (Breyer, J., dissenting) (internal citations omitted).

¹⁰⁵ *United States v. Hayes*, 555 U.S. 415 (2009).

¹⁰⁶ *United States v. Castleman*, 572 U.S. 157 (2014).

¹⁰⁷ *Voisine v. United States*, 579 U.S. 686 (2016).

¹⁰⁸ Added in 1996 (The Lautenberg Amendment) to prohibit any person convicted of a “misdemeanor crime of domestic violence[.]” from possessing a firearm. 18 U.S.C. § 921(a)(33)(A) (2024). “Misdemeanor crime of domestic violence[.]” includes a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that “has, as an element, the use or attempted use of physical force.” *Id.*

¹⁰⁹ *Hayes*, 555 U.S. at 418 (confirming that the domestic relations must still be established beyond a reasonable doubt in the § 922(g)(9) firearms possession prosecution).

¹¹⁰ *See generally Castleman*, 572 U.S. at 161.

¹¹¹ *Id.* at 168.

¹¹² *Id.* at 170–71.

assault also qualifies as a “use of force” and a “misdemeanor crime of domestic violence” under § 922(g)(9) and therefore triggers the statutory firearms ban.¹¹³

All three cases highlighted the specific risks posed by firearms in the hands of domestic violence perpetrators. The Court relied on research showing that “[f]irearms and domestic strife are a potentially deadly combination nationwide,”¹¹⁴ and emphasized that in enacting § 922(g)(9) in 1996, Congress sought to “close [a] dangerous loophole” in the gun control laws.¹¹⁵ This was needed because the then-existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers, most of whom were being charged or convicted with misdemeanors rather than felonies,¹¹⁶ “notwithstanding the harmfulness of their conduct.”¹¹⁷

The *Castleman* Court focused even further on unique and troubling aspects of domestic violence to explain the need for firearm restrictions: Every year, there are “more than a million acts of domestic violence, and hundreds of deaths from domestic violence[;]”¹¹⁸ the severity of domestic violence often escalates over time; and “the presence of a firearm increases the likelihood that it will escalate to homicide.”¹¹⁹ The *Castleman* Court also took the time to explain how the unique dynamics of domestic violence distinguish it from other forms of violence, including instances that under non-DV circumstances may not be perceived as serious or as “violence” in the generic sense.¹²⁰ Thus, for example, physical forms of domestic violence include “[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling,”¹²¹ and in fact, “most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting.”¹²² This nuanced understanding of the dynamics of domestic violence led the Court to observe that “a squeeze of the arm [that] causes a bruise” can amount to “domestic violence” when it accumulates over time and subjects one intimate partner to the other's

¹¹³ *Voisine v. United States*, 579 U.S. 686, 688 (2016).

¹¹⁴ *Hayes*, 555 U.S. at 427 (internal citations omitted). *Accord Castleman*, 572 U.S. at 159; *Voisine*, 579 U.S. at 689.

¹¹⁵ *Hayes*, 555 U.S. at 426; *accord Castleman*, 572 U.S. at 160; *Voisine*, 579 U.S. at 689.

¹¹⁶ *Hayes*, 555 U.S. at 426 (Roberts, J., dissenting) (quoting 142 CONG. REC. 22985 (1996) (statement of Sen. Lautenberg)) (“[M]any people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.”).

¹¹⁷ *Voisine*, 579 U.S. at 689 (citing *Castleman*, 572 U.S. at 160).

¹¹⁸ *Castleman*, 572 U.S. at 159.

¹¹⁹ *Id.* at 159–60 (citations omitted).

¹²⁰ *Id.* at 164–65 (“[W]hereas the word ‘violent’ or ‘violence’ standing alone connotes a substantial degree of force . . . [t]hat is not true of ‘domestic violence.’ ‘Domestic Violence’ is not merely a type of ‘violence’; it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.”).

¹²¹ *Id.* at 165.

¹²² *Id.* (quoting P. TJADEN & N. THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 11 (2000)).

control.¹²³ Consequently, the Court concluded, “[i]f a seemingly minor act like this draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense,” the resulting conviction is properly characterized as a “misdemeanor crime of domestic violence.”¹²⁴

Except for a cursory Second Amendment argument in *Castleman*, which the Court declined to address,¹²⁵ the three cases are statutory interpretation cases and do not discuss any Second Amendment implications. However, Justice Thomas’ dissent in *Voisine* foreshadows things to come, criticizing the majority for reading the statute in a way that creates serious constitutional problems¹²⁶ and opining that, “[w]e treat no other constitutional right [to keep and bear Arms] so cavalierly.”¹²⁷

Things came to a head in 2022 in *N.Y. State Rifle & Pistol Association v. Bruen*.¹²⁸ In *Bruen*, the Court, with Justice Thomas now writing for the majority, struck down as unconstitutional the New York’s licensing regime, which required a citizen to demonstrate “special need for self-defense” before the state would issue a license to carry the handgun publicly.¹²⁹ In holding that New York’s licensing regime infringed on an individual’s Second Amendment right,¹³⁰ the Court rejected an interest-balancing framework and anchored the constitutional analysis firmly in text, history, and tradition.¹³¹ Under the *Bruen* test, the Constitution presumptively

¹²³ *Id.* at 165–66.

¹²⁴ *Id.* at 166.

¹²⁵ *Id.* at 173 (“Finally, *Castleman* suggests—in a single paragraph—that we should read § 922(g)(9) narrowly because it implicates his constitutional right to keep and bear arms. But *Castleman* has not challenged the constitutionality of § 922(g)(9), either on its face or as applied to him, and the meaning of the statute is sufficiently clear that we need not indulge *Castleman*’s cursory nod to constitutional avoidance concerns.”).

¹²⁶ *Voisine v. United States*, 579 U.S. 686, 713 (2016) (Thomas, J., dissenting).

¹²⁷ *Id.* at 715 (Thomas, J., dissenting).

¹²⁸ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

¹²⁹ *Id.* at 8.

¹³⁰ *Id.* at 32–33 (holding that (1) the Second Amendment “presumptively guarantees . . . a right to ‘bear’ arms in public for self-defense” because the conduct is covered under the scope of the Second Amendment, and (2) the government failed to overcome this presumption because the history it compiled “[did] not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense.”).

¹³¹ *Id.* at 17–18. In several of its 2022 term cases, the Supreme Court sent a strong signal that it may be ready to fully embrace a history and tradition standard in evaluating *all* constitutional individual rights. As discussed, in *Bruen*, decided on June 22, 2022, the Court explicitly adopted the “Nation’s historical tradition” standard for Second Amendment analysis. In *Dobbs v. Jackson Women’s Health Org.*, handed down the next day on June 23, the Court applied that framework to assess non-textual rights developed under the Fourteenth Amendment’s Due Process Clause. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022). Three days later, the Court supplemented its historical framing in *Kennedy v. Bremerton School District*. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (“[a]n analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some ‘exception’ within the Court’s Establishment Clause jurisprudence.”) (internal citation omitted).

protects an individual's conduct that is covered by the Second Amendment, and to overcome that presumption, the government must show that the regulation is "consistent with this Nation's historical tradition of firearm regulation."¹³²

To assess whether a regulation impacting a Second Amendment right is "consistent with this Nation's historical tradition of firearm regulation," the Court looks for historical analogues—or a lack thereof—to the current regulation.¹³³ As the various opinions in *Rahimi* demonstrate,¹³⁴ it is unclear what is "analogous." The *Bruen* Court explained that "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check."¹³⁵ While remote resemblance is insufficient, regulations are analogous if they are "relevantly similar;" they do not have to be strictly identical or "historical twin[s]."¹³⁶ Two key metrics to determine if current and historical regulations are relevantly similar are "how and why the regulations burden a law-abiding citizen's right to armed self-defense,"¹³⁷ i.e., "whether modern and historical regulations impose a comparable burden" on Second Amendment rights, and "whether the burden is comparatively justified."¹³⁸ For example, if historical law regulated firearm use to address particular problems, that would be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.¹³⁹ If the current regulation addresses a problem that has existed for centuries, a lack of a "distinctly similar historical regulation" may be evidence that the regulation is unconstitutional.¹⁴⁰ If the societal problem was previously managed with different regulations, the current regulation—though seemingly justified—may still be unconstitutional if it imposes a greater burden than past

Much has been written already about *Bruen*'s seismic jurisprudential shift. See, e.g., Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 73–75 (2023); Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023). But as one scholar observed, "the unanimous doctrinal recommitment to text and historical tradition in *Rahimi* shows that *Bruen* is here to stay. Even the justices who dissented in *Bruen* showed by fully joining the majority opinion in *Rahimi* that they understand *Bruen* to be the law of the land." Mark W. Smith, *Much Ado About Nothing: Rahimi Reinforces Bruen and Heller*, 2024 HARV. J.L. & PUB. POL'Y: PER CURIAM 1, 7 (2024).

¹³² *Bruen*, 597 U.S. at 17. A showing by the government that the regulation "promotes an important interest" is not enough to overcome the presumption. *Id.* at 17, 22.

¹³³ *Id.* at 17. If there are clear identical historical regulations, then this will just be a straightforward application. *Id.* at 26–27.

¹³⁴ See *infra* Part II.B.

¹³⁵ *Bruen*, 597 U.S. at 30.

¹³⁶ *Id.*

¹³⁷ *Id.* at 29.

¹³⁸ *Id.*

¹³⁹ See *id.* at 30.

¹⁴⁰ *Id.* at 26.

regulations.¹⁴¹ The same goes for analogous regulations that existed in history but were *rejected* for their unconstitutionality.¹⁴²

Not all historical evidence “is created equal[.]” however.¹⁴³ The Court groups historical sources into five periods: “(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries.”¹⁴⁴ It then minimizes historical analogues from the late-19th and early-20th centuries because, “[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.”¹⁴⁵

While in *Bruen*, the issue before the Court did not directly address women or IPV, the heightened risk and disproportionate impact of gun violence on women, particularly in abusive relations and in communities of color, were highlighted as key concerns in many amici briefs and in the dissenting opinion. Justice Thomas’ majority opinion,¹⁴⁶ however, does not mention the specific risks to and concerns of women. In fact, it does not mention women at all. Women are mentioned for the first time in Justice Alito’s concurrence in *Bruen*. Justice Alito criticized the dissenting justices for citing statistics about gun violence in general and about the use of guns in domestic disputes in particular.¹⁴⁷ On the other hand, Justice Alito highlights women and gender-based violence when discussing the benefits of defensive firearm use to protect oneself from criminals.¹⁴⁸ Ironically, the fact that most women who are murdered in the United States are killed by an intimate partner at home and that more than half of those murders involve a firearm seemed to escape Justice Alito.¹⁴⁹

Lest one think that the absence of women or IPV-related firearm use in *Bruen* is coincidental, signs of the erasure of women from the Supreme Court’s jurisprudence were prominent in the Court’s 2022 term. A day after it delivered its decision in *Bruen*, the Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*, overturning fifty years of

¹⁴¹ See *id.*

¹⁴² See *id.* at 26–27.

¹⁴³ *Id.* at 34.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)) (emphasis in *Bruen*).

¹⁴⁶ See generally *id.*

¹⁴⁷ *Id.* at 88 (Breyer, J., dissenting) (citing studies and amici briefs showing, for example, that a woman is five times more likely to be killed by an abusive partner if that partner has access to a gun) (internal citations omitted). In response, Justice Alito criticizes the dissent for not explaining “why these statistics are relevant to the question presented in this case. How many of the cases involving the use of a gun in a domestic dispute occur outside the home, and how many are prevented by laws like New York’s?” *Id.* at 72 (Alito, J., concurring).

¹⁴⁸ *Id.* at 74–76 (Alito, J., concurring).

¹⁴⁹ *Domestic Violence & Firearms*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/#:~:text=Guns%20Make%20Domestic%20Violence%20Deadly%20*%20Every,four%20intimate%20partner%20homicides%20with%20a%20gun (last visited Jan 30, 2025).

federal constitutional protections of women's right to choose whether to keep or terminate a pregnancy.¹⁵⁰ Shockingly (though not surprisingly perhaps), the *Dobbs* decision pays scant attention to women, not the least to IPV, despite ample information before the Court, which included specific data concerning access to abortion and the heightened risk for pregnant people in abusive relationships. When it comes to women, the Court engages in abstract, a-contextual, and, in fact, a-historical analysis.

The Court was finally tasked with directly addressing gun violence and IPV in *United States v Rahimi*.¹⁵¹ The *Rahimi* decision, a faithful application of *Bruen*'s "Nation's historical tradition" standard, was a small victory for women's rights advocates in an era of a now firmly originalist conservative Court.¹⁵² At the same time, as was the case with *Bruen* and *Dobbs*, actual women, their voices and experiences, and the likely real-life negative impact of the Court's decisions on them do not take center stage in the decision. On the contrary, they are nearly absent.

B. *Rahimi* Perpetuates the Erasure of Women, Holding Notwithstanding

Perplexingly, women and DV/IPV are mostly absent from the *Rahimi* case.¹⁵³ As this section demonstrates, both the majority opinion (written by Justice Roberts and joined by all other justices except Justice Thomas), as well as the separate concurring opinions written by Justice Gorsuch, Justice Kavanaugh, Justice Barrett, and Justice Jackson, barely discuss (and mostly do not mention) either IPV, the role of firearms within IPV, or the substantial harmful impact on women and other vulnerable populations. While the concurring opinion by Justices Sotomayor and Kagan does touch on these issues, it does so primarily in the context of critiquing the *Bruen* "Nation's historical tradition" standard in favor of the now discarded means-end scrutiny. As such, this Article posits that it also misses an opportunity to

¹⁵⁰ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

¹⁵¹ See generally *United States v. Rahimi*, 602 U.S. 680 (2024).

¹⁵² See Jonathan Gienapp, *Why is the Supreme Court Obsessed with Originalism?*, YALE UNIV. PRESS (Oct. 21, 2024), <https://yalebooks.yale.edu/2024/10/21/why-is-the-supreme-court-obsessed-with-originalism/>.

¹⁵³ With the exception of reciting the facts of *C.M.* and *Rahimi*, the Roberts majority barely mentions women and DV/IPV. See generally *Rahimi*, 602 U.S. at 680. The word "woman" appears once in the majority opinion (and then only twice more, both in Justice Sotomayor's concurrence). See generally *United States v. Rahimi*, 602 U.S. 680 (2024); see *id.* at 702–08 (Sotomayor, J. concurring). The word "wife" appears three times in the majority opinion, in the same paragraph, and "beating" or "abuse" appear twice in the majority opinion, once each as part of citation info. See generally *id.* "Abuser" appears several times in Sotomayor's concurrence, and "wife" once as part of a citation. See *id.* at 702–08 (Sotomayor, J. concurring). While the word "violence" appears multiple times, it is primarily referred to in generic or part of "clear threat of physical violence." See *id.* at 698. Ironically, mentions of "wife" and "interpersonal violence" or DV are more frequent in Justice Thomas' dissent, as part of his arguments to *discredit* the majority's historical analogues. See *id.* at 747–78 (Thomas, J., dissenting).

center the Court's jurisprudence around women and their real-life experiences. Finally, Justice Thomas' dissent only highlights the centuries-old "societal problem of interpersonal violence" as a means of undermining the Court's historical reliance on both surety laws and "going armed" affray laws. While Justice Thomas and the Roberts majority disagree on whether surety laws are comparable to § 922(g)(8), all seem to suggest that surety laws were themselves a satisfactory regulatory response to domestic violence. With regards to "going armed" affray laws, Justice Thomas' focus on the public nature of affrays (as opposed to the "private" nature of IPV in the home) and on the terrorizing of the broader public (as opposed to the often-female victim terrorized by her abusive male intimate partner) is an extension of the Court's jurisprudence of the home and of the private sphere that has been subjected to much feminist critique.¹⁵⁴

Zackey Rahimi is a dangerous man. During a thirteen-month period from 2020 to 2021, Rahimi assaulted his ex-girlfriend C.M. and participated in five different shootings.¹⁵⁵ In December 2019, Rahimi met his girlfriend and mother of his young child, C.M., for lunch in a parking lot.¹⁵⁶ During the meal, they began arguing, and Rahimi became enraged.¹⁵⁷ When C.M. attempted to leave, Rahimi grabbed her by the wrist, dragged her across the public parking lot back to his car in front of a bystander, and shoved her in, causing her to strike her head against the dashboard.¹⁵⁸ Rahimi paused to retrieve a gun from under the passenger seat, giving C.M. the opportunity to escape.¹⁵⁹ Rahimi fired as she fled, although it is unclear whether he was aiming at C.M. or the bystander witnessing the events.¹⁶⁰ Rahimi later called C.M. and warned that he would shoot her if she reported the incident.¹⁶¹

C.M. nonetheless sought a restraining order, based on the parking lot incident as well as other assaults endangering her and their child.¹⁶² On February 5, 2020, a state court in Tarrant County, Texas, issued a restraining order against Rahimi, with the consent of both parties.¹⁶³ The order included findings that Rahimi had committed "family violence," that this violence was "likely to occur again," and that Rahimi posed "a credible threat" to the "physical safety" of C.M. or the child.¹⁶⁴ Based on these findings, the order

¹⁵⁴ See *id.* at 769 (Thomas, J., dissenting); see Kaitlin Lewis, *Clarence Thomas' New Supreme Court Opinion Sparks Backlash: 'Insane'*, NEWSWEEK (Jun 22, 2024), <https://www.newsweek.com/clarence-thomas-new-supreme-court-opinion-sparks-backlash-insane-1916068>.

¹⁵⁵ See *Rahimi*, 602 U.S. at 686–88.

¹⁵⁶ *Id.* at 686.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 686–87.

¹⁶⁴ *Id.* at 687.

prohibited Rahimi from threatening C.M. or her family for two years or contacting C.M. during that period except to discuss the child.¹⁶⁵ It also suspended Rahimi's gun license for two years.¹⁶⁶ In May, however, Rahimi violated the order by approaching C.M.'s home at night and contacting her through several social media accounts.¹⁶⁷ In November, Rahimi threatened a different woman with a gun, resulting in a charge for aggravated assault with a deadly weapon.¹⁶⁸ And while Rahimi was under arrest for that assault, the Texas police identified him as the suspect in a spate of at least five additional public shootings within a short time frame.¹⁶⁹ A search of Rahimi's home yielded a pistol, a rifle, ammunition, and a copy of the restraining order.¹⁷⁰

18 U.S.C. § 922(g)(8) prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he “represents a credible threat to the physical safety of [an] intimate partner,” or a child of the partner or individual.¹⁷¹ Since Rahimi was subject to such an order, he was indicted for violating § 922(g)(8).¹⁷² Rahimi argued that § 922(g)(8) violates on its face his Second Amendment right to keep and bear arms.¹⁷³ The Supreme Court upheld the law as applied to the facts of Rahimi's case.¹⁷⁴ The Court held that “[w]hen a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The first, which occurred in December 2020, arose from Rahimi's dealing in illegal drugs. After one of his customers “started talking trash,” Rahimi drove to the man's home and shot into it. *Id.* While driving the next day, Rahimi collided with another car, exited his vehicle, and proceeded to shoot at the other car. *Id.* Three days later, he fired his gun in the air while driving through a residential neighborhood. *Id.* A few weeks after that, Rahimi was speeding on a highway near Arlington, Texas, when a truck flashed its lights at him. *Id.* Rahimi hit the brakes and cut across traffic to chase the truck. *Id.* Once off the highway, he fired several times toward the truck and a nearby car before fleeing. *Id.* Two weeks after that, Rahimi and a friend were dining at a roadside burger restaurant. *Id.* When the restaurant declined his friend's credit card, Rahimi pulled a gun and shot into the air. *Id.* at 687–88.

¹⁷⁰ *Id.* at 688.

¹⁷¹ *Id.* at 684–85. Under § 922(g)(8) the DV restraining order must meet three criteria: (1) the defendant must have received actual notice and an opportunity to be heard before the order was entered; (2) the order must prohibit the defendant from either “harassing, stalking, or threatening” his “intimate partner” or his or his partner's child, or “engaging in other conduct that would place [the] partner in reasonable fear of bodily injury” to the partner or child; and (3) the order must either contain a finding that the defendant “represents a credible threat to the physical safety” of his intimate partner or his or his partner's child, or “by its terms explicitly prohibit[] the use,” attempted use, or threatened use of “physical force” against those individuals. § 922(g)(8). Rahimi's restraining order met all three criteria. *Id.* at 688.

¹⁷² *Id.* at 688.

¹⁷³ *Id.* at 689.

¹⁷⁴ *Id.* at 702.

in effect.”¹⁷⁵ Importantly, the Court reasoned that “[s]ince the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.”¹⁷⁶ The Nation’s tradition of firearm regulations “distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not.”¹⁷⁷ As applied to the facts of the case, § 922(g)(8) fits comfortably within this tradition.¹⁷⁸ Consequently, the Court found, eight to one, that § 922(g)(8), banning Rahimi from possessing firearms while subject to a domestic violence restraining order, which was issued based on a finding that he posed a credible threat to the physical safety of an intimate partner, is facially constitutional under the Second Amendment.¹⁷⁹

The Court merely retells C.M.’s experience by recounting the facts that led to the DV restraining order. It does not focus on the IPV dynamics between C.M. and Rahimi. The Court seems to place as much emphasis on the other menacing misuses of firearms by Rahimi. Moreover, at no point does the Roberts majority offer context on the scope and form of DV/IPV, or the particular risk posed by firearms. This lack of attention is most evident in the Court’s analysis under the *Bruen* “Nation’s historical tradition” framework.

The majority opinion makes it clear that “the Second Amendment permits more than just those regulations identical to ones that could be found in 1791.”¹⁸⁰ Having established that Rahimi “pose[d] a credible threat to the physical safety of others,” the majority applies *Bruen*’s “Nation’s historical tradition” framework to identify historical analogues that barred threatening individuals from “misusing weapons to harm or menace others.”¹⁸¹ The Court focuses on two kinds of historical laws—surety laws and going armed laws—to establish a tradition of targeting individuals who physically threatened others and disarming those found to present “a clear threat of physical violence to another.”¹⁸² Surety laws were “[w]ell entrenched in the common law”—and therefore widespread—as a form of “preventive justice.”¹⁸³ These laws allowed a magistrate to require individuals suspected

¹⁷⁵ See *id.* at 701. The Court rejected the government’s argument that Rahimi falls outside the protections of the Second Amendment, and therefore may be disarmed, simply because he is not a “responsible” citizen. *Id.* at 700–01.

¹⁷⁶ *Id.* at 690.

¹⁷⁷ *Id.* at 699.

¹⁷⁸ See *id.* at 700.

¹⁷⁹ *Id.* at 688–702. The Court’s analysis is limited to § 922(g)(8)(C)(i) since there was ample evidence to support the finding in the restraining order that Rahimi posed a credible threat to the physical safety of others. *Id.* at 688. The Court did not decide whether a regulation under § 922(g)(8)(C)(ii) is also permissible. *Id.* at 688–702.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 693.

¹⁸² *Id.* at 698.

¹⁸³ *Id.* at 688–702.

of future misbehavior to post a bond.¹⁸⁴ An individual who failed to post the bond would be jailed, while one who posted the bond and violated its terms would forfeit it.¹⁸⁵ The surety mechanism could be “invoked to prevent all forms of violence,” including “the misuse of firearms.”¹⁸⁶ In addition to surety laws, which were aimed at preventing violence before it occurred, a second type of historical law—“going armed laws”—“provided a mechanism for punishing those who had menaced others with firearms.”¹⁸⁷ Going armed laws were a subset of laws governing affrays, which encompassed not only the offense of fighting in public but also the offense of arming oneself “to the [t]error[] of the [p]eople.”¹⁸⁸ Going armed law prohibited “riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land” because “such conduct disrupted the ‘public order’ and ‘le[d] almost necessarily to actual violence.’”¹⁸⁹ Surety and going armed laws together, the Court concluded, confirm the common sense conclusion that an individual, like Rahimi, that poses “a clear threat of physical violence to another” can be disarmed.¹⁹⁰

The Court found § 922(g)(8) to be “relevantly similar” to these two historical analogues in both “why and how it burdens the Second Amendment right.”¹⁹¹ As to the “why,” all three regimes restrict gun use to “mitigate demonstrated threats of physical violence” rather than broadly restrict the general public from arms use.¹⁹² Regarding the “how,” for example, all three regimes apply only once there is a judicial determination that a particular individual would threaten or had threatened another with a weapon, i.e., pose a credible threat to another’s safety.¹⁹³ In sum, § 922(g)(8) does not need to be identical to the founding era surety and going armed laws; its prohibition on firearm possession by those found to present a threat to others “fits neatly within the tradition [that] surety and going armed laws represent.”¹⁹⁴

And yet, the harms of DV- and IPV-related gun use are marginalized in the majority opinion. The Court’s discussion of the historical tradition of firearms regulation looks generally at ordinary criminal laws and civil actions barring people from misusing weapons to harm or menace others or targeting

¹⁸⁴ *Id.* at 695.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 681.

¹⁸⁸ *Id.* at 697.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 698.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ The Court also points out that the three regimes are similar in that they are all temporary, and that the penalty of temporary disarmament is a lesser burden than the imprisonment imposed by going armed laws. *Id.* at 699.

¹⁹⁴ *Id.* at 698.

individuals who physically threaten others.¹⁹⁵ At one point, it even mentions founding era rules about firearm storage or restrictions on gun use by drunken New Year's Eve revelers.¹⁹⁶ Similarly, the majority opinion consistently refers to an individual posing a credible threat to the physical safety of others. But the harm and threat of IPV, as § 922(g)(8) recognizes by its explicit terms, are inherently distinct and severe.¹⁹⁷ Moreover, unlike a disruption to the public order or violence and terror inflicted on the public at large, DV/IPV is both pervasive and targeted at the intimate partner, most often women. Finally, the use of firearms in DV/IPV is also distinct and pervasive, truly terrorizing DV victims and facilitating coercive control of one's intimate partner or, too often, resulting in intimate partner homicide (IPH).

In only one place, when discussing surety laws, the Court briefly mentions spousal abuse. The Court explains that in common law, surety laws could be invoked to prevent spousal abuse, amongst other forms of violence.¹⁹⁸ The Court cites Blackstone for the proposition that “[w]ives [could] demand [sureties] against their husbands; or husbands, if necessary, against their wives[,]” and that “[t]hese often took the form of a surety of the peace, meaning that the defendant pledged to “keep the peace.”¹⁹⁹ According to Blackstone, wives also demanded sureties for good behavior, whereby a husband pledged to “demean and behave himself well.”²⁰⁰ The Court then cites one widely reported incident from 1790, in which Susannah Wyllys Strong, the wife of a Connecticut judge, complained against her husband, and the judge ordered the man to post a bond of £1,000.²⁰¹ Unfortunately, in addition to being rather brief and subject to critique by Justice Thomas,²⁰² the discussion of spousal bonds for peace/good behavior is completely separate from the Court's discussion of the use of surety laws to target the misuse of firearms.²⁰³

The concurring opinions by Justices Gorsuch, Kavanaugh, Barrett and Jackson do not at all mention women, IPV, the role of firearms within IPV, or the substantial harmful impact on women and other vulnerable populations.²⁰⁴ Justice Gorsuch wrote to emphasize strict originalism with the *Bruen* standard and to further support, like the majority opinion, the resort to surety laws and going armed laws as appropriate historical analogues.²⁰⁵

¹⁹⁵ *Id.* at 690–98.

¹⁹⁶ *Id.* at 691.

¹⁹⁷ *See supra* Part I.

¹⁹⁸ *Rahimi*, 602 U.S. at 695.

¹⁹⁹ *Id.* (internal citations omitted).

²⁰⁰ *Id.* at 696.

²⁰¹ *Id.*

²⁰² *Id.* at 764 (Thomas, J., dissenting).

²⁰³ *Id.* at 696.

²⁰⁴ *Id.* at 708–47.

²⁰⁵ *Id.* at 708–14 (Gorsuch, J., concurring).

Justice Kavanaugh and Justice Barret each wrote to elaborate on modes of constitutional interpretation and to explain how the *Bruen* standard should be applied.²⁰⁶ Their analysis aligns with and reaffirms the majority's conclusions.²⁰⁷ Justice Jackson, on the other hand, wrote briefly to show the pitfalls of the *Bruen* standard,²⁰⁸ and to criticize the use of history “to the exclusion of all else.”²⁰⁹ Although Justice Jackson reminds the Court to “be mindful of how its legal standards are actually playing out in real life[.]”²¹⁰ her focus seemed to be on courts applying the standard, legislatures setting policy, and public understanding of constitutional interpretation—not a word about women or IPV.²¹¹

In contrast, the remaining opinions, a concurrence by Justice Sotomayor, joined by Justice Kagan,²¹² and a dissent by Justice Thomas,²¹³ offer a specific focus on women, IPV, and firearms, albeit for very different reasons.

Justice Thomas disagrees that any of the historical regulations used by the majority can justify § 922(g)(8) or disarming Rahimi.²¹⁴ According to Justice Thomas, there is no evidence that § 922(g)(8) is consistent with the nation's historical tradition of firearm regulation; to the contrary, “the founding generation addressed the same societal problem as § 922(g)(8)” through very different means, suggesting that the modern regulation is unconstitutional.²¹⁵ Not only does Justice Thomas minimize C.M.'s experience with IPV,²¹⁶ but he only acknowledges that DV/IPV has been a persistent problem for the sake of undermining the historical analogues offered by the majority. On several occasions, he refers to “the risk of interpersonal violence—that has *persisted since the 18th century*,” yet was addressed “through [the] materially different means” of surety laws.”²¹⁷ Although § 922(g)(8) may share the “why” justification with surety laws, the answer to the “how” question is very different. Surety laws, according to Justice Thomas, did not historically operate to disarm the individual but only averted the “threat of future interpersonal violence” by requiring the posting

²⁰⁶ *Id.* at 714–37 (Kavanaugh, J., concurring); *id.* at 737–40 (Barrett, J., concurring).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 740–46 (Jackson, J., concurring).

²⁰⁹ *Id.* at 744.

²¹⁰ *Id.* at 747 (Jackson, J., concurring).

²¹¹ *Id.*

²¹² *Id.* at 703–08 (Sotomayor, J., concurring).

²¹³ *Id.* at 747–78 (Thomas, J., dissenting).

²¹⁴ *Id.* at 747 (Thomas, J., dissenting).

²¹⁵ *Id.* at 751 (Thomas, J., dissenting).

²¹⁶ *Id.* at 749 (Thomas, J., dissenting) (“In 2020, Zackey Rahimi and his ex-girlfriend, C.M., entered into a qualifying civil restraining order. C.M. had requested the order and asserted that Rahimi assaulted her.”).

²¹⁷ *Id.* at 766 (Thomas, J., dissenting) (emphasis added).

of a monetary bond.²¹⁸ Whereas surety laws addressed interpersonal violence by imposing a fine on certain behavior, such that if a person threatened someone in his community, he was given the choice to either keep the peace or forfeit a sum of money; § 922(g)(8) imposes a much more onerous burden.²¹⁹

As with the majority opinion, Justice Thomas is most explicit about domestic violence when suggesting that the bond/fine regime of surety laws, which did not entail any disarmament, was sufficient to address domestic violence in the founding era:

Surety demands were also expressly available to prevent domestic violence. Surety could be sought by “a wife against her husband who threatens to kill her or beat her outrageously, or, if she have [sic] notorious cause to fear he will do either.” [J. Backus, *The Justice of the Peace* at 24 (1816)]; see 1 W. Hawkins, *Pleas of the Crown* 253 (6th ed. 1777) (“[I]t is certain, that a wife may demand [a surety] against her husband threatening to beat her outrageously, and that a husband also may have it against his wife”). The right to demand sureties in cases of potential domestic violence was recognized not only by treatises, but also the founding-era courts. Records from before and after the Second Amendment’s ratification reflect that spouses successfully demanded sureties when they feared future domestic violence. [See,] e.g., *Records of the Courts of Quarter Sessions and Common Pleas of Bucks County, Pennsylvania, 1684–1700*, pp. 80–81 (1943) (detailing surety demanded upon allegations that a husband was “abusive to [his wife] that she was afraid of her Life & of her Childrns lifes” [sic]); [see also] *Heyn’s Case*, 2 Ves. & Bea. 182, 35 Eng. Rep. 288 (Ch. 1813) (1822) (granting wife’s request to order her husband who committed “various acts of ill usage and threats” to “find sufficient sureties”); *Anonymous*, 1 S. C. Eq. 113 (1785) (order requiring husband to “enter into recognizance . . . with two sureties . . . for keeping the peace towards the complainant (his wife)”).²²⁰

Regarding going armed laws and disarmament of dangerous individuals more broadly, Justice Thomas completely missed the mark on IPV and firearms. It is not surprising, therefore, that his rhetoric focuses on the home and self-defense as the core of the Second Amendment while ignoring the fact that most women who are murdered in the United States are killed by an intimate partner at home, and that more than half of those murders involve the misuse of a firearm.²²¹ He stated that § 922(g)(8) is irreconcilable with

²¹⁸ *Id.* at 763 (Thomas, J., dissenting).

²¹⁹ *Id.* at 753 (Thomas, J., dissenting).

²²⁰ *Id.* at 763–64 (Thomas, J., dissenting).

²²¹ Elizabeth Tobin-Tyler, *Intimate Partner Violence, Firearm Injuries and Homicides: A Health Justice Approach to Two Intersecting Public Health Crises*, 51 J.L. MED. & ETHICS 64, 64 (2023)

the text of the Second Amendment because “[a] covered individual cannot even possess a firearm in his home for self-defense, ‘the central component of the [Second Amendment] right itself.’”²²² Next, historical English laws targeting “dangerous” persons were concerned with preventing insurrection and armed rebellion by political opponents, thus offering no support according to Justice Thomas.²²³ Finally, while affray laws prohibited only carrying certain weapons (“dangerous and unusual”) in a particular manner (“terrifying the good people of the land” without a need for self-defense) and in particular places (in public), § 922(g)(8) prevents a covered person from carrying any firearm or ammunition, in any manner, in any place, including at home, at any time, and for any reason.²²⁴ Affrays were defined by their public nature and effect. They were intentionally distinguished from assaults and private interpersonal violence against a person,²²⁵ and regulated only certain public conduct that injured the public.²²⁶ Similarly, going armed laws did not prohibit carrying firearms at home or even public carry generally, and many going armed laws also had a self-defense exception.²²⁷

Justice Sotomayor, joined by Justice Kagan, criticized Justice Thomas for insisting that because the societal problem—the risk of interpersonal violence—has persisted since the eighteenth century, the means of addressing that problem cannot be “materially different” from the means that existed in the eighteenth century.²²⁸ For one, there is no comparison between the ease of use of firearms today and the guns in the eighteenth century, which “took a long time to load, typically fired only one shot, and often misfired.”²²⁹ Importantly, “it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate.”²³⁰ Since laws in the founding era more likely protected abusive husbands rather than holding them accountable and protecting their spouses, it is no wonder that there was no close historical equivalent to § 922(g)(8).²³¹

(discussing the heightened lethality associated with firearms in IPV situations and advocating for policies to restrict firearm access among abusers).

²²² *Rahimi*, 602 U.S. at 752 (Thomas, J., dissenting).

²²³ *Id.* at 752–56 (Thomas, J., dissenting).

²²⁴ *Id.*

²²⁵ *Id.* at 769 (Thomas, J., dissenting) (“As treatises shortly before the founding explain, “there may be an Assault which will not amount to an Affray; as where it happens in a private Place, out of the hearing or seeing of any, except the Parties concerned; in which Case it cannot be said to be to the Terror of the People.” 1 Hawkins, Pleas of the Crown, at 134; see 1 Burn, Justice of the Peace, at 13. Affrays thus did not cover the very conduct §922(g)(8) seeks to prevent—interpersonal violence in the home.”).

²²⁶ *Id.* at 768–69 (Thomas, J., dissenting).

²²⁷ *Id.*

²²⁸ *Id.* at 704 (Sotomayor, J., concurring).

²²⁹ *Id.* at 705 (Sotomayor, J., concurring).

²³⁰ *Id.*

²³¹ *Id.* (citing Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2154–70 (1996)).

Justice Sotomayor is more broadly concerned with *Bruen*'s "myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems facing our society today."²³² Rather than rigidly adhering to a history that predates full inclusion of women and people of color, the Second Amendment allows us, argues Justice Sotomayor, to adopt new tailored solutions.²³³ Justice Sotomayor then highlights the ample data about the risks that firearms in the hands of domestic abusers pose to their intimate partners, mostly women, to others, and to first responders, as well as the grim data about the use of firearms to commit IPH.²³⁴ One wonders whether this data and specific focus on IPV-related firearm use would have carried more weight with the other Justices if it was not presented within a means-end scrutiny framework, which *Bruen* rejected.²³⁵

III. GENDERED JURISPRUDENCE

So why are women's lives and voices mostly absent from the Court's jurisprudence? As with *Bruen* and *Dobbs*, this Article suggests that the *Rahimi* Court pays little attention to women in line with the Court's gendered standards and jurisprudence of masculinity.²³⁶ In doing so, the Court is complicit in further perpetuating harm and discrimination against women and other vulnerable people.²³⁷

Gender bias and the erasure of women from the Court's constitutional jurisprudence are not new and have been subject to much feminist critique.²³⁸ However, they have become more apparent in recent years due to the make-up of the Court and the expansion of originalist constitutional interpretation. Originalism and the resort to the "Nation's historical traditions" play a key role in marginalizing the interests of and excluding the voices of women and other vulnerable groups. By its own terms, originalism focuses constitutional

²³² *Id.* at 706 (Sotomayor, J., concurring).

²³³ *Id.*

²³⁴ *Id.* See also *supra* Part I.

²³⁵ *Rahimi*, 602 U.S. at 707 (Sotomayor, J., concurring).

²³⁶ See, e.g., Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 907 (2023) [Hereafter: Siegel, *How "History and Tradition" Perpetuates Inequality*]; Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 800 (2023); Vicki C. Jackson, *Exclusionary Originalism as Anti-Constitutionalist: Dobbs and Bruen as Threats to Constitutionalism*, 18 HARV. L. & POL'Y REV. 221, 222 (2024); Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in District of Columbia v. Heller*, 53 POLITY 207, 208 (2021).

²³⁷ See generally Michele Goodwin, *Complicit Bias and the Supreme Court*, 136 HARV. L. REV. F. 119, 120 (2022).

²³⁸ Katherin T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 830 (1990) (arguing that traditional jurisprudence often reflects male-centric perspectives, leading to the exclusion or misrepresentation of women's experiences).

interpretation and meaning on certain historical moments.²³⁹ In interpreting the Second Amendment (but not only), the Court elevates history from the time of the founding or prior—a period when women and people of color were excluded and subjugated in multiple ways.²⁴⁰ Professor Vicki Jackson termed this “exclusionary originalism.”²⁴¹ Echoing Justice Sotomayor’s concern in *Rahimi* that such limited focus on history and tradition fails to give full consideration to today’s problems,²⁴² Professor Jackson explains that the harm of “exclusionary originalism” and the resort to that specific past time is magnified because

that is *all* the exclusionary originalist judge needs to know; she need not concern herself with alternative present views, or evolving understandings of constitutional principles, or the reasons for the challenged government action (except to the extent that they correspond with justifications for earlier practices), or the consequences of different interpretive alternatives, or the political theory of representative democracy. *The past is what matters, what controls; judges are not responsible, the past is.*²⁴³

Of course, “the primary perspective informing the gun laws passed during the critical period the *Bruen* majority privileges [was] that of white men.”²⁴⁴ Women and Black, Indigenous, and People of Color (BIPOC) were excluded from the polity, and their voices were intentionally disregarded.²⁴⁵ What would have been the nation’s historical tradition of firearm regulation “if women and nonwhite people had been able to vote for the representatives who determined these regulations.”²⁴⁶

²³⁹ Murray, *supra* note 236, at 800.

²⁴⁰ Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L. REV. 99, 165 (2023) (highlighting that many historical laws were enacted during times of pervasive discrimination against women and minorities).

²⁴¹ Jackson, *supra* note 236, at 222–23 (“The Court’s decisions in *Dobbs v. Jackson Women’s Health* and *New York State Rifle & Pistol Ass’n v. Bruen*, deploy a meta-approach of exclusionary reliance on ‘original understandings’ or ‘history and tradition’ around the time of constitutional enactments as the only legitimate source(s) in constitutional adjudication. I call both such past-focused approaches ‘exclusionary originalism.’ . . . The basic idea of exclusionary originalism is that what judges need to know to properly interpret a constitutional provision is what happened in a particular past time . . . at the time of enactment, or based on what “traditions” existed at or around the time of enactment.”).

²⁴² United States v. Rahimi, 602 U.S. 680, 706 (2024) (Sotomayor, J., concurring).

²⁴³ Jackson, *supra* note 246, at 223–24 (emphasis added).

²⁴⁴ Bonnie Carlson, *Salvaging Federal Domestic Violence Gun Regulations in Bruen’s Wake*, 99 WASH. L. REV. 1, 22 (2024).

²⁴⁵ *Id.*

²⁴⁶ *Id.* (citing State v. Philpotts, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting)). Cf. Jackson, *supra* note 236, at 235 (“What women—still subject to ‘coverture’ laws in some jurisdictions and lacking the educational and economic opportunities of their male counterparts—would have thought, had they been included and free to reach their own opinion, would be relevant in terms of a historic starting point for understanding constitutional meanings. That women did not serve as active voting participants in these constitutional moments should caution against attributing

Women were not only unable to vote or hold office at the time of the adoption of the Second Amendment, but they were legally and practically subordinated to men.²⁴⁷ In fact, the law allowed men to batter their spouses with impunity.²⁴⁸ Historically, “the idea that a man’s home is his castle was just a proxy for male power in the household[,]”²⁴⁹ including the husband’s power to physically “chastise” his wife with the law’s approval.²⁵⁰ Under the common law, husbands were permitted to “chastise[]” their wives through corporal punishment, provided that no permanent injury resulted.²⁵¹ The right of men to “chastise” their wives supported the legal framework of marriage and coverture.²⁵² Up until the nineteenth century, a wife had no separate legal identity from her husband. She had a duty to obey and serve him, while he had a duty to support her and represent her in the legal system.²⁵³ As described in Blackstone’s commentaries, “[f]or, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children”²⁵⁴ Interestingly, a wife could seek a writ of supplicavit, asking a court to require her husband to provide a bond to promise he would not severely harm her, *other than the harm resulting from reasonable chastisement*.²⁵⁵

Notwithstanding the examples in *Rahimi* of wives relying on the surety regime to “restrain” their husbands, examples which were offered by both the Roberts majority and Justice Thomas’ dissent, women were mostly

too much weight to specific eighteenth or nineteenth century understandings of liberty as applied to women’s reproductive freedoms.”).

²⁴⁷ Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

²⁴⁸ *Id.*

²⁴⁹ Cheryl Hanna, *Behind the Castle Walls: Balancing Privacy and Security in Domestic Abuse Cases*, 32 T. JEFFERSON L. REV. 65, 72–73 (2009); Cristina Georgiana Messerschmidt, *A Victim of Abuse Should Still Have a Castle: The Applicability of the Castle Doctrine to Instances of Domestic Violence*, 106 J. CRIM. L. & CRIMINOLOGY 593, 616 (2016).

²⁵⁰ Hanna, *supra* note 249, at 69; *see also* Siegel, *supra* note 247, at 2118.

²⁵¹ Siegel, *supra* note 247, at 2118. This fits squarely within the existing legal framework of marriage at the time: a wife needed her husband’s participation to file a lawsuit; a husband was entitled to the value of his wife’s labor and most of her property; and a wife was obligated to obey and serve her husband. *Id.* at 2123.

²⁵² Peña, *supra* note 85, at 156 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *432) (describing coverture).

²⁵³ Siegel, *supra* note 247, at 2122–23 (“By law, a husband acquired rights to his wife’s person, the value of her paid and unpaid labor, and most property she brought into the marriage. A wife was obliged to obey and serve her husband, and the husband was subject to a reciprocal duty to support his wife and represent her within the legal system. According to the doctrine of marital unity, a wife’s legal identity ‘merged’ into her husband’s, so that she was unable to file suit without his participation, whether to enforce contracts or to seek damages in tort. The husband was in turn responsible for his wife’s conduct—liable, under certain circumstances, for her contracts, torts, and even some crimes.”).

²⁵⁴ *Id.* at 2123 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *444).

²⁵⁵ *Id.*

excluded from participation in the legal process altogether, and violence within marriage was condoned.²⁵⁶ Even by the 1870s, when the doctrine of chastisement was formally and universally condemned, violence within marriage was often still exempt from scrutiny and sanctioned by law.²⁵⁷ Violence against women in the home continued through the Reconstruction era (and much later into the twentieth century) outside the purview of the legal system because the home was a place of privacy, and courts would not intervene in private domestic disputes.²⁵⁸ Recast as private affairs and under the guise of marital harmony, “the law held that a man’s home was his castle even [though he used physical force against his wife].”²⁵⁹

This was the norm during the timeframe on which the *Bruen* and *Rahimi* opinions rely to determine the historical, societal understanding of gun laws.²⁶⁰ Although our understanding of domestic violence and IPV-related gun use has changed significantly, and legislatures and policymakers have acted accordingly, *Bruen* and *Rahimi* suggest that we should ignore our nuanced current understanding of domestic violence and its fatal interplay with gun possession, “instead considering only what laws would have been supported at the time of our nation’s founding.”²⁶¹

The tradition-entrenching method the Court now employs broadly to decide constitutional matters and which elevates laws adopted at a time when women and BIPOC were not allowed to participate, “intensify the gender biases of a constitutional order that for the majority of its existence denied women a voice in lawmaking and restricted women’s roles.”²⁶² Thus, argues Professor Reva Siegel, the methods the Court employs are gendered “in the simple sense [tying] the Constitution’s meaning to lawmaking from which

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Samantha L. Fawcett, *Upholding the Domestic Violence Firearm Prohibitors Under Bruen’s Second Amendment*, 18 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 405, 430 (2023); Siegel, *supra* note 247, at 2120 (“[D]uring the Reconstruction Era, chastisement law was supplanted by a new body of marital violence policies that were premised on a variety of gender-, race-, and class-based assumptions. This new body of common law differed from chastisement doctrine, both in rule structure and rhetoric. Judges no longer insisted that a husband had the legal prerogative to beat his wife; instead, they often asserted that the legal system should not interfere in cases of wife beating, in order to protect the privacy of the marriage relationship and to promote domestic harmony.”); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1 (2000); Balos, *supra* note 31, at 87 (“One of the most powerful societal values that has reinforced the vulnerability of women to domestic violence has been the concept of the private, domestic sphere. Physical abuse of a wife by her husband was deemed a private matter and therefore not appropriate for state intervention.”); see also Margaret E. Johnson, *A Home with Dignity: Domestic Violence and Property Rights*, 2014 BYU L. REV. 1, 12 (2014) (“For many years, there was a sense that the home is, or should be, an inviolable place even if violence was being perpetrated by one family member against another.”).

²⁵⁹ Hanna, *supra* note 249, at 70; Balos, *supra* note 31, at 79–80.

²⁶⁰ Carlson, *supra* note 244, at 20.

²⁶¹ *Id.* at 21.

²⁶² Siegel, *supra* note 236, at 901.

women were excluded and in the deeper sense that the turn to the past provides the Court resources for expressing identity and value drawn from a culture whose laws and mores were more hierarchical than our own.”²⁶³

When judges are aware of past, present, or future harm against a vulnerable group and do not intervene to avert the continuance of the harm, they exhibit what Professor Michele Goodwin terms “Complicit Bias.”²⁶⁴ Complicit bias is also present when judges refuse to acknowledge glaring injustices against vulnerable groups and further the harm through silence and inaction.²⁶⁵ Finally, judges may show an inclination to protect an individual or group based on relationship, affinity, or group characteristics.²⁶⁶

Of course, the Court is not merely resorting to exclusionary, albeit neutral, past. Resorting to originalism and the “Nation’s historical traditions” is not benign. Scholars have criticized the Court’s cherry-picking of historical evidence and pointed out that “the Court’s historical investigation is not the value-free, apolitical exercise that the Court pretends it to be.”²⁶⁷ By selectively deferring to the past, the Court “provides new justifications for enforcing old forms of status inequality[.]”²⁶⁸ and “infuse[s] traditional understandings of gender into contemporary constitutional decisions.”²⁶⁹

Professor Melissa Murray calls this the “Roberts Court’s Jurisprudence of Masculinity.”²⁷⁰ Professor Murray suggests that the Roberts Court’s jurisprudence prioritizes men’s rights, both explicitly and implicitly, while diminishing and constraining women’s rights.²⁷¹ Critically, argues Professor Murray, the jurisprudence of masculinity goes beyond prioritizing men’s rights by “recast[ing] the legal landscape to ensure maximum solicitude for

²⁶³ *Id.* at 906.

²⁶⁴ Goodwin, *supra* note 237, at 120–21.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Charles, *supra* note 131, at 73–74 (“Juxtaposing the [historical reasoning] in *Dobbs* and *Bruen* is jarring . . . One case searched the past for protections for a claimed right and declared that record barren. The other searched the past for restrictions on a claimed right and declared that record barren. For *Dobbs*, it was clear the absence of historical regulations prohibiting particular conduct did ‘not mean that anyone thought the States lacked the authority to do so.’ For *Bruen*, on the other hand, the opposite inference governed. If gun-related conduct was permitted in early American society, it was a legal right.”); see also Jackson, *supra* note 236, at 223–24 (“The adverse effects of exclusionary originalism . . . are illustrated by the Court’s recent decisions in *Dobbs* and *Bruen*. Its implications for gender and racial equality are most decidedly not benign, nor are they unforeseeable by-products of an approach that gives dispositive weight to laws and customs adopted in a less egalitarian time.”). See generally Siegel, *supra* note 236; Murray, *supra* note 236, at 803.

²⁶⁸ Siegel, *supra* note 236, at 902.

²⁶⁹ *Id.* at 905.

²⁷⁰ Murray, *supra* note 236, at 804.

²⁷¹ See generally *id.* (Using *Dobbs*, *Bruen*, and *Kennedy v. Bremerton School District* to demonstrate how the Court prefers and prioritizes constitutional rights that are associated with men and masculinity, such as rights to free exercise of religion, speech, and guns, while exhibiting disdain for and disinterest in rights that traditionally have been associated with women, including the right of privacy and the right to abortion, which are discredited or discarded entirely).

the protection of men and the exercise of men's rights."²⁷² This jurisprudence of masculinity is inextricably intertwined with the Court's selective understanding of originalism and originalist methodologies:²⁷³

By focusing narrowly on certain historical moments, while ignoring the histories that undermine—or challenge entirely—its preferred vision of constitutional rights, the Court interprets the Constitution, its text, and history in ways that prioritize and protect men in their exercise of constitutional rights while willfully ignoring the history that might support women's claims for constitutional protection and rights.²⁷⁴

Critique of originalism and the Court's jurisprudence of masculinity aside, the next section suggests that the *Rahimi* Court could have employed *Bruen*'s history and tradition framework to focus on women's lives and IPV. As others have observed, "[s]ince it is our country's history and tradition that matters to the Supreme Court in its *Bruen* analysis . . . any solution will have to play within the Court's game" ²⁷⁵

IV. "NATION'S HISTORICAL TRADITION" THROUGH THE LENS OF IPV

Rahimi presented the Court with an opportunity to employ an IPV-centered framework and to focus on women in its jurisprudence. The Court has done this before to some extent. Even though *Hayes*,²⁷⁶ *Castleman*,²⁷⁷ and *Voisine*,²⁷⁸ did not entail Second Amendment challenges to § 922 and all three cases were decided before *Bruen* firmly established the "Nation's historical tradition" test, the IPV lens reflected in those decisions remains viable. A *Bruen* analysis does not preclude the Court from highlighting, for example, the specific risks posed by firearms in the hands of domestic violence perpetrators, the unique and troubling aspects of domestic violence necessitating firearm restrictions, and the unique dynamics of domestic

²⁷² *Id.* at 799–800. The Court does so by reorganizing the traditional public-private divide, insulating men's bodies from government interference while making women's bodies particularly susceptible and well-suited to public regulation. *Id.* In that manner, the Court also recharacterizes the relationship between the state, rights, and regulation. *Id.*

²⁷³ *Id.* at 843.

²⁷⁴ *Id.* at 799–800 ("By focusing narrowly on certain historical moments, while ignoring the histories that undermine—or challenge entirely—its preferred vision of constitutional rights, the Court interprets the Constitution, its text, and history in ways that prioritize and protect men in their exercise of constitutional rights while willfully ignoring the history that might support women's claims for constitutional protection and rights.").

²⁷⁵ Brett V. Ries, *Looking Backward to Move Forward: Ending the "History and Tradition" of Gun Violence Against the LGBTQ+ Community*, 73 DUKE L.J. ONLINE 119, 140 (2023).

²⁷⁶ *United States v. Hayes*, 555 U.S. 415 (2009).

²⁷⁷ *United States v. Castleman*, 572 U.S. 157 (2014).

²⁷⁸ *Voisine v. United States*, 579 U.S. 686 (2016).

violence distinguishing it from other forms of violence, as it did in those three cases.²⁷⁹

This Article suggests that the *Rahimi* Court could and should have stayed true to its history and tradition analytical framework, while nonetheless recognizing women's voices. The Court could have contextualized the parallels drawn with the historical analogues by highlighting the severe and unique threat of harm posed to mostly women by their abusers, especially when firearms are present. Doing so would have also allowed the Roberts majority to better respond to Justice Thomas, who "weaponized" the "uniqueness" of IPV and use of firearms as part of IPV to minimize the historical parallels.

While this Article does not offer a full rewrite of *Rahimi*, it examines several ways in which the Court could have enriched its analysis. First and most obvious, the Court could have substantially enriched its analysis of the historical dangerousness analogues and discussion of surety laws and "going armed" affray laws with the wealth of data (in front of the court in scores of amici briefs) about the dangerousness of IPV abusers and the multiplying dangerousness effect of the use of firearms in IPV. Second, the Court could have similarly used what we know about IPV, firearms, and dangerousness, for a more nuanced and inclusive discussion of the two proclaimed anchors of the Second Amendment—the home and self-defense. Lastly, to contextualize and explain some of the perceived historical gaps, the Court could have explicitly acknowledged that our history and our laws were built on various forms of gendered bigotry and exclusion of women from the polity. Unlike Justice Thomas' claims, this would not point to the lack of analogous regulation of firearms in the hands of domestic abusers but rather send an important message that we should not rely "on the history that the Constitution left behind."²⁸⁰

A. Disarming Dangerous Individuals

First and foremost, the *Rahimi* Court focused on dangerousness and confirmed that the nation's tradition of firearm regulations "distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not."²⁸¹ To that end, "since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."²⁸² Thus, historical surety and going armed laws establish a tradition of targeting individuals who

²⁷⁹ See *Hayes*, 555 U.S. at 415; *Castleman*, 572 U.S. at 160; *Voisine*, 579 U.S. at 686.

²⁸⁰ *United States v. Rahimi*, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring).

²⁸¹ *Id.* at 700.

²⁸² *Id.* at 690.

physically threatened others and disarming those found to present “a clear threat of physical violence to another”²⁸³

Along similar lines, Justice Barrett, then a judge for the Seventh Circuit, noted that historical evidence supports the proposition that “the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.”²⁸⁴ The legislature may do so, she added, “based on present-day judgments about categories of people whose possession of guns would endanger the public safety”²⁸⁵

The class of people barred by § 922(g)(8) is dangerous, and the danger they pose is significant.²⁸⁶ Many perpetrators of IPV have demonstrated a proclivity for violence. Data shows that “past abuse in a relationship is [both] the best predictor of future abuse and . . . the leading risk factor associated with [intimate partner homicide].”²⁸⁷ We know whose possession of guns would otherwise threaten public safety: “We therefore know who is likely to abuse an intimate partner and the circumstances that exist when abuse escalates to murder. We also know that guns are the most likely weapon to result in death.”²⁸⁸ Especially individuals like Rahimi, who was subject to a DV restraining order that included findings that he had committed “family violence,” that this violence was “likely to occur again,” and that he posed “a credible threat” to the “physical safety” of C.M. or the child—such individuals present a clear threat of physical violence to another and should be disarmed.

The Court could have substantially enriched its analysis of the historical dangerousness analogues and discussion of surety laws and “going armed” affray laws with the wealth of data about the dangerousness of IPV abusers and the multiplying dangerousness effect of the use of firearms in IPV.²⁸⁹ The science in this area is abundant and clear. First, victims of domestic violence are in heightened danger when their abusive partners have access to firearms. Many cases of IPV do not make it into the criminal legal system

²⁸³ *Id.* at 698.

²⁸⁴ *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by* N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen, 597 U.S. 1 (2022).

²⁸⁵ *Id.* at 464 (Barrett, J., dissenting), *abrogated by* N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen, 597 U.S. 1 (2022).

²⁸⁶ Kelly Roskam et al., *The Case for Domestic Violence Protective Order Firearm Prohibitions Under Bruen*, 51 FORDHAM URB. L.J. 221, 224 (2023).

²⁸⁷ Nanasi, *supra* note 46, at 606–07 (citing April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers’ Access to Guns*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 53, 56 (Daniel W. Webster et al. eds., 2013)).

²⁸⁸ *Id.* at 607.

²⁸⁹ *See id.* at 562–66.

until it is too late.²⁹⁰ Most women who are murdered in the United States are killed by an intimate partner, and more than half of those murders involve a firearm and take place in the home.²⁹¹ Second, gun laws targeting individuals who commit domestic violence save lives.²⁹²

Dangerousness also manifests in the prevalence and lethality of today's firearms, compared to the founding era. As Justice Sotomayor observed in *Rahimi*, there is no comparison between the ease of use of firearms today and the guns in the eighteenth century, which “took a long time to load, typically fired only one shot, and often misfired.”²⁹³ Moreover, firearm-involved domestic violence was rare during the founding era: “[f]amily and intimate partner homicides were extremely rare” between the seventeenth and nineteenth centuries, and very few murders of spouses were committed with firearms before the Civil War.²⁹⁴ This is not true today, where firearms are the most commonly used weapon in intimate partner homicide.²⁹⁵

In sum, the use of firearms in domestic violence is an urgent threat to the public,²⁹⁶ and firearms in the hands of perpetrators pose a unique danger.²⁹⁷ More so than in the founding era, it is critical to disarm dangerous domestic abusers.

B. A Nuanced Take on Self-Defense and the Home as the Core of the Second Amendment

Second, the Court could have similarly used what we know about IPV, firearms, and dangerousness for a more nuanced and inclusive discussion of the two proclaimed anchors of the Second Amendment—the home and self-defense.

The Supreme Court has proclaimed self-defense to be a “*central component* of the [Second Amendment] right,”²⁹⁸ and identified the home as “the place where the importance of the lawful defense of self, family, and property is most acute”²⁹⁹ The Court emphasizes that the Second Amendment protects the right of all law-abiding citizens to keep and bear

²⁹⁰ See *id.* A substantial number of perpetrators who committed IPV in the month before escalating to killing their intimate partner had not yet entered the criminal legal system. Fan, *supra* note 52, at 172.

²⁹¹ See Nanasi, *supra* note 46, at 562–66.

²⁹² *Id.* at 607.

²⁹³ United States v. Rahimi, 602 U.S. 680, 704 (2024) (Sotomayor, J., concurring).

²⁹⁴ Roskam et al., *supra* note 286, at 245–46 (citing research from RANDOLPH ROTH, AMERICAN HOMICIDE 108, 250 (2009)).

²⁹⁵ See Nanasi, *supra* note 46, at 562–66.

²⁹⁶ Roskam et al., *supra* note 286, at 246–49.

²⁹⁷ See Nanasi, *supra* note 46, at 562–66.

²⁹⁸ N.Y. St. Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 33 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 592, 599 (2008)) (emphasis in original).

²⁹⁹ District of Columbia v. Heller, 554 U.S. 570, 592, 599 (2008).

arms that are in common use for traditionally lawful purposes, including self-defense.³⁰⁰ The Court, however, “seems to equate the self-defense interest of the gun-owner with that of the household as a collective.”³⁰¹ As the dissent in *Heller* observed, “[i]f a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to . . . engage in acts of domestic violence.”³⁰² At a minimum, the *Rahimi* Court could have juxtaposed the focus of the Second Amendment on self-defense with the misuse of firearms by IPV perpetrators for explicitly non-defensive purposes.

For the Supreme Court, the paradigmatic threat against which the law-abiding citizen would self-defend with their firearm emerges from outside the home by intruders and other criminals. This paradigm reflects a gendered reading of threat,³⁰³ which the *Rahimi* Court could have unmasked. For women in the United States, “the primary threats of violence—including gun violence—come from *within* the home.”³⁰⁴ Intimate partners pose a greater threat than home invaders or strangers.³⁰⁵ This gendered perception of the paradigmatic threat and need for self-defense is intertwined with the public-private divide. Recall, for example, that in rejecting “going armed” affray laws as a historical analogue, Justice Thomas focused on the public nature of affrays (as opposed to the “private” nature of IPV in the home) and on the terrorizing of the broader public (as opposed to the often-female victim terrorized by her abusive male intimate partner).³⁰⁶ Although much of the gun debate focuses on public violence, gun violence in the United States is often much more “private,”³⁰⁷ with more than half of all firearms-related homicides occurring *within* the home.³⁰⁸

Finally, the *Rahimi* Court could have engaged in a critical analysis of the home to properly account for the intersection between guns and domestic violence.³⁰⁹ The sanctity of the home is uncontroversial and “has been embedded in our traditions since the origins of the Republic.”³¹⁰ It is

³⁰⁰ *Id.* at 624, 627, 635.

³⁰¹ Joseph Blocher & Maisie Wilson, *Living with Guns: Legal and Constitutional Considerations for Those Cohabiting with Temporarily Prohibited Possessors*, 35 J. AM. ACAD. MATRIM. L. 47, 51 (2022).

³⁰² *Heller*, 554 U.S. at 711 (Breyer, J., dissenting) (citing Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Petitioner, 27) (stating that handguns are prevalent in domestic violence).

³⁰³ Blocher & Wilson, *supra* note 301, at 55–56.

³⁰⁴ *Id.* at 55. See *supra* Part I.

³⁰⁵ *Id.* at 55–56.

³⁰⁶ *United States v. Rahimi*, 602 U.S. 680, 747–78 (2024) (Thomas, J., dissenting).

³⁰⁷ Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 DUKE J. GENDER L. & POL’Y 45, 46 (2020).

³⁰⁸ See *supra* Part I.B.

³⁰⁹ Blocher, *supra* note 307, at 46.

³¹⁰ *Payton v. New York*, 445 U.S. 573, 601 (1980). The phrase, a “man’s house is his castle” may have originated as long ago as the sixteenth century. *Id.* at 596. Long established traditions of the

perceived as a place that “fosters intimate relationships and allows family life to flourish.”³¹¹ The home is thought of as “a place of safety and physical comfort,”³¹² and idealized as a place of respite.³¹³ As previously discussed, for victims of IPV, most of whom are women, it is anything but; for victims of IPV, the home is not a safe place.³¹⁴ The availability of a firearm in the home can exacerbate the already significant risk that such IPV ends in murder.³¹⁵ In fact, insulating the home from public scrutiny has historically been a key contributing factor to the perpetuation of IPV with impunity.³¹⁶

Firearms possession in the “privacy” of the home “does *not* eliminate the potential danger of firearms use, and in fact . . . amplifies that risk for victims of intimate partner violence, who are trapped in a walled-off space with their perpetrator and a deadly weapon.”³¹⁷ By unmasking the often fatal consequences of “unfettered access to firearms for those with a history of perpetrating violence[,]” the *Rahimi* Court could have opened the door to reevaluating “the normative frame [courts] have typically utilized when discussing possession of firearms in the home.”³¹⁸

C. Nation’s Historical Tradition – Discarding What We Left Behind

The most glaring miss in the *Rahimi* decision was the lack of any attempt to apply a critical gaze to the nation’s historical tradition of firearm regulation as applicable to DV-related use of firearms. To contextualize and explain some of the perceived historical gaps and limitations of the historical analogues, the Court could have explicitly acknowledged that our history and our laws were built on various forms of gendered bigotry and exclusion of women from the polity. Unlike Justice Thomas’ claims, this would not point to the lack of analogous regulation of firearms in the hands of domestic abusers, resulting in striking down § 922(g)(8), but rather send an important

common law “afforded the home strong protection from government intrusion.” *Lange v. California*, 594 U.S. 295, 309 (2021).

³¹¹ Balos, *supra* note 31, at 90.

³¹² *Id.*

³¹³ See *Silverman v. United States*, 365 U.S. 505, at 511 n.4 (1961) (“A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.”).

³¹⁴ David K. Warren, *A Man’s Home Is His Castle, but It Has a Secret Dungeon: Domestic Violence Victims Need an Amendment to Florida’s All-Party Consent Law*, 69 FLA. L. REV. 223, 230, 232–33 (2017).

³¹⁵ See *supra* Part I.

³¹⁶ See *supra* Part III.

³¹⁷ Gemma Donofrio, Dobbs, Bruen, and Domestic Violence: Fewer Abortions, More Guns, and the Effects of Both on Survivors of Intimate Partner Violence, 102 N.C. L. REV. 699, 746 (2024).

³¹⁸ *Id.*

message that we should not rely “on the history that the Constitution left behind.”³¹⁹

Whether one agrees with Justice Thomas or with the Roberts majority on the “why” and “how” parallels (or lack thereof) between surety laws, going armed laws, and the prohibition under § 922(g)(8), it is evident that “[i]n the context of domestic violence prohibitions, the historical record is problematic to say the least.”³²⁰ Examples of disarming someone “accused or convicted of domestic violence” are “glaringly absent from the historical record.”³²¹ But this should not mean that § 922(g)(8) fails the *Bruen* inquiry. As Justice Sotomayor pointed out, “it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate.”³²² During oral argument, Justice Kagan echoed a similar point:

200 some years ago, the problem of domestic violence was conceived very differently. People had a different understanding of the harm. People had a different understanding of the right of government to try to prevent the harm. People had different understandings with respect to pretty much every aspect of the problem. So, if you're looking for a ban on domestic violence, it's not going to be there.³²³

A myopic search for founding-era bars on firearm possession by domestic abusers ignores “important differences in social norms surrounding women, marriage, and domestic violence.”³²⁴ Abusers historically enjoyed greater political power and power over the lives of their spouses. The *Rahimi* Court should have highlighted the history of women’s disenfranchisement and exclusion “that likely is the reason for the delay of firearm prohibitions that improve the lives of women.”³²⁵ Although violence against intimate partners has existed throughout history, the founding generations failed to acknowledge domestic violence as a problem. Not only was domestic violence not criminalized, but for a long time, it was actually considered the husband’s *right*, or at the very least, a private matter.³²⁶ Since law in the founding era more likely protected abusive husbands rather than holding them accountable and protecting their spouses, it is no wonder the founding era failed to disarm (or convict) domestic abusers and that there was no close

³¹⁹ United States v. Rahimi, 602 U.S. 680, 722 (2013) (Kavanaugh, J., concurring).

³²⁰ Blocher, *supra* note 307, at 55.

³²¹ Fawcett, *supra* note 258, at 431.

³²² *Rahimi*, 602 U.S. at 704 (Sotomayor, J., concurring).

³²³ Conner Greene, *The Second Amendment's Domestic Violence Problem: How Rahimi Exposes the Flaws of Bruen's Problematic Historical Analogue Test*, 72 CLEV. ST. L. REV. 937, 960–61 (2024) (citing Kagan, J., Transcript of Oral Argument at 73, United States v. Rahimi, 602 U.S. 680, 680 (2024) (No. 22-915)).

³²⁴ Roskam et al., *supra* note 286, at 223.

³²⁵ Peña, *supra* note 85, at 179.

³²⁶ See *supra* Part III.

historical equivalent to § 922(g)(8).³²⁷ Consequently, this nation's historical tradition can only be understood in light of the relegation of women to second-class citizens and by accounting for the pervasive gender discrimination and exclusion.³²⁸ This is history that we left behind, and so should the Court.

CONCLUSION

Some may argue that discourse aside, the fact that the Supreme Court let section 988(g)(8) stand is critical. This Article does not dispute that. However, messaging and framing from the Court makes a difference. Immediately after *Bruen*, there were many challenges levied at lower federal and state courts, including resorting to times when the subordination of women and violence against women were condoned.³²⁹ *Rahimi* presented the Court with an opportunity to realign its history and tradition analysis with women's lives.

Keeping its holding and opinion as narrow as it did, the *Rahimi* Court nonetheless could have taken the opportunity to fulfill the promise of VAWA and join the other branches of the federal and state governments, and society at large, to actively advance the fight against IPV and violence against women more broadly. By continuing to erase women and their lived experiences from its jurisprudence, however, the *Rahimi* decision perpetuates women's marginalization and contributes to undermining efforts to address gender-based violence and the dynamics underlying intimate partner violence.³³⁰

³²⁷ *Rahimi*, 602 U.S. at 704 (Sotomayor, J., concurring) (citing Reva Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2154–70 (1996)).

³²⁸ Fawcett, *supra* note 258, at 432.

³²⁹ Federal courts adjudicated almost four hundred Second Amendment claims in the twelve months after *Bruen* was decided. See Charles, *supra* note 131, at 122.

³³⁰ See *supra* Part II.B.

ETHICAL DELIBERATIONS: REPRESENTING THE ACCUSED IN CIVIL CASES INVOLVING INTIMATE PARTNER AND DOMESTIC VIOLENCE

Dana Harrington Conner*

INTRODUCTION

*Society has always put limits on advocacy in civil litigation.*¹

This Article explores the representation of those accused of intimate partner violence (IPV) and domestic violence (DV)² in the civil context, as well as the professional duties that flow from the lawyer-client relationship.³ Resolving ethical questions that arise in the representation of the accused demands an understanding of how the two prevailing responses to intimate partner violence—criminal prosecution and civil protection—differ in purpose and outcome. Although ethical practice in these two distinct areas requires that the lawyer observe diverse legal protocols, one must also acknowledge the co-occurrence of criminal prosecution and civil protection that arises in cases involving intimate partner violence.⁴

Although all attorneys must abide by the rules of professional conduct, in civil cases the lawyer's role and duties differ in a few important ways. Not only are the lawyer's professional responsibilities distinct in the civil context, but the opportunities to do good are also worth exploring. This is not to suggest that the criminal defense attorney does not have special opportunities to benefit the client and society. This occurs in many ways, such as adversarial testing of the prosecution's case, upholding the U.S. Constitution, and client counseling pursuant to the American Bar Association's Model

* Professor of Law, Associate Dean of Experiential Learning, former Director of the Delaware Civil Law Clinic and Co-Director of the Family Health Law & Policy Institute at Widener University, Delaware Law School. This Article is based, in part, on thirty years of legal experience practicing and teaching in the area of intimate partner violence, as well as teaching legal ethics. The author wishes to thank Ashley Dorsey, Trevor Johnson, Madelyn Hayward, Haley Spiewak, and the entire staff of *SIU Law Journal* for their work in getting this Article ready for publication.

¹ Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381, 435 (2012).

² Intimate Partner Violence (IPV) and Domestic Violence (DV) are used interchangeably herein to refer to violence that occurs among adults in intimate and family relationships.

³ The term "civil context" herein applies to civil protection orders (CPO), civil motions for contempt of CPOs, child custody, divorce, and other civil ancillary matters before the family court.

⁴ See generally STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES, ABA COMM'N ON DOMESTIC VIOLENCE (2007).

Rules of Professional Conduct (hereinafter MRPC).⁵ Similarly, in civil cases there are opportunities to do justice flowing from the representation of the accused. For example, providing advice in keeping with the lawyer's duty of loyalty to the client may also benefit other individuals and society.

It is a widely accepted principle that, as a fiduciary, a lawyer owes a duty of loyalty and fidelity to their client.⁶ The comments to the MRPC provide that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."⁷ However, the scope of this duty and the constraints imposed by other ethical obligations can sometimes be difficult to reconcile. Throughout history, legal experts have debated whether the lawyer's role as a client representative or as an officer of the legal system is of greater importance.⁸ This historical debate reveals fundamentally different perspectives on the attorney's role—ranging from a hired gun to an officer of the court, or somewhere in between.⁹

Unsurprisingly, lawyers hold divergent views on their duties to clients, given that the law governing legal practices suggests attorneys serve multiple functions. The preamble to the MRPC reveals four distinct, and at times competing, roles that the lawyer must balance to uphold justice: client-representative, officer of the court, member of the profession, and public citizen.¹⁰

The MRPC acknowledges that problems may arise because of an attorney's conflicting responsibilities.¹¹ The preamble provides, "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."¹² Moreover, "[s]uch issues must be resolved through the exercise of sensitive

⁵ MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

⁶ *Id.* at r. 1.7 cmt. 1.

⁷ *Id.*; see also *id.* at r. 1.8 cmt. 5.

⁸ *Id.* at pmb. 1; see generally Brad Rudin & Betsy Hutchings, *Zealous Advocacy: A Doctrine Whose Time Has Passed?*, N.Y. BAR ASS'N (Aug. 20, 2024), <https://nysba.org/zealous-advocacy-a-doctrine-whose-time-has-passed/#~:text=While%20the%20adoption%20of%20the,the%20court%20is%20ever%20permissible>.

⁹ See generally Vincent Johnson, *Ethical Lawyering: The Role of Honor, Conscience, and Codes*, 13 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 172 (2023) (reviewing MICHAEL S. ARIENS, *THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS* (2023)); see also Rudin & Hutchings, *supra* note 8. "Proponents of zealous advocacy . . . minimize a lawyer's duty to the justice system and place a premium on zealous counsel's undivided loyalty to the client. The conflict between the two approaches has confounded lawyers for decades." In an article published over twenty-five years ago, lawyers, the author notes, "often feel torn by the tension between the duty of zealous advocacy and the duty to the larger system of justice . . ." And as recently as 2023, an article stated: "The 'competing conceptions' of lawyer as zealous advocate versus lawyer as officer of the court is a fundamental tension in legal ethics."

¹⁰ MODEL RULES OF PRO. CONDUCT pmb. 1 (AM. BAR ASS'N 2023).

¹¹ See *id.*

¹² *Id.* at pmb. 9.

professional and moral judgment guided by the basic principles underlying the [Model] Rules.”¹³

The MRPC emphasizes the lawyer’s obligation to balance their fiduciary duties to both the client and the legal system while acknowledging the challenges that arise when these duties conflict.¹⁴ However, they provide little guidance on how an attorney should determine which duty takes precedence in any given situation.

Managing these competing duties is no easy task for a lawyer whose primary role is to act as a client representative. For example, the MRPC mandate that a lawyer must abide by the client’s decisions regarding the objectives of the representation.¹⁵ In the criminal context, the lawyer must adhere to the client’s decision to accept a plea offer, waive a jury trial, testify, or file an appeal.¹⁶ In the civil context, the lawyer must abide by the client’s decision whether to take legal action or settle a matter.¹⁷ It is clear that the client’s objectives are solely within the client’s purview to decide. The lawyer may advise the client but also must defer to the client’s ultimate decision-making authority on all “ends” decisions.¹⁸ Yet, tactical decisions—the means by which the client’s goals are accomplished—have been deemed to fall primarily within the lawyer’s professional judgment.¹⁹ In both the civil

¹³ *Id.*; see also Johnson, *supra* note 9, at 176 n.8 (explaining that “ethical lawyering presents moral challenges involving the exercise of judgment, while indicating that making correct ethical decisions is necessary but often difficult”).

¹⁴ MODEL RULES OF PRO. CONDUCT pmbl. 9 (AM. BAR ASS’N 2023).

¹⁵ *Id.* at r. 1.2 cmt. 1.

¹⁶ *Id.* at r. 1.2(a).

¹⁷ *Id.*

¹⁸ “Ends” decisions are those decisions that relate directly to the client’s goals and thus are solely within the decision-making authority of the client. See Robert P. Burns & Steven Lubert, *Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist*, 2003 U. ILL. L. REV. 1275, 1288 (2003).

¹⁹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. e (AM. L. INST. 2012) (“A lawyer has authority to take any lawful measure within the scope of representation . . . that is reasonably calculated to advance a client’s objectives as defined by the client . . . unless there is a contrary agreement or instruction and unless a decision is reserved to the client . . . A lawyer, for example, may decide whether to move to dismiss a complaint and what discovery to pursue or resist. Absent a contrary agreement, instruction, or legal obligation . . . a lawyer thus remains free to exercise restraint, to accommodate reasonable requests of opposing counsel, and generally to conduct the representation in the same manner that the lawyer would recommend to other professional colleagues . . . Because a lawyer is required to consult with a client and report on the progress of the representation . . . a client ordinarily should be kept sufficiently aware of what is occurring to intervene in the representation with instructions as to important decisions. A lawyer often must make a decision without sufficient time to consult with the client. During a hearing, for example, decision must be made whether to object to another party’s question, probe further answers of a witness, or seek a curative instruction. Such matters often involve technical legal and strategic considerations difficult for a client to assess. Sometimes a lawyer cannot reach a client within the time during which a decision must be made. In the absence of a contrary agreement or instruction, lawyers have authority to make such decisions. Generally, in making such decisions, the lawyer properly takes into account moral considerations and appropriate courtroom and professional decorum.”).

and criminal contexts, lawyers must provide competent representation,²⁰ act with diligence,²¹ communicate appropriately,²² maintain confidentiality,²³ and provide representation free of conflicts.²⁴

Not only do the rules of professional conduct limit a lawyer's duty of loyalty, but so too do various laws defining the extent to which broader professional obligations are owed to the legal system and society.²⁵ For example, the scope of the lawyer's duty of loyalty to the client must be balanced with a responsibility for the quality of justice necessary to ensure a fair legal system.²⁶ In addition to these limits, there are special requirements that a lawyer must observe in certain practice settings, which is precisely where civil and criminal representation are dissimilar in some important respects. These differences may be the driving force behind some of the confusion lawyers experience as they evaluate their conflicting roles as client representatives, legal system officers, profession members, and public citizens.²⁷ The primary difference between civil and criminal practice is the restrictions on defending an action under particularized circumstances in the civil context, which are explored more in-depth in Parts I and II of this Article.

Many of the rules of professional conduct and the laws that guide the lawyer in representing the client reinforce the general principle that a lawyer's relationship with the client is unique.²⁸ For example, the attorney-client relationship is based on trust and confidence.²⁹ The client must be able to trust the lawyer and have confidence that the attorney will act in keeping with their duty of loyalty to the client.³⁰ Yet, societal views about defining loyalty are not necessarily consistent with a lawyer's duty of loyalty in legal

²⁰ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

²¹ *Id.* at r. 1.3.

²² *Id.* at r. 1.4.

²³ *Id.* at r. 1.6.

²⁴ *Id.* at r. 1.7–1.13.

²⁵ *Id.* at pmb. 9 (“In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living . . . such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”).

²⁶ *See id.* (“Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living”).

²⁷ *Id.* at pmb. 1.

²⁸ Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection and Domestic Violence*, 79 TEMP. L. REV. 877, 897 (2006).

²⁹ *Id.*

³⁰ *Id.*

practice.³¹ To a layperson, loyalty may imply steadfast faithfulness, which supersedes all other professional responsibilities.³² Additionally, a layperson may mistakenly believe that a lawyer will place the client's interests first, regardless of the circumstance and without restriction.³³ As a result, the client may not understand that the lawyer's duties are limited by the very rules that mandate loyalty and fidelity to the client.³⁴

Legal professionals must balance their duty of loyalty³⁵ with other professional obligations mandated by the ethical rules. Put simply, lawyers are legal professionals, not hired guns; the rules as a whole do not authorize such behavior despite its limited occurrence in legal practice.

This Article considers the representation of a client, in a civil case, who has committed an act or acts of IPV, not the innocent client. The examination is limited to circumstances without legal justification for the act of abuse, such as self-defense. Additionally, this Article narrows the focus to representation involving knowledge on the attorney's part that the client has committed an act of IPV that forms the basis for a petition for civil protection.

A lawyer's knowledge of the client's abusive acts arises in a variety of ways, such as: (1) an admission by the client that they committed an act of abuse; (2) a plea of guilty or criminal conviction against the client for an act at issue in the civil case; (3) a threat by the client to the lawyer to harm the adverse party; or (4) the lawyer's knowledge of substantial evidence that establishes the abuse has occurred.³⁶ However, this Article does not consider ethical dilemmas that arise when the lawyer is called upon to assess future risk of violence and determine if a disclosure may be necessary pursuant to MRPC 1.6(b)(1).³⁷

³¹ Rudin & Hutchings, *supra* note 8 (“[reciting] Brougham’s famous credo: [A]n advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means – to protect that client at all hazards and costs to all others, and among others to himself – is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other; nay, separating even the duties of a patriot from those of an advocate, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client.”).

³² See *Loyal*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/loyal> (last visited Feb. 1, 2025) (defining loyal as “unswerving in allegiance” and listing fidelity as a synonym); see also *Fidelity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fidelity> (last visited Feb. 1, 2025) (defining fidelity as “the quality or state of being faithful”).

³³ See generally THOMAS E. SPAHN, A PRACTITIONER’S SUMMARY GUIDE TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE (2013).

³⁴ See MODEL RULES OF PRO. CONDUCT pmb1. 9 (AM. BAR ASS’N 2023).

³⁵ See generally Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer’s Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447 (2006).

³⁶ The examples herein above of actual knowledge are not an exclusive list.

³⁷ For a consideration of the lawyer’s duty to engage in risk assessment, duty to warn, and potential for tort liability, see generally Buel & Drew, *supra* note 35.

The fourth category includes various opportunities to gain knowledge. For example, counsel for the accused may obtain access to a 911 call, body camera footage, text messages, emails, or other documents containing threats or admissions by the client to acts of abuse that form the basis for a protection order. A lawyer's knowledge may also be inferred from the circumstances.³⁸ Some lawyers may take the position that they do not need to know if their client has committed the act at issue or believe that such knowledge can hinder their ability to defend in the criminal context. This Article takes no position on those questions in the representation of a criminal defendant and solely seeks to explore these questions in civil cases. Part II explores why knowledge of culpability is critical at the advisory stage of representation in the civil context.³⁹

The foregoing examples do not comprise an exclusive list of circumstances in which a lawyer has knowledge that their client engaged in abuse. Instead, they illustrate some of the ways in which the lawyer may know or reasonably conclude that a client engaged in abusive behaviors to provide legal advice and representation in civil cases involving IPV. Once a lawyer has knowledge that the client committed an act or acts of IPV, the lawyer must decide how to proceed with the representation.

Although many rules regulate the practice of law, this Article focuses on a select few guidelines that control legal practice when a lawyer represents the accused in a civil case. In addition, this Article applies these guidelines to particularized civil practice settings, such as protection from abuse matters or child custody cases and how the lawyer's ethical duties in civil cases differ from the representation of the accused in the criminal context. This Article's primary focus is examining ethical dilemmas that arise in civil cases involving IPV when the lawyer represents the accused. Nevertheless, an analysis of the issues in light of the differences between criminal defense and the defense of the accused in a civil case is useful, given the proper course of action differs depending on the practice setting.

³⁸ MODEL RULES OF PRO. CONDUCT r. 1.0(f) (AM BAR ASS'N 2023).

³⁹ See *infra* Part II, Advisor to the Accused.

I. MERITORIOUS CLAIMS & CONTENTIONS

Part of the mythology of the adversary system is that litigating lawyers may file any claim and assert any position, so long as it is advantageous to a client. The reality is that rules of professional conduct, rules of procedure, and the law of malicious prosecution and abuse of process have always prohibited a lawyer from asserting frivolous claims and defenses.⁴⁰

Hypothetical:

Client meets with a lawyer regarding a new petition for civil protection that a long-term intimate partner and co-parent of their two children, Survivor (the adverse party), filed against Client. Survivor asserts in the petition for civil protection that Client punched, kicked, and sexually assaulted Survivor two months ago, threatened to kill Survivor a week ago, and has engaged in a course of alarming and distressing conduct for the past five years including, but not limited to, name-calling, controlling, monitoring, and stalking behaviors. Client was arrested two months ago for assault and admits to the attorney that the incidents occurred as Survivor detailed in the petition. Client also tells the lawyer that although Client threatened to kill Survivor last week, Client was just blowing off steam when the statement was made. As for the name-calling and controlling behaviors, Client simply states, “That is what happens when you live with someone that long.” Survivor requests the following relief in the petition: (1) no contact; (2) no abuse; (3) temporary physical and legal custody of the parties’ minor child (“Child” age two); (4) child support; (5) household support; and (6) temporary possession of the residence that is titled solely in Client’s name.

The Client asks the lawyer for advice.

This part of the Article analyzes the lawyer’s responsibilities when the accused client seeks to defend, assert, or controvert an issue without a legal or factual basis. The language of MRPC 3.1, particularly in the context of meritorious claims and contentions in civil matters, provides clear guidance on this issue.⁴¹ According to MRPC 3.1, “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous”⁴² An important exception to MRPC 3.1, relating to the representation of a criminal defendant in a criminal proceeding or a respondent in a proceeding that could result in incarceration, allows the criminal defense attorney to subject the

⁴⁰ GEOFFREY C. HAZARD ET AL., THE LAW OF LAWYERING 30–33 (2015).

⁴¹ See MODEL RULES OF PRO. CONDUCT r. 3.1 (AM BAR ASS’N 2023).

⁴² *Id.*

prosecution's case to adversarial testing.⁴³ A petition for a civil protection from abuse order does not fall within the first part of the exception to MRPC 3.1, as it is not a criminal proceeding.⁴⁴ The second part of the exception, "a proceeding that could result in incarceration" requires deeper analysis.⁴⁵ Although a violation of a civil protection order may result in incarceration, the initial filing and proceeding to obtain a civil protection order carries no risk of incarceration, even if the law defines the respondent's actions as abuse.⁴⁶

The basis for the mandatory provision of MRPC 3.1—that a lawyer shall not bring or defend a proceeding or assert an issue with no basis in law and fact—is evident.⁴⁷ Our legal system is interested in discouraging abuse of the legal process. The lawyer, as gatekeeper and officer of the court, has a duty to avoid such misuse and aid the system with its fundamental duty to ensure that justice is served, with a limited exception applying only to the criminal context or cases that could result in incarceration.

The mandate that a lawyer shall not defend a proceeding or controvert an issue therein may be difficult to accept in an adversarial legal system. In a criminal proceeding, such a mandate is outweighed by the liberty interests of the defendant and the defendant's constitutional right to effective assistance of counsel.⁴⁸ Hence, a clear exception in criminal cases to the general rule not to defend a proceeding unless there is a basis in law and fact is appropriate. Legal experts agree that even when the criminal defense lawyer is unable to ascertain any legal or factual defense on behalf of a criminal defendant, they may "force the prosecutor to prove every component of the crime."⁴⁹

The limits on frivolous defenses in civil legal practice are equally compelling. The public policy goals that underpin the civil protection remedy are central to the ethical analysis. The foundation of this remedy, as an alternative to the criminal justice model, focuses on survivor safety, not

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *See Illinois Restraining Orders*, WOMENSLAW, <https://www.womenslaw.org/laws/il/restraining-orders/all> (last visited Feb. 10, 2025).

⁴⁷ *See* Kevin Frazier, *Practicing Law in the Age of AI Practice Guide: How to Integrate AI and Emerging Technology into Your Practice and Comply with Model Rule 3.1*, 25 MINN. J. L. SCI. & TECH. 67 (2024).

⁴⁸ *See* Tamara Walker, *Rectifying a Wrongs or Requiring Reticence? An Attorney's Duty of Client Confidentiality*, 58 U. CHI. L. REV. 441 (2024).

⁴⁹ *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY, A STUDENT'S GUIDE 746 (2011).

punishment of the accused.⁵⁰ The remedy is not intended to be punitive⁵¹ and carries no risk of incarceration or loss of liberty at the stage during which an order is entered. This is true of the vast majority of civil legal proceedings.⁵² The system aims to provide a remedy to those in need of relief and protection, with the ultimate goal being a search for the truth and the provision of justice when appropriate. As a result, lawyers handling civil legal matters, as officers of the court, are required to defend only when there is a legal basis to provide a defense. In fact, it is difficult to find another example in civil legal practice that so clearly suggests defense is not an option than the one analyzed herein. It is this limited circumstance—a civil case in which the lawyer knows that the client has committed the offense that forms the basis for the petition for protection from abuse—that this Article explores.

Furthermore, a lawyer has authority to restrict the use of certain evidence that the lawyer “reasonably believes to be false[,]” other than a criminal defendant’s testimony.⁵³ A client’s admission to the attorney that the client committed the acts of abuse at issue, as well as evidence of a client’s conviction or plea of guilty, constitutes actual knowledge on the part of the lawyer for the purposes of this exploration.

It is important to highlight this ethical distinction in civil cases. It is well-defined that a lawyer defending a respondent on a motion for contempt of a civil protective order (CPO) may defend regardless of knowledge on the part of the lawyer as to the culpability of the client if that proceeding may result in incarceration.⁵⁴ For other civil cases involving domestic abuse, the word “proceeding” must be considered.⁵⁵ A proceeding to decide whether to issue a protection from abuse order does not involve the possibility of incarceration, given the jurisdiction and authority of the court to grant specified relief pursuant to such a request. Yet, a respondent in a protection from abuse (PFA) proceeding who chooses to testify may make a statement that could be used in a subsequent criminal case that may result in incarceration.⁵⁶ The possibility of using the client’s statement in another

⁵⁰ Dana Harrington Conner, *Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations*, 24 TEMP. POL. & CIV. RTS. L. REV. 343, 360 (2015) (explaining that the civil protection system provides individuals who experience domestic abuse the promise of a process and legal remedy that is tremendously different from the criminal justice model. The focal point of civil protection is survivor safety, not punishment of the alleged perpetrator.).

⁵¹ *Id.* at 343.

⁵² One exception is involuntary commitment proceedings.

⁵³ MODEL RULES OF PRO. CONDUCT r 3.3(a)(3) (AM. BAR ASS’N 2023).

⁵⁴ *Id.* at r. 3.1.

⁵⁵ *Proceeding*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/proceeding> (last visited Jan. 29, 2025).

⁵⁶ See Mark Copoulos, *Philadelphia Protection From Abuse Lawyer*, MDC CIV. & CRIM. DEF. (May 14, 2024), <https://www.philacriminaldefenseattorney.com/legal-knowledge/protection-from-abuse-lawyer/> (discussing how anything you say in your defense at a PFA hearing may be used in trial in a criminal matter).

proceeding that could result in incarceration itself does not activate the exception to MRPC 3.1 (defense regardless of legal or factual basis).⁵⁷ However, it creates a duty to advise pursuant to MRPC 2.1.⁵⁸ The duty to advise includes a discussion about whether to testify in the civil case and if doing so could imperil the client in another legal proceeding, such as a parallel criminal prosecution.⁵⁹

This is why it is critical that the accused have a skilled and competent attorney who will advise the client regarding possible options as to the resolution of the CPO. As previously stated, it may be difficult for the lawyer and client to accept limits on defense if they believe our system truly is adversarial in nature and that a lawyer must defend a client regardless of the circumstances. However, such a view is inconsistent with an attorney's ethical duties in civil legal practice.

II. ADVISOR TO THE ACCUSED

*The right thing is the best thing for clients.*⁶⁰

This section considers the role of the lawyer as an advisor to the accused.⁶¹ Lawyers who represent individuals accused of committing acts of IPV, similar to lawyers who represent survivors of IPV, must possess a deep understanding of the law, dynamics of DV, psychology, and legal ethics.⁶² This knowledge base is the foundation upon which the lawyer engages in decision-making related to the representation of the accused in civil protection from abuse or child custody matters. Legal professionals have explored the foundational skills necessary for the practice of domestic violence law.⁶³ This Article moves beyond those foundational skills to explore competent and ethical advising when the client has committed an act or acts of abuse. Furthermore, this Article uncovers how advising a culpable client is materially different from advising a wrongfully accused client in the civil context.

⁵⁷ See MODEL RULES OF PRO. CONDUCT r 3.1 (AM. BAR ASS'N 2023) (explaining that criminal matters subject to potential incarceration fall under an exception to this general rule and allow attorneys to defend that action by requiring that each and every element be established).

⁵⁸ *Id.* at r. 2.1.

⁵⁹ *Id.* at r. 2.1 cmt. 5.

⁶⁰ Joseph Gitlin, *Real Ethics and Courtesy For Divorce Lawyers: Not All Ethical Rules Appear in the Rules of Professional Conduct. Here's Ethics Advice from a Family-Law Veteran*, 98 ILL. BAR J. 52 (Jan. 2010).

⁶¹ MODEL RULES OF PRO. CONDUCT r 2.1 (AM. BAR ASS'N 2023).

⁶² See generally ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, STANDARDS OF PRAC. FOR THE SUPERVISION OF DOMESTIC & SEXUAL VIOLENCE ATTORNEYS (2017) (discussing the best practices and professional standards for attorneys who handle domestic and sexual violence cases).

⁶³ See generally *id.*

At the outset, it is necessary to emphasize that professional conduct on the part of the lawyer in a civil case differs from that of a lawyer in the criminal context. The distinction is both relevant and important. The rules of professional conduct permit a criminal defense attorney to subject the prosecution's case to adversarial testing regardless of the guilt or innocence of the accused.⁶⁴ Moreover, the U.S. Constitution requires that a defendant receive effective assistance of counsel, regardless of guilt.⁶⁵ Yet, limits are placed on a lawyer in civil legal practice, which prohibits a lawyer from bringing a matter, defending a proceeding, or asserting or controverting an issue in that proceeding, unless there is a basis in law and fact.⁶⁶ This basic principle, related to meritorious claims and contentions, is explored fully in Part I of this Article. Understanding this fundamental principle is also important when providing legal advice within the bounds of ethical practice in civil cases. For example, suppose the lawyer is prohibited from defending against a civil protection from abuse claim because there is no basis in law and fact to do so. In that case, the lawyer must communicate all advice to the client regarding the representation in light of that prohibition.

Providing advice to a client who has committed abuse alleged in a petition for civil protection must be accomplished with care. First, the lawyer is required to provide candid advice regarding the client's proper course of action based on the law,⁶⁷ as well as the limits placed on the lawyer in handling the client's legal matter.⁶⁸ Provided the adverse party has standing to file the claim, there are no other legal impediments to that claim, and there is no basis upon which to defend the civil matter; the lawyer must advise the client accordingly.⁶⁹ This may be one of the most difficult concepts for clients and some lawyers to accept. Simply put, not every client has a right to defend a civil case.⁷⁰ Comment [1] to MRPC 2.1 acknowledges the difficulties faced by the lawyer when providing such candid advice:

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer

⁶⁴ See MODEL RULES OF PRO. CONDUCT r 3.1 (AM. BAR ASS'N 2023) ("A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."); see also *id.* at r. 3.1 cmt. 3 ("The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.").

⁶⁵ U.S. CONST. amend. VI.

⁶⁶ MODEL RULES OF PRO. CONDUCT r 3.1 (AM. BAR ASS'N 2023).

⁶⁷ *Id.* at r. 2.1.

⁶⁸ Lawyers must comply with all rules of professional conduct. See *id.* at r. 8.4(a).

⁶⁹ See *id.* at r. 3.1 (explaining how a lawyer cannot bring or defend issues unless there is a basis in law and fact).

⁷⁰ *Id.*

endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.⁷¹

Providing candid advice is not optional; the rule mandates that the lawyer comply with this professional duty.⁷² Yet, a large majority of individuals may believe that the American legal system permits a legal defense in all circumstances. Likewise, many may also assume that the defense of the client is always an ethical option for a lawyer regardless of the legal context within which the case exists. These viewpoints are unfounded in limited circumstances within the civil legal setting.

Deciding how best to communicate advice to someone who has no defense and limited options regarding a resolution of the legal matter is challenging. Yet, the lawyer has a mandatory obligation to render candid advice pursuant to the rules of professional conduct.⁷³ This is not a permissive undertaking that the lawyer may freely disregard. As a result, the lawyer must tell the client that no valid legal defense exists and what influence that lack of defense has on the representation moving forward.⁷⁴ The lawyer must advise the client that the lawyer may not assist the client in defending the action in a court proceeding or any pleadings filed with the court.⁷⁵

The lawyer may, however, provide the client with options given the lack of a defense in the case.⁷⁶ For example, in a CPO case the accused client may seek a second opinion from another lawyer, engage in self-representation, or consent to an order of protection from abuse.⁷⁷ If the client chooses to consent to an order of protection, the lawyer may negotiate a settlement agreement and represent the client in a court proceeding for the entry of an order by consent.⁷⁸ In some jurisdictions, consent to the entry of an order against the client allows the lawyer to continue to represent the client through the provision of legal advice, mediation, or negotiated settlement, as well as

⁷¹ *Id.* at r. 2.1 cmt. 1.

⁷² *Id.* at r. 2.1 (“[A] lawyer shall exercise independent professional judgement and render candid advice.”).

⁷³ *Id.*

⁷⁴ MODEL RULES OF PRO. CONDUCT r. 1.4(a)(5) (AM. BAR ASS’N 2023) (“A lawyer shall . . . consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”).

⁷⁵ *Id.* at r. 2.1 cmt. 1 (“A client is entitled to straightforward advice expressing the lawyer’s honest assessment.”); *Id.* at r. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . .”).

⁷⁶ *Id.* at r. 2.1 (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

⁷⁷ *Id.* at r. 4.2 cmt. 4 (“This Rule does not . . . preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.”).

⁷⁸ *Id.* at r. 1.2(a) (“[A] lawyer shall abide by a client’s decision whether to settle a matter.”).

representation at the court proceeding on the entry of that agreement.⁷⁹ In fact, none of those actions on the part of the lawyer would violate the ethical rules. In some jurisdictions, the entry of an order of protection by consent is not an admission of guilt or culpability.⁸⁰ This is an important factor when advising the client, as a consent order under these circumstances cannot serve as proof of abuse in future civil proceedings, such as a child custody determination.⁸¹

Yet, other jurisdictions require an admission of culpability or a finding by the court for the entry of a permanent order of civil protection.⁸² In such circumstances, the lawyer must properly advise the client that the admission or finding could be used as proof of abuse in other civil proceedings before the court. Furthermore, regardless of the policies and procedures of a particular jurisdiction as to admissions or a finding of culpability for the entry of a court order, a petitioner is not ordinarily required to accept a settlement offer in a civil protection from abuse case.⁸³

For example, the Delaware Family Court addressed the rights and interests of battered persons, as well as how to best promote survivor autonomy and decision-making authority in *Pastre v. Jarman*.⁸⁴ In *Pastre v. Jarman*, the issue before the court was “whether a Consent Order of Protection [f]rom Abuse should be entered when the Petitioner requests that the matter proceed to a hearing,” when the accused is offering to consent to an order.⁸⁵ In that case, the accused agreed to have an order of protection entered against him by consent agreement and all relief requested by the petitioner.⁸⁶ Nevertheless, the petitioner did not want to enter into a consent agreement, seeking a full hearing on the merits.⁸⁷ The presiding Commissioner denied the survivor’s request for a hearing based partly on the accused’s willingness to enter into a settlement agreement.⁸⁸ On review, the court found that “to allow the respondent to make the unilateral choice of whether a hearing goes forward would put the State of Delaware in the position of enabling the alleged abuser to remain in control of the petitioner[—]a social problem the Protection [f]rom Abuse Act was

⁷⁹ For example, in the State of Delaware a civil protection from abuse order can be entered by consent of the parties without a hearing on the matter and without a finding or admission of abuse. *Understanding the Protection from Abuse Process*, DEL. CTS., <https://courts.delaware.gov/family/pfa/index.aspx> (last visited Feb. 7, 2025).

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *Preparing for the Domestic Violence Final Restraining Order Hearing*, N.J. JUDICIARY (June 16, 2022), https://www.njcourts.gov/sites/default/files/forms/12751_prepare_dvtro_hearing.pdf.

⁸³ *See generally* *Pastre v. Jarman*, CS95-4112 (Del. Fam Ct. Oct. 24, 1995).

⁸⁴ *See generally id.* at 1.

⁸⁵ *Id.*

⁸⁶ *Id.* at 2.

⁸⁷ *Id.*

⁸⁸ *Id.* at 3.

specifically designed to address.”⁸⁹ The decision in *Pastre v. Jarman* establishes power-equity in the legal context.

Despite such a positive legal outcome for survivors, this can complicate matters for an attorney representing the accused when the lawyer cannot secure an agreement for the accused before trial.⁹⁰ If the lawyer cannot defend the matter in court without violating ethical rules, and the adverse party rejects the offer to consent, the lawyer must cease representation or risk an ethical violation.⁹¹ Withdrawal is likely mandatory, as continuing representation would breach the rules of professional conduct.⁹²

Conversely, if both parties are willing to enter into a settlement agreement and the entry of an order by consent, counsel for the accused would not be required to withdraw.⁹³ Representation under these circumstances could enable the lawyer to provide critical advice regarding the adverse party’s requested relief as part of a consent agreement, which may include restrictions regarding contact, abuse, and firearms.⁹⁴ Moreover, many jurisdictions provide the opportunity for temporary relief to survivors of intimate partner violence in the form of financial support, child custody, possession of a residence, compensation for losses suffered as a direct result of abuse, counseling, or other relief necessary to prevent the likelihood of future acts of abuse.⁹⁵ These provisions of a CPO are part of a fully enforceable court order. Advising the accused about the consequences of violating the CPO is an important part of the lawyer’s role as a legal adviser. For example, the client’s understanding that a violation can result in fines, arrest, prosecution, and the possibility of incarceration is critical to ensuring that the client complies with the order. Other benefits may also flow from compliance, such as rehabilitation, decreased likelihood of recidivism, and survivor safety.⁹⁶

Although the first part of MRPC 2.1 is mandatory, the permissive second portion may play the most significant role in client counseling.⁹⁷ To what extent should an attorney address the social, personal, or moral aspects of entering into a consent CPO? Family law, especially domestic violence,

⁸⁹ *Id.* at 4–5.

⁹⁰ Based on the author’s thirty years of handling protection from abuse cases in the family court.

⁹¹ MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS’N 2023).

⁹² *Id.* at r. 1.16(a)(1).

⁹³ See generally *id.* at r. 1.16.

⁹⁴ ABA COMM’N ON DOMESTIC & SEXUAL ASSAULT, DOMESTIC VIOLENCE CIVIL PROTECTION ORDER (CPO) (2020), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/charts/cpo2020.pdf.

⁹⁵ *Id.*

⁹⁶ See *id.*

⁹⁷ MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR. ASS’N 2023) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

intertwines with issues and outcomes that extend beyond the law. Moreover, it is in keeping with the obligations set forth in the rule that the lawyer provides honest and competent advice.⁹⁸

It is up to the lawyer whether to engage in a discussion about the moral and social implications of the client's choices in relation to their legal advice.⁹⁹ The following are examples of how a lawyer could engage in a dialogue with a client about provisions and relief that could be included in an order for protection.

No Contact & No Abuse:

You may want to consider agreeing to the entry of a protection from abuse order against you because you have advised me that you have committed acts of domestic violence. I am unable to defend you in a court proceeding or legal pleading if you intend to contest an allegation of abuse. The rules of professional conduct do not allow me to defend a proceeding or controvert an issue therein unless such defense is based in law and fact. I can, however, assist you in a consent agreement and the entry of such an agreement in court on the record.

Child Support:

The adverse party has requested that you pay \$500.00 per month in child support. You may want to agree to that request for the following reasons: (1) that is the amount that will likely be ordered by the court to pay based upon your income and expenses, and (2) it is your legal obligation to support your children. The petitioner in this action may also file a petition for child support in a separate action with this court that will result in a more permanent order for child support.

Housing:

The petitioner has requested sole possession of your residence for the next twelve months. You may want to consider agreeing to this request or make a counteroffer to pay the petitioner's rent given the court's authority to grant the petitioner sole possession of the residence, if the court makes a finding of abuse. Because you have advised me that you have committed the acts of abuse alleged in the petition, it may be reasonable to provide housing to the petitioner and your children. Otherwise, they could become homeless.

⁹⁸ *Id.* at r. 1.1.

⁹⁹ *See generally id.*

Moreover, in the event that the court makes a finding of abuse, it is unlikely that the court will allow the petitioner and your children to become homeless.

Treatment & Evaluation:

*The petitioner has requested that you undergo evaluations for battering and substance abuse, and treatment if deemed necessary. You should seriously consider engaging in substance abuse treatment because you have admitted you have a drinking problem. You should also consider undergoing an evaluation and treatment for domestic violence by a certified counseling and intervention program because you have admitted to abusing the petitioner.*¹⁰⁰

Further, successfully engaging in treatment could help you to change your behavior and your changed behavior could lead to better outcomes for your children. Moreover, the court will consider evidence of your successful treatment at subsequent hearings on child custody and visitation, which could result in increased access to and involvement with your children.

Weapons:

Whether an order is entered against you by consent or by a finding of abuse, you may want to consider relinquishing your weapons. Once you have received counseling and the order has expired or is lifted, you may be able to seek the return of your firearm.

Pursuant to MRPC 2.1, the lawyer has broad authority when advising a client.¹⁰¹ For instance, regarding a return of firearms once the order has expired, the lawyer can discuss the risks of possessing firearms, even if the return is allowed. In providing candid advice, the lawyer may consider factors beyond the law.¹⁰² Furthermore, the duty to advise ties into the attorney's primary duty of competence.¹⁰³ A discussion about firearm possession aligns with the second part of MRPC 2.1, which permits the lawyer to address outcomes that connect to but extend beyond the law, such as the risks associated with possessing firearms.¹⁰⁴

The comments to MRPC 2.1 acknowledge that advice given in "narrow legal terms may be of little value to a client, especially where practical

¹⁰⁰ The dialogue is based on a particular set of facts. The advice must be tailored to the facts of the cases and the admissions the client has made to the lawyer.

¹⁰¹ MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

¹⁰² *Id.*

¹⁰³ *Id.* at r. 1.1.

¹⁰⁴ *Id.* at r. 2.1.

considerations, such as costs or effects on other people, are predominant.”¹⁰⁵ To state the obvious, firearm possession can lead to significant and potentially deadly consequences. For example, a child could obtain access to the weapon at issue, even when a parent puts in place safety measures, and accidentally discharge the firearm, suffering injury or causing injury or death to another. The discussion should focus on the risks of firearm possession when children live in or visit a residence where firearms are stored. There is no need to discuss political views regarding the use or possession of firearms; safety considerations are all that are necessary.¹⁰⁶

The risks of possessing firearms are not limited to child access but also extend to other dangers when family matters are at issue. For the accused who has yet to undergo an evaluation or engagement with counseling, access to weapons can end in death or criminal charges.¹⁰⁷ It is difficult to predict who is at risk of lethality.¹⁰⁸ Death of the abused partner, children, bystanders, law enforcement officers, the accused, or other individuals is not outside the realm of possibilities.¹⁰⁹ Arrest, prosecution, and additional family trauma also flow from harm. If the accused uses a weapon to threaten, intimidate, or harm another, the possibility of arrest, prosecution, and incarceration increases. Should this occur, the chances of trauma to the children, as well as other individuals, increase and are life-altering.¹¹⁰ Trauma to children could arise when the children have been exposed to the arrest of a parent, have lost one parent to domestic homicide and the other to incarceration for the commission of that homicide, or who have experienced a near-death incident.¹¹¹ This potential for risk of harm, death, arrest, prosecution, or family trauma should not be discounted in cases involving IPV. As a result, a discussion of the risks of possessing firearms and its effect

¹⁰⁵ *Id.* at r. 2.1 cmt. 2.

¹⁰⁶ Commentary by the lawyer on his or her personal or political views about the right to bear arms is beyond the scope of this Article.

¹⁰⁷ See generally Harrington Conner, *supra* note 28, at 916–23.

¹⁰⁸ See generally *id.*

¹⁰⁹ See generally *id.*; see also David M. Studdert et al., *Homicide Deaths Among Adult Cohabitants of Handgun Owners in California, 2004 to 2016: A Cohort Study*, *Annals of Internal Med.* 175, 804–11 (2022), <https://www.acpjournals.org/doi/10.7326/M21-3762>.

¹¹⁰ See Yvonne Humenay Roberts et al., *Children exposed to the arrest of a family member: Associations with mental health*, 23 J. CHILD & FAM. STUD. 214, 214 (2014) (“It is estimated that two out of every five children aged 2 years and above whose parents have been arrested have clinically significant emotional and behavioral problems, about twice the rate of children in the general population; however, only about one in ten receive mental health services.”) (citation omitted); see also *id.* (“Studies that have examined arrest exposure have found that children who are exposed to arrest are significantly more likely to have been the victims of and witnesses to a broader range of violent and nonviolent crimes in their homes (e.g., physical abuse, drug dealing)”) (citations omitted). “Children who are exposed to arrest . . . have a greater likelihood of developing serious problems than do children who parents don’t have a history of arrest.” *Id.* (citation omitted).

¹¹¹ See generally *id.*

on others is justified for lawyers who represent the accused. Engaging in such discussions is a matter of professional competency.¹¹²

Legal experts have considered lawyer disclosure when a client poses a risk of harm to their intimate partner. For example, Sarah Buel and Margaret Drew consider a domestic practice lawyer's duty to assess the risk of harm and disclose when their client poses a danger in order to prevent death or substantial bodily harm.¹¹³ Buel and Drew endorse tort liability for lawyers who fail to engage in risk assessment and make disclosures when necessary. When a client threatens to harm another individual, the path to disclosure for the protection of others is made easier pursuant to the rules of professional conduct.¹¹⁴ Disclosure determinations are more difficult when a threat has not been made but risk factors exist.¹¹⁵ As expert Dr. Henry J. Steadman acknowledges, it is difficult to accurately predict something that does not occur often.¹¹⁶ The occurrence of DV is high,¹¹⁷ yet the occurrence of domestic homicide is low.¹¹⁸ What is the lawyer expected to predict, the possibility of recidivism or homicide, to determine disclosure options? It may be as difficult as trying to find a needle in a haystack that also contains razor blades. Could someone suffer injury or serious bodily injury, be killed, or will no harm occur? Consequently, the lawyer must treat every case involving IPV as though it is going to end in a homicide even though the statistics suggest domestic homicide is generally not a likely outcome. Proceeding with caution and in keeping with the highest level of safety is always the best course of action when there are known risks and the outcomes are difficult to predict. One homicide is one too many.

When disclosure does little to reduce the risk of harm and may increase the risk to a survivor, it can be challenging for defense counsel to determine how to proceed with the representation, if at all. However, representing the accused and providing sound advice may be the best safety measure, reducing the potential for physical harm or emotional trauma to the adult victim, the children, and the accused client.

Closely related to discussions about firearms is advising a client who seeks contact with a child in circumstances that present a risk of harm to the adult victim or the children. Providing advice in these situations can be

¹¹² MODEL RULES OF PRO. CONDUCT r. 1.1. (AM. BAR ASS'N 2023).

¹¹³ See generally Buel & Drew, *supra* note 35.

¹¹⁴ *Id.* at 454–57; see also MODEL RULES OF PRO. CONDUCT r. 1.6 (b)(1) (AM. BAR. ASS'N 2023).

¹¹⁵ Buel & Drew, *supra* note 35, at 470–71.

¹¹⁶ Adele Bernhard et al., *Parallels in Predicting Dangerousness – What Price Security?*, 20 PACE L. REV. 315, 321 (2000).

¹¹⁷ *Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> (last visited Feb. 10, 2025) (“An average of 24 people per minute are victims of rape, physical violence or stalking by an intimate partner in the United States—more than 12 million women and men over the course of a single year.”).

¹¹⁸ NEIL WEBSDALE, *LETHALITY ASSESSMENT TOOLS: A CRITICAL ANALYSIS 1* (2000) (indicating that “fewer than one percent of battered women are killed by their intimate partners”).

complex. Discussions about agreeing to requests for safety measures may be appropriate. It is not disloyal to the client to explain what the law allows and what is reasonable under a particularized set of circumstances.

Access in the context of child custody and contact¹¹⁹ orders between non-custodial parents and their children that include physical access to the child or the adult victim, such as lifting or altering a stay-away order, come with added risks. Carveouts for the purposes of curbside pick-up or drop-off of the children are common. Yet, access by these and other means such as email, text message, or other forms of communication can present a risk of harm—the power to control—¹²⁰or increased trauma to the survivors. Hypervigilance, stress, and ongoing trauma can be very harmful to both the adult victim and the children.¹²¹ As a result, educating the accused about the harms they are continuing to inflict, even if unintentional, may be necessary, but in a way that does not encourage the power to control.

Practicing family law—at its core—is about supporting families. As such, it is not disloyal to the client to discuss a responsibility on the client's part to aid in the healing of every family member. This duty has little and in many cases nothing to do with actual aid to another but instead the client's need for healing that can increase the likelihood that others, such as the adult victim and the children, may heal as well. Simply explaining the importance of undergoing treatment, surrendering firearms, and complying with the provisions of a civil protection order may be the most impactful advice a lawyer can provide. Such advice will not only help the client but could also increase the likelihood of better health and safety outcomes for the family and society.¹²²

¹¹⁹ The term “contact” is used interchangeably with the term “visitation” as it relates to court orders regarding the non-custodial parent's interactions with their children.

¹²⁰ See Dana Harrington Conner, *Financial Freedom: Women, Money & Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 356–58 (2014) (explaining how survivors of intimate partner violence will be prevented from leaving the relationship because of several factors such as “risk of harm, social factors, law enforcement response, system's response, economic dependence, homelessness, and poverty.”)

¹²¹ See generally Dana Harrington Conner, *Polyvictimized Children & Intimate Partner Violence: Promoting Healthy Outcomes for Children*, 22 WIDENER L. REV. 215 (2016).

¹²² See generally *id.*

III. FRIVOLOUS DISCOVERY PRACTICES DESIGNED TO INTIMIDATE OR HARASS

*The risk of civil discovery intimidating a victim is . . . particularly high where the victim is . . . in trauma, or otherwise emotionally or psychologically vulnerable.*¹²³

*For many this feels like yet another victimization . . .*¹²⁴

It is paramount that a lawyer provides competent and diligent representation to the client. And yet, as discussed herein, the rules acknowledge that a lawyer must comply with the rules of professional conduct and is “not bound . . . to press for every advantage that might be realized for the client.”¹²⁵ To ensure that lawyers understand that legal practice is not without limits, the authors of the MRPC removed all references to “zealous advocacy” from the rules and replaced it with the term “diligent.”¹²⁶

With restraint in particularized circumstances in mind, discovery in CPO cases requires consideration when the attorney knows the client has committed the act or acts of abuse that form the basis for a petition. In fact, an attorney for the accused may be subject to disciplinary action if they engage in formal discovery when they know there is no basis upon which to defend the action.¹²⁷

A lawyer is duty-bound under the rules of professional conduct to avoid assisting their client in a crime.¹²⁸ Pursuant to MRPC 1.2(d), “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”¹²⁹ Criminal behavior is easy to recognize while behavior prejudicial to the administration of justice is often much more difficult to identify.¹³⁰ Determining when representation crosses the line from diligence to abuse of the legal system through discovery practices can be difficult, both from the perspectives of the disciplinary authority and the practicing attorney. First, disciplinary authorities can rarely uncover the lawyer’s motivation for discovery when based on confidential

¹²³ PROTECTING CRIME VICTIMS FROM DISCOVERY REQUESTS IN CIVIL PROCEEDING DURING THE PENDENCY OF A RELATED CRIMINAL CASE, *supra* note 164, at 4–5.

¹²⁴ *Id.* at 2.

¹²⁵ MODEL RULES OF PRO. CONDUCT r. 1.3, cmt. 1 (AM. BAR ASS’N 2023).

¹²⁶ Rudin & Hutchings, *supra* note 8.

¹²⁷ MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2023).

¹²⁸ *Id.* at r. 1.2(d).

¹²⁹ *Id.*

¹³⁰ *See id.* at r. 8.4(d) cmt 1–2.

communications between a lawyer and their client.¹³¹ Second, for a lawyer who views their role as a zealous advocate, discovery may be perceived as a logical and necessary part of providing competent representation to the accused.¹³² Determining whether representation crosses the line is critical to preventing discovery that constitutes harassment or intimidation.¹³³ In short, if a deposition does not serve a legitimate legal purpose, the lawyer has crossed the line.

For example, if the accused admits to committing an act of abuse without legal justification, competent advice must include counseling the client to consent to a civil order of protection. In such an instance, counsel must avoid the use of discovery.¹³⁴ Several disciplinary rules may apply if the lawyer engages in discovery. Principally, engaging in frivolous discovery requests violates MRPC 3.4(d).¹³⁵ Additionally, the act may also be deemed to be deceitful conduct under MRPC 8.4(c)¹³⁶ or prejudicial to the administration of justice pursuant to MRPC 8.4(d).¹³⁷ The ethical rules also provide guidance in the comments to MRPC 1.3, which state that “[t]he lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude treating all persons involved in the legal process with courtesy and respect.”¹³⁸

The overarching goal of the CPO is to put in place protective measures “at the earliest stage possible to stop the abuse”¹³⁹ to ensure no further risk of harm to the survivor and to eliminate the abuser’s power to control. This unique protective measure aims to be holistic.¹⁴⁰ It serves as the first stage and most expedited civil legal response to DV. Moreover, it provides remedies criminal prosecution does not afford, such as child custody,

¹³¹ *What to Know About Attorney-Client Privilege During Discovery*, DAVIS LAW GROUP, [https://www.dlgva.com/what-to-know-about-attorney-client-privilege-during-discovery/#:~:text=The%20attorney%20client%20privilege%20protects,the%20privilege%20could%20be%20waive d.\(last visited Mar. 6, 2025\)](https://www.dlgva.com/what-to-know-about-attorney-client-privilege-during-discovery/#:~:text=The%20attorney%20client%20privilege%20protects,the%20privilege%20could%20be%20waive d.(last%20visited%20Mar.%206,%202025)%20(Any%20communications%20subject%20to%20the%20attorney-client%20privilege%20are%20protected%20from%20disclosure%20during%20discovery.)) (“Any communications subject to the attorney-client privilege are protected from disclosure during discovery.”).

¹³² *Deposition Misconduct and How to Prevent It*, NAEGELI DEPOSITION & TRIAL (Aug. 2, 2024), <https://www.naegeliusa.com/blog/deposition-misconduct-and-how-to-prevent-it> (stating that depositions are an “integral part” of the legal system).

¹³³ *Id.*

¹³⁴ *See* MODEL RULES OF PRO. CONDUCT r. 3.4(d) (AM. BAR ASS’N 2023).

¹³⁵ *Id.*

¹³⁶ *Id.* at r. 8.4(c).

¹³⁷ *Id.* at r. 8.4(d).

¹³⁸ *Id.* at r. 1.3(c) cmt. 1.

¹³⁹ *See* Harrington Conner, *supra* note 28, at 916–23.

¹⁴⁰ *See* Harrington Conner, *supra* note 50, at 343–44.

The CPO system provides the promise of a lower standard of proof, an expansive definition of abuse, ancillary relief, a curative measure not punitive in nature, and vests the survivor with legal decision-making authority. These special features are consistent with survivor safety, promoting the health and welfare of battered persons and their children, and responding to the complexities of intimate partner violence (“IPV”).

Id.

support, possession of a residence, and other civil relief.¹⁴¹ For good reason, a very short time frame exists between filing the petition for civil protection and scheduling a hearing.¹⁴² This protective measure is not conducive to discovery practices that could cause additional trauma to survivors by delaying this protective measure.¹⁴³

Certain forms of discovery, depositions in particular, present the greatest risk of harm to survivors of IPV and DV.¹⁴⁴ Moreover, in cases where there is no basis to defend the action, depositions may be one of the most egregious discovery devices for counsel to employ.¹⁴⁵ This is not only because depositions interfere with the intent and purpose of civil protection, which is to provide protective measures without delay and hardship,¹⁴⁶ but also because they can inflict harm to a depth that other forms of discovery do not reach. This discovery method is more likely to result in “retraumatization”¹⁴⁷ than other forms of discovery. Depositions are also highly problematic because of the “wide latitude” afforded to counsel administering a discovery deposition.¹⁴⁸ It is dissimilar to examining a

¹⁴¹ See Harrington Conner, *supra* note 28, at 916–23.

¹⁴² See DEL CODE ANN. tit. 10, § 1043(d) (2016) (providing that when an *ex parte* order has been entered, “a full hearing shall be held within 15 days. The Court may extend an *ex parte* order as needed, but not to exceed 30 days, to effectuate service of the order or where necessary to continue protection.”).

¹⁴³ See Harrington Conner, *supra* note 28, at 916–23.

¹⁴⁴ Northwest Justice Project, *Depositions in Criminal Cases: Tips for Victims and Witnesses*, WASH. L. HELP, <https://www.washingtonlawhelp.org/es/resource/depositions-in-criminal-cases-tips-for-victims-and-witnesses?lang=EN> (last visited Feb. 14, 2025). An exploration of the harms of discovery in CPO cases generally is beyond the scope of this Article. This Article focuses specifically on circumstances in which counsel for the accused is aware that the client has committed an act or acts of abuse that form the basis for the opposing party’s petition for protection.

¹⁴⁵ See generally *Depos v. Depos*, 704 A.2d 1049, 1052 (N.J. Super. 1997) (“[T]he court would expect that after undergoing a deposition, many victims would question their resolve to proceed. Because of the resulting delays, increase in expenses for victims, and the opportunity to attack the resolve of victims, it is not difficult to predict that the taking of depositions could quickly become the strategy of choice for defendants.”).

¹⁴⁶ Professors Cathy Zwolak Kilian and Dana Harrington Conner, motion drafting in the Delaware Civil Law Clinic (2024) (confidential records on file with the author).

¹⁴⁷ Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV 81, 84 (2020) (explaining that “few legal scholars have explored the retraumatization that occurs when survivors come forward and attempt to seek help through the legal system. This gap in the legal literature exists despite overwhelming scientific evidence that survivors experience retraumatization. Such retraumatization has been defined as negative treatment by third parties that the survivor experiences as additional trauma echoing the original IPV”).

¹⁴⁸ Robin R. Cockey, *Deposition Survival Kit*, 33 Md. BAR J. 54, 55 (2000) (“Yet another way a deposition differs from a trial—which will require some discussion—is in the latitude given the lawyer asking the questions. Again, everybody with a TV set knows that questions are permitted at trial only if they call for information that’s ‘relevant and material.’ But few lay people realize that, in a deposition, the door’s open much wider, and the interrogator can ask any question that might lead to evidence that’s relevant and material, even if it takes hours and hours to actually get there. Some witnesses find deposition fishing expeditions infuriating, and certainly some lawyers try to make them so . . .”).

witness during a court proceeding, which is subject to greater restrictions based on the rules of evidence and the protective presence and control of the trial judge.¹⁴⁹ And although counsel for the witness can object, the witness typically must answer the question anyway.¹⁵⁰ During a discovery deposition, counsel can explore subjects that might lead to relevant evidence, even if the questions are objectionable in court.¹⁵¹ As one expert explains, “once the deposition gets under way, clients will be pretty much on their own.”¹⁵² Such unrestricted leeway is ripe for abuse. Moreover, without a trial judge presiding, a deposition is more likely to be longer in duration than an in-court trial examination. Additionally, if counsel for the accused becomes confrontational or belligerent, the judge is not present to curtail this behavior in the moment. As a result, the witness may become distressed, “worn-down,”¹⁵³ and receive a distorted impression of how a trial examination will occur. Likewise, the survivor’s emotional condition will not improve by a subsequent rebuke of counsel by the presiding judge long after the deposition has ended.

Depositions are particularly problematic due to the increased risk of intimidation and harassment that can result from even receiving a notice of deposition.¹⁵⁴ This distress worsens the harm survivors already experience from the domestic violence incident. As a result, the survivor may feel overwhelmed and choose to voluntarily dismiss their petition.¹⁵⁵ Voluntary dismissals already occur frequently in cases involving no discovery due to the fear and intimidation a survivor may experience.¹⁵⁶ Adding the possibility

¹⁴⁹ *Id.* at 54 (“[Y]our client needs to understand there are a couple ways a deposition is different from a trial. The most obvious difference is there’s no judge in the deposition room, so any objections can’t be ruled on. Clients are invariably mystified by the way lawyers handle deposition objections, so you should warn your client that, though lawyers sometimes deal with such objections by picking up the phone and calling the judge, the more common approach is for the objection to be made, following which the client gives the answer anyway.”).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 56.

¹⁵² *Id.* at 54.

¹⁵³ See Robert J. Allison, *Depositions: Seeking Information in Family Law Cases*, NAMISH & LEWIS—FAMILY LAW (June 17, 2024), <https://www.naimishlewislaw.com/family-law/seeking-information-in-family-law-cases-depositions/> (explaining that depositions generally “may create emotional exhaustion in an already stressful situation”).

¹⁵⁴ See *Depos v. Depos*, 704 A.2d 1049, 1051 (N.J. Super. 1997) (explaining that depositions in particular are harmful because they interfere with the timely resolution of these matters, can be used to intimidate the survivor, increase expenses, and are inconsistent with addressing the power imbalance in domestic violence cases).

¹⁵⁵ See generally *id.* (explaining that it is not uncommon for a survivor to struggle to assist with their legal representation due to ongoing trauma).

¹⁵⁶ See DEL. DOMESTIC VIOLENCE COORDINATING COUNCIL, Annual Report 35 (2024) <https://dvcc.delaware.gov/wp-content/uploads/sites/87/2024/10/DVCC-FY24-Annual-Report-min.pdf> (stating that statewide civil protection orders are voluntarily dismissed at a rate of approximately 15.9%).

of a deposition controlled by the perpetrator or his counsel only increases the power imbalance and the possibility that a survivor will simply give up.

Depositions serve many purposes.¹⁵⁷ The lawyer conducting the deposition seeks, among other things, to uncover inconsistencies that may harm the witness at trial.¹⁵⁸ However, some attorneys use depositions as a tactic, knowing that victims of DV often fail to appear.¹⁵⁹ When the survivor misses the deposition, the other party may file a motion in limine to “block the survivor’s trial testimony”¹⁶⁰ potentially leading to the dismissal of the action. This is particularly concerning when a notice of deposition eliminates a CPO with legal validity in both law and fact, under circumstances without legal justification to defend the action.

An ideal way to avoid the misuse of depositions in CPO cases is to ban their use altogether. Alternatively, implementing safety measures to reduce trauma and eliminate the power imbalance flowing from out-of-court depositions would be an ideal start. First, depositions could be replaced by interrogatories or pre-submitted questions by counsel for the accused. This would eliminate the stress of undergoing an examination controlled by the accused or their lawyer. Moreover, if a judge orders a deposition under extraordinary circumstances, it should occur in court, administered by a judge, commissioner, or special master. These protections, however, do not relieve an attorney from their ethical responsibilities. Accordingly, counsel must not seek to depose a survivor of domestic abuse when there is no legal basis to defend the action.

¹⁵⁷ See *Legal Information*, WOMENSLAW, <https://www.womenslaw.org/laws/preparing-court-yourself/trial/depositions/how-can-depositions-help-or-hurt-my-case> (last visited Mar. 6, 2025).

¹⁵⁸ See *id.*

[Although] depositions can be very helpful to your case because they will let you know ahead of time what testimony you can expect from the other party and from their witnesses . . . Depositions can help the other side to build their case against you. If you say something in a deposition that later turns out not to be true or that you describe differently when you testify at trial, it could seriously hurt your case at trial. The other lawyer could use any inconsistencies in your deposition to call the truthfulness of your entire testimony into question.

Id.

¹⁵⁹ See Robert L. Sepp, *How a deposition could make or break your case* (Feb. 21, 2024), <https://www.rsepplaw.com/blog/2024/02/how-a-deposition-could-make-or-break-your-case/>.

¹⁶⁰ See *id.*

IV. COMMUNICATIONS WITH UNREPRESENTED INDIVIDUALS

*In its pure form, [the rule] protects the ignorant and the weak, those who do not understand the law the way their opponent's counsel does and may not understand the significance of what they say. Where there are, available somewhere, lawyers willing to represent them, the rule provides a basis for the protection of their rights.*¹⁶¹

Pursuant to MRPC 4.3, a lawyer may communicate with an unrepresented individual provided the lawyer does not state or imply that the lawyer is disinterested or give legal advice, if the interests of that individual conflict with the lawyer's client.¹⁶² The rule covers a lawyer's dealings with all unrepresented individuals and is not specific to opposing parties.¹⁶³ When a survivor is unrepresented, there are risks inherent in the formation and application of this rule.¹⁶⁴ As one legal scholar provides, "Violations of Rule 4.3 . . . not only tend to be amorphous and unprovable, but . . . [are] less likely to have someone to object."¹⁶⁵

When communicating with an opposing party who is unrepresented, the lawyer should clearly state who they represent, the legal action at issue, and that the lawyer's client has interests that are opposed to the interests of the unrepresented individual.¹⁶⁶ Clarity is essential when speaking to an unrepresented individual. A lawyer's best course of action is to state the following: (1) "*My name is Attorney A and I am a lawyer.*" (introduction); (2) "*I represent Client X.*" (identify the client); (3) "*The legal matter for which I represent my client is the civil protection from abuse action.*" (nature of representation); (4) "*Are you represented by an attorney?*" (confirm that the opposing party is unrepresented); (5) "*If you are represented by counsel please provide your lawyer's name and contact information as I am not permitted to communicate directly with someone who is represented by an attorney*" (disclosure of the rule against speaking with represented individuals, gathering of opposing counsel's contact information and ending of conversation if the individual has retained counsel); (6) "*If you do not have a lawyer for this matter, I am permitted to speak with you.*" (notice that a lawyer is permitted to speak with an unrepresented individual); (7) "*I want to make sure you understand that I represent my client's interests alone.*" (clarification of the lawyer's role and providing a warning that the lawyer is not disinterested); (8) "*I am not permitted to provide you with legal advice*

¹⁶¹ Mark H. Aultman, *The Story of a Rule*, 2000 L. REV. MICH. ST. U. DET. C.L. 713, 716 (2000).

¹⁶² MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 2023).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Aultman, *supra* note 161, at 723.

¹⁶⁶ See MODEL RULES OF PRO. CONDUCT r. 4.3 cmt.1 (AM. BAR ASS'N 2023).

as your interests are in conflict with the interests of my client.” (disclosure of the rule against providing legal advice to an opposing party and the conflict of interest that arises in such circumstances); (9) *“If you agree to speak with me, you are permitted at any time to change your mind and discontinue the conversation.”* (reinforces the unrepresented individual’s autonomy); (10) *“Are you willing to speak with me in an effort to resolve this legal matter?”* (confirms the unrepresented individual’s willingness to communicate).

A lawyer representing the accused in a civil protection from abuse matter must exercise particular caution when communicating with unrepresented survivors of IPV.¹⁶⁷ First, if a criminal no-contact order or temporary civil protection from abuse order is already in place, the perpetrator is prohibited from contacting the victim.¹⁶⁸ As a result, the lawyer must be careful not to unknowingly make statements to the adverse party that the accused could use to communicate with the victim.¹⁶⁹ A no-contact order mandates that the accused refrain from any contact with the victim,¹⁷⁰ including non-threatening communications such as: “I love you,” “I want to get back together,” or “You look nice today.” By telling the survivor that the accused loves the survivor, the lawyer has aided the accused in violating the no-contact provisions of the order.

Even when a temporary no-contact order is not in place before negotiations begin, the lawyer must not knowingly or unknowingly assist the client in threatening or intimidating an unrepresented survivor.¹⁷¹ The lawyer must understand that perpetrators of DV often use code words designed to threaten, harass, and intimidate the victim. In the area of IPV practice, it is often difficult to detect a threat or act of intimidation from other statements made by an abusive partner. For example, in the past, the accused may have told the victim that if the victim ever tries to end the relationship, the accused will kill their dog, “Fluffy.” During negotiations the accused asks the lawyer to tell the adverse party, *“Fluffy really misses you.”* To the attorney for the accused, this may seem like a harmless statement to deliver. But to the survivor of DV, there is hidden meaning in the aforesaid statement, *“Come back or I will kill the dog.”* To avoid unintentionally passing along harmful messages, counsel should focus on legal issues during negotiations and refrain from acting as a messenger for non-legal communications that may contain hidden threats.

¹⁶⁷ See, e.g., ILL. COAL. AGAINST SEXUAL ASSAULT, A GUIDE TO ILLINOIS PROTECTIVE ORDERS 1 (2021).

¹⁶⁸ See, e.g., *id.* at 2–5.

¹⁶⁹ See, e.g., *id.*

¹⁷⁰ See, e.g., *id.* at 2.

¹⁷¹ See MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS’N 2023).

V. COMMUNICATION WITH PERSONS REPRESENTED BY COUNSEL

The rule is usually justified ultimately as a client/public protection rule, with the client viewed as someone needing the protection of the lawyer, and the other party, as an adversary, as someone who needs protection from the lawyer. Like many rules of legal ethics, though, where there is a lawyer on the opposite side representing a client, it also contains another element which protects not only the client but also that other lawyer. It sets up expectations of behavior among lawyers which define how they can represent their clients and conduct their practices. A lawyer who has given notice that she is representing a client has the right to expect that she will be informed about contacts with the client. To the extent the rule is enforceable and engenders expectations on the part of lawyers, violations put not only clients but also their lawyers at a disadvantage.¹⁷²

Modification of Hypothetical in Part I:

Apply the same hypothetical as detailed in Part I with the following additional facts: Survivor has retained an attorney to represent her for her petition for civil protection and request for ex parte order.

When communicating with persons represented by counsel, we could begin and end with the following advice—just don’t do it. Although that is a good starting point, the subject deserves exploration of a few related considerations. According to MRPC 4.2, when representing a client, “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows [is] represented by another lawyer in the matter”¹⁷³ There are limited exceptions to this mandatory rule that a lawyer may not communicate with an individual who has an attorney, such as with the lawyer’s consent or authorization by law or court order.¹⁷⁴

As a general rule, however, parties to an action may communicate directly with each other, even if they are represented by counsel, to resolve their legal matter.¹⁷⁵ One legal scholar explains the legal reasoning for the rule as applied to lawyers and not clients as follows:

Some inherent problems in the rule had been hidden when it could be assumed that the rule applied only to lawyers’ conduct and was not a general rule of law. What of a divorce action where the parties still live together and communicate with one another? Was it realistic to expect that

¹⁷² Aultman, *supra* note 161, at 716.

¹⁷³ MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS’N 2023).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at r. 4.2 cmt. 4.

information, some of it constituting advice, would not be conveyed through lawyers, particularly if the divorce was . . . uncontested? The rule thus had to be viewed as a rule of *legal* ethics, binding lawyers but not their clients. Codes of legal ethics, it had to be reiterated, were rules governing lawyers that did not create substantive rights and obligations for clients.¹⁷⁶

The lawyer is ordinarily permitted to counsel the client regarding the client's right to communicate directly with the other party, even when represented, to settle the matter.¹⁷⁷ The attorney may advise a client about the client's proposed communication with the adverse party, as long as the lawyer's conversation and advice do not aim to circumvent the rules of professional conduct.¹⁷⁸ In cases where a no-contact order has yet to be entered by the court, the accused is free to communicate with the survivor, provided the nature of communication does not result in criminal behavior.¹⁷⁹ Nevertheless, communication between a perpetrator of IPV and their victim carries with it a variety of risks. Those risks include the possibility of manipulation, intimidation, increased trauma, and abuse of power.¹⁸⁰ As a result, it is incumbent upon counsel for the accused to discuss these risks and how to avoid them. Yet, these risk factors may be precisely why the accused is interested in communicating directly with the survivor to convince them to dismiss the action and not to negotiate a settlement agreement. Nevertheless, because counsel will not participate in those communications, counsel must rely on their client's promise to act in good faith to resolve the matter without engaging in intimidation or harassment.¹⁸¹

The ability of the parties to freely engage in efforts to resolve their legal matters is also subject to other laws that proscribe the behavior of individuals in our society. For example, in the hypothetical from Part I, the client is prohibited from contacting the survivor due to the existence of a no-contact order that prohibits any form of communication between the parties. As a result, the client cannot contact the survivor directly based on the facts outlined in the hypothetical. The client's attorney, however, is permitted to speak with the survivor's lawyer in an effort to resolve the legal matter, provided the lawyer does not pass along information that would cause the client to violate any provisions of the *ex parte* order.

¹⁷⁶ Aultman, *supra* note 161, at 720.

¹⁷⁷ MODEL RULES OF PRO. CONDUCT r. 4.2 cmt. 4 (AM. BAR ASS'N 2023).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See Shelley Flannery, *Don't Get Tricked into Dropping the Charges for Domestic Violence*, DOMESTIC SHELTERS (Dec. 18, 2023), <https://www.domesticshelters.org/articles/identifying-abuse/how-abusers-trick-survivors-into-denying-abuse>.

¹⁸¹ *See id.*

VI. DECLINING AND TERMINATING REPRESENTATION

*Withdraw does little to resolve the problem.*¹⁸²

This section provides guidance about when the lawyer may want to consider declining representation and those circumstances that mandate withdrawal once the lawyer has already accepted the matter. However, very few circumstances rise to the level of mandatory withdrawal. Pursuant to MRPC 1.16(a), a lawyer is only required to withdraw under three circumstances: (1) when continued representation will cause the lawyer to violate the ethical rules; (2) the lawyer's own physical or mental health will materially impair the representation; or (3) the client fires the lawyer.¹⁸³ However, even when representation is highly likely to cause a violation of the rules, mandated withdrawal is triggered only when the lawyer is certain they will violate their ethical duties if they continue to represent the client.¹⁸⁴ In most circumstances, the lawyer is either able to correct the course or successfully advise the client of alternatives that will enable the lawyer to avoid an ethical violation.¹⁸⁵ In such circumstances, the lawyer does not need to withdraw. This is an important detail because withdrawing from representation rarely solves the problem.¹⁸⁶ Unquestionably, withdrawing may be the easiest path for the lawyer. Yet, if the lawyer withdraws, the problem is passed on to the client, a new lawyer—if they are even made aware of the issues—or the court.¹⁸⁷ Moreover, withdrawing from representation is not necessarily best for the client, the client's family, society, or the legal system.¹⁸⁸ It is far better for counsel to remain in the case and provide sound advice and competent representation to the client. This is true for permissive withdrawal as well—circumstances in which the lawyer has the ability to withdraw but is not required to end the representation.¹⁸⁹

It is professionally permissible to advise the client that withdrawal is an option for the lawyer under a particular set of circumstances.¹⁹⁰ To do so is not a threat; it is information that is not only acceptable to communicate to

¹⁸² *People v. Johnson*, 62 Cal. App. 4th 608, 622–23 (1998) (explaining that “withdraw does little to resolve the problem” and that it “could trigger an endless cycle of . . . continuances and motions to withdraw . . .”) (citations omitted).

¹⁸³ MODEL RULES OF PRO. CONDUCT r. 1.16(a) (AM. BAR ASS'N 2023).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at r. 1.16(a)(1).

¹⁸⁶ Harrington Conner, *supra* note 28, at 894; Gitlin, *supra* note 60 (suggesting withdrawal does not resolve problem when client intends to commit perjury). If the attorney withdraws from the case, another lawyer or the judge must deal with the problem. *See also* MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1) (AM. BAR. ASS'N 2023).

¹⁸⁷ MODEL RULES OF PRO. CONDUCT r. 1.16(b)(1) (AM. BAR. ASS'N 2023).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at r. 1.16(d).

the client but also ethically appropriate to aid the client in making informed decisions. It is the lawyer's duty to inform and advise.¹⁹¹

The lawyer may also inform the client that they find the client's actions repugnant, and that if the client continues on said course, the client will need to find a new lawyer or self-represent.¹⁹² If the client chooses new counsel, their new attorney may advise them differently, but that advice may not be in the client's long-term best interest—both legal and personal. Advising the client that their actions and decisions are not good for them both personally and legally is ethically necessary to provide competent representation.¹⁹³ The practice of family law should not be through the lens of a snapshot in time on a discreet legal matter. Most family law matters, CPOs in particular, have ramifications for all other family law issues the client will face in the future.¹⁹⁴ This is particularly true for clients who have children in common with their victims.¹⁹⁵ Although the client may perceive the matter as a short-term legal action, such as a civil protection from abuse proceeding, the decisions they make during that matter will influence future legal actions such as child custody and visitation.¹⁹⁶ Because of this, it is the lawyer's duty to advise the client in light of all other family law legal issues the client may encounter in the future.¹⁹⁷

Even if the lawyer has agreed to provide a discrete legal service, it does not follow that they can narrow the scope of their legal advice, and if they do so, it would cause them to fall below the threshold for legal competence.¹⁹⁸ Family law lawyers must understand how decision-making at the CPO stage—a threshold summary proceeding—will affect the client in the long term.¹⁹⁹ In addition to no-contact and no-abuse relief, the CPO may include short-term orders for custody, visitation, residence possession, and support.²⁰⁰ These temporary determinations will influence future litigation in other family law actions. Because of this, the lawyer must advise with both the short-term and long-term legal issues in mind, as well as the implications

¹⁹¹ *Id.* at r. 1.2, r. 1.4, r. 2.1.

¹⁹² *Id.* at r. 1.16(b)(4).

¹⁹³ *Id.* at r. 2.1.

¹⁹⁴ Joe Patituce, *What are the Consequences of a Restraining Order?*, PATITUCE & ASSOC. LLC (Mar. 9, 2024), <https://www.patitucelaw.com/blog/2024/march/what-are-the-consequences-of-a-restraining-order/>.

¹⁹⁵ Brian Mullen, *Lasting Effects of "Temporary" Restraining Orders on Child Custody*, WILKINSON & FINBEINER (Mar. 28, 2017), <https://www.wf-lawyers.com/lasting-effects-temporary-restraining-orders-child-custody/>.

¹⁹⁶ *Id.*

¹⁹⁷ MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR. ASS'N 2023).

¹⁹⁸ *Id.* at r. 2.1(2).

¹⁹⁹ *Id.* at r. 2.1(4).

²⁰⁰ *See, e.g.,* Mullen, *supra* note 203.

that follow once the protective order expires or is replaced by longer-term orders of the court.²⁰¹

Despite the foregoing, there are some circumstances in which withdrawal may be the only viable option. For example, when a lawyer is aware that the client presents a risk of death or substantial harm to the victim or children if the client obtains joint custody or visitation. To what extent should a lawyer engage in negotiating a joint custody or visitation arrangement when doing so will put the adverse party or child at risk of harm, intimidation, or emotional trauma? Settlement decisions are objectives solely within the client's authority to make.²⁰² As such, if the lawyer violates the rules of professional conduct by failing to follow the client's directive on a matter within the sole authority of the client, the lawyer must withdraw pursuant to the MRPC, as a violation of the professional conduct rules constitutes a mandatory withdrawal.²⁰³

Yet, as an advisor to the client, the lawyer may speak to the client about why such a request is harmful. It is not only reasonable to provide such advice, but several ethical rules require it. For example, MRPC 1.2²⁰⁴ mandates that the lawyer shall "consult" with the client pursuant to MRPC 1.4, as to the means by which their objectives shall be pursued.²⁰⁵ MRPC 1.4, in turn, requires the lawyer to "consult" with the client and mandates that the "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."²⁰⁶ Moreover, MRPC 2.1 mandates that "a lawyer shall exercise independent professional judgment and render candid advice."²⁰⁷ The lawyer must follow the foregoing directives, as the rule language is mandatory, not permissive.²⁰⁸ Such conversations can be very helpful to the client in making an informed decision. Moreover, as discussed in Part II, MRPC 2.1 also authorizes the lawyer, in rendering legal advice, to "refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."²⁰⁹ Few legal practice areas call for such

²⁰¹ MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR. ASS'N 2023).

²⁰² *Id.* at r. 1.2(a).

[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

Id.

²⁰³ *Id.* at r. 1.16(a).

²⁰⁴ *Id.* at r. 1.2.

²⁰⁵ *Id.* at r. 1.4.

²⁰⁶ *Id.* at r. 1.4(a)(b).

²⁰⁷ *Id.* at r. 2.1.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

discussions in the way that family law demands. Particularly the social and economic factors that frequently influence decision-making related to CPOs, child custody, support, divorce, and property division. The potential for legal actions for custody, support, and divorce drives decisions in a civil protection proceeding. Because the CPO is often the point at which the relationship between the parties is severed, the decisions the parties make at the CPO stage regularly put in motion legal actions for child custody, support, and divorce. As a result, advice about how voluntarily engaging in DV treatment can have a positive influence on a future court proceeding related to custody or visitation is essential. This applies similarly to how the client responds to and complies with a CPO generally. For example, the client's compliance with the CPO restriction against abusing the adverse party is relevant evidence at a subsequent child custody hearing. As a result, this type of client counseling is critical to family practice.

Yet, there are circumstances when advice does little to change the client's mind or actions. As such, withdrawal may be the only solution. MRPC 1.16(b) enables the lawyer to withdraw in various circumstances.²¹⁰ Of the seven categories²¹¹ that allow a lawyer to withdraw permissively, three apply easily to most circumstances discussed herein. The first permissive withdrawal situation is when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement[.]"²¹² This category would justify a withdrawal of representation if the client seeks contact with a child, but poses a risk of harm to that child or when the client seeks contact with the child simply to have access to the adverse party to commit an act of abuse. Moreover, withdrawal would be warranted if the client insists that the lawyer depose an adverse party solely for the purpose of intimidating that witness.²¹³ The second category for permissive withdrawal is any circumstance in which withdrawal can be accomplished "without material adverse effect on the interests of the client[]" with no specific justification required.²¹⁴ And finally, the third category is when "other good cause for withdrawal exists."²¹⁵ This last category is very broad and can be applied to most circumstances that may not rise to the level of a fundamental disagreement or repugnant behavior.²¹⁶

²¹⁰ *Id.* at r. 1.16(b).

²¹¹ *Id.*

²¹² *Id.* at r. 1.16(b)(4).

²¹³ *Id.* at r. 1.16(b).

²¹⁴ *Id.* at r. 1.16(b)(1).

²¹⁵ *Id.* at r. 1.16(b)(7).

²¹⁶ *Id.* at r. 1.16(b).

CONCLUSION

*There is no greater engine on the planet for doing good than the American legal system. You went to law school to do good. That's all there is to it. That's the whole job description. And if you lose sight of that you might as well be selling aluminum siding.*²¹⁷

As stated at the beginning of this Article, the legal system and “society [have] always put limits on advocacy in civil litigation.”²¹⁸ There is little question that an attorney for the accused in civil practice can provide excellent representation, while still maintaining their professional duties. To do so, counsel must understand the limits placed on civil legal practice, such as not bringing a claim, defending a proceeding, asserting or controverting an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.²¹⁹ This is a basic threshold for ethical civil legal practice. The obligation is mandatory, not permissive.²²⁰ Lawyers are not permitted to ignore these duties, as they are fundamental to the ethical practice of law.

Yet, there are other opportunities for counsel for the accused in civil cases to benefit their client and promote healthy families. The “do no harm” threshold objective is a good starting point for all lawyers. If lawyers practice law with the basic standard followed by other professions, such as medicine, to “first, do no harm,”²²¹ wouldn’t society be better off? In fact, as some argue—this is a very low bar.²²² If we can begin by agreeing that our actions as lawyers are guided by doing little to no harm in any given situation, we can be a healing profession. Advocacy and loyalty to the client do not have to be to the exclusion of the health and welfare of children, adverse parties, and society generally. The gift given by the drafters of MRPC 2.1 provides lawyers with the unique ability to discuss matters that will benefit the client and potentially others as well. The practice of family law is not a win-lose proposition. It can be a “win-win” or a “lose-lose,” depending on how the lawyer approaches the representation.

²¹⁷ Justice William W. Bedsworth, *Conclusions I’ve Drawn*, ORANGE CNTY. L., Jan. 2018 at 67.

²¹⁸ Andrews, *supra* note 1, at 435.

²¹⁹ MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2023).

²²⁰ *Id.* at scope 14.

²²¹ See Robert H. Shmerling, *First, do no harm*, HARVARD HEALTH BLOG (June 22, 2020) <https://www.health.harvard.edu/blog/first-do-no-harm-201510138421> (explaining that “‘first, do no harm’ is attributed to the ancient Greek physician Hippocrates, [but] it isn’t a part of the Hippocratic Oath at all. It is actually from another of his works called *Of the Epidemics*.”); see also Gitlin, *supra* note 60.

²²² Shmerling, *supra* note 221 (“The idea that doctors should, as a starting point, not harm their patients is an appealing one. But doesn’t that set the bar rather low? Of course, no physician should set out to do something that will only be accompanied by predictable and preventable harm. We don’t need an ancient ancestor, however well-respected, or an oath to convince us of that!”).

For example, to advise the accused to object to requested CPO relief such as engaging in DV treatment and counseling, may not be in keeping with what is in the best interest of the client in the long term. Engaging in treatment could positively influence the accused, serve as evidence in a future custody or visitation litigation, benefit the children, and protect the adverse party and society generally.

A lawyer can have it all, or they can choose to see the practice of law as an adversarial system even when such an approach is not what is best for the client. Fighting every point for the sake of what one may view as a “win” may, in fact, be the greatest loss for the client. Open your mind to the possibilities and do no harm. And, while you are at it—do something good.

THE WORDS WE CHOOSE: AN ANALYSIS OF TERMS USED IN DOMESTIC VIOLENCE LAW

Evan Lovell*

INTRODUCTION

Language gives shape and substance to thoughts and ideas. Words are conduits of expression for theories, sentiments, and opinions. Although linguistic scholars have asserted that language plays a vital role in anchoring culture, creating history, and solidifying social bonds, perhaps the most relevant “importance” of language in the legal field is its capacity to influence human behavior and public opinion.¹ Tellingly, famous dystopian novels consistently depict how lawmakers and government agents use language to corral their citizens into specific mindsets and ways of thinking.

Ayn Rand’s *Anthem* describes a world where society has erased the word “I” to suppress individuality and eliminate civil disruption.² In *Ender’s Game* by Orson Scott Card, the military dubbed a new alien species as “buggers” to dehumanize them and create public support for their extermination.³ Margaret Atwood’s *Handmaid’s Tale* shows how women are suppressed by preventing literacy and categorizing them with terms like Marthas, Handmaids, Aunts, and Econowives, which reinforces their society’s hierarchy.⁴ In Ray Bradbury’s *Fahrenheit 451*, the power of words is feared so greatly that the government burns all books to prevent the spread of unendorsed ideas.⁵ In George Orwell’s *1984*, the protagonist is exposed to the theory of linguistic relativity, which asserts that the structure of a language can affect its speakers’ and readers’ worldviews.⁶ In the novel, the

* Evan Lovell graduated from UC Berkeley School of Law, with Pro Bono Hours and a Certificate in Public Interest and Social Justice. He is currently a prosecutor in the California Bay Area.

¹ Kelsey Holmes, *Language: The Essence of Culture*, GREEN HEART ORG. (Jan. 25, 2025), <https://greenheart.org/blog/greenheart-international/language-the-essence-of-culture/>; Alex Shashkevich, *The power of language: How words shape people, culture*, STANFORD NEWS (Aug. 22, 2019), <https://news.stanford.edu/2019/08/22/the-power-of-language-how-words-shape-people-culture/>; The Importance of Language, 1 in STAND UP, SPEAK OUT: THE PRACTICE AND ETHICS OF PUBLIC SPEAKING (2012), <https://open.lib.umn.edu/publicspeaking/part/chapter-1-why-public-speaking-matters-today/>.

² Ayn Rand Institute, *Anthem Overview*, <https://mmichulka.aynrand.org/novels/anthem/#otab-2> (last visited Jan. 25, 2025).

³ ORSON SCOTT CARD, *ENDER’S GAME* (1985).

⁴ MARGARET ATWOOD, *HANDMAID’S TALE* (1st Anchor Books ed. 1998).

⁵ RAY BRADBURY, *FAHRENHEIT 451* (1953).

⁶ GEORGE ORWELL, 1984 (1949); Maria Baghramian & J. Adam Carter, *The Linguistic Relativity Hypothesis*, STAN. ENCYC. OF PHIL. ARCHIVE (Spring 2015 ed.), <https://stanford.library.sydney.edu.au/archives/spr2015/entries/relativism/supplement2.html>.

government created “Newspeak,” a limited, minimalistic language designed to erase any ideas or thoughts that do not align with the official state ideology.⁷

While these literary examples demonstrate the influence of language in society in fictionalized settings and hyperbolic scenarios, the certainty of the connection between *diction* and *public opinion* is unmistakable. The chosen language of a society, or the words enforced by the government and codified in law, can garner public outrage, steer discussions of morality, and frame the alleged necessity of government intervention.⁸

The power of language stems from the inherent depth and plurality of word meanings. Some words have both a denotive meaning and a connotative meaning.⁹ A word’s denotive meaning is its specific or literal definition.¹⁰ The connotative meaning of a word encapsulates whatever positive associations or negative undertones the term carries.¹¹ Such meanings of words can be used, *or misused*, by lawmakers to warp perceptions or frame discussions in self-advantageous ways.¹²

In the legal field, words have been called the “essential tools” of an attorney.¹³ Given the immense responsibility of attorneys as lawmakers and representatives of clients or harmed individuals, the intentionality of word choice is essential to combat the previous misuse of charged terminology.¹⁴ Word choice is also essential to ensure that non-harmful language is written in statutes and used in legal practice.

This Article examines the terminology used in the field of domestic violence law, specifically the terms used to describe individuals who are in relationships that involve domestic violence.

Note about Terminology

This Article examines the terms Victim, Survivor, Victim-Survivor, and Battered Wife/Spouse. It also examines the terms Abuser, Batterer, Perpetrator, and People who have Caused Harm, as well as Offender,

⁷ ORWELL, *supra* note 6, at 4.

⁸ See James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 23 POL. BEHAV. 225 (2001), <http://www.jstor.org/stable/1558384>; H. Winkler et al, *How Language ‘Framing’ Influences Decision-Making*, 28 J. COGNITIVE PSYCH. 427 (2016); *Linguistic Relativity*, NURSINGHERO, <https://www.nursinghero.com/study-guides/atd-hostos-child-development-education/linguistic-relativity> (last visited Jan. 25, 2025).

⁹ *Why Is Language Important? Your Guide To The Spoken Word*, UNIV. OF THE PEOPLE (2020), <https://www.uopeople.edu/blog/why-is-language-important/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Baghramian & Carter, *supra* note 6; Winkler et al, *supra* note 8.

¹³ Sheila Hyatt, *Legal Language*, UNIV. OF DENV. STURM COLL. OF L. (2018), <https://www.law.du.edu/index.php/law-school-learning-aids/legal-language>.

¹⁴ See *id.*

Respondent, and Defendant. For clarity and uniformity, and to avoid prematurely signaling the conclusion of this Article, the terms “experiencers” and “controllers” are used when referring to these types of individuals.

The term “experiencers” is chosen because of its relatively neutral connotation. It simply indicates that these individuals have *experienced* domestic abuse, without describing or narrating what that experience was or how it affected them. The denotive meaning of “experience” is “something that happens to you that affects how you feel[.]”¹⁵ Some may argue that trying to find a “neutral” way to speak of domestic violence is, in and of itself, biased and non-neutral because it intellectualizes a harrowing issue and risks glossing over the harsh realities and impact of domestic violence and, further, minimization and intellectualization are common forms of emotional abuse and some experiencers’ cognitive denial.¹⁶ However, in an Article such as this one it is essential for the terminological analysis.

The term “controller” is inspired by the 2010 film documentary, *Power and Control: Domestic Violence in America*.¹⁷ This documentary examines relationships with physical and emotional abuse through the story of Kim Mosher, a Minnesota mother of three who decides to leave her abusive husband.¹⁸ The film also explores the impact and effectiveness of the Duluth Model, which was created by Ellen Pence and Michael Paymar, founders of the Domestic Abuse Intervention Project and leading innovators in domestic violence policy.¹⁹ Pence and Paymar also developed the “Power and Control” wheel in 1982, which is how the film derives its name.²⁰ This wheel is a “graphic representation of domestic violence relationships that has been translated into 40 languages and has become the ubiquitous symbol of the battered women’s movement.”²¹ The wheel has also been adapted culturally; Mending the Sacred Hoop has implemented and modified it to reflect the tactics a Native American controller might use.²²

¹⁵ CAMBRIDGE ADVANCED LEARNER’S DICTIONARY & THESAURUS (2021).

¹⁶ *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> (last visited Jan. 25, 2025); Terry Gray, *Co-Occurring Inter-relational Domestic Violence and Substance Use Disorders* (Aug. 23, 2017), https://www.naadac.org/assets/2416/2017-8-23_co-occurring_inter-relational_domestic_violence_and_suds_webinarslides.pdf; Ashley Andrews, *The Hard Truth About Domestic Violence*, NEV. TODAY (Mar. 18, 2019), <https://www.unr.edu/nevada-today/stories/domestic-violence>.

¹⁷ PETER COHEN, *Power and Control: Domestic Violence in America* (2010).

¹⁸ *Synopsis*, POWER AND CONTROL (2025), available at: <https://powerandcontrolfilm.com/synopsis/>.

¹⁹ *Id.*

²⁰ *Social Change to End Violence Against Women*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/social-change-end-violence-women/> (last visited Jan. 25, 2025).

²¹ *Synopsis*, *supra* note 18; *Understanding the Power and Control Wheel*, *supra* note 16; see *infra* Part II.B.1 (discussing the term “Battered Women’s Syndrome”).

²² *Understanding the Power and Control Wheel*, *supra* note 16.



Power and Control Wheel

The Power and Control wheel has been prevalent since its creation nearly thirty years ago.²³ It is still prominently featured on the National Domestic Violence Hotline website.²⁴ The term “controller” was selected for this Article not only as a reference to this wheel and its role as a formative domestic violence resource but also because it highlights a commonality within all relationships involving domestic violence.²⁵ Domestic violence is a pattern of behaviors used to gain or maintain power and control.²⁶ The abuse can take on many different forms, including, but not limited to, physical abuse, sexual abuse, emotional/psychological abuse, verbal abuse, reproductive abuse, economic abuse, child abuse, pet abuse, litigation abuse, and stalking.²⁷ One commonality in the diverse range of abusive relationships is that the abusive individual seeks to establish and maintain control over the other individual.²⁸ Consequently, “controller” is a non-exclusionary term when referring to an abusive individual in a relationship involving domestic violence.

²³ *Id.*

²⁴ *Power and Control*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/identify-abuse/power-and-control/> (last visited Jan. 25, 2025).

²⁵ *Understanding the Power and Control Wheel*, *supra* note 16.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

I. BACKGROUND

A. Global and National Domestic Violence Crisis

*Violence against women is endemic in every country and culture, causing harm to millions of women and their families, and has been exacerbated by the COVID-19 pandemic . . . But unlike COVID-19, violence against women cannot be stopped with a vaccine. We can only fight it with deep-rooted and sustained efforts[—]by governments, communities and individuals[—]to change harmful attitudes, improve access to opportunities and services for women and girls, and foster healthy and mutually respectful relationships.*²⁹

Dr. Tedros Adhanom Ghebreyesus, current Director-General of the World Health Organization³⁰

As this excerpt suggests, domestic violence is a global public health problem.³¹ In a report published in March of 2021, the World Health Organization (WHO) shared data from global surveys and studies conducted between 2000 and 2018.³² WHO estimated that one in three women worldwide are subjected to physical or sexual violence by an intimate partner or sexual violence from a non-partner.³³ With the world population at its current size, this means that between 736 million and 852 million women encounter sexual or physical violence.³⁴ Specific to domestic violence, one in four women between the ages of fifteen and twenty-four who have been in a relationship will have already experienced violence by an intimate partner by the time they reach their mid-twenties.³⁵ Additionally, this report does not even include the exacerbating impact of the COVID-19 pandemic on domestic violence cases.³⁶ In February 2021, the National Commission on COVID-19 and Criminal Justice found that domestic violence incidents increased by 8.1% after pandemic-related lockdown orders.³⁷

²⁹ *Devastatingly pervasive: 1 in 3 women globally experience violence*, WORLD HEALTH ORG. [WHO] (Mar. 9, 2021), <https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence>.

³⁰ *Biography - Dr. Tedros Adhanom Ghebreyesus*, WORLD HEALTH ORG. [WHO], <https://www.who.int/director-general/biography> (last visited Mar. 9, 2025).

³¹ *Devastatingly pervasive: 1 in 3 women globally experience violence*, *supra* note 29.

³² *Violence Against Women Prevalence Estimates, 2018*, WORLD HEALTH ORG. [WHO] (2021), <https://www.who.int/publications-detail-redirect/9789240022256> [hereinafter *2018 Estimates*].

³³ *Devastatingly pervasive: 1 in 3 women globally experience violence*, *supra* note 29.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *2018 Estimates*, *supra* note 32.

³⁷ *Impact Report: COVID-19 and Domestic Violence Trends*, COUNS. ON CRIM. JUST., <https://counciloncj.org/impact-report-covid-19-and-domestic-violence-trends/> (last visited Jan. 25, 2025).

Within the United States, more than twelve million adults experience domestic violence annually.³⁸ However, due to chronic underreporting and the patterned, habitual nature of domestic violence, it is likely that this happens to far more individuals.³⁹ Further, this also does not encompass all the other instances of non-physical abuse in relationships with domestic violence.⁴⁰ Additionally, one in four women and one in ten men experience sexual violence, physical violence, or stalking by an intimate partner during their lifetime.⁴¹ From this population, approximately one in five female experiencers and one in twenty male experiencers need medical care.⁴² In terms of needing an attorney or advocates, one in five female experiencers and one in nine male experiencers need legal services.⁴³ Domestic violence is a very gendered issue, as demonstrated by these statistics.⁴⁴ However, it is important to note that female controllers may abuse female experiencers, and male experiencers may be abused by male controllers.⁴⁵ As evidenced by the LGBT Power and Control wheel promoted by Love is Respect (a 24/7 support service and advocacy project of the National Domestic Hotline for individuals who have questions or concerns about their relationship), domestic violence is not strictly one gender inflicting abuse upon the opposite sex.⁴⁶

This national crisis is ongoing and worsening—from 2016 to 2018, the number of physical domestic violence incidents increased by forty-two percent.⁴⁷ Further, in September 2020, in just a single twenty-four-hour national survey period, national, state, and local hotline staff received 19,478

³⁸ *Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> (last visited Jan. 27, 2025).

³⁹ Enrique Gracia, *Unreported Cases of Domestic Violence Against Women: Towards an Epidemiology of Social Silence, Tolerance, and Inhibition*, 58 J. EPIDEMIOL. CMTY. HEALTH 536, 536 (2004).

⁴⁰ *2018 Estimates*, *supra* note 32.

⁴¹ *Domestic Violence*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE (2020), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596811079991 (last visited Jan. 25, 2025).

⁴² Sharon G. Smith et al., *The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report*, NAT'L CTR. FOR INJ. PREV. AND CONTROL (2017).

⁴³ *Domestic Violence*, *supra* note 41.

⁴⁴ *Compare Domestic Violence*, *supra* note 41 with Gracia, *supra* note 39, at 536, and *2018 Estimates*, *supra* note 32.

⁴⁵ *Abuse in LGBTQ+ Communities*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/abuse-in-lgbtq-communities/> (last visited Jan. 25, 2025).

⁴⁶ Tara, *LGBTQ+ Relationships and Dating Violence*, LOVE IS RESPECT, <https://www.loveisrespect.org/resources/lgbtq-relationships-and-dating-violence/> (last visited Jan. 25, 2025); *Power and Control Wheel for Lesbian, Gay, Bisexual, and Trans Relationships*, DOMESTIC ABUSE INTERVENTION PROJECT, <https://www.loveisrespect.org/lir-files/LGBT-Power-and-Control-Wheel.pdf> (last visited Jan. 25, 2025); *About*, LOVE IS RESPECT, <https://www.loveisrespect.org/about/> (last visited Jan. 25, 2025).

⁴⁷ Smith et al., *supra* note 42; *Domestic Violence*, *supra* note 41.

contacts.⁴⁸ During that same twenty-four-hour period, the National Domestic Violence Hotline staff received 1,824 contacts, an average of almost fifteen contacts every minute.⁴⁹ With these rates, domestic violence continues to be an epidemic in the United States.⁵⁰

B. Lack of Uniformity in Terms and Definition of Domestic Violence

An important step to combatting the rise in domestic violence is identifying abusive relationships and those who experience domestic violence. However, Isabell Scott and Nancy McKenna state in *Domestic Violence Practice and Procedure* that experienter identification can, and has been, hindered by attorneys' own preconceptions about domestic violence.⁵¹ As the WHO Director-General states "chang[ing] harmful attitudes" of governments, communities, and individuals is necessary to alleviate the surge of domestic violence.⁵² This achievement can be facilitated if there is a shared definition of domestic violence, a shared understanding of how to identify individuals in those harmful relationships, and a universally accepted term or way of referring to experiencers and controllers.⁵³

And yet, despite the prominence of this problem and its widespread recognition and national attention, there is a lack of uniformity in how to define domestic violence and what terms to use when referencing experiencers and controllers.⁵⁴ Globally, the United Nations has defined domestic violence as:

[A] pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner. Abuse is physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person. This includes any behaviors that frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound someone. Domestic abuse can happen to anyone of any race, age, sexual orientation, religion, or gender. It can occur within a range of relationships

⁴⁸ Smith et al., *supra* note 42.

⁴⁹ *Id.*

⁵⁰ *Domestic Violence*, *supra* note 41.

⁵¹ ISABELL SCOTT & NANCY MCKENNA, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE § 1:9 (Thomson Reuters, Aug. 2024 update).

⁵² *Devastatingly pervasive: 1 in 3 women globally experience violence*, *supra* note 29.

⁵³ Charlotte-Mecklenburg Domestic Violence Research Collaborative, *Guidelines for Defining Domestic Violence*, UNIV. OF N. C. CHARLOTTE URB. INST., <https://ui.charlotte.edu/wp-content/uploads/sites/1003/2024/03/Domestic-Violence-Research-Collaborative-Guidelines-for-Defining-Domestic-Violence.pdf> (last visited Jan. 25, 2025) [hereinafter *Guidelines for Defining Domestic Violence*]; *What is Domestic Abuse?*, U.N., <https://www.un.org/en/coronavirus/what-is-domestic-abuse> (last visited Jan. 25, 2025); Michelle Madden Dempsey, *What Counts as Domestic Violence? A Conceptual Analysis*, 12 WM. & MARY J. WOMEN & L. 301, 306–10 (2006).

⁵⁴ *Guidelines for Defining Domestic Violence*, *supra* note 53; *What is Domestic Abuse?*, *supra* note 53.

including couples who are married, living together or dating. Domestic violence affects people of all socioeconomic backgrounds and education levels. Anyone can be a victim of domestic violence, regardless of age, race, gender, sexual orientation, faith or class[.] Victims of domestic abuse may also include a child or other relative [of the experiencer], or any other household member.⁵⁵

But the WHO, despite the comments of its Director-General, defines the problem as “Violence against women” and lists “Intimate Partner Violence” (IPV) as a subsection of violence against women.⁵⁶ IPV is defined by the WHO as:

[B]ehaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours.⁵⁷

In the United States, there is a federal definition of domestic violence used by the Department of Justice:

Domestic violence is 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 can be physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.⁵⁸

This federal definition, however, is not uniformly adopted in each state.⁵⁹ In fact, there is a high level of variance in state domestic violence statutes.⁶⁰ In most states, the statutes define actions constituting domestic violence and the relationship necessary for acts to be identified as domestic violence.⁶¹ In some states, the statutes list criminal offenses that, if committed by a “qualified individual,” then it constitutes domestic

⁵⁵ *What is Domestic Abuse?*, *supra* note 53.

⁵⁶ *Violence against Women*, WORLD HEALTH ORG. (Mar. 25, 2024), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

⁵⁷ *Id.*

⁵⁸ *Domestic Violence*, U.S. DEP’T JUST. (2019), <https://www.justice.gov/ovw/domestic-violence> (last visited Jan. 22, 2025).

⁵⁹ *See, e.g., State and Federal Domestic Violence Laws in the United States*, STOP VIOLENCE AGAINST WOMEN (Aug. 2013), https://www.stopvaw.org/state_and_federal_domestic_violence_laws_in_the_united_states.

⁶⁰ *See, e.g., id.*

⁶¹ Elizabeth Flanagan, *Speaking for the Silenced: Legal Advocacy for People with Physical Disabilities Experiencing Domestic Violence*, 40 T. JEFFERSON L. REV. 51, 58–59 (2017).

violence.⁶² Other state statutes focus on the actual, attempted, or threatened use of physical or sexual violence (or other form) against a qualified individual.⁶³ Further, the terminology used to refer to experiencers and controllers, if named at all, varies from state to state, as is described later.⁶⁴

With these varying definitions, the United States lacks the united front, or common understanding and terminology, that would better facilitate efforts to support experiencers and combat the surge of recent domestic violence incidents.⁶⁵ A common accepted term for experiencers and controllers, if chosen correctly, can combat public misconceptions, lead to a better understanding of domestic violence, and better equip officials in their efforts of identification and intervention.⁶⁶ If there are terms that are more appropriate or more useful in the field of domestic violence law, and if there is even the slightest chance that using these terms may help or alleviate the epidemic of domestic violence, then lawmakers and attorneys owe it to the public to start adopting and using said terms.

C. Evolution of Terms “Domestic Violence”

The evolution of the term “Domestic Violence” is relevant to this discussion because it is poignantly related to the terms of the experiencer and controller. It also demonstrates the power of language to change public perceptions of issues, as well as transforming police intervention and judicial treatment.⁶⁷

There are various timelines and historic resources that chart the transformation of domestic violence treatment from condoned practice to private family problem to criminalized conduct.⁶⁸ Controllers abused experiencers long before the term “domestic violence” was even created.⁶⁹ One of the earliest records of accepted abuse is during the reign of Romulus in Rome in approximately 753 B.C., when the Laws of Chastisement allowed husbands to beat their wives.⁷⁰ In the Middle Ages (900 to 1300), European noblemen beat their wives regularly, and the Church sanctioned this

⁶² *Id.* at 59.

⁶³ *Id.*

⁶⁴ *See infra* Part II.A.1.

⁶⁵ *Domestic Violence/Domestic Abuse Definitions and Relationships*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/human-services/domestic-violence-domestic-abuse-definitions-and-relationships> (last updated June 12, 2019).

⁶⁶ *Id.*

⁶⁷ *Domestic Violence*, *supra* note 58.

⁶⁸ Steve Baron, *A Brief History of Domestic Violence*, ALAN L. NOBLER, <https://nobler.com/a-brief-history-of-domestic-violence/> (last visited Jan. 25, 2025); Domestic Violence Resource, *Herstory of Domestic Violence: A Timeline of the Battered Women’s Movement* (Sept. 1999), <https://people.uvawise.edu/pww8y/Supplement/-ConceptsSup/Gender/HerstoryDomV.html#id2568098>.

⁶⁹ Baron, *supra* note 68.

⁷⁰ Domestic Violence Resource, *supra* note 68.

treatment, encouraging abused wives to increase devotion and obedience to appease their husbands; it is also likely that the abuse was not strictly limited to those of nobility.⁷¹ In the 1500s, English Jurist Lord Hale explained the tradition of not recognizing marital rape, stating that marriage was a contract and women could not withdraw consent until they were divorced.⁷² These standards and theories of non-recognition and condonement of domestic violence survived in English Common Law and were replicated in the formative years of the U.S. legal system.⁷³

In 1824, a decision by the Mississippi courts seemed to put the first constraint on domestic violence by condoning only “moderate chastisement.”⁷⁴ However, in this decision, the court displayed a firm reminder of the private and shameful nature of bringing attention to these matters:

Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in mutual discredit and shame of all parties concerned.⁷⁵

It was not until nearly one hundred and fifty years later that 1970s feminist activism brought the issue of “Domestic Violence” into the public eye.⁷⁶ They organized with the mantra, “We will not be beaten” and launched a nationwide campaign to expose domestic violence, provide shelter and support, and call for legal change.⁷⁷ In large part from these efforts, in 1976, the first domestic violence shelter opened in New York City and a grant from the Legal Assistance Foundation of Chicago funded the first Legal Center for Battered Women in the United States.⁷⁸ Further, these developments prompted a legislative response from Congress with the Violence Against Women Act in 1994, 2000, 2005, 2013, and 2022 which increased funding

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Bradley v. State*, 1 Miss. (Walker) 156, 158 (1824).

⁷⁵ *Id.*; *The Abuse of Women—A Worldwide Issue*, ENCYCLOPEDIA, <https://www.encyclopedia.com/reference/encyclopedias-almanacs-transcripts-and-maps/abuse-women-worldwide-issue> (last visited Jan. 25, 2025).

⁷⁶ Catherine Jacquet, *Domestic Violence in the 1970s*, CIRCULATING NOW FROM NLM (Oct. 15, 2015), <https://circulatingnow.nlm.nih.gov/2015/10/15/domestic-violence-in-the-1970s/>.

⁷⁷ *Id.*

⁷⁸ *Baron*, *supra* note 68.

for victim services and criminal justice intervention efforts.⁷⁹ Additionally, in 1994 the National Council of Juvenile and Family Court Judges created and promoted the Model Code on Domestic and Family Violence.⁸⁰

An essential component behind criminalizing abuse and prompting legal intervention was giving a name to “Domestic Violence” and thrusting it into public consciousness.⁸¹ However, the term “domestic violence” is not a perfectly chosen or crafted word. “Domestic” has the denotive meaning of “relating to the running of a home or to family relations,” and it has the connotative meaning of “being private or more personal.”⁸² This can be problematic in the sense that historical characterizations of domestic violence as a home problem led to the state and community treating it as a private family matter and not involving external support, resources, or aid.⁸³ Further, the word “violence” holds the denotive meaning of “an act of physical force that causes or is intended to cause harm” and the connotative meaning of being something aggressive and physically damaging.⁸⁴ This term can inadvertently exclude many of those who experience intimate partner abuse or exclude the various non-physical forms of abuse in relationships with domestic violence.⁸⁵ As Justice Sotomayor stated in 2014:

“DOMESTIC Violence” is not merely a type of “violence”; it is a term of art encompassing acts that one might not characterize as “violent” in a nondomestic context . . . Indeed, “most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting.” Minor uses of force may not constitute “violence” in the generic sense. For example, in an opinion that we cited with approval in *Johnson*, the Seventh Circuit noted that it was “hard to describe . . . as ‘violence’” “a squeeze of the arm [that] causes a bruise.” But an act of this nature is easy to describe as “domestic violence,” when the accumulation of such acts over time can subject one intimate partner to the other’s control. If a seemingly minor act like this draws the

⁷⁹ *Id.*

⁸⁰ *Model Code on Domestic and Family Violence*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES (Mar. 15, 2012), <https://www.ncjfcj.org/publications/model-code-on-domestic-and-family-violence/>.

⁸¹ *A Brief History & Overview Of Domestic Violence*, RUDNICK LAW (Sept. 4, 2019), <https://www.rudnicklaw.com/blog/history-domestic-violence/>.

⁸² *Domestic*, OXFORD LANGUAGES & GOOGLE - ENGLISH, <https://languages.oup.com/google-dictionary-en/> (last visited Jan. 25, 2025).

⁸³ Emily M. Farris, *Public Officials and a ‘Private’ Matter: Attitudes and Policies in the County Sheriff Office Regarding Violence Against Women*, 96 SOC. SCI. Q. 1117 (2015); Peggy Solic, *Private Matter or Public Crisis? Defining and Responding to Domestic Violence*, ORIGINS (May 2015), <https://origins.osu.edu/article/private-matter-or-public-crisis-defining-and-responding-domestic-violence>.

⁸⁴ Kristine M. Jacquin, *Violence*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/violence> (last updated Dec. 9, 2024).

⁸⁵ See generally Hannah Loss, *Advocates say it’s time to expand the definition of domestic violence*, JANE DOE INC. (Mar. 22, 2024), <https://www.janedoe.org/advocates-say-its-time-to-expand-the-definition-of-domestic-violence/>.

attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a “misdemeanor crime of domestic violence.”⁸⁶

Likely in response to these concerns and the possible misperceptions of this term, there have been concerted efforts by activists and nonprofit agencies to expand the definition of domestic violence to be more inclusive and deepen society’s understanding of the issue.⁸⁷ To counteract previous notions of domestic violence being solely a “husband hits wife” incident, there are legal works bringing light to the various forms of domestic violence.⁸⁸ Specifically, *Domestic Violence Practice and Procedure* lists:

[S]triking, beating, pulling hair, shoving, pulling, punching, slapping, kicking, hitting, tripping, squeezing, choking, pushing, biting, pulling clothes, pointing weapons, using weapons, throwing things, *threatening, harassing, stalking, intimidating, raping, abusing children, emotional abuse, [and] economic abuse*[.]⁸⁹

It also adds that controllers:

[M]ay abuse other family members, destroy property, drive aggressively or dangerously, or commit other acts which effectively convey the message to your client that he or she is in danger.⁹⁰

In tandem with this effort to educate the public on the meaning or inclusivity of the large umbrella term that is “domestic violence,” domestic violence experts and advocates have started conversations about redefining what it is to be an experiencer and what term to use when referring to controllers.⁹¹

D. Alternate Terms for “Experiencers”

SAKI, the Sexual Assault Kit Initiative, is a national organization administered by the Bureau of Justice Assistance.⁹² It provides funding through a grant program to “support the jurisdictional reform of approaches

⁸⁶ United States v. Castleman, 572 U.S. 157, 166 (2014) (citations omitted) (emphasis added).

⁸⁷ Loss, *supra* note 85.

⁸⁸ See generally DEFINING DOMESTIC VIOLENCE, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE § 1:3, 1 (Aug. 2024).

⁸⁹ *Id.* (emphasis added).

⁹⁰ *Id.* Note: This list does not include litigation abuse or coercive control.

⁹¹ Loss, *supra* note 85.

⁹² About the National Sexual Assault Kit Initiative, SEXUAL ASSAULT KIT INITIATIVE, <https://www.sakitta.org/about/> (last visited Mar. 9, 2025).

to sexual assault cases resulting from evidence found in sexual assault kits (SAKs) that have never been submitted to a crime laboratory.”⁹³ This organization shares that a common question in the field of sexual assault is whether to use the term “survivor” or “victim.”⁹⁴ While its discussion is focused more narrowly on sexual assault and not specifically on domestic violence, these crimes overlap significantly, and SAKI’s explanations are relevant and helpful.⁹⁵ SAKI lists three main points about each term:

Victim. (1) Primarily used by law enforcement, systems-based advocates, and prosecutors and commonly used when discussing a crime or referencing the criminal justice system. (2) It is a legal definition necessary within the criminal justice system. (3) It does not imply weakness, assume guilt, or assign blame.⁹⁶

Survivor. (1) More likely to be used by community-based advocates and other similar service providers. (2) It is a term that often refers to someone who is going or has gone through the recovery process. (3) It implies a sense of empowerment, agency, healing, and sense of peace in life.⁹⁷

SAKI recommends not highlighting a preferential term or selecting one for exclusive use because they “serve different needs” and are “appropriate based on the context and possible requirement for legal status.”⁹⁸ Notably, SAKI mentions multiple times that “victim” is a necessary term or needed legal definition within the criminal justice system; however, it does not provide a foundation for this assertion.⁹⁹ The document only states that legal investigators and prosecutors “use this term to illustrate that a crime has been committed against a person.”¹⁰⁰ The assertion is likely based on the words used in legal statutes, thus this contention should be viewed as a rough statement of legal reality and not legal idealism.

Another non-profit organization, Women Against Abuse (WAA), a leading advocacy service provider for experiencers in Philadelphia since the mid-1970s, likens the debate over experiencer terminology to the use of

⁹³ *Id.*

⁹⁴ Natasha Alexenko et al., *Victim or Survivor: Terminology from Investigation Through Prosecution*, SEXUAL ASSAULT KIT INITIATIVE 1 (2015), <https://www.sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf>.

⁹⁵ *About the National Sexual Assault Kit Initiative*, *supra* note 92.

⁹⁶ Alexenko et al., *supra* note 94.

⁹⁷ *Id.* at 1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

“domestic violence” versus “intimate partner violence.”¹⁰¹ In this comparison, WAA asserts that the term “intimate partner violence” encapsulates a different sphere of experiencers and controllers.¹⁰² While “domestic violence” refers to violence among people in a domestic situation (including spouses and partners), intimate partner violence includes violence perpetrated by individuals in a romantic or dating relationship.¹⁰³ However, despite “intimate partner violence” referring to a new group of experiencers and controllers, it is narrower and more specific.¹⁰⁴ “Intimate partner violence” does not encapsulate family members like siblings, parents, aunts, uncles, and cousins—which are included in WAA’s definition of term “domestic violence.”¹⁰⁵ Notably, some experts in the field do not include abuse among family members in their definition of “domestic violence[;]” consequently, for those individuals, domestic violence and intimate partner violence are more interchangeable as terms.¹⁰⁶

With regard to experiencer terms, WAA speaks of the necessity for an awareness of what groups are included or excluded by the words of choice.¹⁰⁷ They speak to the importance of ensuring that all experiencers are identified and given access to intervention services, including those in relationships involving sex trafficking, “hooking up” or “friends with benefits” dynamics, instructional settings, and other relationships with a pattern of coercive behavior.¹⁰⁸ In concordance with SAKI, WAA asserts that the term “victim” is used by law enforcement and in courtroom proceedings, and “survivor” involves a sense of empowerment.¹⁰⁹ WAA also advises avoiding gendered pronouns in using terms for experiencers and controllers because domestic violence affects the entire spectrum of heterosexual and LGBTQIA relationships, and men and non-binary individuals can be abused as well.¹¹⁰ However, this advice can appear to be more of a signal or posture than intended guidelines, considering the organization’s name: *Women Against Abuse*.¹¹¹

In a 2020 TIME article titled, *I’ve Been Told I’m a Survivor, Not a Victim. But What’s Wrong with Being a Victim?*, Kate Harding speaks to her

¹⁰¹ *Our History*, WOMEN AGAINST ABUSE, <https://www.womenagainstabuse.org/about-us/our-history> (last visited Jan. 24, 2025); see also *The Language We Use*, WOMEN AGAINST ABUSE, <https://www.womenagainstabuse.org/education-resources/the-language-we-use> (last visited Feb. 23, 2025).

¹⁰² *The Language We Use*, *supra* note 101.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

frustration when well-intended advocates told her she should not call herself a victim.¹¹² Similar to WAA and SAKI, Harding understands the empowerment that can come from the term “survivor,” but she felt that it did not represent her because she was never in fear for her life.¹¹³ In speaking of the term “victim,” Harding discusses the implications of weakness and blame that SAKI sought to dismiss.¹¹⁴ However, she also raised the novel consideration that if she opts to identify as a victim, this may create an assumption that this is the proper term, which could negatively impact future experiencers who would not wish to be referred to as victims.¹¹⁵

A solution offered by both SAKI and WAA is the term “victim-survivor.”¹¹⁶ For SAKI, this term is used throughout the document as a neutral identifier (comparable to the use of controller and experiencer in this Article).¹¹⁷ WAA states that more individuals are starting to use “victim-survivor” to represent the continuum and range of an experiencer’s post-violence experience.¹¹⁸ To this nonprofit agency, “victim-survivor” properly encompasses an experiencer’s entire transition from a “victim” in court working with law enforcement to a “survivor” with support and empowerment.¹¹⁹

A flaw of this definition is that it appears to presume that all experiencers will work with law enforcement and go to court. In reality, many experiencers are fearful or hesitant to involve the police in domestic violence disputes, especially when those experiencers are from marginalized communities who have been historically subject to police brutality and stereotyping.¹²⁰ Additionally, given the recency of this term, there is an apparent lack of agreement on what the term denotes. According to FORCE, a LGBTQ focused, multicultural collective organization founded in 2010 to promote a culture of consent and healing for experiencers of domestic violence and sexual assault, “victim-survivor” is a term used to illuminate the intersectional experiencers of Black women and gender non-conforming individuals of color:¹²¹

¹¹² Kate Harding, *I’ve Been Told I’m a Survivor, Not a Victim. But What’s Wrong With Being a Victim?*, TIME (Feb. 27, 2020), <https://time.com/5789032/victim-survivor-sexual-assault/>.

¹¹³ *Id.*

¹¹⁴ *Id.*; Alexenko et al., *supra* note 94.

¹¹⁵ Harding, *supra* note 112; Alexenko et al., *supra* note 94.

¹¹⁶ Alexenko et al., *supra* note 94.

¹¹⁷ *Id.*

¹¹⁸ *The Language We Use*, *supra* note 101.

¹¹⁹ *Id.*

¹²⁰ *Facts & Stats Collection: Domestic Violence in Communities of Color*, WOMEN OF COLOR NETWORK (June 2006), https://womenofcolornetwork.org/docs/factsheets/fs_domestic-violence.pdf; see TK LOGAN & ROB VALENTE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES (2015).

¹²¹ Charnell Covert, *Survivor, Victim, Victim-Survivor*, FORCE UPSETTING RAPE CULTURE, <https://upsettingrapeculture.com/survivor-victim/> (last visited Jan. 25, 2025).

Victim-survivor has been used to express the intersectional experiences of the most marginalized groups affected by sexual assault, violence, and abuse such as Black cis-women, Black trans-women, and gender non-conforming folks of color who have herstorically [sic] never been seen as victims in the eyes of culture, community, or the law. Victim-survivor acknowledges the reality of vulnerability and triumph as well as the need to acknowledge various connected oppressions that can further complicate the already traumatic experience of sexual assault, intimate partner violence, and abuse. As Audre Lorde states, “There is no such thing as a single-issue struggle because we do not live single-issue lives.”¹²²

Ultimately, all four groups recommend asking an experiencer how they want to be referred to or what they identify as and then calling them by whatever term they prefer.¹²³ Thus, it is appropriate to periodically inquire what term should be used.

However, despite the inherent sensitivity, empathy, and respect demonstrated by promoting such an approach, this does not answer what term should be used before an individual’s preference *can* be identified. Following the terminological lead of the experiencer seeking support is an advisable action for advocacy and representation *in practice*, but not for *written law* and *legal statutes*. In these circumstances, identifying the proper terminology cannot be left up to each individual because a uniformly accepted appropriate term is needed as a baseline for the texts of the state statutes, including the criminal and family law codes.

II. ANALYSIS

A. Terminology Usage in Topical Legal Sources

1. State Laws

The National Conference of State Legislatures (NCSL) is a self-acclaimed bipartisan organization that represents legislatures in the states, territories, and commonwealths of the United States.¹²⁴ Within its mission statement is a goal of promoting cooperation and facilitating the exchange of information between state legislatures.¹²⁵ According to the NCSL, “approximately 38 states place domestic violence definitions and penalties

¹²² *Id.*; *FORCE: Upsetting Rape Culture*, ROBERT W. DEUTSCH FOUNDATION, <https://www.rwd.foundation.org/our-work/2017/8/12/motor-house-716lr-nfb9a> (last visited Jan. 25, 2025).

¹²³ Covert, *supra* note 121.

¹²⁴ *Resources*, NAT’L CONF. OF STATE LEGISLATURES (NCSL), <https://www.ncsl.org/our-work> (last visited Jan. 25, 2025).

¹²⁵ *About NCSL*, NAT’L CONF. OF STATE LEGISLATURES (NCSL), <https://www.ncsl.org/about-us> (last visited Jan. 25, 2025).

within the criminal code and nearly every state provides a definition within the domestic relations or social services codes.”¹²⁶ These domestic violence provisions vary in their use of experiencer and controller description and terminology.¹²⁷

Based on the NCSL’s highlighted curation of each state’s domestic violence codes, “victim” is used in seven states: Alabama, Arizona, Kentucky, Missouri, New Jersey, Pennsylvania, Tennessee, and Texas.¹²⁸ There is no use of the term “survivor” or “victim-survivor.”¹²⁹ There was no use of the term “battered wife” or “battered spouse”; although eight states use the word “battery”: Arkansas, Florida, Georgia, Idaho, Michigan, Missouri, and Nevada.¹³⁰ Idaho is the only state that uses the word “wife,” but it uses the word only when describing that a household member is someone with a shared child regardless of being held as “*husband or wife*.”¹³¹

Consistent with the definition put out by the United Nations but contrary to the definitions used by several non-profit organizations, advocacy groups, and the U.S. Department of Justice, thirty-eight states use the term “household member.”¹³² “Cohabitant” is used by California, Hawaii, Utah, and Maryland.¹³³ Notably, New Mexico defines “household member” as more inclusive of a term than “cohabitant”:

“[H]ousehold member” means a spouse, former spouse, parent, present or former stepparent, present or former parent-in-law, grandparent, grandparent-in-law, child, stepchild, grandchild, co-parent of a child or a person with whom the petitioner has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for purposes of this section.¹³⁴

Under New Mexico’s standard, the term “household member” would allow for more domestic violence arrests and charges than “cohabitant” because it would encompass a broader range of experiencers and controllers.¹³⁵ However, as previously stated earlier in this Article, some in the field do not include non-partner familial abuse in their definition of domestic violence.¹³⁶

¹²⁶ *Domestic Violence/Domestic Abuse Definitions and Relationships*, *supra* note 65.

¹²⁷ *See id*; *see* Covert, *supra* note 121.

¹²⁸ *Domestic Violence/Domestic Abuse Definitions and Relationships*, *supra* note 65.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ N.M. STAT. ANN. § 40-13-2 (West 2019) (emphasis added).

¹³⁵ *Id.*

¹³⁶ *See The Language We Use*, *supra* note 101.

With regard to terms for the controller, “abuser” and “batterer” are not mentioned in any of the state domestic violence provisions.¹³⁷ However, the word “abuse” is used in thirty-five state laws, and “battery” is used in eight.¹³⁸ “Perpetrator” is not used in state laws, despite the term being used in the NCSL’s description of their collection and “perpetrated” being used by California and Delaware.¹³⁹ The term “person/people who have caused harm” is in no state laws but “harm” is found in twenty-one state provisions.¹⁴⁰

While these observations may warrant further and future studies, there was nothing to substantiate any immediate claims of causation between the terms used in the provisions and the rates of domestic violence in the state.¹⁴¹

2. National Council of Juvenile and Family Court Judges

The National Council of Juvenile and Family Court Judges (NCJFCJ) is a judicial membership organization that works to provide professional resources on specific focus areas, including domestic violence.¹⁴² In 2012, as part of its effort to share resources and improve the lives of the families and children who seek justice, it shared a Model Code on Domestic and Family Violence (Model Code) drafted by a “multidisciplinary Advisory Committee comprised of judges, battered women’s advocates, attorneys, law enforcement officers, and other professionals.”¹⁴³ The Model Code was originally published in 1994.¹⁴⁴ It sets forth procedures for civil protection orders, how to treat domestic violence as a crime with aggressive intervention, prioritizes child safety in custody, and gives suggestions for community support and coordination.¹⁴⁵

In this Model Code, the term “victim” is used 379 times.¹⁴⁶ “Victim-survivor” and “survivor” are never used, and the word “survived” is used once.¹⁴⁷ The term “battered wife/spouse” is not used. However, there are nine mentions of words with the root “batter”: “battered women”—three times,

¹³⁷ *Domestic Violence/Domestic Abuse Definitions and Relationships*, *supra* note 65.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Domestic Violence Statistics*, *supra* note 38.

¹⁴² *Who We Are*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, <https://www.ncjfcj.org/> (last visited Jan. 25, 2025).

¹⁴³ *Model Code on Domestic and Family Violence*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES (Mar. 15, 2012), <https://www.ncjfcj.org/publications/model-code-on-domestic-and-family-violence/>.

¹⁴⁴ *Family Violence: Model Code on Domestic and Family Violence*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES iii (Jan. 13-15, 1994), https://www.ncjfcj.org/wp-content/uploads/2012/03/modelcode_fin_printable.pdf.

¹⁴⁵ *Id.* at vi.

¹⁴⁶ *See, e.g., id.*

¹⁴⁷ *See, e.g., id.*

“batterer treatment”—once, “battered parent”—twice, and “batterer”—twice.¹⁴⁸

For controller terminology, “abuser” is used nineteen times, and “batterer” is used three times.¹⁴⁹ The most common controller term in the Model Code is “perpetrator.”¹⁵⁰ “Perpetrator” is used 200 times.¹⁵¹ The other terms that were present in the state codes included “defendant,” used eleven times, “offender,” used thirteen times, and “respondent,” used fifty-seven times.¹⁵² Based on its frequent use, “perpetrator” was likely viewed as the most neutral or acceptable term to use in legal documents and statutes.¹⁵³

More recently, in April 2021, NCJFCJ released a bulletin titled, *Teen Dating Violence: Social Media and Tech Misuse Guidance for Judges*.¹⁵⁴ In this publication, “survivor” is the most favored experiencer term, as it is used forty-nine times, while “victim” is used only twelve times.¹⁵⁵ This differs from the March 2021 edition, published only one month earlier: *COVID-19 and Abuse in Later Life: The Impact and What Judges and Courts Can Do*.¹⁵⁶ While this publication discussed elder abuse as a whole, its discussion did include materials and information about the impact of domestic violence on elderly individuals.¹⁵⁷ In this bulletin, the terms “survivor” and “victim” appear an equal amount (four times) and seem to be used interchangeably by NCJFCJ’s Senior Program Attorney, Amanda Kay.¹⁵⁸ However, in NCJFCJ’s September 2020 brief, *Addressing Domestic Violence in Juvenile Dependency Mediation: Spotlight on Nevada’s Juvenile Dependency Mediation Program*, nine months before the teen dating violence brief, the term “victim” is not used but “survivor” is used three times (although two of them were in the “About the Resource Center” section).¹⁵⁹

¹⁴⁸ See, e.g., *id.*

¹⁴⁹ See, e.g., *id.*

¹⁵⁰ See, e.g., *id.*

¹⁵¹ See, e.g., *id.*

¹⁵² See, e.g., *id.*

¹⁵³ *Perpetrator*, BLACK’S LAW DICTIONARY (12th ed. 2024).

¹⁵⁴ *Teen Dating Violence: Social Media and Tech Misuse Guidance for Judges*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES (Apr. 22, 2021), <https://www.ncjfcj.org/publications/teen-dating-violence-social-media-and-tech-misuse-guidance-for-judges/>.

¹⁵⁵ See, e.g., *id.*

¹⁵⁶ Amanda Kay, *COVID-19 and Abuse in Later Life The Impact and What Judges and Courts Can Do*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES (Mar. 29, 2021), <https://www.ncjfcj.org/publications/covid-19-and-abuse-in-later-life-the-impact-and-what-judges-and-courts-can-do/>.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.* at 1–2; see *Teen Dating Violence: Social Media and Tech Misuse Guidance for Judges*, *supra* note 154.

¹⁵⁹ Katherine R. Malzahn-Bass, *Addressing Domestic Violence in Juvenile Dependency Mediation*, SNAPSHOT, https://www.ncjfcj.org/wp-content/uploads/2020/09/NCJFCJ_RCDV_NV_JDMP_Final.pdf (last visited Jan. 26, 2025).

NCJFCJ also has a YouTube page where it has been sharing and posting informational videos semi-regularly since the channel's creation in 2016.¹⁶⁰ However, out of 227 videos over five years, there does not appear to be any on the subject of appropriate experiencer or controller terminology.¹⁶¹ Additionally, while there is a resource video titled, *What Judges Need to Know About Domestic Violence in the LGBTQ Community*, which includes a discussion of the importance of pronouns, identity, and other words, there is not a video on being conscientious or mindful of the impact experiencer or controller terminology can have on these individuals navigating the legal system.¹⁶²

3. Federal Legislation

According to the National Network to End Domestic Violence, the Violence Against Women Act (VAWA) has been instrumental in creating comprehensive and cost-effective responses to domestic violence.¹⁶³ VAWA programs are administered by the U.S. Departments of Justice and Health and Human Services, and the legislation has improved local responses to domestic violence incidents.¹⁶⁴ VAWA was first passed in 1994 and then reauthorized in 2000, 2005, 2013, and 2022.¹⁶⁵

The table below displays the number of uses of different experiencer and controller terms in these versions or iterations of VAWA:

¹⁶⁰ NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, YOUTUBE (Apr. 28, 2016), <https://www.youtube.com/c/NCJFCJ>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Violence Against Women Act*, NNEDV, <https://nnedv.org/content/violence-against-women-act/> (last visited Jan. 26, 2025).

¹⁶⁴ *Id.*

¹⁶⁵ *Violence Against Women Act (VAWA)*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/violence-against-women-act-vawa/> (last visited Jan. 26, 2025).

Violence Against Women Act (VAWA) Versions:						
		1994	2000	2005	2013	2022
Experiencer Terms	Victim	131	63	414	317	286
	Battered —	7	57	23	3	0
	Survivor	0	0	0	0	74
Controller Terms	Abuser	6	11	23	2	4
	Batterer	3	0	1	1	2
	Perpetrator	1	1	16	5	6
	Offender	25	4	20	15	19
	Defendant	28	0	2	15	14
	Respondent	1	0	0	0	0

In the 1994 version of VAWA, the experiencer term “victim” is used 131 times.¹⁶⁶ “Battered” is used seven times.¹⁶⁷ The term “survivor” is not found anywhere in the legislation.¹⁶⁸ “Abuser” is used six times, “batterer” is used three times, “perpetrator” is used once.¹⁶⁹ Additionally, “offender” appears twenty-five times, “defendant” appears twenty-eight times, while “respondent” appears only once.¹⁷⁰

In VAWA’s legislation in 2000, “victim” is used sixty-three times, and “survivor” is not used.¹⁷¹ The term “battered” became much more present in the text—it was used fifty-seven times.¹⁷² “Abuser” is used eleven times, “offender” is used four times, and “perpetrator” is used once.¹⁷³ However,

¹⁶⁶ Violence Against Women Act of 1993, H.R. 1133, 103rd Cong. (1994).

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Violence Against Women Act of 2000, S.2787, 106th Cong. (2000).

¹⁷² *Id.*

¹⁷³ *Id.*

unlike in 1994, the term “batterer” is not present in this legislation, nor is “defendant” or “respondent.”¹⁷⁴

Five years later, in 2005, the experiencer term “victim” was similarly used heavily, a total of 414 times.¹⁷⁵ “Survivor” was not used once, and “battered” was used twenty-three times.¹⁷⁶ With regard to controller terms, “abuser” is used twenty-three times, “batterer” once, and “perpetrator” sixteen times.¹⁷⁷ The term “offender” reverted to its 1994 frequency with twenty uses, and “defendant” made a return and was used twice.¹⁷⁸ The absence of “respondent” remained consistent.¹⁷⁹

VAWA’s 2013 legislation maintained the prominence of “victim” terminology with 317 uses and no use of the “survivor” term.¹⁸⁰ Notably, there were only three uses of “battered,” similar to VAWA 1994 and much less than VAWA 2000 and 2005.¹⁸¹ The term “abuser” was used substantially less, only twice.¹⁸² “Batterer” was again used once, but “perpetrator” use decreased and was only written five times.¹⁸³ “Offender” and “defendant” were both written fifteen times, but “respondent” was absent in the text.¹⁸⁴

VAWA’s latest iteration in 2022 marks a significant change from its previous forms in terms of experiencer terminology.¹⁸⁵ Most notably, the legislation for the first time uses the term “survivor,” and does so seventy-four times.¹⁸⁶ There is no use of the term “battered,” and the term “victim” has decreased to 286 times.¹⁸⁷ Controller terminology, on the other hand, remains relatively unchanged. Uses of “abuser” and “batterer” remain in the single digits, and there is no significant variation in the use of “perpetrator” and “offender.”¹⁸⁸ “Defendant” is used only one less time than in 2013, and “respondent” continues to be excluded entirely from the text.¹⁸⁹

¹⁷⁴ *Id.*

¹⁷⁵ Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong. (2006).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2022).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

B. Experiencers

1. *Victim*

The denotive meaning of victim is “a person harmed, injured, or killed as a result of a crime, accident, or other event or action.”¹⁹⁰ The word “victim” is often associated with weakness and vulnerability.¹⁹¹ This connotative meaning of “victim” could be seen as positive in the sense that it would invoke a sense of societal responsibility to be protective of this group of individuals.¹⁹² Referring to experiencers as “victims” could lead to a public understanding that these individuals need to be cared for and protected from controllers.¹⁹³ In a way, the word “victim” could have the positive impact of appealing to the paternalistic motivations, instincts, or undertones of law enforcement and the judicial system.¹⁹⁴ However, historically, there have been many vulnerable groups that have been marginalized and ignored by police and the courts.¹⁹⁵ Consequently, it would be risky to rely on the internal or independent motivations of police and court officials to be the sole protectors or proponents for the needs of experiencers, because regardless of what term is used, no law is self-implementing.¹⁹⁶ This is especially true considering the discretion and wide latitude prosecutors have to charge or not charge cases. In the criminal justice system, the American Bar Association asserts that prosecutors “serve[] the public interest” and exercise “discretion to not pursue criminal charges in appropriate circumstances.”¹⁹⁷ As Michael Tonry explains: “[p]olice arrest people, but prosecutors decide whether those arrests lead to charges.”¹⁹⁸ In the modern era with intense media scrutiny and polarization, treatment of experiencers can vary depending on their regional jurisdiction because “American prosecutors sometimes openly and unashamedly take media reactions, public opinion, and political considerations into account when deciding what cases to prosecute and how

¹⁹⁰ *Victim*, OXFORD ENGLISH DICTIONARY (2024), https://www.oed.com/dictionary/victim_n?tl=true.

¹⁹¹ Beverly Engel, *When Did “Victim” Become a Bad Word?*, PSYCH. TODAY (Apr. 9, 2015), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201504/when-did-victim-become-bad-word>.

¹⁹² *See generally id.* (“There is nothing either stated or implied in the definition that indicates weakness.”).

¹⁹³ *See generally id.* (“We have to admit that when a person is victimized . . . that person is changed . . . [t]hat person needs to be held and nurtured.”).

¹⁹⁴ *See generally Victim*, *supra* note 190.

¹⁹⁵ *Facts & Stats Collection: Domestic Violence in Communities of Color*, *supra* note 120; Logan & Valente, *supra* note 120.

¹⁹⁶ *Id.*

¹⁹⁷ *Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS’N, https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/ (last visited Mar. 10, 2025).

¹⁹⁸ Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1 (2012).

to handle them.”¹⁹⁹ Thus it is often the advocacy by survivors and their supporters that creates the political will and inspires the attention and motivation of law enforcement to dedicate the resources necessary for investigation and prosecuting these types of crimes.

Additionally, this “weak” and “vulnerable” connotative meaning of victim comes with a sense of blame and guilt.²⁰⁰ It is common to hear laypeople and nonexperts ask, “*Why did they stay?*” or “*Why did they allow themselves to be victimized?*” Pairing these sentiments with the National Rifle Association’s “Refuse to be the Victim” campaign, it is evident that there is a heavy amount of societal aversion for “victims.”²⁰¹ In fact, “victim” is a common term that is vilified and used as an insult in social commentary and political literature, especially in right-wing circles.²⁰² Myriad conservative works—such as: *Privileged Victims: How America's Culture Fascists Hijacked the Country and Elevated Its Worst People*; *The Rise of Victimhood Culture: Microaggressions, Safe Spaces, and the New Culture Wars*; and *The Antidote: Healing America from the Poison of Hate, Blame, and Victimhood*—consistent with their titular descriptions, attribute American social issues and political polarization to the concept of “victimhood.”²⁰³ In this sense one should avoid using a term that is so negatively charged, is perpetually vilified, and has a redeeming quality that is rooted in paternalism.

Further, it is unwise to stereotype who or what an experiencer is or appears to be. Experiences of domestic violence are just like individuals who have gone through other trauma—there is no single identifier or characteristic.²⁰⁴ This “descriptive inadequacy” is one of the main conceptual critiques of the term “battered women’s syndrome.”²⁰⁵ Erin Smith in her amicus brief to *People v. Cornell Brown* states:

[Battered women’s syndrome] implies that all [experiencers] of domestic violence experience one common set of effects from battering. This implication is at odds with our current understanding of the complexity and variability of individuals’ responses to violence. Rather than there being a

¹⁹⁹ *Id.* at 2.

²⁰⁰ *See generally Victim*, *supra* note 190.

²⁰¹ *Refuse To Be A Victim*, NAT’L. RIFLE ASS’N., <https://rtbav.nra.org/> (last visited Jan. 20, 2025).

²⁰² *See generally* ALYSON M. COLE, *THE CULT OF TRUE VICTIMHOOD: FROM THE WAR ON WELFARE TO THE WAR ON TERROR* (2006).

²⁰³ EDDIE SCARRY, *PRIVILEGED VICTIMS: HOW AMERICA’S CULTURE FASCISTS HIJACKED THE COUNTRY AND ELEVATED ITS WORST PEOPLE* (2020); BRADLEY CAMPBELL & JASON MANNING, *THE RISE OF VICTIMHOOD CULTURE: MICROAGGRESSIONS, SAFE SPACES, AND THE NEW CULTURE WARS* (1st ed. 2018); JESSE LEE PETERSON, *THE ANTIDOTE: HEALING AMERICA FROM THE POISON OF HATE, BLAME, AND VICTIMHOOD* (2021).

²⁰⁴ Brief for *People v. Cornell Brown* as Amici Curiae Supporting Respondent, 33 Cal. 4th 892 (2004) (No. S113929), 2004 WL 349934.

²⁰⁵ *Id.*

set of uniform responses to violence, “scientific and clinical literature has documented a broad range of emotional, cognitive, physiological, and behavioral sequelae to traumatic events such as battering.” The variability in responses to violence is not captured by a term that purports to label just one “syndrome.”²⁰⁶

Being an experiencer of domestic violence is a result of the actions of the controller, not the result of personal characteristics or circumstances.²⁰⁷ So the term “victim” with its connotations of weakness and vulnerability could paint this image of an experiencer who “appears abused” or seems “likely to be abused.” While that may be accurate for some, it is not precise for all experiencers. Consequently, it is risky because domestic violence identification or recognition should not be hindered by the stereotypes invoked by the terms in use.

2. *Survivor*

“Survivor” has the denotive meaning of “a person who continues to live, despite almost dying[.]”²⁰⁸ It must be recognized that the CBS TV show *Survivor* has somehow changed the meaning of the word “survivor,” or at the very least supplemented it with alternative connotative meanings.²⁰⁹ The *Survivor* show started in 2000 and has been very popular in American culture.²¹⁰ It has been nominated for numerous reality program Emmy Awards, with the host Jeff Probst winning four Emmys in the category “Outstanding Host for a Reality or Reality-Competition Program.” The show is generally credited with launching the reality television fad of the 2000s.²¹¹ From *Survivor* there is almost a dual meaning to the term.

The first meaning is that a “survivor” is someone who has encountered something horrific or life-threatening and *survived* the experience.²¹² This would be a very positive and rewarding connotation to an experiencer, because it not only honors the harm they encountered, but focuses on their recovery from the abuse and not the abuse itself. Many experts and

²⁰⁶ *Id.*

²⁰⁷ SCOTT & MCKENNA, *supra* note 51 at § 1:9.

²⁰⁸ *Survivor*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/survivor> (last visited Mar. 10, 2025).

²⁰⁹ See Editors of Encyclopedia Britannica, *Survivor - American Television Show*, ENCYCLOPEDIA BRITANNICA (2021), <https://www.britannica.com/topic/Survivor-American-television-show> (last visited Jan 25, 2025).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *What does survivors mean?*, DEFINITIONS (2021), <https://www.definitions.net/definition/survivor> (last visited Apr. 5, 2025); *Survivor*, DICTIONARY, <https://www.dictionary.com/browse/Survivor> (last visited Apr. 5, 2025); *Survivor*, NIH NAT'L CANCER INST., <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/survivor> (last visited Jan 18, 2025).

experiencers have explained that this sort of spotlight on their recovery, as opposed to their suffering, can be empowering and uplifting.²¹³

The second connotative meaning of the term “survivor” is someone courageous, displaying grit, and suffering in the pursuit of a larger goal.²¹⁴ This meaning can invoke a sense of *necessary suffering*, which should certainly be avoided when referring to experiencers. However, it also connotes respect for the amount of fortitude required to “come out the other side,” which is not a bad perception to show or have for experiencers.²¹⁵ That being said, it can also cut against experiencers because using such “strong” and “courageous” terminology could bleed into judicial stagnation or a lack of legal intervention, protection and advocacy, and the waning of support.²¹⁶ If the public takes this connotation to the extreme, then there would not be a need for survivor support funds and advocacy services because these experiencers have already “survived” and overcome the domestic violence.²¹⁷

Further, when it comes to self-doubt and denial of the severity of the domestic violence in an experiencer’s life, there can sometimes be a sense of comparison between experiencers.²¹⁸ Often, the experiencers will state that their experience was “not as bad” as some other experiencer or say, “Well, someone else had it worse.”²¹⁹ However, trauma impacts everyone differently, so any references to another person’s abuse to invalidate one’s own trauma and experience is counter-productive and harmful to the healing process.²²⁰

This tendency can be exacerbated by the use of the term “survivor” because *Survivor* is a competition show where in the semiannual season finale, at the “Final Council” there is a jury of contestants voting between two or three individuals to determine who is the better survivor.²²¹ In a parallel fashion to court procedures, they have a group of peers judging the reality show contestants to see who endured more, who did more, and who

²¹³ Alexenko et al., *supra* note 94.

²¹⁴ Susan G Klappa et al., *Beyond Words: Understanding Grit in Survivors of Stroke and Caregivers*, 7 J. PATIENT EXPERIENCE 1101 (2020).

²¹⁵ Alexenko et al., *supra* note 94.

²¹⁶ See *Survivor-Centered Justice: Why is it Essential For Ending Gender-Based Violence?*, INT’L. DEV. LAW ORG., <https://www.idlo.int/news/highlights/survivor-centered-justice-why-it-essential-ending-gender-based-violence> (last visited Jan 18, 2025).

²¹⁷ See *Why We Shouldn’t Stop Using the Term Victim*, CHANGING US, <https://www.changingus.org/blog/using-the-term-victim> (last visited Jan 18, 2025).

²¹⁸ See *id.*

²¹⁹ Jonathan Bungard, *Comparing Trauma*, SAFE HAVEN TRAUMA SERVS. (Dec 15, 2019), <https://safehaventherapy.com/blog/2019/12/15/comparing-trauma#:~:text=Besides%2C%20it%20is%20likely%20that,as%20bad%20as%20someone%20else's%3F>.

²²⁰ *Trauma Response: Understanding How Trauma Affects Everyone Differently*, UNIV. OF MD. MED. SYS., <https://health.umms.org/2022/06/08/trauma-response/> (last visited Jan 18, 2025).

²²¹ See Editors of Encyclopedia Britannica, *supra* note 209.

deserves the most recognition.²²² As such, using this term could harm experiencers because it can inadvertently create a sense of comparison within the experiencer community.²²³

3. *Victim-Survivor*

As a burgeoning new term, “survivor-victim” has yet to be defined in any sort of established dictionary; thus, it comes with the combined denotive and connotative meanings of “victim” and “survivor.”²²⁴ This is to say, the many criticisms of the term “victim” or arguments for it to be replaced do not simply disappear or change because a new term has been added to the end of it.²²⁵

Additionally, in terms of denotive meaning, a very literal reading of the term would be that a “victim-survivor” is an individual who has survived victimization.²²⁶ This would be appropriate and likely instill the desired effect in public understanding. However, “victim-survivor” could be interpreted to be an individual who survived interacting with a victim.²²⁷ Many two-word or three-word terms include “survivor” as the secondary word: plane crash survivor, car crash survivor, AIDS survivor, cancer survivor, etc. In each of these terms, the antecedent word is something bad, dangerous, and undesirable. While Domestic Violence certainly matches those descriptors, being a “victim” is not. One should be cautious in attaching the term “victim” to “survivor” because it could invoke those other antecedent words and have them be falsely attributed to the state of being victimized.

There could also be a concern that this term is not a realistic term to use because it is invented by attaching two words, and not just any words, but two words that are consistently the subject of news articles and scholarly discussions of whether one should be used or the other.²²⁸ Because of the current “survivor versus victim” conversation, the term itself could be delegitimized as a quippy performative oxymoron.²²⁹ More simply, it could be too much of a mouthful. There is some risk that, like the evolution of the

²²² See *id.*

²²³ See Danielle Campoamor, *I Am Not a Sexual Assault “Survivor”- I’m a Victim*, BAZZAR (May 21, 2018), <https://www.harpersbazaar.com/culture/features/a20138398/stop-using-survivor-to-describe-sexual-assault-victims/>.

²²⁴ *Survivor, Victim, Victim-Survivor*, FORCE, <https://upsettingrapeculture.com/survivor-victim/#:~:text=Victim%2Dsurvivor%20has%20been%20used,the%20eyes%20of%20culture%2C%20community> (last visited Jan 18, 2025).

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See *Why We Shouldn’t Stop Using the Term Victim*, *supra* note 217.

²²⁸ Alexenko et al., *supra* note 94; *The Language We Use*, *supra* note 101.

²²⁹ *Id.*

term LGBT, which evolved to LGBTQ, to LGBTQIA, LGBTQIA+, “victim-survivor” could become the subject of ridicule or a touchpoint in the outrage of “policing of language.”²³⁰ However, those sorts of criticism and responses may speak less to the quality and effectiveness of “victim-survivor” as a term and speak more to the character and morals of the criticizing individuals. Avoiding all criticism is impossible.

4. *Battered Wife/Spouse*

For some individuals with traditional views of the term “wife” and “spouse,” this term can invoke old notions conveyed by the Doctrine of Necessaries—a “legal duty to provide [wives] with food, clothing, shelter, and medical services”—from which there could be an implicit emphasis on spousal responsibility and a heightened sense of needed love and care.²³¹ Although, notably, the judicial application of this doctrine, in practice, contributed less to paternalism and more to sexism and female subjugation.²³² However, if the term invokes a traditional, ideal image of a *healthy* marriage, the juxtaposed reality of domestic abuse would seem all the more heinous and wrong, which could result in an increased motivation for aid, intervention, or support.²³³ However, it can be problematic to rely on traditional notions of gender roles in marriages to substantiate the immoral nature of abuse. Abuse is wrong at all times, no matter who is being abused.

Additionally, the term “wife” and “spouse” can be very exclusionary of LGBT relationships that may not have a wife in the relationship or may not be married with spouses and prefer to use the term “life partner.”²³⁴ Additionally, “wife” is gendered and would contribute to the erasure of male experiencers when so often they are underrepresented and ignored in

²³⁰ Erin Blakemore, *From LGBT to LGBTQIA+: The Evolving Recognition of Identity*, NAT'L GEOGRAPHIC (Oct. 19, 2021), <https://www.nationalgeographic.com/history/article/from-lgbt-to-lgbtqia-the-evolving-recognition-of-identity>; *Garden State Families Encourages Many to Confront the “education Molestation Act”*, A4454/S2781, GARDEN STATE FAMS., <https://gardenstatefamilies.org/blog/garden-state-families-encourages-many-to-confront-the-education-molestation-act-a4454-s2781> (last visited Jan. 26, 2025); Lily Wakefield, *Trump-Themed Coffee Shop Encouraging Customers to Bring Guns Opens Next Door to LGBT Bar*, PINKNEWS (Mar. 1, 2020), <https://www.pinknews.co.uk/2020/03/01/trump-themed-coffee-shop-guns-lgbt-bar-conservative-grounds-largo-florida/>.

²³¹ *Connor v. Sw. Fla. Reg'l Med. Ctr., Inc.*, 668 So. 2d 175, 175 (Fla. 1995).

²³² *See Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (1993), *modified* (Jan. 22, 1993); *McGuire v. McGuire*, 59 N.W.2d 336, 336 (Neb. 1953).

²³³ *See Connor*, 668 So. 2d at 175; *see also Borelli*, 16 Cal. Rptr. 2d at 16; *see also McGuire*, 59 N.W.2d at 336.

²³⁴ *See generally* Methodists Urge Ministers to Avoid Gendered Terms Like Husband & Wife, LGBTQ NATION (Jan. 5, 2024), <https://www.lgbtqnation.com/2024/01/methodists-urge-ministers-to-avoid-gendered-terms-like-husband-wife/> (discussing replacing the terms “wife” and “husband” with gender neutral terms).

advocacy groups and academic discussions.²³⁵ Although women are the vast majority of experiencers, one in ten men experience sexual violence, physical violence, or stalking by an intimate partner during their lifetime.²³⁶

Further, “battered” invokes a sense of a physical battery, and as was discussed earlier in this Article, there are many different types of abuse encompassed in domestic violence.²³⁷ Thus, using this term would exclude the other emotional, psychological, financial, litigational abuse or other types of non-physical threats, intimidation, and control.²³⁸ It would also exclude any other physical abuse or torment that does not rise to the level of battery.²³⁹ As a result, experiencers who encounter this type of non-battery abuse may not consider themselves to be experiencers and question the severity of their own situations.²⁴⁰ This may effectively exclude them from the community of domestic violence experiencers and weaken the fight against domestic violence.²⁴¹

C. Controllers

When discussing or theorizing about controllers, it is important to keep in mind that, like experiencers, there is no monolithic identity of controllers.²⁴² There is, of course, a commonality that they seek to control their experiencers, but how that desire for control manifests in the relationship is diverse.²⁴³ In Lundy Bancroft’s *Why Does He Do That: Inside the Minds of Angry and Controlling Men*, he describes ten main categories or archetypes of controllers:

The Demand Man. Highly entitled, expects experiencer’s life to revolve around them and becomes angry when things do not go their way.

Mr. Right. Considers themselves to be the ultimate authority on every subject, does not like their superiority to be questioned, debated, or disagreed with.

²³⁵ *Myths Around Men Experiencing Abuse*, THE HOTLINE, <https://www.thehotline.org/resources/myths-around-men-experiencing-abuse/> (last visited Jan. 26, 2025).

²³⁶ *Devastatingly pervasive: 1 in 3 Women Globally Experience Violence*, *supra* note 29.

²³⁷ See Engel, *supra* note 191.

²³⁸ See generally *Victim*, *supra* note 190.

²³⁹ See *Domestic Violence*, *supra* note 58.

²⁴⁰ See *id.*

²⁴¹ Karen Bellehumeur, *A Former Crown’s Vision for Empowering Survivors of Sexual Violence*, WINDSOR Y.B. OF ACCESS TO JUST. (2020), <https://1.next.westlaw.com/Document/I7171079b467611ebbea4f0dc9fb69570/View/FullText.html> (last visited Jan. 26, 2025).

²⁴² Engel, *supra* note 191.

²⁴³ See generally *Victim*, *supra* note 190.

The Water Torturer. Pay-back oriented, stays calm during arguments and psychologically manipulates the experiencer into always feeling at fault and “crazy.”

The Drill Sergeant. Highly critical of the experiencer’s behavior and attire, invasive into the experiencer’s actions outside the home and seeks to limit them to approved activities.

Mr. Sensitive. Acts under the pretense of being gentle and supportive but expects endless attention and is always hurt by the experiencer’s actions and will lash out and guilt trip.

The Player. Attractive individual, who flaunts affairs and flirtation to degrade the experiencer, or vehemently denies chronic infidelity to foster insecurity and self-doubt.

Rambo. Aggressive intimidator, appears protective in early stages of relationship but starts to enjoy creating fear and views experiencers as inferior and not worth respect.

Victim. Highly self-centered and tells persuasive and heart-wrenching accounts of previous mistreatment to appeal to experiencer’s compassion and justify abusive behavior.

The Terrorist. Sadistic partner, makes direct and specific threats against the experiencer, highly likely to stalk and escalate abuse in response to any distance or attempts to leave.²⁴⁴

Bancroft also notes that this is not an exhaustive list and that many controllers display or share characteristics across multiple archetypes with “tremendous variation.”²⁴⁵ Also, while Bancroft’s work presents a detailed summary of the types of controllers, the title speaks of “angry and controlling men,” and uses terms like “Mr.” and “Man” in the categories.²⁴⁶ This is using gendered language and is exclusionary to experiencers in lesbian relationships and other female, non-binary, or gender non-conforming controllers.²⁴⁷ However, it is possible that due to the absence of male or heterosexual male privilege, female and nonbinary controllers employ different tactics of control and abuse.²⁴⁸

²⁴⁴ LUNDY BANCROFT, WHY DOES HE DO THAT?: INSIDE THE MIND OF ANGRY AND CONTROLLING MEN 150–200 (2002).

²⁴⁵ *Id.* at 97.

²⁴⁶ *Id.* at 150–200.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

It is nevertheless imperative that whatever term is used in the field of Domestic Violence reflects the diversity and wide range of controllers and types of abuse.

1. Abuser

Abuser is defined in the Cambridge dictionary as “someone who treats another person in a cruel, violent, or unfair way[.]”²⁴⁹ Because of this denotive meaning, “abuser” is a very inclusive term.²⁵⁰ It does not require the controller’s actions to be physical or involve any bodily harm, only a level of cruelty and unfairness or, in other words, *controlling behavior*.²⁵¹

The term “abuser” centers the “abuse” in the controller’s identification.²⁵² It directly states that this individual was the one inflicting abuse.²⁵³ The risk of this abuse-centricity is that, like the labels “cheater” or “liar,” it is a very character-tarnishing or character-branding term.²⁵⁴ The connotative meaning of abuser invokes a sense of irredeemability, conveying that this is their character or this is the type of person they truly are at their core.²⁵⁵

This connotation of irredeemability can be viewed positively because it is beneficial to not gloss over or euphemize the controller’s treatment of the experiencer.²⁵⁶ Asserting the negative character of the controller can demonstrate the near certainty of repeated and future abuse.²⁵⁷ This, in turn, can emphasize to the experiencer the importance of leaving the controller or seeking community resources for support.²⁵⁸

The drawback of the character-branding nature of the term “abuser” is that it can discourage controllers from seeking therapy or treatment.²⁵⁹ If someone evaluates this term from the mindset of what is most conducive to the rehabilitation and restoration of controllers, then this term can be criticized for villainizing controllers and perhaps demotivating them from

²⁴⁹ *Abuser*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/abuser> (last visited Mar. 10, 2025).

²⁵⁰ *See id.*

²⁵¹ *See id.*

²⁵² *See id.*

²⁵³ *See id.*

²⁵⁴ *See id.*

²⁵⁵ *See id.*

²⁵⁶ *See id.*

²⁵⁷ *See also* ROBERT C. DAVIS & CHRISTOPHER MAXWELL, PREVENTING REPEAT INCIDENTS OF FAMILY VIOLENCE: A REANALYSIS OF DATA FROM THREE FIELD TESTS 18 (2003), available at: <https://www.ojp.gov/pdffiles1/nij/grants/200608.pdf> (finding that domestic violence has the highest repeat rate of all crimes, especially in the weeks after reporting to police).

²⁵⁸ *See also id.*

²⁵⁹ *See* Scott Miller, *Domestic Abuse Intervention Project - The Duluth Model (DAIP)*, CEBC – CAL. EVIDENCE-BASED CLEARINGHOUSE (2021), <https://www.cebc4cw.org/program/domestic-abuse-intervention-project/>.

trying to stop their own cyclical pattern of control and violence.²⁶⁰ Lundy Bancroft even asserts that in reform efforts, the first challenge is “to motivate him to work on himself.”²⁶¹ However, this criticism of “abuser” implicitly relies on the sentiment that a controller’s interests should be prioritized over an experiencer’s interest.²⁶² Additionally, many factors impede a controller’s ability to reform themselves, such as mental health concerns, substance abuse, addiction, and financial obstacles to treatment.²⁶³ Thus, it may be unfair to scapegoat this term as a primary cause for the inefficacy of these treatments or the controller’s own resistance and hesitation.

2. Batterer

The first definition of “batterer” is “a person or thing that batters”; the secondary definition is “a person who inflicts violent physical abuse upon a child, spouse, or other person.”²⁶⁴ The strength of this term lies in its identifiability and common use. It is frequently used in case opinions, legal texts, advocacy resources, and common internet information pages.²⁶⁵ However, like the term “battered wife” or “battered spouse,” it narrows the field of what is considered abuse in domestic violence.²⁶⁶ Further, in judging a term’s appropriateness, frequent past use should not hold more weight than accurately representing and encompassing all types of controllers. If “batterer” remains as the controller term, many experiencers who encounter severe forms of non-physical abuse could think their significant other is not a batterer and thus conclude they are not experiencing domestic violence.²⁶⁷ This is a term-facilitated outcome or scenario that should be avoided.²⁶⁸

²⁶⁰ See *id.*

²⁶¹ BANCROFT, *supra* note 244, at 548. Bancroft’s use of gendered language is referenced earlier in this Article.

²⁶² *Id.*

²⁶³ *Addiction And Domestic Violence*, ADDICTION CTR. (July 29, 2024), <https://www.addictioncenter.com/addiction/domestic-violence/>; Alexander, *Abuse and Mental Illness: Is There a Connection?*, THE HOTLINE, <https://www.thehotline.org/resources/abuse-and-mental-illness-is-there-a-connection/> (last visited Jan. 22, 2025). See *Batterers Intervention Program*, RECOVERY TECH., <https://recoverytechnology.org/services/batterers-intervention-program/> (last visited Jan. 22, 2025).

²⁶⁴ *Batterer*, DICTIONARY, <https://www.dictionary.com/browse/batterer> (last visited Jan. 22, 2025).

²⁶⁵ See *People v. Brown*, 33 Cal. 4th 892, 900 (Cal. 2004); *State v. Townsend*, 186 N.J. 473, 484 (N.J. 2006); *State v. Edgington*, 802 N.W.2d 238 (Iowa Ct. App. 2011); SCOTT & MCKENNA, *supra* note 51 at § 1:12; Andrew Klein et al., *Massachusetts’ Certifying Agency Replaces Batterer Program with Nicer Name*, 22 NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION 1 (2016); *Our Mission*, BATTERED WOMEN’S JUST. PROJECT, <https://www.bwjp.org/about-bwjp.html> (last visited Jan. 22, 2025); *Batterer Intervention*, FUTURES WITHOUT VIOLENCE, <https://www.futureswithoutviolence.org/batterer-intervention/> (last visited Jan. 22, 2025).

²⁶⁶ See *Batterer*, *supra* note 264; *Myths Around Men Experiencing Abuse*, *supra* note 235.

²⁶⁷ See *id.*

²⁶⁸ See *id.*

3. Perpetrator

The denotive meaning of “perpetrator” is a person who commits a crime or does something wrong or evil.²⁶⁹ It stems from the late Latin agent noun *perpetrare* which means “to perform” or “to accomplish.”²⁷⁰ With this term, the focus is more on the action of committing or perpetrating a crime, and less on the actual damage or harm inflicted upon the experiencer.²⁷¹ While “perpetrator” certainly condemns the controller and emphasizes their wrongdoing, the wrong is implicitly attributed to the act of committing a crime.²⁷² This is problematic in the sense that a controller is not just wrong or morally reprehensible because domestic violence is illegal—the controller is wrong because their actions are also hurting and hindering the freedom of the experiencer.²⁷³

Additionally, there is a connotation of mystery surrounding the term “perpetrator.”²⁷⁴ “Perpetrator” is often used by investigative agencies when they are seeking out an individual whose identity has not been determined.²⁷⁵ It is used when there is a hit-and-run car accident, bank robbery, or when there is an ongoing search for a terrorist.²⁷⁶ But with domestic violence, there is nothing hidden or unclear about who the controller is—an experiencer does not encounter domestic violence by a “John Doe” or a “Jane Doe.”²⁷⁷ The

²⁶⁹ *Perpetrator*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/perpetrator> (last visited Jan. 23, 2025).

²⁷⁰ *Perpetrator*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/perpetrator> (last visited Jan. 23, 2025).

²⁷¹ *Id.*

²⁷² See *Perpetrator*, *supra* note 269; *Perpetrator*, *supra* note 270.

²⁷³ See *id.*

²⁷⁴ *Perpetrator*, VOCABULARY, <https://www.vocabulary.com/dictionary/perpetrator> (last visited Jan. 23, 2025).

²⁷⁵ See *Responding to Hate Crimes: A Police Officer's Guide to Investigation and Prevention*, IACP, <https://www.theiacp.org/resources/responding-to-hate-crimes-a-police-officers-guide-to-investigation-and-prevention> (last visited Jan. 23, 2025).

²⁷⁶ See UNODC, HANDBOOK ON CRIMINAL JUSTICE RESPONSES TO TERRORISM 17, 21–22 (2009); BRENT L. SMITH ET AL., PRE-INCIDENT INDICATORS OF TERRORIST INCIDENTS: THE IDENTIFICATION OF BEHAVIORAL, GEOGRAPHIC, AND TEMPORAL PATTERNS OF PREPARATORY CONDUCT 15 (2006), <https://www.ojp.gov/pdffiles1/nij/grants/214217.pdf>; Leo Brine, *Hit-and-run victim follows perpetrator, helps police make arrest*, OLYMPIAN (July 29, 2021, 1:58 PM), <https://www.theolympian.com/news/local/article253114523.html>; A.J. BENSON ET AL., HIT-AND-RUN CRASHES: PREVALENCE, CONTRIBUTING FACTORS AND COUNTERMEASURES 3 (2017), https://aaaafoundation.org/wp-content/uploads/2018/04/18-0058_Hit-and-Run-Brief_FINALv2.pdf.

²⁷⁷ Sandra Laville, *Victim treated as perpetrator: one woman's story of domestic violence*, THE GUARDIAN (Mar. 27, 2014, 20:01), <https://www.theguardian.com/society/2014/mar/27/victim-perpetrator-woman-domestic-violence-police>; Emma Younger, *When police misjudge domestic violence, victims are slapped with intervention order applications*, ABC NEWS (Aug. 14, 2018), <https://www.abc.net.au/news/2018-08-15/domestic-violence-victims-mistaken-for-perpetrators/10120240> (reporting on the abusers who attack their partners and then play victim); Melissa Jeltsen, *This is Why Cops Shouldn't Handle Domestic Violence Calls*, CUT (Sept. 22, 2021), <https://www>.

parties in the domestic violence incident are typically identified. Thus, the term “perpetrator” is not ideal because it can inaccurately connote that there is something not known about the controller.

Some have claimed that the term “perpetrator” is prejudiced, or too negatively connoted, and demonstrates a “gender bias against accused males.”²⁷⁸ However, in 2018 the First Circuit held that “on its face” this term is “gender neutral”—so long as there is no explicit use of “he” pronouns and the omission of “she” pronouns in written procedures.²⁷⁹

4. People Who Have Caused Harm

The term “people who have caused harm” works to separate the controller’s abuse and their own identity. It is similar to using terms like *person with hearing loss* instead of “the hearing impaired,” or *American with Disabilities Act (ADA)* instead of “Disabled Americans Act.”²⁸⁰ According to the National Association of the Deaf, “hearing impaired” improperly focuses on what the person cannot do and sets the standard as “hearing” and anything different as damaged, hindered, or substandard.²⁸¹ So, instead, as the ADA National Network explains, these “person-first” terms are recommended so the characteristic—the disability—does not define the person or become their identifier.²⁸² By putting it after the person and not as a preface, it is not a dehumanizing or demoralizing word.²⁸³

In the same vein, the term “person who caused harm” allows the controller not to be defined by their participation in domestic violence.²⁸⁴ Within the realm of rehabilitation, this can have a strong positive impact. If a controller does not see themselves as a domestically violent controller but

thecut.com/2021/09/gabby-petito-body-cam-cops-fail-domestic-violence-victims.html. Although, sometimes police officers mistake the experiencer for the controller, as evidenced by their practice of arresting both the experiencer and controller when called to assist with a domestic violence situation. See generally Peter S. Hovmand et al., *Women Arrested for Domestic Violence: Unintended Consequences of Pro and Mandatory Arrest Policies*, 25 SYS. DYNAMICS REV. 161 (2009) (evaluating mandatory arrest policies and the unintended effect of police officers arresting experiencers along with their controllers).

²⁷⁸ Doe v. Tr. of Bos. Coll., 892 F.3d 67, 91 (1st Cir. 2018).

²⁷⁹ *Id.* at 92.

²⁸⁰ 42 U.S.C.A. §§ 12101–12213 (West 2024); *Community and Culture – Frequently Asked Questions*, NAD (2025), <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/> (last visited Apr. 5, 2025).

²⁸¹ *Community and Culture – Frequently Asked Questions*, *supra* note 280.

²⁸² *Guidelines for Writing About People With Disabilities*, ADA NAT’L NETWORK (2013), <https://adata.org/factsheet/ADANN-writing>; Katherine Bouton, *Deaf? Hard of Hearing? Hearing Impaired? Be Careful What You Call Us*, AARP (July 11, 2016), <https://www.aarp.org/health/conditions-treatments/info-2016/deaf-disabled-hearing-loss-kb.html>.

²⁸³ *Id.*

²⁸⁴ See Amanda Kippert, *What is Restorative Justice?*, DOMESTIC SHELTERS (June 5, 2024), <https://www.domesticshelters.org/articles/ending-domestic-violence/what-is-restorative-justice>.

rather someone who has done this behavior in the past, then they will likely be able to see how they can change and not repeat those actions in the future.²⁸⁵ Thus, if they are not referred to with terms like “batterers” or “abusers,” then controllers may see the domestic violence as less of a personal characteristic and more of a characteristic that they can work toward changing.²⁸⁶ However, the drawback of this term is that it could facilitate controller denial because the softened term may allow them to convince themselves that what they did was justified or “not that bad.”²⁸⁷ Although Lundy Bancroft asserts that controllers will always “deny and minimize their abuse,” it is likely that many controllers will have this softened and distorted viewpoint of themselves and their actions, regardless of what term is used.²⁸⁸

Further, one obstacle to experiencers seeking help or leaving the relationship is that they may still love the controller.²⁸⁹ It may be difficult for an experiencer to accept that their spouse or significant other is an “abuser,” a “perpetrator,” or a “batterer.”²⁹⁰ Alternatively, they may more easily come to terms with the fact that the controller is a person who caused them harm.²⁹¹ Thus, if the term is softened or euphemized it may better facilitate experiencer acknowledgment and motivate them to seek help without thinking they are vilifying or condemning the person they once cared for, had children with, or even still love.

²⁸⁵ See Olga Cunha et al., *Intimate Partner Violence: Perceptions and Attributions of Male Perpetrators*, 24 J. FORENSIC PSYCH. RSCH & PRAC. 338, 353 (2022) (discussing how perpetrators who do not take responsibility for their abusive behavior are less motivated to change).

²⁸⁶ See Sherry Lynn Skaggs, *Labeling Theory*, BRITANNICA, <https://www.britannica.com/topic/labeling-theory> (last updated Mar. 27, 2025) (discussing how when an individual engages in a behavior that is deemed inappropriate by others, other people label that person to be deviant, and eventually the individual will internalize and accept this label).

²⁸⁷ Michael, *Ten Reasons Why Domestic Violence Offenders Don't Change – and How to Make Sure You're Not One of Them*, ANANIAS FOUND. (Sept. 7, 2021), https://www.ananiasfoundation.org/why-domestic-violence-offenders-dont-change/?utm_source=chatgpt.com (discussing how the single largest hazard and reason that domestic violence offenders do not change, is that they minimize the harm).

²⁸⁸ BANCROFT, *supra* note 244, at 142.

²⁸⁹ See Mary Elaine Benton, *Barriers to Leaving Abusive Relationships*, HOPE'S DOOR NEW BEGINNING CTR: BUILDING LIVES WITHOUT VIOLENCE, <https://hdnbc.org/barriers-to-leaving-abusive-relationships> (last updated Sept. 29, 2022) (discussing how in many instances, the victim of abuse may still love their abuser).

²⁹⁰ *Why Victims Stay*, KNOWMORE: SUPPORT, RESPONSE & PREVENTION, <https://knowmore.fsu.edu/helping-healing/why-victims-stay> (last visited Jan. 21, 2025).

²⁹¹ See generally Brenda Evans, *Why Do We Avoid Language Like “Domestic Violence”, “Perpetrator”, and “Victim”? Our Therapeutic Lead*, FOR BABY'S SAKE (June 28, 2024), <https://forbabyssake.org.uk/news/2024/06/28/domestic-abuse-language/> (discussing why words in these abusive situations matter, how they affect the survivor and the person who caused the harm).

5. Offender, Respondent, and Defendant

The denotive meaning of “offender” is someone committing an illegal act.²⁹² “Respondent” means someone who is the subject of a petition.²⁹³ “Defendant” is defined as a person sued in a civil matter or prosecuted in a criminal matter.²⁹⁴ The flaw of these terms is that they all over-intellectualize and sterilize the description of a controller. Domestic violence is a very personal crime because it stems from a pattern of harm inflicted by someone close to the experiencer.²⁹⁵ Because it is a pattern, it is not an isolated incident and is typically a part of a long series of abusive and controlling behaviors.²⁹⁶ Referring to controllers with such common legal terms can erase the complexities and unique qualities of domestic violence crimes.²⁹⁷ These words also cloak the controller term with a degree of “legalese” which is historically considered inaccessible to lay people.²⁹⁸

Additionally, a connotation of the term “defendant” is that the individual is *defending* against something or needs to be defended from an attack.²⁹⁹ However, in reality it is the experiencer who needs to be protected and given defense from the controller. An experiencer standing up for themselves and participating in a controller’s prosecution should not be dubbed or viewed as an “attack.” Similarly, the term “respondent” appears as though they are the ones responding to something.³⁰⁰ This can improperly portray the relationship because the experiencer is not the source of the legal concerns—it is the controller who created the problem in the relationship that prompted the need for legal intervention.

²⁹² *Offender*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/search/dictionary/?scope=Entries&q=offender> (last visited Jan. 20, 2025).

²⁹³ *Respondent*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/respondent> (last visited Jan. 20, 2025).

²⁹⁴ *Defendant*, LEGAL INFORMATION INST., <https://www.law.cornell.edu/wex/defendant> (last visited Jan. 21, 2025).

²⁹⁵ *See What Is Domestic Abuse*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse> (last visited Jan. 21, 2025) (discussing how domestic violence is a term for behavior in a relationship that is used to gain or maintain power and/or control over an intimate partner, seemingly in a close relationship between the experiencer and the person who caused the harm).

²⁹⁶ *Understanding the Power and Control Wheel*, *supra* note 16.

²⁹⁷ Briggittine French, *We Can’t Prevent Gender-Based Violence Until We Can Accurately Name It*, TEEN VOGUE (Sept. 6, 2024), <https://www.teenvogue.com/story/we-cant-prevent-gender-based-violence-until-we-can-accurately-name-it> (discussing how using certain language, especially ambiguous language, created dangerous environments of aggression and control).

²⁹⁸ *Legalese*, DICTIONARY, <https://www.dictionary.com/browse/legalese> (last visited Jan. 21, 2025).

²⁹⁹ *Defendant*, AM. HERITAGE DICTIONARY, <https://www.thefreedictionary.com/defendant> (last visited Jan. 21, 2025); *Defend*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/defend> (last visited Jan. 21, 2025).

³⁰⁰ *See Respondent*, DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/respondent> (last visited Jan. 22, 2025) (defining respondent as a person who answers a request for information).

CONCLUSIONS

A. Changing Misconceptions

Attempting to change public misconceptions about domestic violence may be more important than choosing “appropriate” terminology.³⁰¹ For example, fixing the way people perceive the word “victim” may be more important than changing the term to “survivor,” especially when most analyses involve a degree of guesswork to predict how the new term will change or steer public opinion.³⁰²

That being said, no matter how ideal it would be to dispel all negative connotations of existing terms and bring public clarity to the complex identities of experiencers and controllers, that is a lofty and aspirational goal. Further, it cannot be ignored that the connotations of words influence public opinion, and some negatively connotated domestic violence terms are actively contributing—if not creating—these public misconceptions.³⁰³ Consequently, individuals in the field should not settle for improper terms while waiting for education and outreach to change public opinion. Instead, it can be a coordinated two-pronged approach: (1) identifying and choosing the best, most appropriate terms and (2) educating individuals about common misconceptions within the field of domestic violence.

Additionally, while verbiage is very important, debates and disputes over correct terminology should not distract or derail from actually helping experiencers. An experiencer’s first priority may be receiving support and aid, regardless of what term is used for them or their controller.³⁰⁴ However, if how the experiencer or controller is identified and referred to makes the intervention to any extent better or worse in terms of respect, agency, and visibility, then this discussion is worthwhile, so long as it does not interfere with other valuable forms of advocacy.

³⁰¹ See generally *Myths About Domestic Abuse*, WOMEN’S AID, <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/myths/> (last visited Jan. 22, 2025) (addressing the issues relating to the misconceptions reported in this article should be put above using the “correct” terminology).

³⁰² See *Why Language Matters: Why We Should Avoid the Term ‘Victim’ When Talking About Children Who Have Experienced Abuse*, NSPCC LEARNING, <https://learning.nspcc.org.uk/news/why-language-matters/avoid-victim-talking-about-children-experienced-abuse> (last updated Jan. 26, 2024) (discussing how the term victim really means someone who has suffered as a result of another’s actions or due to unfortunate circumstances. But it is a term that comes with implications like powerlessness, vulnerability, and weakness).

³⁰³ See generally *The Power Of Language: How Words Shape People, Culture*, STANFORD REP. (Aug. 22, 2019), <https://news.stanford.edu/stories/2019/08/the-power-of-language-how-words-shape-people-culture> (discussing how language is a cultural, social, and psychological phenomenon).

³⁰⁴ See Mraynes, *How You Can Help A Victim Of Domestic Violence*, EXPONENT II (Mar. 1, 2010), <https://exponentii.org/blog/how-you-can-help-a-victim-of-domestic-violence/> (discussing how one of the experiencer’s first steps after recognizes the abuse, regardless if they chose to leave the relationship, should be reaching out for support, either from a group or family).

B. Terms to Use

The guiding principle should be what is in the best interest of the experiencer. What that can look like can vary. For experiencer terms, it could mean using terms that allow the experiencer to feel the most respected and empowered. For controller terms, one may use words that best allow the experiencer to acknowledge what the controller has done to them to facilitate closure and healing.³⁰⁵ Overall, though, the preferred approach is to seek the experiencer's or controller's input for what term is best for them.

For other broader circumstances, where a specific experiencer cannot guide the selection in practice, the best neutral or baseline terms would be "victim" and "survivor" for experiencers, and "abuser" for controllers.

For experiencers, the term "survivor" can be used for those who have lived through (*survived*) a relationship with domestic violence and are now no longer being abused. The term "victim" should be used for experiencers who either died or were killed from domestic violence or for those who are actively still experiencing abuse. This is the sort of continuum that "victim-survivor" hopes to encapsulate.³⁰⁶ However, the term's attempt to describe the process of healing and growing is not self-explanatory or clear. Choosing to use each term at different stages of the experiencer's journey alleviates the negative connotations of each term. The connotations of "victim" being vulnerable, weak, or undesirable can have the positive impact of motivating others to offer support and assist while also asserting the gravity and dangerous nature of the situation.³⁰⁷ But those connotations would disappear when "survivor" is used after the domestic violence has ended (or, ideally, when the experiencer states that they no longer feel like a victim and do not want to be addressed as such).³⁰⁸ Further, the negative connotations of "survivor" are mitigated by the empowering nature of the term if it is reserved for those who are no longer being abused.

The term "abuser" properly centers the abuse in the relationship and does not exclude or exclude other forms of domestic violence. While it can

³⁰⁵ See *Why Language Matters: Why We Should Avoid the Term 'Victim' When Talking About Children Who Have Experienced Abuse*, *supra* note 302 (explaining why it is necessary to allow the individual to determine what language and words are used to define themselves and how the term "victim" impacts how individuals see themselves); *Words Are Powerful*, CTR. FOR HOPE & SAFETY, <https://hopeandsafety.org/learn-more/words-are-powerful/#:~:text=Words%20are%20extremely%20powerful.,of%20domestic%20and%20sexual%20violence> (last visited Apr. 5, 2025) (explaining how words have an impact upon how individuals view themselves).

³⁰⁶ See Alexenko et al., *supra* note 94 (explaining both "Victim" and "Survivor" are used contextually and describing these individuals who have suffered from sexual or domestic assault as victim-survivors).

³⁰⁷ See *id.* (explaining how the term "Victim" can denote that an individual is suffering or has suffered from a crime).

³⁰⁸ See *id.* (explaining how the term "Survivor" differs from "Victim" and places more meaning upon the conflict being over).

still have the detriment of vilifying or branding controllers, it may be beneficial to use the term “recovering abuser” to denote or identify those who are making strides toward stopping the cycle of violence and abuse. In Alcoholics Anonymous they use the term “recovering alcoholic” to signal that the individual is working to maintain their sobriety while also identifying and recognizing that there is the potential to fall out of recovery and relapse.³⁰⁹ In the field of domestic violence, “recovering abuser” can be used to show that this controller is making an effort and no longer abusing individuals, while not erasing their potential to cause such harm if they do not continue along their path of recovery.³¹⁰

Ultimately, there may not be a correct answer. Different experts may have differing opinions, and different experiencers and controllers may have varying preferences, but it is important for individuals to know that when they are writing or speaking a term out loud, they are making a choice.³¹¹ When an individual chooses to use a specific term, they are choosing what denotive and connotative meaning they want to invoke.³¹² It is therefore important to be conscientious and mindful about these choices and aware of the meanings attached to these terms. That way, when individuals are working in the field of domestic violence, they are making sensitive and informed decisions about the words they use. With this mindfulness, the power and influence of words on public opinion are properly harnessed to strengthen the effort to end domestic violence.

³⁰⁹ ALCOHOLICS ANONYMOUS, THIS IS A.A.: AN INTRODUCTION TO THE A.A. RECOVERY PROGRAM (2022), https://www.aa.org/sites/default/files/literature/p-1_thisisaa1.pdf (last visited Jan. 25, 2025).

³¹⁰ Cf. Expert Declaration of Nancy Lemon in Matter of Charges against Sheriff Ross Mirkarimi (2022) https://sfethics.org/wp-content/uploads/2015/04/lemon_declaration_with_exhibits.pdf (asserting that the Sheriff made statement consistent with that of an “unreformed batterer” and juxtaposed his behavior with the characteristics of “reformed batterers”).

³¹¹ See *Words Are Powerful*, *supra* note 305.

³¹² See generally Alexenko et al., *supra* note 94.

CRIME OR CARE?: INTERNATIONAL LAWS TO ADDRESS “CONTROL” IN VIOLENCE WITHIN DOMESTIC RELATIONSHIPS

Pavithra Rajendran*

By sheer force of a vicious custom, even the most ignored and worthless men have been enjoying a superiority over women that they do not deserve and ought not to have.¹

- Mahatma Gandhi

INTRODUCTION

What does the term “control” mean in the context of violence within domestic relationships? Recently, a thirty-three-year-old man was sentenced to three years and one month in prison by the Maidstone Crown Court in the United Kingdom, making headlines on BBC News.² He was found guilty of “coercive and controlling behavior” towards his partner, which included demanding that she always wear loose clothing, keeping curtains closed to prevent her from seeing anyone outside, isolating her from friends and family, insisting that she keep her phone on a video call so he could monitor her, and ultimately, assaulting her while she was in the hospital.³ The West Kent Proactive Domestic Abuse Team described the man as someone who sought to maintain control over his victim through bullying tactics.⁴

In Sri Lanka, if something similar happened, the wife’s in-laws, siblings, and even her parents would likely view the husband’s actions as a normal expression of protection and care.⁵ They would likely share their experiences of husbands who asked them to wear full sleeves, avoid talking with friends, and restricted them from engaging in employment as “acts of

* J.S.D. Candidate at Notre Dame Law School. LL.M in International Human Rights Law (*Cum Laude*, University of Notre Dame, Fulbright Scholar, 2023), LL.M. & LL.B. (Hons., University of Colombo), Attorney-at-Law of the Supreme Court of Sri Lanka. I wish to thank the Editors of the *Southern Illinois University Law Journal* for their consistent and thoughtful support throughout the editorial process. Any errors found are solely my responsibility.

¹ Mahatma K. Gandhi, Speech, in *THE COLLECTED WORKS OF MAHATMA GANDHI* (1933).

² Amy Walker, *Man Jailed for Coercive and Controlling Behaviour*, BBC NEWS (Apr. 12, 2024), <https://www.bbc.com/news/articles/c51n0y33edno>.

³ *Id.*

⁴ See generally Preston Ni, *The 5 Major Ways Adults Bully Each Other*, PSYCH. TODAY (Jan. 22, 2017), <https://www.psychologytoday.com/us/blog/communication-success/201701/the-5-major-ways-adults-bully-each-other>.

⁵ See generally Asha L. Abeyasekera, “*The Buddha in the Home*”: *Dwelling with Domestic Violence in Urban Sri Lanka*, 31 GENDER, PLACE & CULTURE 1165 (2024).

care” for the wife and the family.⁶ In other words, behaviors that are seen as “coercive and controlling” in the recent UK case are simply part of the culture in Sri Lanka, yet they are considered a crime in another.

Violence within domestic relationships is not adequately addressed by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁷ and is not uniformly considered a “women’s issue” in all jurisdictions.⁸ Violence within domestic relationships is a widespread women’s rights issue found throughout history. Unlike most other forms of violence against women, national authorities are often reluctant to significantly involve themselves in violence within domestic relationships, considering it a private family matter.⁹ Alternatively, many countries consider domestic battery a crime and try to address it under criminal law frameworks.¹⁰ Only a few countries consider violence within domestic relationships a human rights issue, yet they have not sufficiently incorporated all forms of violence within domestic relationships as issues to address.¹¹

⁶ See generally *id.*

⁷ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

⁸ A number of jurisdictions use gender-neutral terminology in their laws addressing violence within domestic relationships, thereby treating it as a general crime without specifically identifying it as gender-based violence. See, e.g., UK Domestic Violence Act 2021 c. 17 §1 (2) (“Behavior of a person (‘A’) towards another person (‘B’) is “domestic abuse.”)

The term “spousal violence” as used in the Japan Act on the Prevention of Spousal Violence and the Protection of Victims means physical violence caused by one spouse (illegal physical attacks that threaten the other spouse’s life or person; the same applies hereinafter) or words and deeds by one spouse that cause the same level of psychological or physical harm to the other spouse (hereinafter collectively referred to as “physical violence, etc.” in this paragraph and Article 28-2), and includes cases where a spouse has, subsequent to being subjected to physical violence, etc. by the other spouse, obtained a divorce or annulment of marriage but continues to be subjected to physical violence, etc. by the former spouse. Japan Act on the Prevention of Spousal Violence and the Protection of Victims, Law No. 31 of 2001, art. 1, para. 1–2 (Japan).

The term “victim” as used in the Sri Lanka Prevention of Domestic Violence Act means a person who has been subjected to spousal violence. Sri Lanka Prevention of Domestic Violence Act, § 2 (1) (2005) (Sri Lanka) (“[A] person, in respect of whom an act of domestic violence has been, is, or is likely to be, committed (hereinafter referred to as “an aggrieved person”) may make an application to the Magistrate’s Court for a Protection Order, for the prevention of such act of domestic violence.”).

⁹ Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 220 (2014).

¹⁰ See Isabel Santagostino Recavarren, Shantel Marekera & Mariam Anaïs Gnakra, *Laws and Policies to Address Violence Against Women in Countries Affected by Fragility and Conflict*, WORLD BANK GROUP (Dec. 18 2023), <https://documents1.worldbank.org/curated/en/099818501082429168/pdf/IDU11afb3c4a1dab514cf01ae7e1dd7746da4cd0.pdf>.

¹¹ The preamble of South Africa’s Domestic Violence Act recognizes violence within domestic settings as a violation of the rights to equality, freedom, and security guaranteed by their constitution South Africa’s Domestic Violence Act 119 of 1998. It also acknowledges this violence as a breach of the country’s obligations under the International Bill of Rights. South Africa’s Domestic Violence Act 119 of 1998. Consider also the Preamble of Spain’s Organic Act on Integrated Protection Measures Against Gender Violence, which states:

However, as several scholars correctly point out, any form of violence against women is a violation of women's honor and dignity.¹²

Another issue in addressing violence within domestic relationships arises from its varied terminology. In global forums, there is not a uniform term to address violence within domestic relationships.¹³ While most countries use “domestic violence,” some refer to it as “intimate partner violence,” “violence at home,” or, in Sri Lanka, “quarrel between husband and wife.” This Article argues that these terminologies do not all cover the same concept, despite having similar meanings. Specifically, while “domestic violence” suggests a higher level of legality and severity involving two legally married people,¹⁴ “intimate partner violence” implies a conflict between partners who are not necessarily legally married and suggests less severity before the law.¹⁵ On the other hand, “quarrel between husband and

Gender violence is not a problem confined to the private sphere. On the contrary, it stands as the most brutal symbol of the inequality persisting in our society. It is violence directed against women for the mere fact of being women; considered, by their aggressors, as lacking the most basic rights of freedom, respect and power of decision.

...

Article 15 of our Constitution recognizes the right of all people to life and to physical and moral integrity, stating that they may in no case be subjected to torture or to inhuman or degrading punishment or treatment. Our Magna Carta goes on to state that these rights are binding on all public authorities, and that their exercise may only be regulated by law.

Spain's Organic Act on Integrated Protection Measures Against Gender Violence (B.O.E. 2004, 313) (Spain).

¹² See generally CATHERINE A. MCKINNON, BUTTERFLY POLITICS (2017); CATHERINE A. MCKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES (2006); see also CATHERINE A. MCKINNON, SEX EQUALITY: RAPE LAW (2001); Stephen J. Schulhofer, *The Challenges of Rape Law Reform: America's New Model Penal Code* (Max Planck Inst. for the Study of Crime, Sec. and L. Working Paper No. 11, 2023), <https://read-me.org/more-human-rights/2024/2/8/the-challenges-of-rape-law-reform-americas-new-model-penal-code>. See also STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 168–205 (1998).

¹³ See generally Isabel Marcus, *Reframing “Domestic Violence:” Terrorism in the Home*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE (1st ed. 1994).

¹⁴ In Timor-Leste, Article 2 of the Law on Domestic Violence (2010) defines domestic violence as a matter of family and only allows a family member to sue another family member, thereby requiring a marital or familial relationship. Law on Domestic Violence, art. 2 (Law No. 7/2010) (Timor-Leste).

¹⁵ The United States provides a broader definition by using the term ‘intimate partners,’ which includes not only legally married or cohabiting partners but also those who are dating, engaged, or in any sexual or romantic relationship, regardless of their living arrangements. OFF. OF VIOLENCE AGAINST WOMEN (OVW), DOMESTIC VIOLENCE (2025).

Domestic violence is 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 can be physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.

Id.

wife” or “violence at home”¹⁶ seems to normalize the dispute, portraying it as a common issue between couples and discouraging third-party involvement. However, this Article uses the term “violence within domestic relationships,” which encompasses all the various meanings discussed.

The final issue is the nature of violence within domestic relationships, which is the main concern of this Article. National and international bodies have identified various forms of domestic violence, such as battery, sexual assault (including marital rape), verbal abuse, psychological abuse, and economic and financial abuse.¹⁷ While battery and sexual assault are traditional forms of violence within domestic relationships, the latter forms—verbal abuse, psychological abuse, and economic and financial abuse—are relatively recent developments that primarily stem from power and control dynamics, as explained by social scientists in the early twenty-first century.¹⁸ However, as previously underscored, definitions related to this dynamic, particularly the concept of “control,” vary significantly from state to state, community to community, and culture to culture.

Given this context, this Article seeks answers to the following three questions: (i) What does controlling behavior mean in the context of violence within domestic relationships, and how is it executed? (ii) Have international bills of rights and regional human rights treaties adequately addressed controlling behavior as a form or means of violence within domestic relationships, and have these measures been carefully and effectively adopted by state parties? (iii) If not, is it possible to address control in cases of violence within domestic relationships in a uniform context through existing international bills of rights and regional human rights treaties? Answers to all these questions are explained using a women's rights-based approach, validating control as a key cause of violence within domestic relationships by emphasizing that this issue should be taken seriously rather than hidden behind reasons like “care” or “culture.”

The United Kingdom allows married and divorced individuals, civil partners, ex-civil partners, persons who have agreed to marry each other, and those who are or have been in an intimate personal relationship to initiate cases against their abusers. UK Domestic Abuse Act, 2021, c. 17 § 2.

¹⁶ According to the World Bank, in 2019, including Iran, there are forty-nine countries in the world that do not have any specific laws to address violence within domestic relationships and often normalize the husband's control and cruelty as a “family matter.” *Gender Equity*, WORLD BANK, <https://datatopics.worldbank.org/sdgatlas/archive/2017/SDG-05-gender-equality.html#:~:text=In%2049%20countries%20there%20is,do%20not%20criminalize%20marital%20rape> (last visited Feb. 10, 2025).

¹⁷ *What Is Domestic Abuse?*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse> (last visited Feb. 25, 2025).

¹⁸ *Is your relationship based on power and control?*, DOMESTIC ABUSE INTERVENTION PROJECT (2020), <https://www.thehotline.org/wp-content/uploads/media/2020/09/Power-and-Control-Wheel.pdf> (last visited Feb. 10, 2025).

I. DEFINITION AND CHARACTERISTICS

A. Explaining the Concept of “Control” from Coercive Control Theory

Evan Stark, a pioneer in the field, developed the theory of coercive control in domestic relationships to better understand its significance in the lives of partners.¹⁹ According to Stark, coercive control shares similarities with patterns known as “psychological or emotional abuse” and “patriarchal or intimate terrorism.”²⁰ However, he specifically opted for the term “coercive control” because he believed it highlights the severity akin to a crime.²¹

While agreeing with Stark, this Article also argues that adopting terms like “control” or “controlling behavior” is important even in the presence of psychological or emotional abuse. Controlling behavior does not necessarily compel victims through force; control can be exerted by manipulating romantic relationships, where women voluntarily comply with their partners, believing it to be part of the “romance.”²² Alternatively, psychological or emotional abuse has been narrowly adopted in domestic laws, creating another obstacle to addressing control under these categories, as explained in Part II. Additionally, many jurisdictions have yet to expand their violence within domestic relationships laws beyond physical forms of abuse. This legal limitation presents a significant challenge in making any women-centric recommendations regarding violence within domestic relationships. In his works, Stark sought to establish coercive control as a form of violence within domestic relationships, noting that, unlike other forms of abuse, coercive control persists in subordinating women to men over an extended period.²³ In other forms of abuse, once women seek protection through shelters, abusers typically cannot maintain their dominance over them.²⁴

¹⁹ See generally Evan Stark, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. POLICE CRISIS NEGOT. 199 (2012).

²⁰ *Id.* at 201 (“Domestic violence laws target discrete threats and assaults. However, most abused women have been subjected to a pattern of sexual mastery that includes tactics to isolate, degrade, exploit, and control them as well as to frighten them or hurt them physically. This pattern has been variously termed ‘psychological or emotional abuse,’ ‘patriarchal or intimate terrorism’ and ‘coercive control,’ the term I prefer.”) (citations omitted).

²¹ *Id.*

²² Kendra Cherry, *The Psychology of Compliance*, VERYWELLMIND (Dec. 2, 2023), <https://www.verywellmind.com/what-is-compliance-2795888> (“In psychology, compliance refers to changing one’s behavior at the request or direction of another person. Unlike obedience, in which the individual making the request for change is in a position of authority, compliance does not rely on a power differential. Compliance involves changing your behavior because someone asked you to do so. While you may have had the option to refuse the request, you chose to comply.”); see generally *What is Coercive Control*, WOMEN’S AID, <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/> (last visited Feb. 10, 2025).

²³ Stark, *supra* note 19, at 203.

²⁴ *Id.*

Unlike other crimes, control does not end at a single point of injury or harm; instead, it continues as ongoing abuse for a woman as long as she remains in the relationship.²⁵

He further explains that unlike perpetrators of other crimes, coercive control abusers typically do not commit overt acts against their wives or partners, but rather restrict them from engaging in activities they desire or from making decisions independently.²⁶ In this context, Stark argued that the police, who primarily involve themselves in the criminal justice process of violence within domestic relationships, often focus solely on inquiring about what the abuser did rather than what they failed to do and how this restriction impacts the victim's rights.²⁷

The most crucial characteristic of controlling behavior is its invisibility due to its continuity with gender stereotypes.²⁸ Stark argued that many tactics of coercive control are already considered part of women's roles in society.²⁹ This normalization of behaviors and roles can facilitate and normalize coercive control by men over their women partners.

Until recently, coercive control was invisible in plain sight. In part, this is because many of the control tactics target activities already identified as women's default responsibilities (such as housework or cooking) or involve areas still viewed as male prerogatives, such as control over money or how women perform sexually. Taken separately, many of these behaviors seem to reflect individual biases, such as the belief that a woman should not work or that she should exchange sex for access to her own credit card. Other behaviors may seem idiosyncratic, such as a demand that a wife clean "till you can see the lines" or that the temperature of the bath water be exactly so many degrees.³⁰

As this Article argues, control is often overlooked in certain jurisdictions, where it is not seen as a crime but rather as a cultural norm, resulting in greater leniency for men.

²⁵ *Id.* ("What distinguishes coercive control from simple domestic violence and most stranger assaults is that the victim's vulnerability to future harm is a function of her objective and structural subordination rather than of the level of physical violence.").

²⁶ *Id.*

²⁷ *Id.* ("The nature of policing necessitates focusing on what perpetrators do to their partners. But the larger significance of coercive control derives from what abusers prevent women from doing for themselves.").

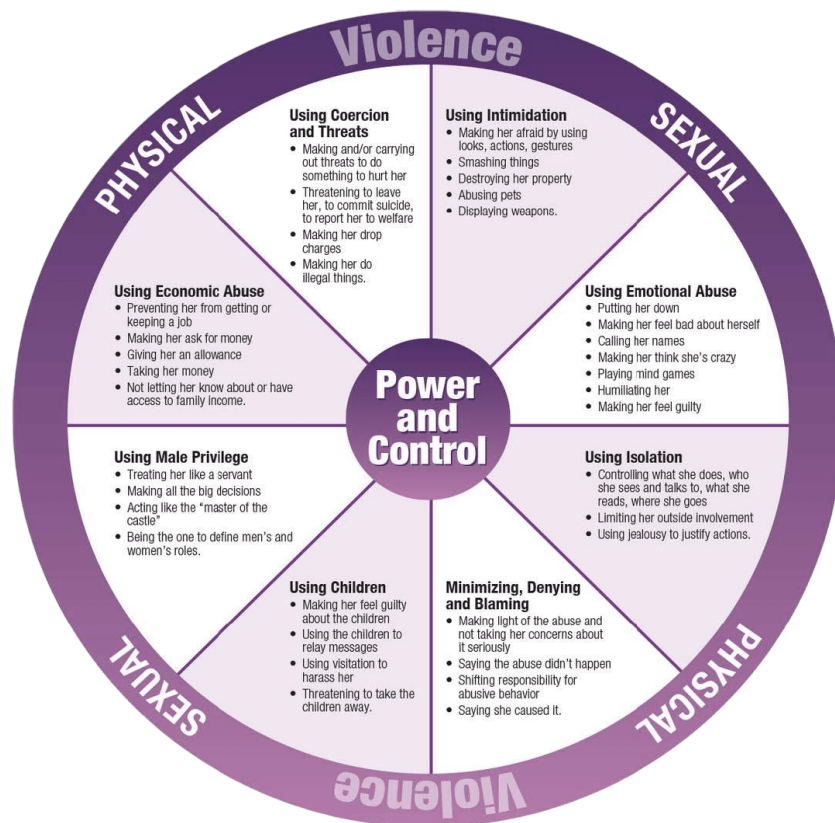
²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

B. Tactics and Patterns of Control

Starting with Stark, many social scientists, particularly psychologists, have identified tactics used by abusers to exert control over their victims.³¹ The United Nations has illustrated these tactics through the “Power and Control Wheel,” which has been subsequently modified by many organizations to advance the rights of women victims.³² As modified by the Central Australian Women’s Legal Service (CAWLS), the Power and Control Wheel illustrates various common tactics used by abusive partners.³³



³¹ Shelley Flannery, *A Guide to Coercive Control: How to recognize this subtle yet dangerous form of domestic abuse*, DOMESTIC SHELTERS (Aug. 4, 2021), <https://www.domesticshelters.org/articles/identifying-abuse/a-guide-to-coercive-control>; Louise Morales-Brown, *What are the signs of coercive control?*, MED. NEWS TODAY (June 29, 2020), <https://www.medicalnews.com/articles/coercive-control>.

³² *What Is Domestic Abuse?*, *supra* note 17.

³³ See *Coercive Control*, UHAVEN, <https://www.uhaven.org.au/coercive-and-controlling-behaviour> (last visited Feb. 25, 2025) (illustrating abusive tactics by figure above, found on website).

Annie Tanasugarn, a psychologist and Clinical Trauma and Relationship Specialist, has analyzed modern romantic and marital relationships and combined those tactics into four common patterns:

- Limiting autonomy.³⁴ This includes preventing a partner from working, restricting access to transportation, and isolating them from friends. These behaviors, often masked as protective or helpful actions, aim to make the victim financially, emotionally, and psychologically dependent on the abuser. This dynamic, sometimes called “white knight syndrome,”³⁵ ultimately undermines the victim’s independence.³⁶
- Use of technology to track.³⁷ Abusers may insist on installing cameras in the house or use two-way surveillance under the guise of security or staying in touch, but these actions are rooted in control, not “altruism.”³⁸ Similarly, they may restrict access to computers and phones, hack into devices, request passwords, or place a GPS tracker on their partner’s car. These behaviors, presented as protective measures, are actually tactics for monitoring and surveillance.³⁹
- Intimacy and sex used as power or control.⁴⁰ Overt signs of coercive control include making “suggestions” about what to wear, try, or do in the bedroom. Covert forms may involve violating personal “boundaries,”⁴¹ overstepping relational

³⁴ Annie Tanasugarn, *4 Common Patterns of Coercive Control in Relationships*, PSYCH. TODAY (June 8, 2022), <https://www.psychologytoday.com/us/blog/understanding-ptsd/202206/4-common-patterns-coercive-control-in-relationships>.

³⁵ *White Knight Syndrome (Causes + Examples)*, PRAC. PIE (Sept. 8, 2023), <https://practicalpie.com/white-knight-syndrome/> (“White Knight Syndrome is an urge to constantly save someone. It’s like you’re putting on shining armor, hoping to fix someone else’s life, even if they didn’t ask you to.”); see also Mary C. Lamia, *The White Knight Syndrome*, PSYCH. TODAY (Aug. 5, 2017), <https://www.psychologytoday.com/us/blog/the-white-knight-syndrome>.

³⁶ Tanasugarn, *supra* note 34.

³⁷ *Id.*

³⁸ *Altruism*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/altruism> (last visited Mar. 3, 2025) (“Altruism is acting to help someone else at some cost to oneself. It can include a vast range of behaviors, from sacrificing one’s life to save others, to giving money to charity or volunteering at a soup kitchen, to simply waiting a few seconds to hold the door open for a stranger. Often, people behave altruistically when they see others in challenging circumstances and feel empathy and a desire to help.”).

³⁹ Tanasugarn, *supra* note 34.

⁴⁰ *Id.*

⁴¹ *Boundaries*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/boundaries> (last visited Mar. 3, 2025) (“Each person must decide where they draw the line between preserving their privacy, at least from those with whom they are not intimate, and letting others in. To maintain those lines, they erect boundaries and work to preserve them. Some individuals are more vigilant, and even

intimacy or disregarding previously agreed-upon limits. When sex or intimacy is used for power and control, it may appear as a desire to “spice things up” with manipulation involving pleading, compliments, promises, or praise. What begins as a one-time experience can become routine, with new demands further eroding personal autonomy and boundaries.⁴²

- Monitoring the partner’s health and body.⁴³ Most tactics do not necessitate “immediate medical intervention,” making them difficult to track. However, medical intervention may become necessary when someone’s physical health is controlled or compromised. For instance, a partner may dictate what his victim eats, how she sleeps, or what she wears and enforce a strict daily schedule. “Compliments and intermittent positive reinforcement” are used to manipulate compliance.⁴⁴ In extreme cases, it may involve monitoring food intake, enforcing rigid or dangerous exercise routines, or denying necessary healthcare, further compromising the victim’s well-being.⁴⁵

Many of these tactics, while often not involving explicit threats or force, are still forms of coercion. Abusers can manipulate women into believing that these controlling behaviors are acts of care or protection. However, it is crucial to recognize that this type of control is coercion in and of itself. It operates through manipulation and emotional pressure, which compels compliance without the need for overt threats. In this sense, controlling behavior is not simply a tactic—it is a form of coercion that exerts power over the victim.

II. EXISTING INTERNATIONAL LAWS AND APPLICABILITY

A. Background: Beyond Traditional Approaches

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) within international law and women’s rights is significant for two compelling reasons. First, CEDAW focuses on addressing discrimination, which is a fundamental cause of various challenges faced by

aggressive, about their firewalls, which can lead to discomfort, if not conflict, with others. But in general, setting healthy boundaries can be a way of preserving one’s mental health and well-being.”).

⁴² Tanasugarn, *supra* note 34.

⁴³ Stark, *supra* note 19, at 203.

⁴⁴ Tanasugarn, *supra* note 34.

⁴⁵ Stark, *supra* note 19, at 203.

women throughout history.⁴⁶ Second, CEDAW is the second most signed United Nations convention,⁴⁷ establishing crucial directives for its state parties. However, while CEDAW indirectly addresses violence in domestic relationships, it does not explicitly mention or define the terms “domestic violence” or “violence” within its articles.⁴⁸

In 2008, the U.N. Department of Economic and Social Affairs/Division for the Advancement of Women (DESA/DAW) prepared a manual titled “Handbook for Legislation on Violence Against Women.”⁴⁹ This handbook provides clear guidelines to jurisdictions on enacting laws addressing violence against women, including a section that focuses on standards for legislation on violence within domestic relationships, covering key issues such as physical, sexual, emotional, psychological, patrimonial, property, and economic violence as forms of domestic violence.⁵⁰ However, many jurisdictions have not fully adopted the definitions provided in the handbook. The handbook notes the inadequacies in defining violence within domestic relationships in Indian and Brazilian laws, as both jurisdictions have yet to adopt a comprehensive definition of domestic violence.⁵¹ Additionally, India has not adopted psychological abuse as a form of violence within domestic relationships. Although it mentions “verbal and emotional,” this is narrowly defined and does not adequately cover psychological abuse.⁵²

The importance of adopting the concept of “psychological abuse” has been recognized by several European countries, especially after the Istanbul Convention in 2014.⁵³ This Convention emphasized that “[p]arties shall take the necessary legislative or other measures to ensure that the intentional

⁴⁶ G.A. Res. 34/180, ¶ 8 (Dec. 18, 1979).

⁴⁷ See Status of Ratification Interactive Dashboard, UNOHCHR, <https://indicators.ohchr.org/> (last visited Mar. 21, 2025).

⁴⁸ See generally, G.A. Res. 34/180, at 1.

⁴⁹ UNITED NATIONS DEP’T OF ECON. & SOC. AFFS., DIV. FOR THE ADVANCEMENT OF WOMEN, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN (2008), <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>.

⁵⁰ *Id.* at 24.

⁵¹ *Id.* at 24–25.

⁵² The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3(d)(iii) (India): “verbal and emotional abuse” includes:

- (a) insults, ridicule, humiliation, name calling, and insults or ridicule especially with regard to not having a child or a male child; and
- (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

Protection of Women from Domestic Violence Act, 2005, INDIA CODE, § 3(d)(iii), available at: https://www.indiacode.nic.in/bitstream/123456789/15436/1/protection_of_women_from_domestic_violence_act%2C_2005.pdf.

⁵³ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, May 11, 2011, C.E.T.S. No. 210, <https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence>.

conduct of seriously impairing a person’s psychological integrity through coercion or threats is criminalized.⁵⁴

The Istanbul Convention is also likely the first international convention to underline the correlation between psychological abuse and coercion.⁵⁵ However, it does not emphasize the means of control and its connection with abuses such as psychological or emotional abuse. This omission makes it difficult to incorporate the control element as psychological abuse. Nevertheless, the Istanbul Convention has indeed played a significant role in encouraging European states to consider violence within domestic relationships beyond its traditional forms, which is a commendable achievement.

B. Global North: The Recent Developments

The challenge of distinctly understanding control as a form of violence within domestic relationships originated in *Tunikova and Others v. Russia*, decided by the European Court of Human Rights (ECHR) in 2021.⁵⁶ Using Russia as an example, the ECHR identified the region’s laws related to violence within domestic relationships as deficient and discriminatory.⁵⁷ The ECHR emphasized not only legal failures but also highlighted societal ignorance in understanding control in domestic relationships. Specifically, it noted that “[i]n Ms. Gracheva’s case, one police inspector told her that her husband’s controlling and coercive behavior was a “manifestation of love”

⁵⁴ *Id.* at art. 33.

⁵⁵ *Id.*

⁵⁶ *Tunikova & Others v. Russia*, App. No. 55974/16 (Dec. 14, 2021), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%22001-213869%22%5D%7D>.

⁵⁷ *Id.* at ¶ 96–97 (“Russia however has remained among only a few member States whose national legislation does not provide victims of domestic violence with any equivalent or comparable measures of protection. To date, the situation has not changed: no form of protection orders has been made available to victims of domestic violence in Russia. The State protection scheme to which the Government referred is not an adequate substitute for protection orders in the context of domestic violence. As the Court has previously found, this scheme seeks to address the risk of attacks on participants in criminal proceedings by mostly unidentified criminal associates. However, the risk of continuous domestic abuse is different and is normally not connected to a person’s participation in criminal proceedings as such. In domestic violence cases, the identity of the perpetrator is known, and a protection order is designed to keep him away from the victim so that she can carry on as normal a life as possible under the circumstances. By contrast, State protection measures involve highly disruptive and costly arrangements, including a full-time security detail, relocation, a change of identity, or even plastic surgery. Such drastic measures not only place a burden on a victim of domestic violence, rather than on the perpetrator, but are typically unnecessary in the context of domestic violence where the existence of a protection order, together with strict monitoring of the abusive partner’s compliance with its terms and sufficiently dissuasive sanctions for breaking them, could have ensured the victim’s safety and fulfil [sic] the State’s obligation to protect her against the risk of ill-treatment”) (citations omitted).

and advised her to withdraw her complaint and “limit her communication with him.”⁵⁸

Following *Tunikova*, along with state obligations toward both Istanbul Convention and ECHR, many European states started incorporating “control” either as a form of abuse or an element of psychological abuse in domestic relationships.⁵⁹ In this context, being a party to either of these conventions has become a default mechanism for accommodating controlling behavior as a form of violence within domestic relationships in most European states.

The United Kingdom was the first country to officially recognize controlling behavior in violence within domestic relationships under the law, with European and Australian territorial jurisdictions following suit.⁶⁰ Significantly, in 2022, after the Australian state and territory governments released the National Plan to End Violence against Women and Children, most Australian territories began adopting “controlling behavior” as a form of violence in domestic relationships.⁶¹ For example, while territories like New South Wales,⁶² Queensland,⁶³ and South Australia⁶⁴ enacted new legislation, territories like Tasmania⁶⁵ and Victoria⁶⁶ amended their laws to include controlling behavior.

In North America, the Canadian Parliament very recently passed Bill C-332 to amend the criminal code to incorporate coercive controlling behavior in violence within domestic relationships.⁶⁷ However, in the United States, only some states have enacted similar laws. For example, in Florida,

⁵⁸ *Id.* at ¶ 110.

⁵⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, <https://www.coe.int/en/web/human-rights-convention/home>.

⁶⁰ See Ciara Nugent, ‘Abuse Is a Pattern.’ *Why These Nations Took the Lead in Criminalizing Controlling Behavior in Relationships*, TIME (June 21, 2019), <https://time.com/5610016/coercive-control-domestic-violence/>.

⁶¹ See *National Plan to End Violence against Women and Children 2022-2032*, AUSTL. GOV’T DEP’T SOC. SERVS. (2022), www.dss.gov.au/system/files/resources/national-plan-end-violence-against-women-and-children-2022-2032.pdf.

⁶² See Crimes Legislation Amendment (Coercive Control) Act 2022 (NSW) sch 1 (Austl.), <https://legislation.nsw.gov.au/view/pdf/asmade/act-2022-65>; see also *Coercive Control*, WOMEN’S LEGAL SERV. NSW, <https://www.wlsnsw.org.au/training/coercive-control/> (last visited Feb. 1, 2025).

⁶³ See Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) ch 29A (Austl.), <https://www.legislation.qld.gov.au/view/html/bill.first/bill-2023-007>.

⁶⁴ See *Coercive Control in South Australia*, ATT’Y-GEN.’S DEP’T, <https://www.agd.sa.gov.au/law-and-justice/legislation/coercive-control-in-south-australia> (last visited Feb. 1, 2025).

⁶⁵ See Family Violence Reforms Act 2022 (Tas) ch 5 s 2 (Austl.), <https://www.legislation.tas.gov.au/view/html/asmade/act-2022-021#GS5@EN>.

⁶⁶ See Family Violence Protection Act 2008 (Vic) (Act No. 52/2008) pt 2 s 5(2) (Austl.), <https://content.legislation.vic.gov.au/sites/default/files/2023-05/08-52aa061-authorized.pdf>.

⁶⁷ Coercive Control of Intimate Partner Act, (Bill C-332/2024) (Can.), <https://openparliament.ca/bills/44-1/C-332/>.

Greyson’s Law⁶⁸ was introduced in 2021 and passed in April 2023,⁶⁹ and in Massachusetts, House Bill 4241⁷⁰ was introduced in 2024 and is still pending as of the time of writing. Other states, including Illinois,⁷¹ Vermont,⁷² Connecticut,⁷³ California,⁷⁴ and Hawaii⁷⁵ have already enacted laws. Colorado,⁷⁶ Maryland,⁷⁷ New York,⁷⁸ South Carolina,⁷⁹ and Washington⁸⁰ have proposed bills to address coercive controlling behavior in their domestic violence laws.

Unfortunately, the rest of the United States has not taken any legislative action to address controlling behavior as of the time of this writing.⁸¹ However, as a whole, the United States is making progress. Notably, the Department of Justice’s Office on Violence Against Women (OVW) defines 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[.]” and it extensively explains psychological abuse to encompass controlling behavior.⁸² Additionally, it considers “technological abuse” as a form of violence,⁸³ which covers one of the critical controlling patterns identified by Annie Tanasugarn.⁸⁴

⁶⁸ Jesse Scheckner, *Streamlined bill safeguarding children at risk of parental harm refiled for 2023 Session*, FLA. POL. (Jan. 4, 2023), <https://floridapolitics.com/archives/579128-streamlined-bill-safeguarding-children-at-risk-of-parental-harm-refiled-for-2023-session/>.

⁶⁹ See *Greyson’s Law Passed!*, GRAYSON’S CHOICE, <https://greysonschoice.org/greysons-law> (last visited Jan. 30, 2025) (explaining where this law stems from, its passing, and the importance of the law).

⁷⁰ H.B. 4241, 193d Gen. Court (Mass. 2024).

⁷¹ H.B. 1808, 102d Gen. Assemb., Reg. Sess. (Ill. 2022).

⁷² H.B. 27, 2023-2024 Gen. Assemb., Reg. Sess. (Vt. 2024).

⁷³ S.B. 1091, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

⁷⁴ S.B. 1141, 2019-2020 Reg. Sess. (Cal. 2020).

⁷⁵ H.B. 2425, 32d Leg., Reg. Sess. (Haw. 2024).

⁷⁶ H.B. 21-1099, 75th Gen. Assemb., Reg. Sess. (Colo. 2021).

⁷⁷ H.B. 1352, 2020 Gen. Assemb., Reg. Sess. (Md. 2020).

⁷⁸ S.B. S5306, 2019 Gen. Assemb., Leg. Sess. (N.Y. 2019-2020).

⁷⁹ S.B. 927, 124th Gen. Assemb. (S.C. 2021).

⁸⁰ H.B. 1901, 67th Leg., Reg. Sess. (Wash. 2022).

⁸¹ *Domestic Violence*, OFF. ON VIOLENCE AGAINST WOMEN U.S. DEP’T JUST. (Jan. 22, 2025), <https://www.justice.gov/ovw/domestic-violence>.

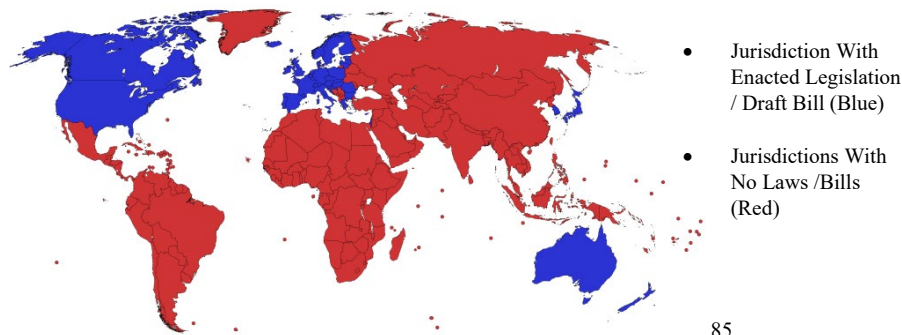
⁸² *Id.* (“Elements of psychological abuse include—but are not limited to—causing fear by intimidation; threatening physical harm to self, partner, children, or partner’s family or friends; destruction of pets and property; and forcing isolation from family, friends, or school and/or work.”).

⁸³ *Id.* (“An act or pattern of behavior that is intended to harm, threaten, control, stalk, harass, impersonate, exploit, extort, or monitor another person that occurs using any form of technology, including but not limited to: internet enabled devices, online spaces and platforms, computers, mobile devices, cameras and imaging programs, apps, location tracking devices, or communication technologies, or any other emerging technologies.”).

⁸⁴ See *supra* Part I.B.

C. Global South: A Remaining Concern

Unfortunately, there still remains many jurisdictions where no steps have been taken to address controlling behavior in violence within domestic relationships laws. In the following map, all places highlighted in red fall under this category:



85

As illustrated above, the Global South lags in adopting measures to define controlling behavior in domestic violence laws. More significantly, none of the Asian, African, South and Central American, or Caribbean regions have taken steps to address controlling behaviors in their domestic violence laws. Notably, these regions not only mostly have developing jurisdictions but also experience the highest levels of discrimination against women in areas such as family, dissolution of marriage, violence against women, household responsibilities, battery, and many other matters.⁸⁶ For example, in the category “[p]erception that being a housewife is as fulfilling as working for pay,” most South and Southeast Asian and Sub-Saharan jurisdictions report higher levels of discrimination against women compared to Global North jurisdictions.⁸⁷

⁸⁵ The provided map depicts jurisdictions (in red) that have not taken any steps to address controlling behavior in domestic violence laws, with a notable gap in the Global South. Many Wakefield, *Coercive Legislation Global Database*, NARCISSISTIC ABUSE REHAB (Oct. 30, 2020), https://www.narcissisticabuserehab.com/COERCIVE-CONTROL-LEGISLATION-AROUND-THE-WORLD/#google_vignette.

⁸⁶ See *Gender, Institutions and Development Database (GID-DB) 2023*, ORG. FOR ECON. CO-OPERATION & DEV. (Sept. 11, 2024), [https://data-explorer.oecd.org/vis?fs\[0\]=Topic%2C1%7CSociety%23SOC%23%7CGender%20equality%23SOC_GEN%23&fs\[1\]=Measure%2C0%7CPerception%20that%20being%20a%20housewife%20is%20as%20fulfilling%20as%20working%20for%20pay%23DF_HR_ATT_1%23&pg=0&fc=Measure&snb=1&vw=ov&df\[ds\]=dsDisseminateFinalDMZ&df\[id\]=DSD_GID%40DF_GID_2023&df\[ag\]=OECD.DEV.NPG&df\[vs\]=1.0&dq=.....&pd=%2C&to\[TIME_PERIOD\]=false](https://data-explorer.oecd.org/vis?fs[0]=Topic%2C1%7CSociety%23SOC%23%7CGender%20equality%23SOC_GEN%23&fs[1]=Measure%2C0%7CPerception%20that%20being%20a%20housewife%20is%20as%20fulfilling%20as%20working%20for%20pay%23DF_HR_ATT_1%23&pg=0&fc=Measure&snb=1&vw=ov&df[ds]=dsDisseminateFinalDMZ&df[id]=DSD_GID%40DF_GID_2023&df[ag]=OECD.DEV.NPG&df[vs]=1.0&dq=.....&pd=%2C&to[TIME_PERIOD]=false).

⁸⁷ See *id.*

In light of this context, addressing controlling behavior within domestic relationships emerges as a critical and urgent necessity for the Global South. However, this is not an easy task, as many countries, particularly those in the Global South, are reluctant to address violence within domestic relationships beyond traditional manifestations such as physical, emotional, and sexual abuse. Furthermore, in some countries in South Asia and East Africa, sexual abuse, such as marital rape, is not yet recognized as a form of violence within domestic relationships.⁸⁸ These countries continue to uphold concepts such as the marital rape exemption, where the husband’s right to have sex with his wife without consent is legally permitted,⁸⁹ known as *maritalis ius* in ancient Roman Law.⁹⁰ This reality underscores how law and culture intersect to maintain male dominance in domestic relationships.

III. OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAWS

While most African, South American, Central American, and Caribbean states are members of regional human rights bodies such as the African Union and the Organization of American States, Asia has not developed a similar systematic framework.⁹¹ This lack of a regional human rights system in Asia presents significant challenges when attempting to make rights-based recommendations to their legal systems.⁹²

This Article aims to establish two different approaches for the Global South to adopt in controlling behavior within their criminal justice systems. The first approach, the Inter-Regional Compliance Model, is specifically tailored to the member states of the African and Inter-American systems. The second approach, the Universal Bill of Rights Compliance Model, applies to any state, including Asian countries and non-member states of regional

⁸⁸ 7 Ways Sexual Violence Laws Are Failing Survivors Around The World, EQUAL. NOW, (Nov. 24, 2024), https://equalitynow.org/news_and_insights/7-ways-sexual-violence-laws-are-failing-survivors-around-the-world/ (“Criminalized in only two (Bhutan & Nepal) of the six countries studied, and even then, it carries lower penalties compared to other forms of rape”); see, e.g., *Amplifying Survivors Voice – Interviews with Survivors of Gender Based Violence in Kenya*, EQUAL. NOW (Dec. 2, 2021), <https://equalitynow.org/resource/amplifying-survivor-voices-interviews-with-survivors-of-gender-based-violence-in-kenya/>.

⁸⁹ See generally MDA Freeman, *But If You Can’t Rape Your Wife, Who(m) Can You Rape? The Marital Rape Exemption Re-Examined*, 15 FAM. L. Q. 1 (1981).

⁹⁰ See generally Ionuț Ciutacu, *The Evolution of the Legal Institution of Marriage in Roman Law*, SCIENTIA MORALITAS CONFERENCE PROCEEDINGS 63 (2023).

⁹¹ See *Asia: Regional Leadership Needed on Human Rights – Worsening Repression Puts Rights at Risk at Home and Abroad*, HUM. RTS. WATCH (Jan. 11, 2024), <https://www.hrw.org/news/2024/01/11/asia-regional-leadership-needed-human-rights>.

⁹² See *id.*

human rights bodies, that have attested the U.N. Bill of Rights,⁹³ including treaties such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and specifically the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁹⁴

A. Inter-Regional Compliance Model

To build a strong regional compliance model, persuasive jurisprudence can be drawn from *Tunikova and Others v. Russia*.⁹⁵ In this case, rather than seeking a provision that specifically addressed violence within domestic relationships or violence against women from the European Convention, the ECHR recognized that denying women access to justice through deficient legal frameworks constitutes a violation of Articles 3⁹⁶ and 14⁹⁷ of the Convention, which ensure the prohibition of torture and the prohibition of discrimination.⁹⁸ Apart from state parties' obligations underscored in the Inter-American⁹⁹ and African Conventions¹⁰⁰ on Human Rights, both the Inter-American and African systems enacted treaties on women's rights, demonstrating a commitment to eradicating discrimination against women. This Article suggests that these women's rights treaties can be effectively used to address and mitigate controlling behavior in violence within domestic relationships.

⁹³ See *International Bill of Human Rights*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R, <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> (last visited Feb. 10, 2025).

⁹⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, T.I.A.S. No. 92, 908, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

⁹⁵ *Tunikova & Others v. Russia*, App. No. 55974/16, ¶ 64 (Dec. 14, 2021), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-213869%22%7D>.

⁹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 ("No one shall be subjected to torture or to on human or degrading treatment or punishment in all circumstances. Human dignity must be respected, even in detention. Acts of torture or ill-treatment must be considered as criminal offences. Protection against torture is a universally acknowledged principle and is not disputed in international law; there are special conventions in this field drawn up by the Council of Europe (e.g. the European Convention for the Prevention of Torture and the Convention on Action against Trafficking in Human Beings) and by the United Nations.").

⁹⁷ *Id.* at art. 14. Everyone must enjoy the rights enshrined in the European Convention on Human Rights regardless of skin color, sex, language, political or religious beliefs or origins. *Id.* The prohibition of discrimination is closely linked to the principle of equality which holds that all people are born and remain free and equal in dignity and rights. *Id.*

⁹⁸ *Tunikova & Others*, App. No. 55974/16, at ¶ 114–131.

⁹⁹ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

¹⁰⁰ African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58.,

1. *Convention of Belém do Pará (Inter-American)*

The Convention of Belém do Pará effectively established state obligations to intervene in violence within domestic relationships.¹⁰¹ In exploring the incorporation of state obligations to address controlling behavior, this paper focuses on several provisions of Article 7, which state:

(b) apply due diligence to prevent, investigate and impose penalties for violence against women;

(d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;

(e) take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;¹⁰²

Article 7(b) emphasizes the application of the “due diligence” principle, a crucial element adopted by many states (although not universally, as in the case of the United States)¹⁰³ in incorporating international laws into domestic contexts.¹⁰⁴ By adopting this principle, one can successfully claim that addressing controlling behavior is acting upon due diligence.¹⁰⁵ Article 7(d) addresses intimidating or threatening behavior, which is similar to coercion, a closely connected element of control within domestic relationships.¹⁰⁶ Interpreting control through intimidating or threatening behavior is sensible in this context. Furthermore, tolerating controlling behavior is a practice in many jurisdictions, especially those in the Global South.¹⁰⁷ Article 7(e) specifically calls on state parties to revisit discriminatory practices and

¹⁰¹ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women “Convention of Belém do Pará,” OAS, art 2(a), June 9, 1994, 33 I.L.M. 1534 (“Violence against women shall be understood to include physical, sexual and psychological violence: that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse . . .”).

¹⁰² *Id.* at art. 7(b–e).

¹⁰³ See CHRISTINE M VENTER, *INTERNATIONAL WOMEN’S RIGHTS, EQUALITY AND JUSTICE – A CONTEXT AND PRACTICE CASEBOOK* 144 (2012).

¹⁰⁴ Inter-American Convention, at art. 7(b).

¹⁰⁵ *Id.*

¹⁰⁶ See generally *id.*

¹⁰⁷ See Linda Mshweshwe, *Understanding domestic violence: masculinity, culture, traditions*, 6 HELIYON 1, 1 (2020) (“Research shows that the problem of domestic violence in South Africa persists despite the current strategies aimed at addressing it.”).

amend or enact existing laws that perpetuate such tolerance.¹⁰⁸ In this context, parties to the Inter-American Convention bear an obligation to revise these practices and amend or enact laws related to violence within domestic relationships to address controlling behavior as a form of discrimination and a crime against women.¹⁰⁹

2. *The Maputo Protocol (African)*

The Maputo Protocol addresses various aspects of violence against women in an African context.¹¹⁰ Article IV(c) states: “Identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence.”¹¹¹ This imposes an obligation on state parties to identify and implement measures to eliminate the root causes of violence, including controlling behavior, which is a significant element in violence within domestic relationships.¹¹² Therefore, this provision is sufficient for the African Union to recommend that state parties enact or amend laws accordingly.

Additionally, decisions by the African Court on Human and Peoples’ Rights, specifically *Egyptian Initiative for Personal Rights and Interights v. Egypt*¹¹³ and *Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Ethiopia*,¹¹⁴ have strongly emphasized the obligation of state parties to protect women from violence within domestic relationships under the Maputo Protocol.

¹⁰⁸ See generally Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women “Convention of Belém do Pará,” OAS, June 9, 1994, 33 I.L.M. 1534.

¹⁰⁹ See generally *id.*

¹¹⁰ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, African Union, July 11, 2003, I.L.M., https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf.

¹¹¹ *Id.* at art. 4(c).

¹¹² *Id.*

¹¹³ *Egyptian Initiative for Personal Rights & Another v Egypt*, Communication 334/2006, African Commission on Human and Peoples Rights [Afr. Comm’n H.P.R.] (Mar. 3, 2011), <https://africanlii.org/akn/aa-au/judgment/achpr/2011/110/eng@2011-03-03>.

¹¹⁴ See *Equality Now & Ethiopian Women Laws. Ass’n (ELWA) v Fed. Republic of Ethiopia*, Communication 341/2007, African Commission on Human and Peoples Rights [Afr. Comm’n H.P.R.] (Oct. 14, 2021), <https://africanlii.org/akn/aa-au/judgment/achpr/2021/523/eng@2021-10-14>.

B. Universal Bill of Rights Compliance Model

1. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The CEDAW was drafted to address rights, craft state obligations, and design the committee, but it failed to address violence explicitly.¹¹⁵ Despite this absence, the CEDAW does not entirely avoid the issue of violence against women or violence within domestic relationships. Article 2, which focuses on discrimination,¹¹⁶ Article 16, which emphasizes equality in marital rights,¹¹⁷ and Article 5,¹¹⁸ which pushes for the eradication of

¹¹⁵ See generally *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, 34 U.N.T.S. 180.

¹¹⁶ *Id.* at art. 2 (“Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.”).

¹¹⁷ *Id.* at art. 16 (“Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”).

¹¹⁸ *Id.* at art. 5 (“Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common

discriminatory socio-cultural practices, all have significant relevance to violence within domestic relationships.

A crucial facet of CEDAW is its focus on marriage—a relationship where men often legally exert control over their wives in many Global South jurisdictions. Article 16(1)(c) requires state parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . . [t]he same rights and responsibilities during marriage and at its dissolution.”¹¹⁹

As such, during a marital relationship, whether with or without force, demanding a wife to perform an unreasonable quantity of chores or making her solely responsible for household duties under the guise of a “wife’s duty” could be considered a violation.¹²⁰ However, apart from this provision, incorporating controlling behavior into Article 16 generally is challenging because every provision there is narrowly defined. For example, under Article 16(1)(e), although CEDAW mentions “married women’s access to information,” it is only guaranteed for the purposes of their children’s education and other rights related to equal decision-making.¹²¹ Despite this, Article 16 and Article 2 overall require state parties to eradicate *all* kinds of discrimination and ensure equality between men and women.¹²² This framework is sufficient for any state party to recognize controlling behavior as discrimination against women and take the necessary legal or policy actions to diminish it.

The CEDAW committee¹²³ has consistently addressed issues related to violence within domestic relationships. Notably, in *Goekce v. Austria* and *Yildirim v. Austria*, the committee emphasized that a state’s failure to protect women from violence within domestic relationships constitutes a violation of CEDAW Articles 2, 3, 7¹²⁴ and the “General Recommendation 19”¹²⁵ of

responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.”).

¹¹⁹ *Id.* at art. 16(1)(c).

¹²⁰ *See generally id.* at art. 16.

¹²¹ *Id.* at art. 16(1)(e).

¹²² *Id.* at art. 2, 16.

¹²³ The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), established under the Convention on the Elimination of All Forms of Discrimination Against Women, functions as the primary monitoring body for ensuring compliance with the Convention by reviewing reports from States Parties, issuing recommendations, and addressing individual complaints related to the violation of women’s rights. *See generally Committee on the Elimination of Discrimination against Women*, U.N.T.S., <https://www.ohchr.org/en/treaty-bodies/cedaw> (last visited Feb 1, 2025).

¹²⁴ Comm. on the Elimination of Discrimination against Women on its Thirty-Ninth Session, § 12.1.1–12.4, U.N. Doc. C/39/D/5/2005 (2007); *see also* G.A. Res. 34/180, art. 2, 3, 7 (Dec. 18, 1979).

¹²⁵ *Id.*; *see* Comm. on the Elimination of Discrimination against Women on its Eleventh Session, U.N. Doc. A/47/38 (1993) (detailing General Recommendation 19 of CEDAW which addresses violence against women and clarifies that discrimination against women includes gender-based violence).

CEDAW.¹²⁶ These articles ensure state parties’ obligations to eradicate discrimination, promote the development and advancement of women, and ensure human rights and fundamental freedoms in parity with men.¹²⁷ Additionally, in *A.T. v. Hungary*, the committee condemned the state’s justification of violence within domestic relationships as a “private matter” and its failure to intervene effectively.¹²⁸

These actions by the CEDAW committee highlight its commitment to resolving the challenges associated with violence within domestic relationships and ensuring the rights of women. However, beyond the technical difficulties (e.g., exhaustion of domestic remedies) of accessing the committee, many states in Asia and a few states in Africa have not ratified the Optional Protocol.¹²⁹ This prevents citizens of these countries from accessing the committee for redress.

¹²⁶ *Goekce v. Austria*, Communication 5/2005, United Nations Committee on the Elimination of Discrimination against Women [UN CEDAW] (Aug. 6, 2007), [https://juris.ohchr.org/casedetails/1715/en-US](https://juris.ohchr.org/casedetails/1715/en-US;Comm.on.the.Elimination.of.Discrimination.against.Women.on.its.Thirty-Ninth.Session,U.N.Doc.C/39/D/5/2005(2007);Yildirim.v.Austria,App.No.34308/96(Oct.19,1999),https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-4820%22]); Comm. on the Elimination of Discrimination against Women on its Thirty-Ninth Session, U.N. Doc. C/39/D/5/2005 (2007); *Yildirim v. Austria*, App. No. 34308/96 (Oct. 19, 1999), [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-4820%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-4820%22]); Comm. on the Elimination of Discrimination against Women on its Thirty-Ninth Session, U.N. Doc. C/39/D/6/2005 (2007).

¹²⁷ Comm. on the Elimination of Discrimination against Women on its Thirty-Ninth Session, § 12.1.1–12.4, U.N. Doc. C/39/D/5/2005 (2007); *see also* G.A. Res. 34/180, art. 2, 3, 7 (Dec. 18, 1979).

¹²⁸ *A.T. v. Hungary*, Communication 2/2003, United Nations Committee on the Elimination of Discrimination against Women [UN CEDAW], ¶ 8 (Jan. 26, 2005), <http://hrlibrary.umn.edu/cedaw/decisions/2-2003.html>. *See* Comm. on the Elimination of Discrimination against Women on its Thirty-Second Session, § 9.1–9.7, U.N. Doc. A/60/38 (2005) (indicating Hungary’s failure and the remedial measures necessary to rectify the mistake).

¹²⁹ Not being a party to the Optional Protocol to CEDAW limits individuals’ and groups’ ability to seek redress for violations of women’s rights at the international level when domestic remedies fail. *See generally* G.A. Res. 54/4, annex, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Oct. 6, 1999). It also means the CEDAW Committee cannot initiate inquiries into grave or systematic violations within the state, reducing accountability. *See generally id.*

2. *The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR)*

Article 16(1)¹³⁰ and Article 7¹³¹ of the UDHR, Article 23(4)¹³² of the ICCPR, coupled with Article 3¹³³ and General Comment No. 16 (2005),¹³⁴ along with Articles 2(2)¹³⁵ and 3¹³⁶ of the ICESCR, share a similar approach to CEDAW regarding the protection of women from violence within domestic relationships.

The Human Rights Committee (HRC) has also addressed states' duties to protect women from violence.¹³⁷ In *L.N.P. v. Argentina*, brought before the HRC, the victim claimed that national authorities failed to act on her complaint of sexual violence.¹³⁸ The HRC found this violated Articles 7¹³⁹

¹³⁰ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16(1) (Dec. 10, 1948) ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.").

¹³¹ *Id.* ("All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.").

¹³² International Covenant on Civil and Political Rights, art. 23, ¶ 4, Dec. 16, 1966, T.I.A.S. No. 92,908,999 U.N.T.S. 171 ("States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.").

¹³³ *Id.* at art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.").

¹³⁴ This is a general commentary on Article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which ensures the equal rights of men and women to enjoy all economic, social, and cultural rights. Committee on Economic, Social, and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4 (2005).

¹³⁵ International Covenant on Economic, Social and Cultural Rights, art. 2, ¶ 2, Dec 16, 1966, 993 U.N.T.S. 3 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

¹³⁶ *Id.* ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.").

¹³⁷ The Human Rights Committee, a body of authority tasked with addressing complaints related to the International Covenant on Civil and Political Rights (ICCPR), operates as the principal mechanism for individuals and states to seek redress for violations of the rights enshrined within the covenant. *Human Rights Committee*, U.N. HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/ccpr> (last visited Feb. 6, 2025).

¹³⁸ *L.N.P. v. Argentina*, Communication 1610/2007, United Nations International Covenant on Civil and Political Rights [UN ICCPR] (Aug. 16, 2011), <https://juris.ohchr.org/casedetails/1617/en-US>; see *Human Rights Committee, L.N.P. v. Argentina*, U.N. Doc. CCPR/C/102/D/1610/2007 (July 18, 2011).

¹³⁹ International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, T.I.A.S. No. 92,908,999 U.N.T.S. 171 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or

and 17¹⁴⁰ of the ICCPR, emphasizing the importance of state intervention and protection in such cases.¹⁴¹

Like the CEDAW committee, HRC also recognizes the complexities of violence against women and strives to address these issues.¹⁴² However, the non-ratification of the respective protocol by many Asian and some African countries remains a significant barrier, preventing women in these regions from accessing HRC.

CONCLUSION

This Article questioned whether control in cases of violence within domestic relationships could be addressed uniformly through existing international bills of rights and regional human rights treaties. While incorporating “controlling behavior” into domestic laws is possible through existing international bills of rights and regional human rights treaties, achieving uniformity among states is still challenging. Areas that have a regional system for human rights could incorporate controlling behavior into domestic laws, but jurisdictions that are not part of the regional system and solely rely on bills of rights face a different challenge. Existing bills of rights do not effectively address violence within domestic relationships, thereby causing those states to adhere to their existing discriminatory laws.¹⁴³ Despite this distinction, this Article asserts that “controlling behavior” is a pervasive discriminatory practice in domestic relationships and advocates for incorporating international laws to eradicate violence within domestic relationships.

punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”).

¹⁴⁰ *Id.* at art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.”).

¹⁴¹ *L.N.P. v. Argentina*, Communication 1610/2007, United Nations International Covenant on Civil and Political Rights [UN ICCPR] (Aug. 16, 2011), <https://juris.ohchr.org/casedetails/1617/en-US>; see Human Rights Committee, *L.N.P. v. Argentina*, U.N. Doc. CCPR/C/102/D/1610/2007 (July 18, 2011).

¹⁴² *Human Rights Committee*, *supra* note 137.

¹⁴³ See 7 *Ways Sexual Violence Laws Are Failing Survivors Around The World*, *supra* note 88.

CHALLENGING MASCULINITY TO COMBAT GBV IN KENYA

Teresa Jacques Valenzuela,* Juliet S. Sorrensen,** Shannon R. Galvin,*** Megan M. Osadzinski,**** and Patrick Mbullo Owuor*****

INTRODUCTION

One in three women in the world has had a direct experience with some form of gender-based violence.¹ A partner or family member kills a woman every eleven minutes.² This violence affects women's physical, mental, sexual, and reproductive health.³ Gender-based violence (GBV), including intimate partner violence (IPV) and sexual violence, is a pervasive public health crisis.⁴ In fact, GBV is considered one of the world's "longest, deadliest pandemics" and poses a significant threat to human security, peace, and development.⁵

* Teresa Jacques Valenzuela is an LLM student in International Human Rights affiliated with Northwestern University Pritzker School of Law.

** Juliet S. Sorrensen is a clinical professor of law affiliated with Northwestern University Pritzker School of Law.

*** Shannon R Galvin, MD, is an associate professor of Medicine (Infectious Diseases) affiliated with the Northwestern School of Medicine.

**** Megan M. Osadzinski is a Schuette clinical fellow in health and human rights at the Center for International Human Rights at Northwestern University Pritzker School of Law.

***** Patrick Mbullo Owuor, PhD, is an assistant professor of anthropology affiliated with the Department of Anthropology, Wayne State University, Detroit, MI, USA, and Pamoja Community-Based Organization, Kenya.

¹ *Violence against women*, WORLD HEALTH ORG. (Mar. 25, 2024), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

² *One woman or girl is killed every 10 minutes by their intimate partner or family member*, UN WOMEN (Nov. 25, 2024), <https://www.unwomen.org/en/news-stories/press-release/2024/11/one-woman-or-girl-is-killed-every-10-minutes-by-their-intimate-partner-or-family-member>.

³ *Violence against women*, *supra* note 1.

⁴ *Id.*

⁵ António Guterres, *Role & Responsibility of Men and Boys in Eliminating Gender-Based Violence*, UNITED NATIONS (Mar. 22, 2022), <https://press.un.org/en/2022/sgsm21195.doc.htm>; Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, U.N. Doc. CEDAW/C/GC/35, at 1, 9 (July 26, 2017) [hereinafter *General Recommendation No. 35*].

Strict gender norms and traditional views of masculinity⁶ strongly influence gender-based violence.⁷ Liz Plank argues, “There is no greater threat to humankind than our current definitions of masculinity.”⁸ Perceptions of masculinity often serve as a significant cause of violence against women (VAW), as they justify a culture of male aggression, violence, rape, and economic violence.⁹

Since the onset of the COVID-19 pandemic, Kenya has witnessed a surge in GBV.¹⁰ Findings from the 2022 Kenya Demographic and Health Survey show that twenty-nine percent of women have experienced sexual violence,¹¹ thirty-four percent have experienced physical violence since age fifteen, and over forty percent of women report having experienced physical or sexual intimate partner violence in their lifetime.¹² These trends have prompted agencies such as the African Union Commission’s Agenda for 2063 to emphasize the need to address GBV as a means of enhancing human security and development in the region.¹³ Despite these efforts, research on GBV has demonstrated that Kenya’s governmental efforts and strategies to date have been inadequate in responding to this widespread phenomenon.¹⁴

There is an urgent need to “turn to men”¹⁵ in the fight against GBV.¹⁶ Many studies highlight the transformative impact of engaging

⁶ G. Barker et al., *Questioning Gender Norms With Men to Improve Health Outcomes: Evidence of Impact*, 5 GLOB. PUB. HEALTH 539, 553 (2010).

⁷ *General Recommendation No. 35*, *supra* note 5, at 1, 9. The CEDAW Committee defined violence against women as “violence which is directed against a woman because she is a woman or that affects women disproportionately.” However, ever since General Recommendation 35, the term “gender-based violence against women” has been used as a more precise term since it “makes explicit the gendered causes and impacts of the violence.” *See id.* The term further strengthens the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors.

⁸ LIZ PLANK, *FOR THE LOVE OF MEN: FROM TOXIC TO A MORE MINDFUL MASCULINITY* 1 (New York: St. Martin’s Publ’g Grp. 2019).

⁹ Claudia Garcia-Moreno et al., *WHO multi-country study on women’s health and domestic violence against women*, WORLD HEALTH ORG. 8 (Feb. 9, 2005), <https://www.who.int/publications/i/item/9241593512>.

¹⁰ HUM. RTS. WATCH, *I HAD NOWHERE TO GO: VIOLENCE AGAINST WOMEN AND GIRLS DURING THE COVID-19 PANDEMIC IN KENYA* (2021), https://www.hrw.org/sites/default/files/media_2021/12/kenya0921_web.pdf

¹¹ Jennifer Keller et al., *A 6-Week School Curriculum Improves Boys’s Attitudes and Behaviors Related to Gender- Based Violence in Kenya*, 32 J. INTERPERSONAL VIOLENCE 535 (2017).

¹² KENYA NAT’L BUREAU OF STATS., *KENYA DEMOGRAPHIC AND HEALTH SURV. 2022* 82–89 (2022), <https://africa.unwomen.org/sites/default/files/2023-06/2022%20KDHS%20Key%20Indicators%20Report%5B100%5D.pdf>.

¹³ AFR. UNION COMM’N, *AGENDA 206* (2015), https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf.

¹⁴ Comm. on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Kenya*, UN Doc. CEDAW/C/KEN/CO/8 (2017); *see generally* HUM. RTS. WATCH, *supra* note 10.

¹⁵ Michael Flood, *The Turn To Men in Gender Politics*, 31 WOMEN’S STUD. J. 48, 48–49 (2017).

¹⁶ *Id.*

“masculinities” to shift gendered power dynamics and achieve more equitable gender norms and peaceful outcomes.¹⁷ The Working Group on Discrimination Against Women and Girls has emphasized the importance of involving men and boys in combating GBV to end VAW.¹⁸

Community-based organizations (CBO) like Pamoja provide valuable insights and evidence-based solutions for GBV prevention. Pamoja, which means ‘together’ in Swahili, is a (CBO) founded in 2007 that works with communities in Kisumu, Western Kenya.¹⁹ Its mission is to empower communities to identify and address the most significant needs affecting their well-being. The organization currently serves approximately 16,000 direct beneficiaries.²⁰ Pamoja runs several community-led projects and interventions focused on HIV prevention,²¹ targeting people living with HIV, orphans and vulnerable children, adolescent girls, and young women.²² More specifically, Pamoja aims to improve its health services, particularly in HIV testing and counseling, post-violence care services, and contraceptive methods.²³ As a result, Pamoja has become a key agent of gendered change in the Western Kenya region.²⁴

In March 2023, Pamoja and the Access to Health (ATH) Project from Northwestern University in Illinois conducted community-based participatory research (CBPR) comprising structured surveys and in-depth interviews to understand the barriers and facilitators of health service uptake.²⁵ The surveys and qualitative interviews targeted the Pamoja staff, community health workers (CHWs), program volunteers, healthcare professionals, and program participants.²⁶ The interviews and unpublished results of this study reveal that many community-led HIV prevention interventions were missing male involvement, especially young boys.²⁷ The findings further highlighted the need to involve boys and men in preventing

¹⁷ See generally *id.*; Chloe Dillon, *Engaging Men and Boys for Gender Equality*, DT GLOB. (Feb. 1, 2024), <https://dt-global.com/blog/engaging-men-and-boys/#:~:text=Engaging%20men%20in%20development%20programming,care%20work%2C%20and%20preventing%20violence>.

¹⁸ Working Group on Discrimination Against Women and Girls, *Men's accountability for gender equality on its thirty-seventh session*, U.N. Doc. A/HRC/WG.11/37/1 (2023).

¹⁹ *About Us*, PAMOJA CBO, <https://pamojapamoja.org/about-us/> (last visited Jan. 26, 2025).

²⁰ *Home*, PAMOJA CBO, <https://pamojapamoja.org/> (last visited Jan. 26, 2025).

²¹ *Orphans and Vulnerable Children*, PAMOJA CBO, <https://pamojapamoja.org/ovc/> (last visited Jan. 26, 2025); *Dreams*, PAMOJA CBO, <https://pamojapamoja.org/dreams/> (last visited Jan. 26, 2025).

²² *Id.*

²³ *Dreams*, *supra* note 21.

²⁴ *She Leads*, PAMOJA CBO, <https://pamojapamoja.org/she-leads/> (last visited Jan. 26, 2025).

²⁵ *Access to Health*, NORTHWESTERN PRITZKER SCH. L.: BLUHM LEGAL CLINIC INT'L HUM. RTS., <https://www.law.northwestern.edu/legalclinic/humanrights/projects/access-to-health/> (last visited Feb. 17, 2025).

²⁶ *Access to Health*, Trip Report 2023, Kisumu, Kenya, (March 17, 2023 - March 26, 2023) (unpublished report) (on file with author).

²⁷ *Id.* (quoting focal group with local Community Based Health Workers).

GBV.²⁸ Additionally, they pointed out that in Western Kenya, many HIV prevention interventions have focused primarily on women.²⁹ While focused on addressing the urgent needs of women, the education of men and boys on topics such as toxic masculinity, GBV, sexual and gender-based violence (SGBV), consent, contraceptives, sexual health, and pregnancy have remained unaddressed.³⁰

To sharpen the methodological findings, a CBPR approach was used. This approach emphasized engagement with community stakeholders by interviewing communities and analyzing different voices across different community levels, ensuring diverse perspectives.³¹ This included focus group discussions, data analysis to identify recurring patterns related to masculinity norms, and barriers to male participation in health initiatives.³² The participatory nature of the study facilitated the identification of culturally embedded beliefs that hinder boys' and men's active engagement in GBV prevention efforts, providing a comprehensive view of community dynamics in Kisumu.³³

This Article explores the imperative of including boys in GBV prevention, emphasizing the need to challenge traditional gender norms and stereotypes from an early age. Specifically, it examines: (I) the impact of "restrictive" masculinities and gender-based stereotypes, (II) the impact of unhealthy concepts of masculinity and GBV, (III) the role men and young men can play in GBV prevention, and (IV) existing strategies for GBV prevention that engage boys and men.

I. THE IMPACT OF "RESTRICTIVE" MASCULINITIES AND GENDER-BASED STEREOTYPES

The underlying causes of GBV are rooted in traditional gender norms and stereotypes,³⁴ but GBV is not solely a women's issue. To effectively prevent GBV, it is crucial to recognize the impact of gender stereotypes and to involve men and boys as agents of change.

Although diverse conceptions of masculinity exist around the world,³⁵ masculinities are social constructions that define "what it means to be a

²⁸ *Id.*

²⁹ *Id.* (quoting focal group with local Community Based Health Workers).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ STUDY OF THE SECRETARY GENERAL, ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION, U.N. 29 (2006).

³⁵ Ignacio Lozano-Verduzco et al., *Masculinities and Biomedical Governmentality in the Contexts of HIV Prevention and Treatment for Latinx Immigrants*, 29 J. MEN'S STUD. 194, 194 (2021).

man.”³⁶ Sociocultural norms profoundly influence men’s behavior and perceptions of “masculinity.”³⁷ Restrictive masculinity refers to rigid, socially constructed norms that dictate how men should behave, often emphasizing traits such as dominance, emotional suppression, and control.³⁸ These norms impose cultural expectations that associate men with being “strong,” “financially dominant,” “protecting,” or “controlling,” while domestic work is considered “women’s work” and “devalued.”³⁹ Such rigid cultural norms promote inflexible expectations of what it means to be a “real” man⁴⁰ and exclude women from the workforce.⁴¹

Similarly, “gender roles” assign certain behaviors, functions, and tasks to individuals based on their sex.⁴² These roles often associate specific traits with masculinity, such as physical strength, being task-oriented, aggression, and a sense of invincibility.⁴³ These roles are often considered “natural” or “biological” but can harm individuals’ development.⁴⁴ These roles create gender stereotypes, mandates, and societal expectations around masculinity and femininity. More importantly, these socially constructed roles perpetuate hierarchical relationships between men and women,⁴⁵ placing men in a dominant position in both private and public spheres.⁴⁶

³⁶ OECD DEV. POL’Y PAPERS, ENGAGING WITH MEN AND MASCULINITIES IN FRAGILE AND CONFLICT-AFFECTED STATES, 41–42 (2019).

³⁷ See Lozano-Verduzco et al., *supra* note 35, at 195 (“Masculinity studies have shown the relevance of its normativities that stem from the hegemonic model of masculinity because they act as a form of control over behaviors, bodies, and identities, much in the sense that Foucault described his concept of governmentality as “a mentality of government, but also a governing of mentalities. We understand masculinity as performative, as the repetition of discursive and material acts that transform bodies into subjectivities in a somewhat rigid framework of vigilance, and that produce what they name. Because understanding gender as performative means to understand it as sociocultural norms that exert power over bodies, and understanding bodies as powerful enough to materialize those norms, as well as transform them, we must then understand that men’s behaviors related to health are governed by norms on masculinity and race, and questioning those norms may be helpful in transforming them.”) (internal citations omitted).

³⁸ See JAMES M. O’NEIL, MEN’S GENDER ROLE CONFLICT: PSYCHOLOGICAL COSTS OF TRADITIONAL MASCULINITY (2015).

³⁹ OECD, MAN ENOUGH? MEASURING MASCULINE NORMS TO PROMOTE WOMEN’S EMPOWERMENT 10–11 (2021).

⁴⁰ LIZ PLANK, FOR THE LOVE OF MEN A NEW VERSION FOR MINDFUL MASCULINITY (2019).

⁴¹ *Id.*

⁴² SUP. CT. JUST. MEX., PROTOCOL FOR JUDGING WITH A GENDER PERSPECTIVE 33 (2020).

⁴³ OECD, *supra* note 39, at 10–11.

⁴⁴ SUP. CT. JUST. MEX., *supra* note 42, at 33.

⁴⁵ *Id.*

⁴⁶ JANE KATO-WALLACE ET AL., ADOLESCENT BOYS AND YOUNG MEN: ENGAGING THEM AS SUPPORTERS OF GENDER EQUALITY AND HEALTH AND UNDERSTANDING THEIR VULNERABILITIES 14 (2016).

In patriarchal societies, gender roles and societal norms significantly impact violence against women (VAW).⁴⁷ Traditional gender norms contribute to GBV by creating inflexible social expectations around male behavior.⁴⁸ This is why General Recommendation No. 35 of the Committee on the Elimination of Discrimination against Women (CEDAW) emphasizes the term “gender-based violence” rather than “violence against women.”⁴⁹ The CEDAW Committee recognizes that violence arises from societal norms, not just individual actions.⁵⁰ In many cultures, boys are socialized to embrace “rigid definitions of emotion repressing violent, misogynistic, and heteronormative manhood.”⁵¹ These gender norms maintain women’s inferior status and reinforce harmful gender stereotypes.⁵²

Therefore, “masculinity” refers to the socially constructed expectations imposed on men, which in Kisumu, Kenya, often emphasize traits like dominance, emotional restraint, and financial control.⁵³ In Kisumu, community and social gatherings, religion, and traditional teachings reinforce these norms by positioning men as household leaders and decision-makers.⁵⁴ Pamoja’s research found that such gender expectations foster a culture where men’s power over women is normalized, contributing to GBV.⁵⁵

In Kenya, the rise of social media has led to an increase in the prevalence of a harmful “manosphere,”⁵⁶ an online phenomenon where boys and young men encounter platforms that denigrate, objectify, and subject women to “slut-shaming.”⁵⁷ This includes online harassment, non-consensual distribution of intimate images, and hate-filled, offensive comments.⁵⁸ Through this social media content, men are encouraged to

⁴⁷ Nancy Perrin et al., *Social Norms and Beliefs about Gender Based Violence Scale: A Measure for use with Gender Based Violence Prevention Programs in Low-Resource and Humanitarian Settings*, 13 CONFLICT & HEALTH 1, 2 (2019).

⁴⁸ *Id.*

⁴⁹ Eleventh Session of the Comm. on the Elimination of Discrimination against Women, *CEDAW General Recommendation No. 19*, U.N. Doc. A/47/38 (1992); *General Recommendation No. 35*, *supra* note 5.

⁵⁰ *Id.*

⁵¹ KATO-WALLACE ET AL., *supra* note 46, at 15.

⁵² *Id.*

⁵³ PAMOJA, D.R.E.A.M.S. INITIATIVE: THROUGH A STAKEHOLDERS LENS (2023); Access to Health, *supra* note 26.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Caroline Kimeu, *As social media grows in Kenya, so does the disturbing and toxic ‘manosphere,’* GUARDIAN (Oct. 2, 2023, 1:00 PM), <https://www.theguardian.com/global-development/2023/oct/02/as-social-media-grows-kenya-so-does-disturbing-toxic-manosphere>.

⁵⁷ *Id.*

⁵⁸ Udgoon Siyad, *We must make online spaces safer for women*, THE STANDARD (2020), https://www.standardmedia.co.ke/counties/article/2001357115/we-must-make-online-spaces-safer-for-women#google_vignette; APC & KICTANET, UNIVERSAL PERIODIC REV. 49TH

“exercise coercive control” in response to women’s growing social and economic power, which many perceive as a threat to men’s status and well-being.⁵⁹

These false conceptions are classic examples of “restrictive masculinities” that harm men and end up hurting women too.⁶⁰ Some men remain trapped in a “man box” with intense pressure to conform to rigid gender norms, while those who do not comply with the dominant masculine ideals may face further marginalization.⁶¹ In reality, the ideal of dominant masculinity often differs from the actual experiences of men, particularly for those who face hardship, racial prejudice, or societal inequalities, as well as those who identify with non-normative sexual orientations or gender identities.⁶²

In the Kenyan context, “restrictive masculinity” manifests in rigid ideas of men being the “providers” or “immune to emotions or pain.”⁶³ Some researchers argue that because of the sharp divide between women’s roles and men’s roles during colonization, gender-based stereotypes are very strict.⁶⁴ Other findings have also suggested a connection between masculinity norms in Kenya and higher engagement in sexual health risk behaviors.⁶⁵ Beliefs in “uncontrollable male sexual desires,” dominance over women, and the association of multiple sexual partners with sexual prowess led to increased unprotected sex among men, heightening the risk of HIV infection.⁶⁶

SESSION—JOINT STAKEHOLDER REPORT: HUMAN RIGHTS IN THE DIGITAL CONTEXT IN KENYA 13 (2024).

⁵⁹ Kimeu, *supra* note 56.

⁶⁰ OECD, *supra* note 39, at 3.

⁶¹ BRIAN HEILMAN ET AL., THE MAN BOX: A STUDY ON BEING A YOUNG MAN IN THE US, UK, AND MEXICO 8 (Equimundo & Unilever, 2017) (“The Man Box refers to a set of beliefs, communicated by parents, families, the media, peers, and other members of society, that place pressure on men to be a certain way. These pressures tell men to be self-sufficient, to act tough, to be physically attractive, to stick to rigid gender roles, to be heterosexual, to have sexual prowess, and to use aggression to resolve conflicts.”).

⁶² *Men’s Accountability for Gender Equality, Guidance Document of the Working Group on Discrimination Against Women and Girls, A/HRC/WG.11/37/1.*, UNITED NATIONS HUM. RTS. COUNCIL (Feb. 7, 2023), <https://digitallibrary.un.org/record/4007088?v=pdf>.

⁶³ James R. Mahalik et al., *Health Behaviors and Masculinity in Kenyan and U.S. Male College Students*, 7 PSYCH. OF MEN & MASCULINITY 191, 191 (2006).

⁶⁴ *Id.*

⁶⁵ Siyad, *supra* note 58.

⁶⁶ Mahalik et al., *supra* note 63, at 191.

II. THE IMPACT OF UNHEALTHY CONCEPTS OF MASCULINITY AND GBV

According to gender role strain theory, men must conform to traditional masculine norms, and failure to do so can result in severe consequences.⁶⁷ However, it is nearly impossible for men to achieve these masculine ideals fully.⁶⁸ One of the most dangerous gender stereotypes is the belief that “men are generally unemotional.”⁶⁹ Many studies show that when men fear or avoid emotions, they are more likely to exhibit aggression and violence.⁷⁰

Cultural expectations surrounding masculinity and emotional control, such as the stereotype that “men don’t cry,” or that “men shouldn’t ask for help,” result in “Masculine Gender Role Stress.”⁷¹ In some cases, men use it as one of the few socially accepted ways to express emotions. Men who struggle to manage their emotions are more likely to abuse their partners and believe that men should not share their feelings or seek help.⁷²

Terrence Real has considered that there is a “silent epidemic in men,”⁷³ where millions of men cover their depression and instead exhibit behaviors that are often associated with being “manly,” such as rage, addictive behaviors, workaholism, alcoholism, drug consumption, and difficulty with intimacy.⁷⁴ Studies suggest a connection between masculine gender role stress and IPV, indicating that men with traditional gender-role attitudes are more likely to exhibit both masculine gender role stress and acceptance of male violence against women.⁷⁵ Similarly, findings support that sexually aggressive men often uphold traditional masculine gender-role attitudes.⁷⁶

This mental health crisis often leaves female partners as “the first line of defense,”⁷⁷ especially since a key aspect of demonstrating masculinity involves embracing aggression and violence, which male figures in both

⁶⁷ Dennis E. Reidy et al., *Man Enough? Masculine Discrepancy Stress and Intimate Partner Violence*, 68 PERSONALITY & INDIVIDUAL DIFFERENCES 160 (2014).

⁶⁸ Barker et al., *supra* note 6, at 539.

⁶⁹ Matthew Jakupcak, *Masculine Gender Role Stress and Men’s Fear of Emotions as Predictors of Self-Reported Aggression and Violence*, 18 VIOLENCE & VICTIMS 533 (2003).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² David Tager et al., “Walking Over ‘Em’: An Exploration of Relations Between Emotion Dysregulation, Masculine Norms, and Intimate Partner Abuse in a Clinical Sample of Men,” 11 PSYCH. MEN & MASCULINITY 233 (2010).

⁷³ See TERRENCE REAL, *I DON’T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION* (Scribner Reprint eds., 1998).

⁷⁴ *See id.*

⁷⁵ Michael M. Copenhaver et al., *Masculine Gender-Role Stress, Anger, and Male Intimate Abusiveness: Implications for Men’s Relationships*, 42 SEX ROLES 405, 406–07 (2000).

⁷⁶ *Id.* at 407.

⁷⁷ PLANK, *supra* note 40.

familial and societal settings reinforce.⁷⁸ This emphasis on assertiveness extends to sports, where people often even celebrate aggressively while non-aggressive behavior is considered feminine and can lead to bullying.⁷⁹ Additionally, boys learn that they can assert their masculinity by challenging authority, showing disdain for academics, and engaging in intimidating behavior.⁸⁰

When faced with stress related to traditional masculine gender roles, men may seek methods to reinforce their sense of masculinity.⁸¹ As Liz Plank states, “Manhood is never fully earned and needs to be renewed over and over again.”⁸² In this sense, men often refer to status and income to assess their “effective manhood” and control relationships.⁸³ Accordingly, poor men may resort to controlling behaviors in relationships, including verbal and physical abuse, to maintain “relationship control.”⁸⁴ Studies of domestic violence show that men are more prone to violence when they perceive their partners as lacking submissiveness.⁸⁵

Reconsidering our perception of masculinity and its impact on young boys and men is crucial. Pamoja CBO’s ongoing examination of the DREAMS program (a program focused on reducing and eliminating HIV infection among adolescents and young women) highlighted how masculinity plays an important role in GBV prevention.⁸⁶ In interviews conducted in Kisumu, Kenya, participants frequently expressed that gender expectations pressured men to maintain a strong, emotionless facade.⁸⁷ One community health worker noted, “Here, a man’s value is measured by his ability to command respect and control. If he shows vulnerability, it is as if he loses his place among other men.”⁸⁸ Another interviewee observed that younger boys quickly learn that aggression is rewarded, while vulnerability

⁷⁸ Douglas Schrock & Michael Schwalbe, *Men, Masculinity, and Manhood Acts*, 35 ANN. REV. SOCIO. 277, 287 (2009).

⁷⁹ Tarkington J. Newman et al., *The Relationship Between Youth Sport Participation and Aggressive and Violent Behaviors: A Scoping Review of the Literature*, 12 J. SOC’Y SOC. WORK & RSCH. 371, 379–80 (2021).

⁸⁰ Jason Bantjes & Johan Nieuwoudt, *Masculinity and Mayhem: The Performance of Gender in South African Boys’ School*, 17 MEN & MASCULINITIES 376, 380 (2014).

⁸¹ Rheel S. W. Chan & Kai-Tak Poon, *The Unmanliness of Ostracism: The Role of Masculine Gender Role Stress and Intimate Partner Violence in Men’s Mental Health*, 89 SEX ROLES 731, 733 (2023).

⁸² PLANK, *supra* note 40.

⁸³ Schrock & Schwalbe, *supra* note 78, at 284.

⁸⁴ *Id.* at 285.

⁸⁵ *Id.*

⁸⁶ *Dreams*, *supra* note 21. D.R.E.A.M.S. (DETERMINED-RESILIENT-EMPOWERED-AIDS FREE-MENTORED-SAFE) Program is a girl-centered program with an aim of reducing HIV new infection among adolescent girls and young women (AGYW). *Id.*

⁸⁷ Interviews by Nw. Pritzker Sch. L. Access to Health Project with Various Community Health Workers, in Kisumu, Kenya (Mar. 2023) (documentation on file with author).

⁸⁸ *Id.*

is stigmatized.⁸⁹ These insights revealed the urgent need for inclusive approaches that engage men and boys in redefining masculinity and encourage emotional expression without the fear of judgment.⁹⁰

Findings from the DREAMS focus groups at Pamoja revealed that men and boys were not sufficiently involved in efforts to tackle GBV.⁹¹ When helping girls with HIV/AIDS prevention, reproductive health, and financial empowerment, men were less likely to engage in the programs, test for HIV, or get treatment.⁹² Both rural Limpopo and Eastern Cape, South Africa, experienced this phenomenon.⁹³

Hence, the surveys and in-depth interviews with the Pamoja staff, community health workers (CHWs), program volunteers, healthcare professionals, and program participants revealed that there is currently a gap in addressing the urgent needs of women and the education of men and young boys on topics such as toxic masculinity, GBV, SGBV, consent, contraceptives, sexual health, and pregnancy that have been largely neglected.⁹⁴

III. MALE AGENTS OF CHANGE: THE ROLE OF MEN IN GBV PREVENTION

Recognizing the impact of gender inequality on both women and men is essential to understanding the pivotal role that men and boys can play as agents of change in GBV prevention. Only through their participation can we create a world where their daughters can thrive, providing a strong incentive to support gender equality.⁹⁵

As stated previously, gender norms do not solely influence men's health behaviors but also impact their partners, families, and children.⁹⁶

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*; see also Betty Adera, *Meaningful Engagement of Boys and Men: A Pathway to Prevention and Response to Gender-Based Violence*, GLOBAL COMMUNITIES (Dec. 8, 2021), <https://globalcommunities.org/blog/meaningful-engagement-of-boys-and-men-a-pathway-to-prevention-and-response-to-gender-based-violence/> (“Through DREAMS, we provide training to boys aged 10-17 years old. The aim is to reach younger boys before GBV becomes an accepted part of their lives, so that they can recognize, learn and prevent violent behavior against women and girls.”).

⁹² Adera, *supra* note 91 (“[B]ecause working with women and girls is only half of the story, DREAMS is also engaging with men and boys to change their attitudes and behaviors toward women.”).

⁹³ Paul J. Fleming et al., *What Role Can Gender-Transformative Programming for Men Play in Increasing Men's HIV Testing and Engagement in HIV Care and Treatment in South Africa?*, 18 *CULT HEALTH SEX* 1251, 1254 (Nov. 2016).

⁹⁴ Interviews by Nw. Pritzker Sch. L. Access to Health Project with Various Community Health Workers, *supra* note 87.

⁹⁵ WOMEN 2000 AND BEYOND, THE ROLE OF MEN AND BOYS IN ACHIEVING GENDER EQUALITY 5 (Dec. 2008), <https://www.un.org/womenwatch/daw/public/w2000/W2000%20Men%20and%20Boys%20E%20web.pdf>.

⁹⁶ Barker et al., *supra* note 6.

Considering men's dominance in sexual and reproductive decisions, gender stereotypes play a crucial role in shaping the sexual behaviors of young people.⁹⁷ Research links rigid views of masculinity to violence, sexually-transmitted infections (STIs), substance abuse, HIV/STI transmission rates, contraceptive use, household duties, parenting, and men's health-seeking behaviors.⁹⁸

The World Health Organization (WHO) emphasizes that empowering women and girls is not enough without addressing the gendered vulnerabilities of men and boys.⁹⁹ A more nuanced approach is needed—one that includes their perspectives in policy discussions, prioritizes early intervention programs, and works to change social norms by promoting healthy masculinities.¹⁰⁰ When men and boys are not engaged in efforts to promote gender equality, women and girls ultimately bear the consequences.¹⁰¹

These ideas date from the 1990s.¹⁰² Two United Nations global conferences—the United Nations International Conference on Population and Development in 1994 and the Fourth World Conference on Women in 1995—highlighted the importance of male engagement and responsibility for partnership between men and women and the consolidation of democracy.¹⁰³ Also, other global conferences of the United Nations have highlighted the important roles of men and boys in the sharing of family and household responsibilities, sexual and reproductive health, and the HIV/AIDS pandemic.¹⁰⁴

In this sense, it is important to acknowledge that male violence is a complex and structural problem that society cannot simply attribute to men. Many institutions and social structures like culture, the state, education, religion, and family play an important part in normalizing gender stereotypes that lead to misogyny, aggression, abuse, GBV, or male violence.¹⁰⁵ Additionally, these structural gender-based stereotypes contribute to

⁹⁷ See KATO-WALLACE ET AL., *supra* note 46, at 26.

⁹⁸ Barker et al., *supra* note 6.

⁹⁹ See KATO-WALLACE ET AL., *supra* note 46, at 26.

¹⁰⁰ See U.S. DEP'T OF STATE, UNITED STATES STRATEGY TO PREVENT AND RESPOND TO GENDER-BASED VIOLENCE GLOBALLY (2022), https://www.state.gov/wp-content/uploads/2022/12/GBV-Global-Strategy-Report_v6-Accessible-1292022.pdf.

¹⁰¹ See *id.*

¹⁰² See WOMEN 2000 AND BEYOND, *supra* note 95.

¹⁰³ World Conference on Women, *Report of the fourth World Conference on Women*, U.N. Doc. A/CONF. 177/20/Rev.1, ¶ 15 (Sept. 4, 1995).

¹⁰⁴ U.N. GAOR, 27th Sess., U.N. Doc. RA/S-27/19/Rev.1 (2000); U.N. GAOR, 23d Sess., U.N. Doc. A/S-23/10/Rev.1 (2000). For an overview of the outcomes of these processes, see U.N. Division for the Advancement of Women, *Information Received from the Division for the Advancement of Women*, (2003), <https://digitallibrary.un.org/record/493496?ln=en>. See also RIMJHIM JAIN, ENGAGING MEN AND BOYS IN ENDING GENDER BASED VIOLENCE, INCLUDING VIOLENCE AGAINST WOMEN AND GIRLS 21 (MenEngage All. 2021).

¹⁰⁵ *Id.*

inadequate responses by institutions and governments that fail victims of GBV.¹⁰⁶

The Kenya Gender-Based Violence Service Gap Analysis report evaluated service gaps and provided concrete operational recommendations for improving GBV prevention.¹⁰⁷ It summarized findings from a GBV service gap analysis of four counties in Kenya (Bomet, Kisumu, Kitui, and Kwale).¹⁰⁸ The main recommendations for the region included: “[investing] in awareness raising activities on women, men and children’s right to a life free of violence as part of community mobilization efforts to change the acceptance of GBV and other social norms around GBV[;]”¹⁰⁹ “[investing] in efforts to sensitize women and men on the importance of help-seeking[;]”¹¹⁰ and “[investing] in proven community initiatives aimed at tackling harmful gender norms[.]”¹¹¹

Pamoja’s CBO interventions interview results also highlighted these areas.¹¹² During the focus groups, CHWs expressed concerns about excluding boys from the program.¹¹³ Participants emphasized the need to include boys in sexual education and mentorship programs to address gender-based violence and promote community reform.¹¹⁴ Healthcare professionals suggested a more balanced approach by involving boys in HIV prevention efforts and family planning.¹¹⁵

Engaging men and boys in GBV prevention does not mean achieving the goal of empowering women and girls.¹¹⁶ Recognizing the importance of including boys in these efforts and expanding education to cover areas like sexual health allow barriers to break down and foster a culture of respect and equality from the start. Men’s partnerships with anti-violence women’s groups are crucial to demonstrate the shared interest of men and women in stopping violence.¹¹⁷

Given the complex and multifaceted nature of GBV, prevention must involve boys and men. Effectively addressing GBV requires holistic strategies that challenge deeply ingrained attitudes and behaviors.¹¹⁸ As

¹⁰⁶ *Id.*

¹⁰⁷ See WORLD BANK GRP., KENYA GENDER-BASED VIOLENCE SERVICE GAP ANALYSIS AT THE COUNTY LEVEL (2020).

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* at iii.

¹¹⁰ *Id.*

¹¹¹ *Id.* at iv.

¹¹² Interviews by Nw. Pritzker Sch. L. Access to Health Project with Various Community Health Workers, *supra* note 87.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ KATO-WALLACE ET AL., *supra* note 46, at 26.

¹¹⁷ WOMEN 2000 AND BEYOND, *supra* note 95, at 3.

¹¹⁸ *Id.* at 12.

discussions on GBV prevention progress, the need for a comprehensive approach becomes evident. While initiatives that support women and girls remain vital, there is growing recognition of the significant role that men and boys play in either sustaining or dismantling harmful gender norms.¹¹⁹ Examining successful initiatives that have prioritized male involvement reveals valuable insights into effective strategies for fostering behavioral change and promoting gender equality.

IV. EXISTING SUCCESSFUL STRATEGIES FOR GENDER-BASED VIOLENCE (GBV) PREVENTION

Research confirms that men and boys can, and do, change attitudes and behaviors as a result of relatively short-term programs.¹²⁰ Examples of changed behaviors include those related to their use of violence against women, their sexual and reproductive behavior, maternal, newborn, and child health, and their interaction with children.¹²¹ It has also resulted in their questioning of violence by other men and their own health-seeking behavior.¹²²

Small interventions can create structural policy changes. Evidence suggests that interventions can create substantial change, improving the lives of adolescent girls in emotional well-being and IPV, GBV prevention, HIV prevention, labeling and stigma, violence, and the transition to a healthy masculinity.¹²³ Some specific strategies that have been implemented to engage men and young boys in GBV prevention are described in more detail below.

A. Gender Norms

The NISITU Program in Kenya engaged boys and men in girl-centered interventions in Nairobi, Dandora, Mathare, Kariobangi, and Nakuru.¹²⁴ The program aimed to address and prioritize the needs of girls in relation to sexual exploitation and violence by targeting boys and men and testing how their engagement improves outcomes for girls.¹²⁵

¹¹⁹ *See id.*

¹²⁰ Barker et al., *supra* note 6, at 545.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 539.

¹²⁴ NISITU: *Engaging Men and Boys in Girl-Centered Programming*, POPULATION COUNCIL, <https://popcouncil.org/project/nisitu-engaging-men-and-boys-in-girl-centered-programming/> (last visited Jan. 16, 2025).

¹²⁵ *Id.*

This program conducted weekly interventions for boys and young men, focusing on gender norms, gender transformation, and GBV.¹²⁶ The intervention for young girls focused on exploring their attitudes toward gender roles, power with relationships, and violence.¹²⁷ By the end of the program, participants showed significant improvements in their knowledge of sexual and reproductive health knowledge.¹²⁸

B. Intimate Partner Violence (IPV)

World Vision conducted a recent study in Kenya that helped to understand how supporting men's common mental health problems linked to harmful alcohol and substance use helped reduce IPV.¹²⁹

For this project, 320 men in two communities facing mental health issues, such as anxiety and substance abuse, participated in interventions. The program adapted the Program Management Plus intervention program specifically for men with a history of alcohol abuse.¹³⁰ The impacts of the interventions were assessed after six weeks and three months, revealing that providing mental health support for men could play a crucial role in redirecting the paths of individuals who are at risk of engaging in GBV.¹³¹

C. GBV Prevention

Implementing an educational curriculum on improving male attitudes toward women can also help with GBV prevention.¹³² A study conducted in Nairobi, Kenya involved 1,250 adolescent boys receiving six two-hour weekly interventions called "*Your Moment of Truth*."¹³³ The program focused on education about gender equality and violence, positive masculine development, and safe intervention.¹³⁴

In addition, the study aimed to complement a girls' empowerment program that effectively reduced sexual assault rates in Nairobi.¹³⁵ It focused on consent in sexual relations, false beliefs about rape, attitudes toward sexual aggression, and restrictive gender norms.¹³⁶ Nine months after the

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Phiona Naserian Koyiet, *Supporting Men's Mental Health to Reduce Gender-Based Violence in Kenya*, SEXUAL VIOLENCE RSCH. INITIATIVE, <https://www.svri.org/supporting-mens-mental-health-to-reduce-gender-based-violence-in-kenya/> (last visited Jan. 20, 2025).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Keller et al., *supra* note 11, at 8–9.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 7.

¹³⁶ *Id.*

intervention, data on attitudes toward women showed significant improvement.¹³⁷

D. HIV Prevention

Similarly, interventions could reduce some forms of IPV in women and overall HIV incidence.¹³⁸ A program called *SHARE* in Rakai, Uganda, included men in interventions to reduce IPV towards women and overall HIV incidence.¹³⁹ By combining IPV prevention strategies with HIV services, the intervention aimed to tackle the interconnected nature of these issues.¹⁴⁰

The findings revealed a significant reduction in reports of physical and sexual IPV within the intervention group.¹⁴¹ Moreover, by combining self-reported data with objective measures like HIV testing, the study found that there was a notable decrease in HIV incidence among participants receiving integrated services.¹⁴²

E. Other Holistic Interventions

Other holistic approaches have explored case studies on youth for post-rape care in humanitarian contexts.¹⁴³ In Uganda, a Comic Book Workshop aimed to enhance youth-friendly post-rape care in the Bidibidi refugee settlement.¹⁴⁴ The intervention used a comic book to address crucial topics such as sexual and gender-based violence (SGBV), youth-friendly healthcare, and post-exposure prophylaxis.¹⁴⁵ Results showed the workshop's effectiveness, with participants finding the comic book informative and engaging.¹⁴⁶ Overall, this approach highlighted the potential of holistic approaches, like the comic book, in improving post-rape care and combating SGBV stigma in humanitarian settings.¹⁴⁷

¹³⁷ *Id.* at 10.

¹³⁸ Jennifer A. Wagman et al., *Effectiveness of an integrated intimate partner violence and HIV prevention intervention in Rakai, Uganda: analysis of an intervention in an existing cluster randomized cohort*, 3 THE LANCET GLOB. HEALTH 23, 24 (2015).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 29.

¹⁴² *Id.* at 29.

¹⁴³ Carmen Logie et. al., *A Participatory Comic Book Workshop to Improve Youth-Friendly Post-Rape Care in a Humanitarian Context in Uganda: A Case Study*, 11 GLOB. HEALTH SCI. PRAC. 1 (2023).

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 8.

¹⁴⁷ *Id.* at 10.

Studies have also explored stress reduction techniques with refugees.¹⁴⁸ The Healthy Men Healthy Communities program aimed to improve the physical and mental health of South Sudanese refugee men in Uganda while also focusing on GBV prevention.¹⁴⁹ The program was conducted in two refugee settlements and involved three community leaders trained as facilitators.¹⁵⁰

The results showed increased knowledge and confidence among participants in stress reduction techniques and healthy communication strategies.¹⁵¹ The findings suggest that the program has the potential to address gender inequality and violence against women in vulnerable settings such as refugee settlements.¹⁵² It concluded that in order to achieve “gender equality and address violence against women, men indisputably need to be part of the solution.”¹⁵³

Overall, case studies and research have demonstrated the effectiveness of various interventions in engaging men and boys in GBV prevention efforts.¹⁵⁴ These findings underscore the importance of including men and boys as active agents of change in the fight against GBV and emphasize the need for ongoing efforts to challenge and transform harmful gender norms and stereotypes.

In this sense, CBOs like Pamoja that primarily focus on the needs of adolescent girls and young women (AGYW) in programs like DREAMS¹⁵⁵ would benefit enormously from including boys and young men in their interventions. Increasing the participation of boys in behavioral interventions such as *My Health, My Choice*¹⁵⁶ and *Healthy Choices for a Better Future*¹⁵⁷ would contribute to addressing misogynistic attitudes and help combat the resentment that exists because of the lack of targeted programming for boys in Pamoja and Kenya. Educating boys about SGBV, consent, contraceptives, and sexual health could help address the high rates of SGBV in the

¹⁴⁸ Ruth Zielinski et al., *Implementation of Healthy Men Healthy Communities: A Health Promotion and Gender-Based Violence Prevention Program for Male South Sudanese Refugees in Uganda*, 12 HEALTHCARE 147, 150 (2024).

¹⁴⁹ *Id.* at 148.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 152.

¹⁵² *Id.* at 147.

¹⁵³ *Id.* at 153.

¹⁵⁴ *See id.* at 152–53.

¹⁵⁵ DREAMS: Partnership To Reduce HIV/AIDS In Adolescent Girls and Young Women, USAID, <https://www.usaid.gov/global-health/health-areas/hiv-and-aids/technical-areas/dreams> (last visited Jan. 24, 2025).

¹⁵⁶ Eddy Ingutia, *Nurturing a responsible generation through My Health My Choice*, LVT HEALTH (Mar. 18, 2021), <https://lvtthealth.org/nurturing-a-responsible-generation-through-my-health-my-choice/>.

¹⁵⁷ *Healthy Choices for a Better Future*, HC I PROGRAM 3, https://old.pop.org/files/hcii_final_curriculum_co_apr11.pdf (last visited Apr. 11, 2025).

community.¹⁵⁸ However, most of these programs are donor-driven, and donor agencies should reconsider whether their donor policy should exclude boys or support boys and girls equally.

CONCLUSION

To address GBV in Kisumu, Kenya, it is crucial to involve men and young boys alongside women and girls in programmatic interventions. This requires creating a safe, violence-free environment for children to grow,, while educating children and youth about gender equality, violence, and healthy relationships. Insights from Pamoja's interviews highlight the importance of understanding the transmission modes of HIV and its associated risks, along with the need for counseling and post-violence care.¹⁵⁹

Effective interventions must address barriers to care and improve access to sexual and reproductive health services for both girls and boys. Increasing awareness and providing support services tailored to boys, adolescents, and young men is crucial. Social and cultural influences, coupled with knowledge gaps and myths, further highlight the necessity for comprehensive strategies that challenge ingrained gender norms and behaviors. The evidence suggests no decrease in societal violence and sustainable peace without gender equality.¹⁶⁰ Therefore, engaging men and boys as partners in this endeavor offers a transformative path toward a future where GBV does not occur and all individuals are empowered to live without fear or oppression.

¹⁵⁸ Zielinski et al., *supra* note 148.

¹⁵⁹ Interviews by Nw. Pritzker Sch. L. Access to Health Project with Various Community Health Workers, *supra* note 87.

¹⁶⁰ See VALERIE HUDSON ET AL., SEX AND WORLD PEACE (2d eds., 2023).

A LABOR OF LOVE: THE INTERSECTION OF DOMESTIC VIOLENCE AND HUMAN TRAFFICKING AND WHY ATTORNEYS HAVE A DUTY TO UNDERSTAND THE DIFFERENCE

Jessica Visage*

INTRODUCTION

Vicky turns on the radio in her car as she drives to the store when a commercial comes on encouraging people to report human trafficking. The radio tells her that victims of human trafficking are malnourished and scared. She goes about her day as normal, not thinking she is a victim. She knows that she fears her husband—she knows that she must obey him—but Vicky does not equate this with human trafficking. She does not know that traffickers are often people the victims know and that human trafficking can mirror domestic violence.

Vicky is a young woman who met her husband, Henry, online several years ago while she lived in Brazil. She lived in a rural area and grew up in poverty. Henry was much older, very handsome, and American. Henry was wealthy and gave Vicky the attention she never had growing up. Like most stories of domestic violence, Henry was perfect—until he wasn't. At Henry's request, Vicky moved to the United States only to become isolated from her support system. Henry's behavior quickly changed, and Vicky became his servant and slave. After having his children, the idea of ever leaving became impossible. He has only hit Vicky a few times; his abuse is almost always psychological and sexual. He threatens to have her kids taken away and assures her that she will be deported without her children if she attempts to leave. When Vicky is compliant with his demands for sex, she is rewarded with an appointment to get her hair or nails done or given extra spending money so that she may buy her children new toys and clothes. On days when she refuses Henry's demands for sex, she is yelled at, insulted, and told she is worthless. More often than not, Vicky complies with Henry's demands, but in her mind, she is just a wife meeting her husband's needs.

* Jessica Visage is a third-year law student at SIU Simmons Law School. This Essay was completed as part of the author's Senior Writing Seminar at SIU Simmons Law School taught by Professor Shelly Page. In addition to her coursework at SIU Simmons Law School, the author presides as the President of the Human Trafficking Law Society at Simmons Law School and has previously worked as a legal assistant helping victims of human trafficking prior to coming to law school. The author wishes to thank Professor Shelly Page for her guidance and support while writing this Essay.

While Vicky is a fictional character, her story is far from abnormal. Across the United States, traffickers lure women, men, and children into relationships where a promise of love turns into a horrific experience. Thirty-nine percent of sex trafficking victims and five percent of labor trafficking victims are recruited by an intimate partner.¹

The purpose of this Essay is to deepen the reader's understanding of the similarities and differences between domestic violence and human trafficking. Domestic violence and human trafficking differ, but the intersection of the two can leave victims without proper resources when lawyers cannot identify the difference. First, this Essay provides an overview of both domestic violence and human trafficking, revealing a widespread problem in the United States. This Essay then explains the intersection and differences between domestic violence and human trafficking, and how domestic violence is often a tool used by traffickers. Finally, this Essay emphasizes the lawyer's duty to be informed on this matter and how identifying human trafficking can help clients.

I. DOMESTIC VIOLENCE AND HUMAN TRAFFICKING ARE WIDESPREAD PROBLEMS IN THE UNITED STATES

An estimated twelve million men and women have been victims of domestic violence in the United States.² That is more than the combined populations of New York City and Chicago.³ In 2016, an estimated 40.3 million people worldwide were victims of either forced labor or forced marriage⁴—more than the entire population of California.⁵ Domestic violence and human trafficking are widespread problems in the United States.⁶ Because these issues affect many people, lawyers will likely

¹ *Human Trafficking Trends in 2020*, POLARIS PROJECT 2–3 (2020), <https://polarisproject.org/wp-content/uploads/2022/01/Human-Trafficking-Trends-in-2020-by-Polaris.pdf>.

² *Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> (last visited Jan. 27, 2025) (citing Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, NAT'L SEXUAL VIOLENCE RES. CTR. (2010), <https://www.nsvrc.org/publications/NISVS-2010-summary-report>).

³ See *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/chicagocityillinois,newyorkcitynewyork/PST045223> (last visited Jan. 27, 2025).

⁴ INT'L LAB. OFF., *GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE* (2017) (explaining that forced marriage often includes forced labor and sexual servitude and that the forced labor estimate includes sex work).

⁵ See *QuickFacts*, *supra* note 3.

⁶ See *Domestic Violence Statistics: A Comprehensive Investigation*, Dolan + Zimmerman, <https://www.dolanzimmerman.com/domestic-violence-statistics/#:~:text=Every%20year%2C%20nearly%2010%20million,viole%20by%20an%20intimate%20partner>. (last visited Jan. 27, 2025) (discussing how every year in the United States, more than ten million men and women are victims of domestic violence); see Adam Hewitt, *More Than 1 Million Human Trafficking Victims in USA – New Study*, HOPE FOR JUSTICE (June 1, 2023), <https://hopeforjustice.org/news/more-than-1->

encounter victims while practicing law.⁷ This section focuses on the estimated number of people affected by domestic violence and human trafficking, as well as the long-term effects of these experiences.

A. Domestic Violence Affects Millions of People Every Year

The terms “domestic violence” and “intimate partner violence” are typically used interchangeably.⁸ While some organizations and state laws define domestic violence as including violence that is committed by an intimate partner or another family member such as a parent or sibling, many organizations use the term “domestic violence” to mean violence explicitly committed by a romantic partner.⁹ This Essay focuses on violence committed by a romantic partner and intends to use the term “domestic violence” more narrowly to mean intimate partner violence.

Domestic violence involves physical, sexual, and/or psychological harm to a current or former intimate partner.¹⁰ Abusers often use harmful behavior to control their victims.¹¹ While the reasons for abuse may vary, the cause does not impact whether abuse occurs.¹² For example, Illinois law criminalizes domestic battery without requiring a showing that the abuser intended to maintain control.¹³

million-human-trafficking-victims-in-usa-new-study/ (discussing how there is a new shocking statistic, that there are more than one million victims of human trafficking in the United States, which is nearly triple the estimate from almost eight years ago, when the figure was closer to 400,000).

⁷ See Johnathan Gunderson, *How Lawyers Can Help Human Trafficking Victims*, THE COLLS. OF L. (Aug. 20, 2018), <https://www.collegesoflaw.edu/blog/2018/08/20/lawyers-help-human-trafficking/> (discussing how there has been an increase in human trafficking cases, and lawyers have an opportunity to help victims).

⁸ *Intimate Partner Violence*, CMTY. HEALTH COLLECTION, <https://libguides.massgeneral.org/intimatepartnerviolence#:~:text=Some%20people%20will%20use%20these,exclusive%20to%20people%20living%20together> (last updated Feb. 3, 2025).

⁹ See *About Intimate Partner Violence*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/intimate-partner-violence/about/index.html> (last visited Feb. 3, 2025); but see *The Language We Use*, WOMEN AGAINST ABUSE, <https://www.womenagainstabuse.org/education-resources/the-language-we-use> (last visited Jan. 27, 2025) (explaining why domestic violence and intimate partner violence are different but still used interchangeably).

¹⁰ See *Domestic Violence*, NAT'L INST. OF JUST., <https://www.justice.gov/ovw/domestic-violence> (last visited Feb. 3, 2025).

¹¹ *What Is Domestic Abuse?*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse/> (last visited Jan. 27, 2025).

¹² See *Why People Abuse: Abuse is never okay. Learn why people abuse*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/identify-abuse/why-do-people-abuse/#:~:text=Why%20People%20Abuse%20Abuse%20is,Learn%20why%20people%20abuse.&text=Domestic%20violence%20stems%20from%20a,and%20restrict%20their%20partner's%20lives> (last visited Feb. 3, 2025) (discussing how no matter why, where, or how these people develop such behaviors, those who commit abusive acts choose to do so—they could also choose not to).

¹³ See 720 ILL. COMP. STAT. ANN. 5/12-3.2(a) (West 2022).

In 2019, the National Intimate Partner and Sexual Violence Survey estimated that three in ten women and one in ten men in the United States have experienced domestic violence severe enough to affect their functioning, including in the form of “rape, physical violence, and/or stalking by a partner”¹⁴ The same report indicated that over “1 in 3 women (35.6%) and 1 in 4 men (28.5%) . . . experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.”¹⁵ The World Health Organization (WHO) reported similar statistics for women worldwide.¹⁶ The Bureau of Justice Statistics reported 951,930 intimate partner violence victimizations and 1,370,440 domestic violence victimizations in 2022.¹⁷ Domestic violence often extends beyond the initial act, sometimes acting as a funnel for human trafficking, where victims move from one form of abuse to another.¹⁸

After experiencing domestic violence, victims are likely to develop post-traumatic stress disorder (PTSD), depression, anxiety, and substance abuse.¹⁹ Additionally, victims of domestic violence face a higher risk of becoming victims of human trafficking, especially when they attempt to escape their abuser.²⁰ As this Essay explores in Part III, traffickers exploit vulnerabilities, such as prior abuse, to obtain and control victims.²¹ Given that domestic violence affects millions,²² a large pool of potential trafficking victims exists.²³ Furthermore, due to the overlap between domestic violence and human trafficking, many instances of domestic violence may be unreported instances of human trafficking.²⁴

¹⁴ *Domestic Violence Statistics*, *supra* note 2.

¹⁵ *Id.*

¹⁶ *Violence against women*, WORLD HEALTH ORG. (Mar. 25, 2024), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (reporting that twenty-seven percent of women worldwide have experienced intimate partner violence).

¹⁷ NAT’L CRIME VICTIMIZATION SURV., DOMESTIC VIOLENCE IN THE U.S. FINDINGS FROM THE 2022 NCVS 1 (2023).

¹⁸ *See generally* Gunnur Karakurt et al., *Impact of Intimate Partner Violence on Women's Mental Health*, J. FAM. VIOLENCE 1, 1 (2014) (explaining how victims of domestic violence experience more than the initial act of violence).

¹⁹ *See id.*

²⁰ JEAN BRUGGEMAN & ELIZABETH KEYES, MEETING THE LEGAL NEEDS OF HUMAN TRAFFICKING VICTIMS: AN INTRODUCTION FOR DOMESTIC VIOLENCE ATTORNEYS & ADVOCATES 7–8 (Amanda Kloer et al. eds., 2009).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

B. Sex Trafficking Is One of the Most Common Forms of Human Trafficking in the United States

Human trafficking is often broken down into two types of trafficking: labor trafficking and sex trafficking.²⁵ Labor trafficking involves forcing a person to do labor, whereas sex trafficking involves forcing a person to engage in commercial sex acts.²⁶ Traffickers use force, fraud, and coercion to maintain control to exploit their victim for some sort of personal gain, typically monetary, but sometimes the gain is simply receiving the service.²⁷

The U.S. Department of State estimated that 27.6 million people worldwide are victims of human trafficking.²⁸ In 2007, the United States implemented the National Human Trafficking Hotline, allowing people to report human trafficking.²⁹ Since its inception, the hotline has identified 197,000 trafficking victims.³⁰ In the United States, sex trafficking is the most common form of trafficking.³¹ In 2021, the National Human Trafficking Hotline recorded 10,359 trafficking cases, many involving multiple victims.³² Of those cases, seventy-two percent involved sex trafficking.³³ Polaris reported in 2020 that thirty-nine percent of sex trafficking victims were recruited by “an intimate partner or a marriage proposition” whereas only five percent of labor trafficking victims were recruited the same way.³⁴

Victims often find it difficult or impossible to flee, and many do not know they are victims of human trafficking until after they escape.³⁵ As such, they rarely report their traffickers.³⁶ The National Institute of Justice attributes the lack of reporting and undercounting to several factors, including lack of training in law enforcement, difficulty differentiating human trafficking from other crimes, and a lack of awareness on the victim’s

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *National Human Trafficking Prevention Month*, U.S. DEP’T. OF STATE (Jan. 20, 2025), <https://www.state.gov/national-human-trafficking-prevention-month/#:~:text=There%20are%20estimated%20to%20be,a%20pandemic%20to%20exploit%20others>.

²⁹ *National Statistics*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/en/statistics> (last visited Jan. 30, 2025).

³⁰ *Id.*

³¹ *Id.*

³² *Polar Analysis of 2021 Data from the National Human Trafficking Hotline*, POLARIS PROJECT 1 (2021), <https://polarisproject.org/wp-content/uploads/2020/07/Polaris-Analysis-of-2021-Data-from-the-National-Human-Trafficking-Hotline.pdf>.

³³ *Id.*

³⁴ *Id.* at 2–3.

³⁵ Nat’l Inst. of Just., *Gaps in Reporting Human Trafficking Incidents Result in Significant Undercounting*, HUM. TRAFFICKING SEARCH (Aug. 4, 2020), <https://humantraffickingsearch.org/resource/gaps-in-reporting-human-trafficking-incidents-result-in-significant-undercounting/>.

³⁶ *Id.*

part “that their circumstances constituted human trafficking.”³⁷ In developing a better understanding of the differences between domestic violence and human trafficking, victims are more likely to be identified and receive the help and resources they need to escape and recover.³⁸

II. HOW TO DIFFERENTIATE BETWEEN DOMESTIC VIOLENCE AND HUMAN TRAFFICKING

It is undoubtedly difficult to differentiate human trafficking from domestic violence because of their similarities.³⁹ Both perpetrators of human trafficking and domestic violence tend to maintain control over their victims by isolating the victim, threatening harm, using physical violence, and asserting complete control over finances.⁴⁰ Additionally, perpetrators often use tactics to make their victims feel like they are loved, such as love bombing and providing necessities such as housing, clothing, and food.⁴¹

Domestic violence laws vary by state,⁴² but prosecution generally requires proving intent to cause physical harm to a household member.⁴³ For example, many states do not classify emotional, psychological, and financial abuse as prosecutable offenses.⁴⁴ Alternatively, prosecutors can charge human trafficking when a person uses fraud, force, or coercion to obtain labor services or to benefit from a commercial sex act.⁴⁵

There are two key differences between domestic violence and human trafficking: 1) domestic violence tends to require a showing of physical harm, whereas human trafficking does not require that the victim actually suffer a physical harm and 2) domestic violence does not require a showing of purpose beyond the intent/knowledge of causing physical harm.⁴⁶ In a situation of human trafficking, however, it must be shown that the

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Sarah Bessell, *Fact Sheet: Human Trafficking and Domestic Violence*, HUM. TRAFFICKING LEGAL CTR. 1 (2018), <https://www.htlegalcenter.org/wp-content/uploads/Human-Trafficking-and-Domestic-Violence-Fact-Sheet.pdf>; see also Dorchen A. Leidholdt, *Human Trafficking and Domestic Violence A Primer for Judges*, ABA (Jan. 1, 2013), https://www.americanbar.org/groups/judicial/publications/judges_journal/2013/winter/human_trafficking_and_domestic_violence_a_primer_for_judges/.

⁴⁰ See Bessell, *supra* note 39, at 3; see also Leidholdt, *supra* note 39.

⁴¹ See Bessell, *supra* note 39, at 3.

⁴² Compare 720 ILL. COMP. STAT. ANN. 5/12-3.2 (West 2015), with KAN. STAT. ANN. § 21-5414 (West 2011).

⁴³ See 720 ILL. COMP. STAT. ANN. 5/12-3.2 (West 2015).

⁴⁴ Christopher Coble, *Emotional Abuse Laws: When to Seek Legal Help*, FIND L., <https://www.findlaw.com/legalblogs/law-and-life/emotional-abuse-laws-when-to-seek-legal-help/> (last updated Mar. 21, 2019).

⁴⁵ See 18 U.S.C.A. § 1591 (West 2018).

⁴⁶ Compare 720 ILL. COMP. STAT. ANN. 5/12-3.2 (West 2015) and KAN. STAT. ANN. § 21-5414 (West 2011) with 18 U.S.C.A. § 1591 (West 2018).

perpetrator's purpose was to obtain or cause a commercial act or obtain labor services.⁴⁷

Looking at our hypothetical involving Vicky and Henry, Vicky's situation can be labeled human trafficking because Henry coerces Vicky into performing commercial sex acts. On the outskirts it may appear that Vicky is only experiencing domestic violence, but as this Essay explains, Henry's purpose, coupled with Vicky's sex acts being classified as commercial, turns this situation into human trafficking.

A. The Intersection of Domestic Violence and Human Trafficking

To fully understand the differences between human trafficking and domestic violence, the reader must first understand how perpetrators of these crimes use similar tactics and, more specifically, how traffickers use domestic violence. Family members or intimate partners recruit the majority of sex trafficking victims, and the start of that relationship oftentimes mimics the start of an abusive relationship.⁴⁸ While only five percent of labor trafficking victims reported being recruited by an intimate partner,⁴⁹ not all human trafficking that intersects with domestic violence is sex trafficking.⁵⁰ There are many cases of intimate partners recruiting and obtaining victims for the purpose of labor trafficking. Take, for example, the allegations outlined in *Doe v. Faraghala* as described by The Human Trafficking Legal Center, which provides that the victim was recruited by her trafficker to be married, and then transported to the United States and forced "to work as a domestic servant" in the home of her trafficker, "and as a janitor" for the trafficker's limousine business.⁵¹ It was also alleged that the trafficker was already married and co-owned the business with his wife and that both he and his wife used violence to force and coerce the victim to provide labor services.⁵²

Perpetrators of domestic violence and human trafficking maintain power and control over their victims through various tactics, including emotional abuse, isolation, sexual abuse, manipulation of family members, physical abuse, economic abuse, coercion, threats, and intimidation.⁵³ Both types of perpetrators often accelerate the relationship using "love

⁴⁷ See § 1591.

⁴⁸ See *Analysis of 2020 National Human Trafficking Hotline Data*, POLARIS PROJECT, <https://polarisproject.org/2020-us-national-human-trafficking-hotline-statistics> (last visited Feb. 2, 2025).

⁴⁹ See *id.*

⁵⁰ See Bessell, *supra* note 39, at 1; see also Leidholdt, *supra* note 39.

⁵¹ See Bessell, *supra* note 39, at 4.

⁵² See *id.* at 1.

⁵³ See Leidholdt, *supra* note 39.

bombing”⁵⁴—a manipulation tactic frequently associated with domestic violence.⁵⁵ Love bombing occurs when a person showers their partner with gifts or compliments and makes it a point to be in constant contact.⁵⁶ While this may seem harmless at first, love bombing is merely a tool that perpetrators use to get their victims to trust them so that they can isolate them.⁵⁷ In addition to domestic abusers, love bombing is also a common tactic used by traffickers.⁵⁸

Take, for example, Sarah’s story: Sarah was seventeen -years old when she was approached by a thirty-year-old man who told her she was pretty.⁵⁹ The man complimented her, took her out to eat, paid for Sarah to get her nails done, and within two months, he had convinced Sarah to live with him.⁶⁰ Sarah’s boyfriend used his position of trust as an intimate partner to coerce Sarah to engage in commercial sex acts at the age of seventeen, thereby becoming her trafficker.⁶¹ Because a minor cannot consent to commercial sex, a presumption of fraud, force, or coercion arises making “the means element [] irrelevant regardless of whether evidence of force, fraud, or coercion exists.”⁶² Even without this presumption, fraud was still present. Sarah described her trafficker as her boyfriend, but this intimate relationship was a form of fraud that the trafficker used to gain Sarah’s trust. Additionally, physical force is not always necessary when traffickers establish an intimate relationship based on fraud.⁶³ As explained in Sarah’s story, her boyfriend garnered sympathy from Sarah by stating he could not make rent and then praised her as a means to continue defrauding her and ultimately coercing her into trafficking.⁶⁴

After power is established, both perpetrators of domestic violence and human trafficking use similar tactics to maintain control, such as isolation.⁶⁵ Isolation is a powerful tool because it allows them to keep their victims away

⁵⁴ See *What is Love Bombing?*, CLEVELAND CLINIC (Feb. 1, 2023), <https://health.clevelandclinic.org/love-bombing>.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *Survivor Story: Boyfriend Turned Trafficker*, POLARIS PROJECT (Apr. 14, 2015), <https://polarisproject.org/blog/2015/04/survivor-story-boyfriend-turned-trafficker/>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² CHERYL TAYLOR PAGE & ROBERT WILLIAM PIATT, JR., *HUMAN TRAFFICKING* 8 (2023).

⁶³ *Id.*

⁶⁴ *Survivor Story: Boyfriend Turned Trafficker*, *supra* note 58.

⁶⁵ *Did You Know that Human Trafficking and Domestic Violence are Very Similar?*, JBWS, <https://jbws.org/news/did-you-know-that-human-trafficking-and-domestic-violence-are-very-similar/> (last visited Jan 31, 2025).

from resources that would otherwise allow them to escape.⁶⁶ Traffickers may use different forms of isolation, such as structural isolation, in which the victim cannot physically leave or talk to others, or functional isolation, in which the perpetrator uses coercive tactics to force the victim to stay even though the victim may not be physically restrained from leaving.⁶⁷ Other tactics include physical and sexual abuse, threats, and intimidation.⁶⁸ These types of abusive behaviors aid in keeping the victim isolated and prevent the victim from leaving, whether the situation is domestic violence or human trafficking.⁶⁹

While the tactics to obtain the victim and maintain control are similar and can help a person identify a victim, determining whether that person is a victim of domestic violence or human trafficking requires an understanding of the perpetrator and his purpose.

B. Prosecuting Domestic Violence Often Requires a Showing of Physical Harm

In Illinois, criminal domestic battery requires a showing of physical harm.⁷⁰ The statute specifically states that domestic violence occurs when a person “knowingly without legal justification by any means: (1) [c]auses bodily harm to any family or household member; (2) [m]akes physical contact of an insulting or provoking nature with any family or household member.”⁷¹

In a case of domestic violence in the state of Illinois, the perpetrator must knowingly cause bodily harm.⁷² Still, “domestic violence” is not a criminal offense; instead, perpetrators must be charged with domestic battery or another relevant crime.⁷³ Additionally, under Illinois law, there is no requirement that the perpetrator act for a specific purpose when they commit the offense of domestic battery.⁷⁴ For example, the perpetrator does not need to cause bodily harm for the purpose of maintaining control over the victim.⁷⁵

⁶⁶ See Liz Mahan, *Functional Isolation: Understanding Isolation in Trafficking Survivors* (Dec. 2017) (M.A. thesis, John Jay College of Criminal Justice) (on file with CUNY Academic Works, City University of New York).

⁶⁷ *Id.* at 5–7.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 5–7.

⁷⁰ See 720 ILL. COMP. STAT. ANN. 5/12-3.2(a) (West 2024).

⁷¹ *Id.*

⁷² *Id.*

⁷³ The Illinois Domestic Violence Act of 1986 covers police procedure and civil procedure for orders of protection. See generally 750 ILL. COMP. STAT. ANN. 60/101 (West 2025); 750 ILL. COMP. STAT. ANN. 60/203 (West 2025). ().

⁷⁴ See 720 ILL. COMP. STAT. ANN. 5/12-3.2 (a) (West 2024).

⁷⁵ See *Protecting Children from Domestic Violence*, ILL. DEP’T CHILD. & FAM. SERVS., <https://dcfs.illinois.gov/safe-kids/protecting.html> (last visited Jan 30, 2025); 5/12-3.2 (a).

However, the statute also does not protect victims who are not physically harmed. Using our hypothetical with Vicky and Henry, if Henry never physically harmed Vicky, she would not be protected under the criminal domestic battery law in Illinois.⁷⁶ Henry could maintain complete control over Vicky without ever using physical force and he would not face any domestic battery charges. However, other crimes could be implicated, such as intimidation.⁷⁷

In Illinois, intimidation is a class three felony with a minimum sentence of two years.⁷⁸ To be convicted, the prosecution must show that a person intentionally caused “another to perform or to omit the performance of any act . . .” by threatening to expose the person “to hatred, contempt or ridicule . . .” or various other actions such as threatening to “inflict physical harm on the person . . . or any other person . . .” or threatening to accuse the person of a crime.⁷⁹ However, abusers sometimes avoid direct threats, making it difficult to prove intent.⁸⁰ Instead, perpetrators often use psychological tactics like gaslighting, humiliation, and insults to manipulate their victims, leaving them with a sense of fear that they would not be believed if they told anyone.⁸¹

While most states have similar laws that require a showing of physical harm, some states have begun expanding the definition of domestic abuse to include “coercive control.” For example, in Massachusetts, the legislature expanded its definition to include “pattern[s] of behavior intended to threaten, intimidate, harass, isolate, control, coerce or compel compliance of a family or household member that causes that family or household member to reasonably fear physical harm or have a reduced sense of physical safety or autonomy”⁸²

However, this law only expands the definition of abuse for those seeking a civil restraining order—it does not criminalize coercive control.⁸³ Similarly, California, Hawaii, Connecticut, Colorado, Washington, and New Jersey have added coercive control to their definitions of domestic violence.⁸⁴

⁷⁶ 5/12-3.2(a)(1).

⁷⁷ 720 ILL. COMP. STAT. ANN. 5/12-6(b) (West 2024).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See generally id.*

⁸¹ Lisa Aronson Fontes, *The Mind Control Tactics of Domestic Abusers: Abusers control their partners by making them feel disoriented and afraid.*, PSYCH. TODAY (May 27, 2021), <https://www.psychologytoday.com/us/blog/invisible-chains/202105/the-mind-control-tactics-of-domestic-abusers>.

⁸² MASS. GEN. LAWS ANN. ch. 209a, § 1 (West 2024).

⁸³ *Id.*

⁸⁴ *See, e.g.*, HAW. REV. STAT. ANN. § 709-906(6) (West 2023) (stating that it “shall be a petty misdemeanor for a person to . . . exercise coercive control.”).

Despite states expanding their definition of domestic abuse to include coercive control, only Hawaii has criminalized it, making it a petty misdemeanor to assert coercive control over another person.⁸⁵ For now, prosecuting domestic violence in most states requires prosecuting crimes such as domestic battery, intimidation, harassment, and sexual assault.⁸⁶

C. Human Trafficking Requires the Showing of an Act, Means, and Purpose

The Trafficking Victims Protection Act of 2000 divides human trafficking into two main forms: sex trafficking and forced labor.⁸⁷ Sex trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining . . . of a person for the purpose of a commercial sex act.”⁸⁸ Labor trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁸⁹

A key distinction between domestic violence and human trafficking is the required elements of fraud, force, or coercion, and the purpose behind it.⁹⁰ In domestic violence, the focus is on whether the perpetrator intended to cause harm, regardless of the reason.⁹¹ In contrast, human trafficking requires proof that the perpetrator used specific means for a specific purpose.⁹²

1. *There Must Be a Showing of an Act*

⁸⁵ *See id.*

⁸⁶ *Contra id.*

⁸⁷ 22 U.S.C.A. § 7101 (West 2025).

⁸⁸ § 7102(12).

⁸⁹ § 7102(11)(B).

⁹⁰ *See generally* § 7101.

⁹¹ *See Aggravated Domestic Battery*, FREIDBERG ATT’Y AT L., <https://www.chicagocriminalattorney.pro/practice-areas/domestic-violence/aggravated-domestic-battery/#:~:text=The%20prosecution%20must%20prove%20that,in%20injury%20to%20the%20victim> (last visited Feb. 2, 2025) (“The core of an aggravated domestic battery charge is the intentional or knowing infliction of bodily harm.”).

⁹² *See generally* ILL. DEP’T OF HUM. SERVS., ILLINOIS DEPARTMENT OF HUMAN SERVICES (IDHS) HUMAN TRAFFICKING RECOGNITION TRAINING CURRICULUM GUIDE FOR HOTELS AND MOTELS, <https://www.dhs.state.il.us/OneNetLibrary/27897/documents/Initiatives/HumanTrafficking/Human-Trafficking-Curriculum-Guide.pdf#:~:text=Under%20Illinois%20law%20Human%20Trafficking,will%20be%20subjected%20to%20involuntary> (“[T]he last element proven is that the action and means were done for a purpose of involuntary servitude, debt bondage, slavery, or commercial sex act.”).

Human trafficking must involve recruiting, harboring, transporting, providing, or obtaining of another person⁹³ for exploitative purposes.⁹⁴ When distinguishing between domestic violence and human trafficking, the presence of any of these specific acts—such as recruitment or transportation—is a strong indicator of trafficking, rather than domestic violence alone.⁹⁵

An intimate partner relationship does not rule out the possibility of human trafficking, as traffickers often exploit these relationships to recruit and obtain victims.⁹⁶ The acts of recruiting and obtaining can be exceptionally deceptive and make a situation of human trafficking look like another crime, such as domestic violence.⁹⁷ Traffickers may seduce their victims for an intimate relationship or marry their victims, thereby obtaining them.⁹⁸ The trafficker's characterization as an intimate partner or spouse creates a perception of consent, causing confusion not only to the victim, but also to bystanders.⁹⁹ This leads to victims of human trafficking being mischaracterized as victims of domestic violence.¹⁰⁰

For example, in *United States v. Vianez*, the victim was taken to the hospital for severe injuries, with the trafficker thereafter being charged with domestic assault.¹⁰¹ While the connection between the injuries and her intimate partner were not made clear, it is likely that an intimate partner relationship coupled with physical injuries raised the concern of domestic violence.¹⁰² Later, Vianez was “convicted of sex trafficking and related crimes, sentenced to 20 years in prison, and ordered to pay the victim restitution in the amount of \$1,354,500.”¹⁰³ The FBI reported that Vianez first met the victim when she was seventeen years old and “convinced the girl to become sexually involved with him” before coercing her to engage in prostitution.¹⁰⁴

⁹³ See 22 U.S.C.A. § 7101(b) (West 2025).

⁹⁴ § 7102(12).

⁹⁵ *Id.*

⁹⁶ Bessell, *supra* note 39, at 1.

⁹⁷ *Id.*

⁹⁸ *Id.* at 3.

⁹⁹ Tammie Nielsen, *Human Trafficking & The Power of Relationships*, THE BRIDGE (Jan. 1, 2022), <https://tbotw.org/human-trafficking-the-power-of-relationships/>.

¹⁰⁰ Katie Henneke, *Understanding the Nexus Between Human Trafficking and Domestic Violence*, 25 GEO. J. GENDER & L. (2024), <https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2024/05/Katie-Henneke-Understanding-the-Nexus-between-Human-Trafficking-and-Domestic-Violence.pdf>.

¹⁰¹ Bessell, *supra* note 39, at 3–4.

¹⁰² *Id.*

¹⁰³ *Id.* at 4.

¹⁰⁴ Press Release, U.S. Attorney's Office for the Western District of Washington, Violent Pimp Sentenced to 20 Years in Prison for Sex Trafficking, Witness Tampering, and Interstate Transportation of a Minor for Prostitution Pierce County Man Used Threats and Violence to Force

While transporting and providing victims are common acts associated with human trafficking, these acts are not required if there is another act such as recruiting or obtaining the victim.¹⁰⁵ In many cases, the victims are not transported outside of their state of residence.¹⁰⁶ In 2020, less than half of the sex trafficking victims reported that they were transported outside of their own state.¹⁰⁷

In cases where the victim is trafficked by an intimate partner, they may live with their trafficker and even have children with them.¹⁰⁸ Likewise, it is not necessary for a victim to be provided to another person.¹⁰⁹ While sex trafficking typically involves forcing the victim to engage in commercial sex acts with others, the victim may also be trafficked solely to provide services to their trafficker rather than to others.¹¹⁰ If a victim states they did not engage in sex acts or perform labor services for anyone other than the trafficker, further investigation is necessary to determine whether they were trafficked and if they were recruited or obtained by the perpetrator.¹¹¹

2. *There Must Be a Showing of Force, Fraud, or Coercion*

The use of fraud, force, or coercion is a common means of maintaining control over the victim in both cases of human trafficking and domestic violence, but only human trafficking requires a showing of the use of force, fraud, or coercion.¹¹² However, in cases of sex trafficking where the victim is under the age of majority, it is not necessary to prove that there was force, fraud, or coercion because a minor cannot consent to commercial sex acts.¹¹³ For all other cases of human trafficking, force, fraud, and coercion can either

17-Year-Old Into Prostitution, (Sept. 24, 2010), <https://archives.fbi.gov/archives/seattle/press-releases/2010/se092410.htm>.

¹⁰⁵ U.S. DEP'T OF STATE—OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSONS, UNDERSTANDING HUMAN TRAFFICKING 3 (2023), <https://www.state.gov/wp-content/uploads/2023/12/Understanding-Human-Trafficking-Accessible-10.18.2023.pdf> (stating that the “acts” requirement of trafficking is met when a trafficker “recruits, harbors, transports, provides, obtains, patronizes, or solicits”).

¹⁰⁶ KYLEIGH FEEHS & ALYSSA CURRIER WHEELER, HUMAN TRAFFICKING INSTITUTE, 2020 FEDERAL HUMAN TRAFFICKING REPORT 52 (2021), <https://traffickinginstitute.org/wp-content/uploads/2022/01/2020-Federal-Human-Trafficking-Report-Low-Res.pdf>.

¹⁰⁷ *Id.*

¹⁰⁸ Bessell, *supra* note 39, at 3.

¹⁰⁹ Henneke, *supra* note 100.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (“Human trafficking is defined by the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons as the recruitment, transportation, transfer, harboring, or receipt of persons by means of threat, use of force, coercion, abduction, fraud, deception, abuse of power, or giving payments to achieve consent for the purpose of exploitation.”).

¹¹³ 18 U.S.C.A. § 1591(a)(2) (West 2018) (providing an exception for the force, fraud, coercion requirement).

appear obvious or be more subtle and difficult to detect.¹¹⁴ While force tends to be more straightforward, coercion and fraud can be proven through various acts by the trafficker.¹¹⁵ These actions often intersect with domestic violence, which muddies the waters and makes it difficult to differentiate.¹¹⁶

A false promise of love and marriage is one tactic that traffickers use to obtain victims.¹¹⁷ This causes victims to be unaware that they are being trafficked.¹¹⁸ The 2023 Trafficking in Persons Report released by the U.S. Department of State provides that traffickers use online dating platforms to make promises “of marriage or a romantic relationship to lure” victims into trafficking.¹¹⁹ One victim explained how her trafficker falsely promised to get engaged after they became financially stable, but obtaining financial stability required the victim to engage in commercial sex acts.¹²⁰

In *United States v. Yarbrough*, the perpetrator, Yarbrough, was found to have “repeatedly used false promises of romantic relationships and family to target and lure vulnerable victims into forced prostitution.”¹²¹ When trafficking starts out as a romantic relationship, the victim can become confused and likely will not know they are being trafficked.¹²² Jenna McKaye, a trafficking survivor, founder of the Jenna McKaye Foundation, and author of *Grit and Grace*, was obtained by her high school boyfriend and tells people that she did not know she was being trafficked.¹²³ McKaye’s trafficker began a romantic relationship with her and convinced her to move out of her home away from family, drop out of school, and get married.¹²⁴ Shortly after she was isolated, her trafficker began posting photos of McKaye online, and men began arriving at her apartment to rape her.¹²⁵ Kimberly Bitz shared McKaye’s story with Stop Modern Day Slavery, and explains how she was forced to have sex with over 200 men and it was not until nearly

¹¹⁴ See generally *Force, Fraud, or Coercion*, U.N. WOMEN (Jan. 25, 2011), <https://www.endvawnow.org/en/articles/549-force-fraud-or-coercion.html>.

¹¹⁵ See generally *id.*

¹¹⁶ See generally *id.*

¹¹⁷ Kate Olson, *The Hidden Deceptions of Human Trafficking: A Personal Testimony*, LOVE JUST. INT’L (Jan. 24, 2024), <https://www.lovejustice.ngo/blog/the-hidden-deceptions-of-human-trafficking-a-personal-testimony>.

¹¹⁸ *Id.*

¹¹⁹ U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 10*, 58 (June 2023), https://www.state.gov/wp-content/uploads/2023/05/Trafficking-in-Persons-Report-2023_Introduction-Additional-Pagesv4_FINAL.pdf.

¹²⁰ See, e.g., *Love and Trafficking*, POLARIS PROJECT, <https://polarisproject.org/love-and-trafficking/> (last visited Feb. 2, 2025).

¹²¹ Bessell, *supra* note 39, at 2, 4.

¹²² Olson, *supra* note 117.

¹²³ Jenna McKaye, *I Met My Trafficker in High School*, IND. DISABILITY JUST., <https://indisabilityjustice.org/i-met-my-trafficker-in-high-school/> (last visited Feb. 2, 2025).

¹²⁴ *Id.*

¹²⁵ *Id.*

thirteen years after she escaped that she realized she was being trafficked.¹²⁶ She stated, “I actually had no idea that I was being trafficked while I was in it. I just thought that it was a normal part of my abusive relationship.”¹²⁷

Coercion is a common tactic used by both traffickers and perpetrators of abuse to maintain control.¹²⁸ Under 22 U.S.C. § 7102(3), coercion is defined as “threats of serious harm to or physical restraint against any person” or “any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person” or “the abuse or threatened abuse of the legal process.”¹²⁹ Physical violence and threats are present in both domestic violence and human trafficking cases.¹³⁰ While psychological coercion is sufficient to meet the elements of human trafficking, it can be more difficult to identify, therefore even if physical restraint or harm is not present, “it is essential . . . to examine more closely the methods of psychological coercion and victimization.”¹³¹

Similar to perpetrators of domestic violence, traffickers use coercive control tactics such as “isolation, provoking fear, alternating kindness and threats to produce disequilibrium, encouraging feelings of guilt and self-blame, creating dependency, and establishing conditions that lead to learned helplessness.”¹³² Traffickers isolate their victims, induce fear, use their authority to influence behavior, grant the victim some small indulgences, act unpredictably, create dependency, and cause the victim to feel helpless.¹³³ Both physical and psychological coercion are indications of human trafficking,¹³⁴ and it is essential to investigate whether these tactics were used to induce labor or commercial sex acts.

3. *There Must Be a Specific Purpose of Obtaining Either Labor or Commercial Sex*

¹²⁶ Kimberly Bitz: *A Human Trafficking Survivor Shares Her Story*, STOP MODERN DAY SLAVERY <https://stopmoderndayslavery.org/2021/06/kimberly-bitz-a-human-trafficking-survivor-shares-her-story/> (last visited Mar. 11, 2025).

¹²⁷ *Id.*

¹²⁸ *Force, Fraud, or Coercion*, *supra* note 114.

¹²⁹ 22 U.S.C.A. § 7102 (West 2024).

¹³⁰ Bessell, *supra* note 39, at 2, 4.

¹³¹ Elizabeth Hopper & Jose Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185, 188 (2006), available at: <https://www.stu.edu/Portals/law/docs/human-rights/ihrtr/volumes/1/185-209-ElizabethHopperandJoseHidalgo-InvisibleChainsPsychologicalCoercionofHumanTraffickingVictims.pdf>.

¹³² *Id.* at 191.

¹³³ *Id.* at 191–99.

¹³⁴ *Understanding Human Trafficking*, U.S. DEP’T STATE (Jan. 20, 2025), <https://www.state.gov/what-is-trafficking-in-persons/>.

The main difference between domestic violence and human trafficking is the perpetrator's purpose.¹³⁵ In human trafficking, the purpose is to exploit another person for labor or commercial sex.¹³⁶ In cases of domestic violence, the perpetrator does not have to gain anything, although many times, victims of domestic violence are also forced to perform sex acts or are forced to engage in domestic servitude.¹³⁷ When a victim of domestic violence is forced to engage in commercial sex acts or is forced to provide labor, the domestic violence becomes trafficking.¹³⁸ Human trafficking does not require multiple parties to be involved or for a person to be sold to other traffickers.¹³⁹ In many cases, traffickers use fraudulent promises to obtain their victims and then only use them for their own personal gain as opposed to providing the victims to another person.¹⁴⁰

D. Labor Trafficking Requires Evidence of the Trafficker Securing Labor or Services

Labor trafficking, as defined in the Trafficking Victims Protection Act of 2000, is “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”¹⁴¹ Labor services can include any type of work or service provided through force, fraud, or coercion.¹⁴² One form of labor trafficking is domestic servitude, where victims are forced to provide domestic labor, such as cleaning services and childcare.¹⁴³ Victims may also be recruited through fraudulent promises of a relationship or marriage.¹⁴⁴ Forced or arranged marriages allow traffickers to obtain victims and exploit them for labor services.¹⁴⁵

One victim, M.B., was arranged to marry Zahida Aman's son. The son's family took M.B. to get a marriage visa and then brought her to the United

¹³⁵ Leidholdt, *supra* note 39.

¹³⁶ *See id.*

¹³⁷ Bessell, *supra* note 39, at 4.

¹³⁸ Tayler Mathews & Hayley Forrestal, *Domestic Violence, Trafficking, and the Sex Trade*, CHI. ALL. AGAINST SEXUAL EXPLOITATION (Oct. 11, 2023), <https://www.caase.org/domestic-violence-and-sex-trade/>.

¹³⁹ *See id.*

¹⁴⁰ *Id.*

¹⁴¹ 22 U.S.C.A. § 7102(11)(B) (West 2024).

¹⁴² *Labor Trafficking*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/en/human-trafficking/labor-trafficking> (last visited Feb. 2, 2025).

¹⁴³ POLARIS PROJECT, LABOR TRAFFICKING OF DOMESTIC WORKERS AT-A-GLANCE 1 (2011).

¹⁴⁴ *Labor Trafficking Examples*, POLARIS PROJECT, <https://polarisproject.org/labor-trafficking-examples/> (last visited Feb. 2, 2025).

¹⁴⁵ *Id.*

States.¹⁴⁶ After arriving in the United States, M.B. lived with her new in-laws and was forced to perform domestic labor and other work for the family.¹⁴⁷ Her duties included cleaning, preparing meals daily, handwashing clothes, and even landscaping, laying concrete, painting, staining, and removing carpets..¹⁴⁸ To ensure she remained compliant with the demands, her traffickers told M.B. that she was in the United States illegally and threatened to have her¹⁴⁹ deported.¹⁵⁰ She was prohibited from contacting her family in Pakistan; she had no driver's license, no access to her documents, and even her access to food was restricted.¹⁵¹ In addition to the psychological coercion, she was also physically assaulted on several different occasions.¹⁵² While M.B. was promised a marriage, her life in the United States did not live up to that promise; instead, she was trafficked and forced to live as a domestic servant for her in-laws.

Zahida Aman, M.B.'s mother-in-law, was convicted of conspiracy to obtain and maintain unpaid labor and services, forced labor, and document servitude.¹⁵³ Other members of the house were also convicted, with Mohammed Rehan Chaudhri being convicted of conspiracy and forced labor and Mohammad Nauman Chaudhri being convicted of conspiracy..¹⁵⁴ The defendants appealed their convictions arguing that the Trafficking Victims Protection Act "does not apply to a domestic relations case"¹⁵⁵ The U.S. District Court for the Eastern District of Virginia held that "the forced labor statute contains no language that suggests Congress did not intend for the statute to apply to familial situations like this one" and reasoned that "this situation is precisely what the forced labor statute seeks to reach."¹⁵⁶ The court also rejected the argument that the statute was limited to employment settings and reasoned that "labor services" includes "any form of physical or mental effort or exertion to perform such work or tasks."¹⁵⁷

To determine whether a person is a victim of labor trafficking when they are recruited by an intimate partner or by a promise of marriage, it is not necessary to establish an employment relationship.¹⁵⁸ Additionally, the type of labor or services being performed may be domestic work or any other type

¹⁴⁶ United States v. Aman, 3:19-cr-85, at 2 (E.D. Va. Aug. 16, 2022).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 4.

¹⁴⁹ *Id.* at 11.

¹⁵⁰ *Id.* at 13.

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 1.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

of labor or service that requires mental or physical effort or exertion.¹⁵⁹ Based on the court's interpretation of what qualifies as "labor or services," the question is raised: How many victims of domestic violence have actually been subjected to labor trafficking by being forced to cook, clean, and cater to their abuser while fearing for their lives if they attempted to escape? How many victims are unidentified merely because of a lack of knowledge on what qualifies as labor trafficking?

E. Sex Trafficking Requires Evidence of a Commercial Sex Act

A commercial sex act is defined as "any sex act on account of which anything of value is given to or received by any person."¹⁶⁰ This definition implies that money does not have to be given to a specific person; rather, "*anything of value*" may be received by "*any person*."¹⁶¹ This indicates that items such as food, clothing, or other valuable goods may be given to the person performing the act, or to the trafficker.¹⁶²

Keith Raniere was convicted of sex trafficking and other crimes related to his role as the leader of NXIVM, a self-help organization, and DOS, a secret society.¹⁶³ Female members of NXIVM and DOS recruited other women to join.¹⁶⁴ These women were forced to provide "collateral" as part of their membership and also had to submit to their "master."¹⁶⁵ On several occasions, victims were forced to engage in sex acts with Raniere, however, no money was exchanged.¹⁶⁶ On appeal, Raniere argued that the conviction of sex trafficking was improper because he did not receive any economic value from the sex acts.¹⁶⁷ The Second Circuit Court of Appeals held that "anything of value" was intended to mean both tangibles and intangibles and that the sex act itself did not need to be "for profit."¹⁶⁸ The court also reasoned that the term "value" is a subjective concept based on "the value which the [recipient] subjectively attaches to what is sought to be received."¹⁶⁹

While many sex trafficking cases involve an exchange of money, a lack of exchange of money should not dispose of the possibility of trafficking.¹⁷⁰ Rather, further inquiry should be made as to whether the victim, trafficker,

¹⁵⁹ *Id.*

¹⁶⁰ 22 U.S.C.A. § 7102(4) (West 2024).

¹⁶¹ *Id.* (emphasis added).

¹⁶² *Id.*

¹⁶³ *United States v. Raniere*, 55 F.4th 354, 357 (2d Cir. 2022).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 358.

¹⁷⁰ *Id.*

or other person received anything to which they attach value. In *United States v. Girard*, the court “observed that all of the following are ‘things of value’: ‘amusement,’ ‘[s]exual intercourse, or the promise of sexual intercourse,’ ‘a promise to reinstate an employee,’ ‘an agreement not to run in the primary election,’ and ‘[t]he testimony of a witness.’”¹⁷¹ This indicates that when the trafficker or other person receives amusement from a sex act, the act may still be deemed sex trafficking even when money is not exchanged.¹⁷²

III. DOMESTIC VIOLENCE IS A TOOL FOR TRAFFICKERS

Domestic violence is a tool that traffickers use to their advantage.¹⁷³ As previously discussed, the same physical and psychological coercion used by perpetrators of domestic violence are also used by traffickers.¹⁷⁴ Beyond the power and control it gives them, domestic violence acts as a veil, hiding the trafficker’s true intent and actions, allowing them to continue trafficking.¹⁷⁵ For example, in a situation where a trafficker does not receive money for forcing their victim to engage in sex acts, they will not be viewed as a trafficker and their victim will not be aware that they are being trafficked.¹⁷⁶ Additionally, in labor trafficking situations where an intimate partner is the trafficker, the absence of an employee-employer relationship can make it difficult to identify the trafficker.¹⁷⁷ Many victims report not knowing they were trafficked.¹⁷⁸ This lack of awareness by the victim, law enforcement, and legal professionals allows the trafficking and victimization to continue.¹⁷⁹ Understanding the distinction between human trafficking and domestic violence—and how traffickers exploit domestic violence to control their victims—is essential to ensuring victims receive the resources they need to escape and recover.

¹⁷¹ *Id.* at 361 (quoting *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979)).

¹⁷² *Girard*, 601 F.2d at 71.

¹⁷³ BRUGGEMAN & KEYES, *supra* note 20, at 6–8.

¹⁷⁴ *Id.* at 7–8.

¹⁷⁵ *See id.* (discussing the intersection between domestic violence and human trafficking and how human trafficking victims have been encountered by domestic violence attorneys without their knowledge because of the overlap).

¹⁷⁶ *See Understanding Human Trafficking*, POLARIS PROJECT, <https://polarisproject.org/understanding-human-trafficking/> (last visited Feb. 2, 2025) (explaining that sex trafficking victims often do not see themselves as victims because they have been groomed and manipulated to believe they are consenting to the sexual acts).

¹⁷⁷ BRUGGEMAN & KEYES, *supra* note 20, at 13.

¹⁷⁸ *See id.* (explaining that victims often are unaware that the abuse is unlawful).

¹⁷⁹ *See id.* at 6–8, 11 (discussing the need for attorneys to be aware of trafficking indicators and suggesting questions to identify trafficking victims).

IV. ATTORNEYS HAVE A DUTY TO KNOW HOW DOMESTIC VIOLENCE AND HUMAN TRAFFICKING INTERSECT

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice.”¹⁸⁰ Attorneys, regardless of what field of law they practice, should be aware of domestic violence and human trafficking indicators and be able to differentiate between the two. An attorney is better suited to counsel his client when he can identify a victim of human trafficking. For example, a family law attorney should be able to identify domestic violence, but if that attorney does not know what human trafficking is, he may fail to identify his client as a victim of human trafficking, thus limiting his client’s access to justice. Likewise, a prosecutor who is told there is a case of domestic violence may not bring charges of human trafficking if she never investigates whether the perpetrator had a purpose for abusing the victim. Attorneys have an ethical obligation to know the indicators of both human trafficking and domestic violence so that they can provide proper counsel.

This Part aims to accomplish three goals: 1) address the ethical duties of attorneys and why zealous representation requires an understanding of human trafficking and domestic violence; 2) explain how likely it is that attorneys will come into contact with victims of human trafficking; and 3) provide examples of how attorneys can identify human trafficking during interviews with the client.¹⁸¹ Some attorneys are more likely to come into contact with victims of human trafficking more frequently because of the field they practice in.¹⁸²

A. The Rules of Professionalism Require Attorneys to Be Able to Differentiate Between Domestic Violence and Human Trafficking

While the rules of professionalism do not explicitly state that attorneys have a duty to know the difference between domestic violence and human trafficking, there are several areas of practice that require the attorney to know the difference in order to provide effective, diligent, and competent counsel. Victims of human trafficking are entitled to bring civil claims against their traffickers, and failing to identify a client as a trafficking victim

¹⁸⁰ MODEL RULES OF PRO. CONDUCT pmbl. 1 (AM. BAR ASS’N 2023).

¹⁸¹ See *Myths, Facts, and Statistics*, POLARIS PROJECT, <https://polarisproject.org/myths-facts-and-statistics/> (last visited Feb. 2, 2025) (explaining that 10,359 human trafficking events were reported with a suspected 16,554 victims in 2021); see also BRUGGEMAN & KEYES, *supra* note 20, at 7 (discussing how domestic violence attorneys likely have encountered trafficking victims without knowing).

¹⁸² See BRUGGEMAN & KEYES, *supra* note 20, at 7.

may hinder their ability to pursue such claims in the future.¹⁸³ Additionally, non-citizen victims of human trafficking may be eligible for certain benefits, such as a T-visa, which provides specific protections for non-immigrant victims.¹⁸⁴ While attorneys are not expected to be experts in the complexities of human trafficking laws, being able to recognize a trafficking victim enables the attorney to advise that the client seek specialized legal counsel for these matters.

This is perhaps best illustrated by returning to our hypothetical of Vicky and Henry. Vicky does not have legal status in the United States because Henry never allowed her to apply for legal permanent residency even though they are married. Henry frequently reminds Vicky that she is “illegal” and would be taken from her children if she leaves. She eventually seeks out a family law attorney and files for divorce. The attorney believes Vicky is a victim of domestic violence, but he never inquires whether Henry has a purpose for abusing Vicky. The attorney is underinformed about immigration matters and human trafficking and so only works on filing the necessary paperwork for the divorce. The attorney does not know that Vicky would likely qualify for a T-visa, providing her a path to citizenship of which she was unaware.¹⁸⁵ The attorney is also unaware that Vicky could file a civil claim against Henry to recover damages and reasonable attorney fees.¹⁸⁶

Family law attorneys are not the only attorneys who should be able to distinguish between domestic violence and human trafficking. The ABA Model Rules of Professional Conduct (MRPC) provide that a lawyer should “keep abreast of changes in the law and its practice[s] . . .” and “engage in continuing study and education . . .”¹⁸⁷ Additionally, a comment to Rule 1.3 of the MRPC provides that a “lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”¹⁸⁸ For attorneys who frequently come into contact with victims of domestic violence, the interests of the client require an understanding of human trafficking since the two crimes often overlap.

At a midyear meeting, the National Conference of Bar Presidents examined various areas of practice and identified ways lawyers in those areas

¹⁸³ See *id.* at 19 (explaining that the statute of limitations for an intentional tort claim will vary by state and may be lost if not carefully monitored).

¹⁸⁴ *Id.* at 24–25.

¹⁸⁵ See generally *T Visa Law Enforcement Resource Guide*, U.S. DEP’T OF HOMELAND SEC., <https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf> (last visited Feb. 2, 2025).

¹⁸⁶ See 18 U.S.C.A. § 1595 (West 2023) (“An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator.”).

¹⁸⁷ MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2023).

¹⁸⁸ *Id.* at r. 1.3 cmt. 1.

could take action against human trafficking.¹⁸⁹ The conference focused on pro bono attorneys, prosecutors, defense attorneys, immigration attorneys, family law attorneys, plaintiff trial attorneys, and corporate counsel.¹⁹⁰ The U.S. Department of Justice outlined the legal needs of trafficking survivors as including family law, employment law, public benefits access, rights enforcement, immigration, criminal defense, and sealing or expunging criminal records.¹⁹¹

B. Attorneys Who Are Most Likely to Work With a Victim of Human Trafficking

Because human trafficking involves themes that frequently intersect with domestic violence,¹⁹² the attorneys most likely to encounter victims of human trafficking include prosecutors, defense attorneys, family law attorneys, and immigration attorneys.¹⁹³

Prosecutors should be able to identify victims of human trafficking, especially when they encounter victims of domestic violence and individuals who have been arrested for prostitution. Unfortunately, despite there being significant resources on human trafficking, there is a lack of awareness of the difference between human trafficking and domestic violence.¹⁹⁴ For example, in *The National Human Trafficking Prosecution Best Practice Guide*, the term “domestic violence” appears just four times, and never in reference to how domestic violence and human trafficking are different.¹⁹⁵ Even more concerning is that under the section titled “Charging Options,” the guide does not include domestic battery, domestic violence, or any similar charge, nor is there an explanation as to why these charges may not be appropriate.¹⁹⁶

Additionally, prosecutors should be wary of improperly charging victims for crimes that are directly related to their trafficking. The United

¹⁸⁹ Kavitha Sreeharsha, *Taking on Human Trafficking: A Role for Every Lawyer and Every Bar Association*, AM. BAR ASS'N BAR LEADER (2013), https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2012_13/july_august/taking_human_trafficking_role_every_lawyer_every_bar_association/.

¹⁹⁰ *Id.*

¹⁹¹ U.S. DEP'T OF JUST., *The Legal Rights and Needs of Victims of Human Trafficking in the United States* 1 (2015), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/HT_Legal_Rights_Needs_fact_sheet-508.pdf.

¹⁹² See generally *The Intersection of Domestic Violence, Sexual Assault, and Human Trafficking*, CTR. FOR CT. INNOVATION (Sept. 2015), https://www.innovatingjustice.org/sites/default/files/documents/UnderstandingHumanTrafficking_2.pdf.

¹⁹³ Sreeharsha, *supra* note 189.

¹⁹⁴ *Id.*

¹⁹⁵ NAT'L DIST. ATT'YS ASS'N, NATIONAL HUMAN TRAFFICKING PROSECUTION BEST PRACTICES GUIDE (2020).

¹⁹⁶ *Id.* at 41.

Nations Human Rights Office of the High Commissioner stated that “[s]tates must ensure that victims are not held liable for any unlawful activity carried out as a direct consequence of their trafficking situation, regardless of the gravity or seriousness of the offence committed”¹⁹⁷ The U.S. Department of State also recommends that states should provide that victims of trafficking not be “punished or prosecuted for acts . . . they committed as a direct consequence of being trafficked”¹⁹⁸ Finally, even the Trafficking Victims Protection Act provides that “victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked”¹⁹⁹ In failing to identify a victim of human trafficking, victims will suffer the legal consequences of their trafficker’s actions.

Likewise, defense attorneys have an obligation to identify when their client might be a victim of human trafficking, especially when the client is facing charges related to the trafficking, such as prostitution or drug-related crimes. Failing to identify these material facts could result in ineffective assistance of counsel.²⁰⁰ If a client is identified as a victim of human trafficking, the defense attorney may have the opportunity to raise additional defenses, such as the non-punishment principle that trafficking victims should not be convicted of crimes related to their trafficking.²⁰¹

Family law and immigration attorneys must also be able to identify trafficking victims to properly advise their clients. This includes informing clients about available resources, the statutes of limitation for civil claims against traffickers, and other potential remedies. Resources may include crime victim compensation, access to emergency funds, restitution and compensation for unpaid wages, and public benefits.²⁰² If the client is an immigrant, they may be eligible for a T-visa.²⁰³ This knowledge may help the client feel more at ease with pursuing legal action because her status in the United States can be protected, and she can even receive employment authorization.²⁰⁴

¹⁹⁷ *Victims of Trafficking Should be Protected, Not Punished: UN Expert*, U.N. HUM. RTS. OFF. HIGH COMM’R. (June 29, 2021), <https://www.ohchr.org/en/press-releases/2021/06/victims-trafficking-should-be-protected-not-punished-un-expert>.

¹⁹⁸ U.S. DEP’T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, PROTECTING VICTIMS OF TRAFFICKING; THE NON-PUNISHMENT PRINCIPLE 2 (2023).

¹⁹⁹ *Id.* at 1.

²⁰⁰ Sara Dohoney Byrne, *Meeting the Legal Needs of Human Trafficking Survivors*, 52 WAKE FOREST L. REV. 379, 383 (2017).

²⁰¹ See U.S. DEP’T OF STATE, *supra* note 198, at 1.

²⁰² Byrne, *supra* note 200, at 385.

²⁰³ *Victims of Human Trafficking; T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 25, 2025), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-t-nonimmigrant-status>.

²⁰⁴ *Id.*

While not every attorney must be an expert, knowing how to identify a victim of human trafficking can help victims and ensure they receive access to the justice system. Across the country, various professions require training on identifying victims of trafficking, and the legal field should follow this lead. For example, many airlines now require their employees to undergo training through the Blue Lightning Initiative, led by the Department of Transportation, to help them identify and report potential victims of human trafficking.²⁰⁵ In California, hotels and motels are required to provide training to employees on human trafficking awareness.²⁰⁶

The legal profession requires diligent work and competence.²⁰⁷ It is within the ethical requirements of the attorney to work diligently to identify human trafficking markers and inquire further when markers are present.

C. Attorneys Will Be Better Equipped to Counsel Their Clients if They Know What Questions to Ask and How to Ask Them

Client interviews, when done properly, can reveal a lot about the client. An attorney's knowledge and ability to connect with the client are key in determining whether the client is a victim of domestic violence or human trafficking. Good attorneys will not ask just surface-level questions; rather, they will inquire about deeper issues. For example, a prosecutor that is investigating a case of prostitution will not just ask if the woman was paid so that a charge of prostitution can be brought. Instead, the prosecutor should ask questions pertaining to where the woman is from, how old she is, and whether she feels safe.²⁰⁸

By becoming more informed about human trafficking and how to identify victims, attorneys can practice trauma-informed law. Failure to adopt a trauma-informed approach can cause additional stress and re-traumatization to the client.²⁰⁹ Moreover, clients are more likely to share information when they feel comfortable.²¹⁰ The National Human Trafficking Training and Technical Assistance Center provides steps for establishing a relationship before screening a client to determine if they are a victim. These steps include building trust and rapport, promoting safety and well-being, taking your time, allowing the individual to process each question and respond at their own pace, providing access to language services as needed,

²⁰⁵ BLUE LIGHTNING INITIATIVE, <https://www.dhs.gov/blue-campaign/blue-lightning-initiative> (last visited Jan. 28, 2025).

²⁰⁶ S.B. 970, 2017-2018 Reg. Sess. (Cal. 2018).

²⁰⁷ MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2023).

²⁰⁸ *Id.* at r. 1.3 cmt. 2.

²⁰⁹ Rebecca Howlett & Cynthia Sharp, *Strategies for a Trauma-Informed Law Practice*, AM. BAR ASS'N (Oct. 26, 2021), <https://www.americanbar.org/groups/gpsolo/resources/ereport/archive/strategies-trauma-informed-law-practice/>.

²¹⁰ *Id.*

and using a calm, empathetic tone.²¹¹ When an attorney builds trust with his client and identifies whether she is a trafficking victim, the attorney can offer more effective legal counsel and refer her to other attorneys when necessary.

CONCLUSION

The signs of human trafficking and domestic violence oftentimes overlap, which can lead to confusion and missed opportunities for victims to escape their traffickers and recover.²¹² Victims of human trafficking have been subjected to force, fraud, or coercion for the purpose of being subjected to labor trafficking or sex trafficking.²¹³ Human trafficking is a widespread issue in the United States and across the world,²¹⁴ and most of the time the traffickers are people the victims know.²¹⁵ Victims will rarely be able to identify themselves as a victim of human trafficking, especially when their trafficker is an intimate partner.²¹⁶ For these reasons, attorneys should strive to understand the difference. Oftentimes, the force, fraud, and coercion mirrors domestic violence,²¹⁷ which is why the attorney should inquire further and attempt to determine whether there was an underlying purpose of sex trafficking or labor trafficking. Attorneys are likely to work with trafficking victims at some point in their career,²¹⁸ and being able to identify signs of both human trafficking and domestic violence allows the attorney to provide better counsel to his client by satisfying the ethical and professional standards required of attorneys to provide diligent and competent counsel.

²¹¹ *Ask: Screen and identify individuals who may have experienced trafficking using a trauma-informed, person-centered approach*, NAT'L HUM. TRAFFICKING TRAINING & TECH. ASSISTANCE CTR., <https://nhhtac.acf.hhs.gov/soar/eguide/ask> (last visited Jan. 28, 2025).

²¹² BRUGGEMAN & KEYES, *supra* note 20, at 7–8.

²¹³ *Id.*

²¹⁴ INT'L. LAB. OFF., *supra* note 4, at 9.

²¹⁵ *Human Trafficking Trends in 2020*, *supra* note 1.

²¹⁶ *Id.*

²¹⁷ BRUGGEMAN & KEYES, *supra* note 20, at 7–8.

²¹⁸ Gunderson, *supra* note 7 (discussing how there has been an increase in human trafficking cases, and lawyers have an opportunity to help victims).

CHILD “PROTECTIVE” SERVICES: FAILING TO PROTECT CHILDREN EXPOSED TO DOMESTIC VIOLENCE

Amber M. Alexander^{*}

INTRODUCTION

One of the most challenging things about being a child protection investigator is knowing that there is a concern for a child’s safety, but the state’s laws and policies prevent the investigator from taking action.¹ This is a frequent issue for investigators whose states have laws that do not recognize the various forms of domestic violence or how mere exposure to violence can negatively impact a child’s safety, health, and well-being.² During an interview with a child protection investigator from Washington State, the investigator recounted the first of many cases in which they felt helpless because the investigator’s department³ does not permit interventions for domestic violence cases when the child has not been physically injured as a result.⁴

The investigator received an “E” case⁵ with three young children in the home: an eight-month-old, a three-year-old, and a ten-year-old.⁶ The children lived in the home with their mother, who had a protection order against their father due to severe ongoing domestic violence;⁷ however, the

^{*} Amber M. Alexander is a third-year student at Southern Illinois University Simmons Law School, expected to graduate in May 2025. Before attending law school, she worked for eight years as a high-risk child protection investigator in Washington and Colorado, advocating for children affected by abuse and neglect. Amber wishes to thank Cynthia Buys for her invaluable support and guidance while writing this Note. She also extends heartfelt thanks to the countless children and families she worked with in the child welfare system, who have motivated her to attend law school and are the inspiration behind this Note.

¹ Interview with Anonymous Child Protection Investigator, Wash. Dep’t. of Child., Youth & Fams. (July 22, 2023).

² *Id.*

³ *Id.*; see generally *Supporting + Protecting Children, Youth, and Families*, WASH. STATE DEP’T OF CHILD., YOUTH & FAMS., <https://dcyf.wa.gov/> (last visited Jan. 20, 2025).

⁴ Interview with Anonymous Child Protection Investigator, *supra* note 1.

⁵ A report of abuse or neglect that calls for a rapid response (typically called an “Emergency” or an “E” case). *Id.* An “E” requires that an investigator see each of the listed child victims within twenty-four hours of when the report was made. *Id.* Per Washington’s policy, this case had been screened as an “E” due to the children’s young ages and the family’s extensive history with the Department. *Id.*

⁶ *Id.*

⁷ The protection order did not expire for another three years. *Id.* The mother was the only protected party listed; the children were excluded. *Id.* The order was issued three years prior as a condition of

mother still allowed the father to reside in the home.⁸ The family had an extensive history of concerns due to the ongoing violence, and there had been numerous reports made to law enforcement, the Washington Department of Children, Youth and Families (the “Department”),⁹ and the Housing Authority.

The investigator’s report stated that in a recent incident, the father screamed at the mother for over two hours while the children were present.¹⁰ This escalated to the father throwing beer bottles at the mother, punching holes in the walls, shoving her into furniture, punching her, spitting on her, strangling her, and threatening to kill her—all in front of the children.¹¹ The ten-year-old sobbed and pled for his father to stop while shielding his younger sisters, trying to keep them out of their father’s way as he beat their mother.¹² Just before the father strangled her, he broke the mother’s phone so that she could not leave or call for help.¹³

Law enforcement eventually arrived at the residence, but by then, the father had fled from the home and could not be located.¹⁴ The mother was uncooperative with officers, refused to answer questions, and declined any medical attention despite her bloody nose, scratched face, and bruised neck.¹⁵

the father’s release from prison. *Id.* He served a one-year sentence after being convicted of domestic battery against the mother. *Id.*

⁸ *Id.*

⁹ There were over forty calls concerning the children’s safety in the care of their parents. *Id.* The reporters were teachers, neighbors, extended family members, law enforcement, pediatricians, and daycare providers. *Id.* Twenty-three of those calls resulted in open investigations with the family; however, none of the cases resulted in something other than a simple investigation and case closure. *Id.* The summary outcomes of the investigations were all Unfounded for the allegations of neglect against the mother and father. *Id.* Each investigation was launched due to the ongoing domestic violence in the home. *Id.* The children had never been removed from their parents’ care by the Department or the police. *Id.* The family had never agreed to participate in any departmental services. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* Women, especially women of color, show a strong reluctance to seek help from the police during or after a domestic violence dispute. TK LOGAN & ROB (ROBERTA) VALENTE, NAT’L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 2 (2015). Survivors’ reluctance to cooperate with officers often stems from fear of losing their privacy, fear of retaliation by their abuser, and a desire to protect their children. *Id.* at 3. Many women report feeling afraid that the police would actually make matters worse (either for the victim or the offender). *Id.* at 4. Others worry that the police will do nothing, leaving victims vulnerable to further abuse. *Id.* It is also common for officers to threaten or arrest victims of domestic violence rather than perpetrators. *Id.* It is of note that in this particular case example, the mother was an enrolled member of a Native American tribe. Interview with Anonymous Child Protection Investigator, *supra* note 1. This undoubtedly contributed to the mother’s pattern of unwillingness to cooperate with the police investigation (and likely the child welfare investigations).

The home was in disarray from the fight, but the officers found that the children were uninjured, so no action was taken.¹⁶

During the investigator's home visit with the mother and children, the children appeared to have their basic needs¹⁷ met and did not present with any physical injuries.¹⁸ The older children denied feeling unsafe with their mother but affirmed that they feel scared when their parents fight, which was frequent.¹⁹ The children denied that they were ever physically injured during one of the fights but that they were almost always present and witnessed them.²⁰

The investigator reported being highly concerned for the mother as the victim of the abuse but even more worried about the impact of the violence on the children.²¹ The investigator consulted with their supervisor while using the Department's safety assessment tool, specifically assessing whether there was an active safety threat.²² The investigator assumed that because of the severity and frequent nature of the violence, they must be able to do something to help the children and the mother.²³ Unfortunately, the safety threat criteria did not support this because the children, reportedly, were never physically injured during the domestic violence incidents.²⁴ While there had been a clear impact on the children's primary caregiver (i.e., their mother), there was insufficient evidence that this affected her ability to meet the children's physical needs.²⁵ Despite the overwhelming evidence of ongoing domestic violence in the household, the Department's policies did not authorize the investigator to continue to monitor the children's safety or permit further support to the family unless the mother agreed to voluntary services.²⁶

Before closing the investigation, a new incident occurred in which the father was arrested again for violating the protection order, which led to the investigator meeting with the mother once more.²⁷ She had several new injuries, including a black eye, bruising to her forearms, and scratches across

¹⁶ *Id.*

¹⁷ Adequate food, clothing, appropriate sleeping arrangements, hygiene supplies, no observable household hazards, and the older two children were enrolled and attending school. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² An "active" safety threat would permit the investigator to take next steps in the investigation, such as holding a formal family meeting, requiring the family to engage in supportive services, or seeking court oversight. *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*; see WASH. DEP'T OF CHILD., YOUTH & FAMS., 17 SAFETY THREATS 1 (2019).

²⁶ Interview with Anonymous Child Protection Investigator, *supra* note 1.

²⁷ *Id.*

her face.²⁸ The investigator offered the mother domestic violence support and services, mental health services (individual and family), financial support, daycare vouchers, household goods, and other intensive services; however, the mother declined everything.²⁹ The investigator informed her that the allegations of neglect of the children were Unfounded³⁰ and that the investigation was closing.³¹ The investigator saw the children one last time, and the oldest sibling reaffirmed that he was safe with his mother.³² The sibling reported that he was sad his dad was in jail but was glad that he did not have to see or hear his mom getting hurt, at least until his dad got out of jail and everything went back to “normal.”³³

States must reform their laws and policies to encompass more inclusive and protective domestic violence safety threat criteria to ensure that child welfare agencies can offer support and services to children who are harmed or exposed to this type of violence. Children deserve to be safe and secure in their homes. Research is clear that children who are harmed or exposed to domestic violence suffer greatly.³⁴ This suffering often continues into adulthood,³⁵ negatively impacting future relationships and creating a generational cycle of violence, victimization, and harm.³⁶

This Note aims to conduct a state-by-state examination of the child welfare system's domestic violence safety threat criteria and argues for greater protection of children growing up in households with domestic violence. In Part I, this Note provides an overview of domestic violence in the United States as it relates to adults, both as victims and perpetrators. It

²⁸ *Id.*

²⁹ *Id.*

³⁰ Once an investigation is completed, the child welfare agency formally determines whether the allegations against the parent or caregiver are Founded or Unfounded. CHILD WELFARE INFO. GATEWAY, HOW THE CHILD WELFARE SYSTEM WORKS 4 (2020). A Founded finding indicates there is sufficient evidence that abuse or neglect of the child occurred. *Id.* Founded findings prompt (and usually require) child welfare agencies to take additional steps post-investigation to mitigate any concerns for the child's safety or well-being. *Id.* In contrast, an Unfounded finding indicates there is insufficient evidence that abuse or neglect occurred. *Id.* An Unfounded finding is typically the result if the allegations are false, if the investigation does not yield sufficient evidence to prove the allegations, or if the abuse or neglect does not meet the state's definition of child maltreatment. *Id.* Unfounded findings result in case closure unless a family agrees to participate voluntarily in recommended services. *Id.*

³¹ Interview with Anonymous Child Protection Investigator, *supra* note 1.

³² *Id.*

³³ *Id.*

³⁴ See generally Sherry Hamby et al., *Children's Exposure to Intimate Partner Violence and Other Family Violence*, JUV. JUST. BULL. (Oct. 2011); KELLY KELEHER ET AL., CO-OCCURRING INTIMATE PARTNER VIOLENCE AND CHILD MALTREATMENT: LOCAL POLICIES/PRACTICES AND RELATIONSHIPS TO CHILD PLACEMENT, FAMILY SERVICES AND RESIDENCE (2006).

³⁵ FUTURES WITHOUT VIOLENCE, THE FACTS ON CHILDREN AND DOMESTIC VIOLENCE 1 (n.d.).

³⁶ See generally NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE & CHILDREN 1 (2023); *Effects of Domestic Violence on Children*, U.S. DEPT. OF HEALTH & HUM. SERVS.: OFF. OF WOMEN'S HEALTH, <https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children> (last visited Jan. 25, 2025).

then takes a closer look at the impact of domestic violence on children, carefully outlining what types of harm children suffer from domestic violence as it is a misconception that children are only impacted if they are physically injured during an altercation.³⁷

Part II explains how domestic violence is connected with child welfare agencies by reviewing the Child Abuse Prevention and Treatment Act (CAPTA) and the child protection investigative process. As a state agency, child welfare policies and procedures vary nationwide.³⁸ This Note examines one of the procedures that nearly all child welfare agencies use: a safety assessment. This assessment is an evaluative tool used by investigators to assess a child's overall safety in their home.³⁹ Each state defines its safety threat criteria for the assessment.⁴⁰

Some states restrict the agency's legal access to a household by having narrowed criteria for a domestic violence safety threat that calls for intervention.⁴¹ This narrowed criteria usually focuses on the violence's impact on only the adult victim and how it impairs or is likely to impair the adult's ability to protect his or her child from *physical harm*.⁴² Other narrowed criteria may focus only on the bodily harm to the victim caregiver, child, or self-harm by the perpetrating caregiver.⁴³ Moreover, some states do not have any domestic violence safety threat criteria.⁴⁴ Alternatively, other states liberalize the agency's legal access to a household by expanding the safety threat criteria to include domestic violence that merely occurs in a household and places a child at risk of *physical and/or emotional harm*.⁴⁵

Part III proposes that child welfare agencies implement and conduct universal domestic violence screenings. Further, it suggests that states reform their safety threat criteria to encompass physical harm, emotional harm, and neglect that children may suffer as a result of household domestic violence. Safety threat criteria reform is desperately needed, specifically for domestic violence, to increase the overall safety and well-being of children and caregivers in any given household. It is imperative for states that only recognize a *physical* threat to change their safety threat criteria to encompass

³⁷ Hamby et al., *supra* note 34, at 2; KELEHER ET AL., *supra* note 34, at 7.

³⁸ CHILD WELFARE INFO. GATEWAY, *supra* note 30, at 2.

³⁹ CHILD WELFARE INFO. GATEWAY, THE USE OF SAFETY AND RISK ASSESSMENTS IN CHILD PROTECTION CASES 2 (2022).

⁴⁰ *Id.* at 3.

⁴¹ See, e.g., ILL. DEP'T OF CHILD. & FAM. SERVS., CHILD ENDANGERMENT RISK ASSESSMENT PROTOCOL SAFETY DETERMINATION FORM 3 (rev. Feb. 2019).

⁴² See, e.g., *id.*

⁴³ See, e.g., WASH. DEP'T OF CHILD., YOUTH & FAMS., *supra* note 25, at 1.

⁴⁴ See, e.g., ARK. DEP'T OF HUM. SERVS., INVESTIGATION OF CHILD MALTREATMENT REPORTS 5 (rev. Feb. 2015); STATE OF KAN. DEP'T FOR CHILD. & FAMS., FAMILY SERVICE RISK AND SAFETY ASSESSMENT 1 (2016).

⁴⁵ See, e.g., COLO. DEP'T OF HUM. SERVS., COLORADO FAMILY SAFETY ASSESSMENT TOOL 1 (2016); CONN. DEP'T OF CHILD. & FAMS., SDM SAFETY ASSESSMENT 2 (rev. Jan. 2007).

physical and emotional threats toward a child. The critical difference between these two types of criteria is that the more narrowed criterion only protects children if they are physically injured or at risk of physical injury, while the more expansive criterion also protects children if they are exposed to or witness domestic violence in their household.

Research shows that exposure to violence in the home can contribute to behavioral, social, or emotional issues even when a child is physically uninjured by domestic violence.⁴⁶ These types of problems are often comparable to those suffered by children who are physically harmed by household violence.⁴⁷ Both child maltreatment and domestic violence occur in sixty percent of households in which either is present.⁴⁸ Part III also suggests that the federal government mandate or encourage states to implement these changes through existing government programs, such as CAPTA. CAPTA recognizes the concerning high percentage of children harmed and exposed to domestic violence and encourages states and communities to adopt assessment and “intervention procedures aimed at enhancing the safety of both children and victims of domestic violence.”⁴⁹

I. DOMESTIC VIOLENCE IN THE UNITED STATES

A. A General Introduction to Domestic Violence

Domestic violence is violence perpetrated by one intimate partner against another in the form of abusive behavior that is part of a “systematic pattern of power and control.”⁵⁰ Domestic violence, or Intimate Partner Violence (“IPV”),⁵¹ can look different for every survivor.⁵² Society often only thinks of domestic violence as physical violence; however, it also includes sexual violence, reproductive control,⁵³ stalking, threats, economic

⁴⁶ *Domestic Violence*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/case-work-practice/domestic-violence/?top=292> (last visited Jan. 25, 2025).

⁴⁷ CHILD WELFARE INFO. GATEWAY, CHILD WITNESSES TO DOMESTIC VIOLENCE 1 (2021).

⁴⁸ 42 U.S.C. § 5101 (1996).

⁴⁹ *Id.*

⁵⁰ *Domestic Violence Statistics*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> (last visited Jan. 25, 2025).

⁵¹ Hamby et al., *supra* note 34, at 1.

⁵² *Domestic Violence Statistics*, *supra* note 50.

⁵³ M.J. BREIDING ET AL., NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION: INTIMATE PARTNER VIOLENCE IN THE UNITED STATES – 2010 22 (2010).

abuse, and emotional/psychological⁵⁴ abuse.⁵⁵ In the United States, more than twelve million adults experience domestic violence annually.⁵⁶ Approximately one in four women and one in seven men have experienced severe physical domestic violence.⁵⁷ About 10% of women⁵⁸ and 2.2% of men have been raped by an intimate partner in their lifetime.⁵⁹ Nearly 11% of women and 2% of men have been stalked by an intimate partner, in which they felt very fearful or believed that they or someone close to them would be harmed or killed.⁶⁰ Approximately 50% of the population, both men and women, have experienced psychological aggression by an intimate partner.⁶¹ While each of these statistics represents individuals in the United States, there is often an overlap in the types of violence that victims experience.⁶²

Domestic violence can have lasting impacts on victims, even when the abuse is an isolated incident, infrequent, or when it has stopped.⁶³ Victims can suffer lasting harm as it relates to their economic, physical, or mental/emotional well-being.⁶⁴ There is also a substantial relationship between domestic violence and homicide rates.⁶⁵ The Bureau of Justice reported that in 2021, about 6% of male murders were committed by an intimate partner.⁶⁶ This rate was about five times higher for female murder victims, where 34% of females murdered that year were victims of intimate partner homicide.⁶⁷ Moreover, about 72% of all murder-suicides are committed by an intimate partner.⁶⁸

⁵⁴ Expert opinions vary on whether emotional abuse and psychological abuse are the same. *Emotional and Psychological Abuse*, WOMENSLAW, <https://www.womenslaw.org/about-abuse/forms-abuse/emotional-and-psychological-abuse> (last visited Jan 23, 2025). Some experts argue that psychological abuse is a form of emotional abuse. *Id.* Psychological abuse may include particular tactics used by a perpetrator to control the victim's way of thinking (e.g., coercion, "gaslighting," isolation). *Id.*

⁵⁵ *Domestic Violence Statistics*, *supra* note 50.

⁵⁶ BREIDING ET AL., *supra* note 53, at 10.

⁵⁷ *Id.* at 14.

⁵⁸ This number is significantly higher for American Indian and Alaska Native women than any other ethnic group. *See* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 1 (2016). American Indian women are three times more likely to experience sexual violence. *See id.*

⁵⁹ BREIDING ET AL., *supra* note 53, at 13.

⁶⁰ *Id.* at 17.

⁶¹ *Id.* at 18.

⁶² *Id.* at 22.

⁶³ *Domestic Violence Statistics*, *supra* note 50.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ ERICA L. SMITH, FEMALE MURDER VICTIMS AND VICTIM-OFFENDER RELATIONSHIP, 2021 1 (Dec. ed., 2022).

⁶⁷ *Id.* The statistics for Black women killed by an intimate partner are much higher. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE & THE BLACK COMMUNITY 1 (2020). The National Coalition Against Domestic Violence (NCADV) reported that intimate partners killed an estimated 51.3% of all murdered Black females. *Id.*

⁶⁸ *Domestic Violence Statistics*, *supra* note 50.

Domestic violence affects all communities regardless of age, socioeconomic status, sexual orientation, gender, race, religion, or nationality.⁶⁹ However, there are countless instances in which certain populations are disparately impacted by domestic violence. For example, ethnic minority women are disproportionately affected by domestic violence.⁷⁰ In comparison to non-Hispanic white women (34.6%), non-Hispanic Black women (43.7%) and Native American/Alaskan Native women (46%) have reported higher rates of domestic violence.⁷¹ Within the LGBTQ community, 43.8% of lesbian women and 61.1% of bisexual women have experienced some form of domestic violence in their lifetime, as compared to 35% of heterosexual women.⁷² In comparison to heterosexual men (29%), bisexual men have experienced higher rates of domestic violence at 37.3%.⁷³ Also, people who identify as transgender are more likely to experience domestic violence than those who identify as cisgender.⁷⁴

B. The Impacts of Domestic Violence on Children

The effects of domestic violence on adult victims are well-documented; however, there is less research showing the impact on children who witness a parent either being victimized or perpetrating violence.⁷⁵ These children are the “forgotten victims” of domestic violence.⁷⁶ Children who are exposed to domestic violence are 30-60% more likely⁷⁷ to be victims of abuse and neglect by a parent.⁷⁸ Domestic violence may be the single most prominent precursor to child fatalities that result from abuse or neglect.⁷⁹ Approximately 20% of child homicides (for children between ages two and fourteen) are related to domestic violence.⁸⁰

⁶⁹ *Id.*

⁷⁰ Jamila K. Stockman et al., *Intimate Partner Violence and Its Health Impact on Disproportionately Affected Populations, Including Minorities and Impoverished Groups*, 24 J. WOMEN’S HEALTH 62 (2015).

⁷¹ *Id.*

⁷² *Domestic Violence and the LGBTQ Community*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE (June 6, 2018), <https://ncadv.org/blog/posts/domestic-violence-and-the-lgbtq-community>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ U.N. CHILD.’S FUND, BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 3 (2006).

⁷⁶ *Id.*

⁷⁷ KELEHER ET AL., *supra* note 34, at 4.

⁷⁸ U.N. CHILD.’S FUND, *supra* note 75, at 3. Even outside of the home, children exposed to domestic violence are fifteen times more likely to be physically and/or sexually abused than the national average. *See Domestic Violence Statistics*, *supra* note 50. This statistical risk has been confirmed in other countries, such as China, South Africa, Colombia, India, Egypt, the Philippines, and Mexico. *See generally* WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH (2002).

⁷⁹ *Domestic Violence Statistics*, *supra* note 50.

⁸⁰ Austin A. Adhia et al., *The Role of Intimate Partner Violence in Homicides of Children Aged 2-14 Years*, 56 AM. J. PREV. MED. 38, 40 (2018). These homicides are a result of when the perpetrator

“Even when [children] are not physically attacked, [they] witness 68% to 80% of domestic assaults.”⁸¹ Annually, an estimated 15.5 million children are exposed to domestic violence in their households.⁸² About seven million of those children live in families in which severe violence⁸³ has occurred.⁸⁴ The Office of Juvenile Justice and Delinquency Program found that one in fifteen children is exposed to physical domestic violence, either between parents or a parent and that parent’s partner.⁸⁵ Of those children exposed to domestic violence, an overwhelming majority (90%) are directly exposed as opposed to indirectly exposed.⁸⁶ Indirect exposure occurs when a child overhears the violence, witnesses the repercussions (e.g., physical injuries on the victim parent, household damage, or police involvement), or generally becomes aware of the domestic violence.⁸⁷ More than a third (41.2%) of children exposed to physical domestic violence felt that they needed to verbally or physically intervene to stop a fight.⁸⁸ Domestic violence perpetrators may use the children in an attempt to control the adult victim, such as “threatening to gain sole custody, kill, kidnap, or otherwise harm children if victims leave.”⁸⁹ Any exposure to domestic violence—both direct and indirect—has detrimental impacts on children and their development.⁹⁰

Infants and toddlers experience a higher level of emotional distress when directly exposed to domestic violence in their home environments, which can impair their brain development and also harm their cognitive and sensory growth.⁹¹ Young children exposed to domestic violence may exhibit symptoms such as “excessive irritability, sleep problems, emotional distress,

also kills or attempts to kill the adult victim, or the domestic violence results in a legal conflict (e.g., divorce, separation, custody) that precedes the homicide. *Id.*

⁸¹ Blake Griffin Edwards, *Alarming Effects of Children’s Exposure to Domestic Violence*, PSYCH. TODAY (Feb. 26, 2019), <https://www.psychologytoday.com/us/blog/progress-notes/201902/alarming-effects-childrens-exposure-domestic-violence>.

⁸² Renee McDonald et al., *Estimating the Number of American Children Living in Partner-Violent Families*, 20 J. FAM. PSYCH. 137, 139 (2006).

⁸³ Examples of severe violence might include one parent physically “beating or burning the other, threatening to use a gun or knife, or forcing their partner to have sex.” Renee L. DeBoard-Lucas & John H. Grych, *Children’s Perceptions of Intimate Partner Violence: Causes, Consequences, and Coping*, 26 J. FAM. VIOLENCE, 343, 343 (2011).

⁸⁴ McDonald et al., *supra* note 82, at 139.

⁸⁵ Hamby et al., *supra* note 34, at 1.

⁸⁶ *Id.* at 8.

⁸⁷ *Rates of Child Abuse and Child Exposure to Domestic Violence*, RES. CTR. ON DOMESTIC VIOLENCE: CHILD PROT. & CUSTODY, <https://www.rcdvpc.org/rates-of-child-abuse-and-child-exposure-to-domestic-violence.html> (last visited Jan. 27, 2025); J.L. Edleson, *Children Witnessing of Adult Domestic violence*, 14(8) J. INTERPERSONAL VIOLENCE, 839, 841–42 (1999); Stephanie Holt et al., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797, 800 (2008).

⁸⁸ DeBoard-Lucas & Grych, *supra* note 83, at 348.

⁸⁹ NAT’L COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 36, at 1.

⁹⁰ Hamby et al., *supra* note 34, at 2; KELEHER ET AL., *supra* note 34, at 7.

⁹¹ U.N. CHILD.’S FUND, *supra* note 75, at 7.

fear of being alone, immature behavior, and problems with toilet training and language development.”⁹² Pre-schoolers who are exposed to domestic violence have been observed to suffer post-traumatic stress disorder, exhibiting signs of bed-wetting or night terrors.⁹³ They may also have difficulty with their speech (e.g., stuttering) or suffer from severe separation anxiety.⁹⁴ Further, preschool children exposed to this violence are also at a greater risk of certain ailments (e.g., allergies, asthma, gastrointestinal problems, headaches, and the flu).⁹⁵ As children grow older, they may struggle to concentrate in school.⁹⁶ As students, exposed children often have lower self-esteem, have fewer or no friends, have poor grades, and may not participate in extracurricular activities.⁹⁷

Domestic violence exposure often leads to a variety of mental health and psychological issues in children.⁹⁸ Exposed children frequently exhibit psychosomatic illnesses, depression, suicidal tendencies, aggressive behavior,⁹⁹ and lower levels of social competence.¹⁰⁰ School-aged children may feel guilty or blame themselves for the domestic violence.¹⁰¹ The long-term psychological effects of exposure also depend on other variables, such as the “severity of [the] abuse witnessed, co-occurring childhood abuse and whether the child had a stable adult figure” in their life.¹⁰²

The exposure usually has lifelong impacts on children.¹⁰³ Adults exposed to domestic violence during childhood have a greater risk of “tobacco use, substance abuse, obesity, cancer, heart disease, depression, and a higher risk of unintended pregnancy.”¹⁰⁴ Females exposed in childhood are significantly more likely to be victimized by dating violence, both when they are teenagers and adults.¹⁰⁵ Further, these children are significantly more

⁹² *Id.* at 7.

⁹³ Sandra A. Graham-Bermann & Julia Seng, *Violence Exposure and Traumatic Stress Symptoms as Additional Predictors of Health Problems in High-Risk Children*, 146(3) J. PEDIATRICS 349, 351 (2005).

⁹⁴ *Effects of Domestic Violence on Children*, *supra* note 36.

⁹⁵ See generally Graham-Bermann & Seng, *supra* note 93, at 349.

⁹⁶ U.N. CHILD.’S FUND, *supra* note 75, at 7. One study suggests that forty percent of children exposed to domestic violence have lower reading abilities than children who have not been exposed. *Id.*

⁹⁷ *Effects of Domestic Violence on Children*, *supra* note 36.

⁹⁸ Hamby et al., *supra* note 34, at 2.

⁹⁹ Children are more likely to bully others and up to three times more likely to get into a physical altercation themselves. See U.N. CHILD.’S FUND, *supra* note 75, at 7.

¹⁰⁰ See generally John W. Fantuzzo & Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*, 9 THE FUTURE CHILD. 21 (1999).

¹⁰¹ *Effects of Domestic Violence on Children*, *supra* note 36.

¹⁰² John Kramer, *How Developmental Trauma Affects Adults Exposed to Domestic Violence in Childhood*, CTRS. FOR HEALTH & HEALING (July 1, 2021), <https://cfhh.ca/blog/how-developmental-trauma-affects-adults-exposed-to-domestic-violence-in-childhood/>.

¹⁰³ FUTURES WITHOUT VIOLENCE, *supra* note 35.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* One study shows that a female child who grows up in a household in which her father is domestically violent toward her mother is more than six times likely to be sexually abused as a

likely to be in domestically violent relationships as adults, as victims, or as perpetrators.¹⁰⁶ For instance, male children who are exposed to their mothers being victimized by domestic violence are ten times more likely to abuse their female partners as adults.¹⁰⁷ Among these adult offenders, those who, as a child, witnessed a parent use a weapon were more likely to commit an offense involving a weapon as an adult.¹⁰⁸ Approximately seventy-eight percent of adults convicted of rape report being exposed to domestic violence as children.¹⁰⁹

II. THE CHILD WELFARE SYSTEM

Child welfare is a protection agency that operates state-wide, typically under the Department of Children and Families (DCF)¹¹⁰, the Department of Child and Family Services (DCFS),¹¹¹ the Department of Human Services (DHS),¹¹² or other similar titles. The legal basis for child welfare jurisdiction comes from state laws and regulations, as well as federal laws and guidelines.¹¹³ The Child Abuse Prevention and Treatment Act (CAPTA) is one of the federal government's roles in the system, as it provides funding and sets specific standards for child protection services; however, there is significant discretion left to individual states in terms of how they structure and administer their child welfare systems.¹¹⁴

In 1974, the federal Secretary of Health and Human Services established CAPTA to ensure efficiency and coordination between interdepartmental agencies involved in child abuse and neglect activities by providing funding for prevention, assessment, investigation, and treatment.¹¹⁵ The initial Act did not have any focus on domestic violence; however, the CAPTA Reauthorization Act of 2010 includes several amendments to bring this type of violence to the forefront of issues within the child welfare system.¹¹⁶ The Act highlights that child maltreatment and

child. See Laurie Vargas et al., *Domestic Violence and Children* 13 VISTAS: COMPELLING PERSPECTIVES ON COUNSELING 67, 67 (2005).

¹⁰⁶ NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 36, at 1.

¹⁰⁷ *Effects of Domestic Violence on Children*, *supra* note 36.

¹⁰⁸ Hamby et al., *supra* note 34, at 1.

¹⁰⁹ Dominique A. Simons et al., *Developmental Experiences of Child Sexual Abuses and Rapists*, 32 CHILD ABUSE & NEGLECT 549, 549 (2008).

¹¹⁰ See generally WIS. DEP'T OF CHILD. & FAMS., <https://dcf.wisconsin.gov/> (last visited Jan. 26, 2025).

¹¹¹ See generally ILL. DEP'T OF CHILD. & FAM. SERVS., <https://dcfs.illinois.gov/> (last visited Jan. 26, 2025).

¹¹² See generally COLO. DEP'T OF HUM. SERVS., <https://cdhs.colorado.gov/> (last visited Jan. 26, 2025).

¹¹³ *Federal/State Laws and Regulations for Child Welfare*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/> (last visited Jan. 26, 2025).

¹¹⁴ 42 U.S.C.A. § 5101-5119(c) (West).

¹¹⁵ JENNIFER MILLER & REBECCA ROBUCK, CHILD ABUSE & DOMESTIC VIOLENCE: PUTTING CAPTA TO WORK 6 (2014).

¹¹⁶ CAPTA Reauthorization Act of 2010 42 U.S.C.A. Ch. 67 (West).

domestic violence occur in up to sixty percent of families in which either is present; therefore, states and communities should strive to enhance the safety of children and victims of domestic violence by adopting specialized assessments and procedures.¹¹⁷ The CAPTA Reauthorization encourages states to collect and disseminate information related to various training resources in conjunction with the National Resource Centers of the Family Violence Prevention and Services Act.¹¹⁸ This aims to develop effective programs and best practices for advancing collaboration between child protection agencies and domestic violence service providers.¹¹⁹ The Act also determined a need for a federal data system involving federal, state, tribal, regional, and local child welfare systems to include information about the incidence and characteristics of child abuse and neglect in circumstances in which domestic violence is present.¹²⁰ Collaborations between child protection services and domestic violence services were prioritized in the Act to improve collaborative investigation and intervention procedures for safety and services to children exposed to domestic violence.¹²¹

A. An Overview of the Child Protection Investigative Process

While the CAPTA Reauthorization Act emphasized a significant need for child welfare agencies to reconcentrate child abuse and neglect services and treatment to include children exposed to domestic violence, many states have not done so.¹²² To understand how this impacts children exposed to domestic violence, it is critical to know how the child welfare system functions in general.

In nearly all states, a child becomes involved in the child welfare system after the state agency receives an intake report alleging that the child has been abused or neglected or is at risk of being abused or neglected.¹²³ Mandated reporters make the majority of these reports.¹²⁴ As required by CAPTA, each state must have provisions or procedures for requiring specific individuals to immediately report if they know or have a reasonable belief that a child has been abused or neglected.¹²⁵ Professionals who have frequent contact with children are mandated reporters in most states, such as healthcare providers, teachers, social workers, law enforcement officers, mental health providers,

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See, e.g., ARK. DEP'T OF HUM. SERVS., *supra* note 44, at 5; WASH. DEP'T OF CHILD., YOUTH & FAMS., *supra* note 25, at 1.

¹²³ CHILD WELFARE INFO. GATEWAY, *supra* note 30, at 2.

¹²⁴ *Id.*

¹²⁵ CAPTA Reauthorization Act of 2010 42 U.S.C.A. Ch. 67 (West).

childcare providers, and clergy members.¹²⁶ About one-third of states mandate any person who suspects child abuse or neglect to make a report to their local agency.¹²⁷ In all states, any other person is permitted to make a report to their local agency if they have a reason to believe that a child has been abused or neglected.¹²⁸

Additionally, every state has laws and regulations defining what constitutes abuse or neglect.¹²⁹ These definitions set out the jurisdiction of local child protection services and thus limit their authority to intervene.¹³⁰ Accordingly, when a report of abuse or neglect is received, the agency will follow local regulations to determine whether to “Screen In” or “Screen Out” the report.¹³¹ If there is sufficient information to suggest that child abuse or neglect, as locally defined, has occurred or is likely to occur, the agency will “Screen In” the report and launch an investigation.¹³² Contrarily, if there is insufficient information or the report does not meet the state’s threshold of abuse or neglect, the report will be “Screened Out.”¹³³

Once a report is “Screened In”, it is assigned to a local child protection investigator.¹³⁴ The investigator must then respond to the report by meeting with the involved children within a particular timeframe.¹³⁵ The timeframes vary depending on the severity of the allegations.¹³⁶ Reports that allege severe or imminent abuse or neglect will require a response time within twenty-four hours.¹³⁷ All other reports are typically assigned three- or five-day response times.¹³⁸ During the investigation, the child protection worker meets with the victim child and all other children in the home.¹³⁹ Depending on the child’s development, the type of allegations, or the severity of the risk, the investigator may be required to attempt to speak with the victim child privately and outside of the presence of their parent or caregiver.¹⁴⁰ This procedure permits the investigator to conduct an unhindered interview with the child, allowing for a more complete safety assessment.¹⁴¹ The investigator also speaks with the child’s parent (including the alleged

¹²⁶ CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTING OF CHILD ABUSE AND NEGLECT 2 (2023).

¹²⁷ *Id.* at 4.

¹²⁸ Otherwise known as a “permissive reporter.” *Id.*

¹²⁹ CHILD WELFARE INFO. GATEWAY, *supra* note 30, at 2.

¹³⁰ *Id.*

¹³¹ *Id.* at 3.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 4.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ This is also known as an “Emergency” case or an “E.” *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 3.

perpetrator), any other adults that reside or frequent the home, the child's school or daycare, the reporting party, the child's primary care provider, and any other collateral references that the family provides (e.g., neighbors, extended family, family supports, or parent employers).¹⁴²

Throughout an investigation, the assigned child protection worker continuously assesses the child's safety in the home.¹⁴³ At the investigation's conclusion, the worker and the worker's supervisor determine whether the allegations of child abuse or neglect are "Founded"¹⁴⁴ or "Unfounded."¹⁴⁵ An investigation is Unfounded if there is insufficient evidence to support the allegations of abuse or neglect or if the evidence does not legally constitute abuse or neglect in the state.¹⁴⁶ In these cases, the worker does not have legal jurisdiction to keep the investigation open once an Unfounded finding is established, regardless of any concerning circumstances.¹⁴⁷

Alternatively, an investigation is Founded when there is a preponderance of evidence that child abuse or neglect, as defined locally by the state, has occurred.¹⁴⁸ A Founded finding may prompt various responses by the agency depending on the state or local policy.¹⁴⁹ The level of response is primarily driven by an assessment of the child's immediate and general safety.¹⁵⁰ Child welfare workers and their supervisors complete some form of a safety threat assessment.¹⁵¹ If a safety threat is identified in the home, the agency must determine the next steps to ensure the child's safety, health, and well-being.¹⁵² If the safety threat can be mitigated by the agency and a non-offending parent or other third party, the child may remain in the home with services and treatment in place.¹⁵³ However, if the safety threat cannot be mitigated (e.g., there is not a non-offending parent to participate in safety planning, the home environment is not stable enough for services and treatment, the family is unwilling to engage in services voluntarily, among others) the child welfare agency may seek the child's removal from the home.¹⁵⁴ In addition, the agency may seek intervention from the juvenile court to require the parent to comply with treatment and services.¹⁵⁵

¹⁴² *Id.* at 4.

¹⁴³ *Id.*

¹⁴⁴ Also referred to as "Substantiated." *Id.* Other terms may vary from state to state. *Id.*

¹⁴⁵ Also referred to as "Unsubstantiated." *Id.* Other terms may vary from state to state. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 5.

¹⁵⁰ *Id.*

¹⁵¹ These safety assessment forms, and the safety assessment criteria vary depending on state and local laws, regulations, and policies. *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

B. Safety Assessments

CAPTA requires each state to have procedures for “immediate screening, risk and safety assessment, and prompt investigation” regarding reports of known and suspected child abuse or neglect.¹⁵⁶ These procedures must include immediate steps to ensure and protect the safety of the child victim and any other child in the home who might also be at risk of abuse or neglect.¹⁵⁷ Safety assessments are tools that assess for present or impending danger to the child.¹⁵⁸ These tools are used independently from the findings (i.e., Founded or Unfounded) of the investigation but are highly considered in the totality of the case.¹⁵⁹ Findings ultimately consider whether there are facts or evidence to support that the allegations in the initial report are true, and whether child abuse or neglect occurred.¹⁶⁰ In comparison, safety assessments help determine whether a child is “Safe” or “Unsafe” in his or her current living environment.¹⁶¹

While safety assessments are used throughout the life of any child welfare case, an initial safety assessment is always conducted during the investigation.¹⁶² Generally, to complete a safety assessment, the investigator must gather sufficient information about the alleged abuse or neglect,¹⁶³ child welfare history,¹⁶⁴ parent or caregiver functioning,¹⁶⁵ child

¹⁵⁶ 42 U.S.C.A. § 5106a (West).

¹⁵⁷ *Id.*

¹⁵⁸ CHILD WELFARE INFO. GATEWAY, *supra* note 39, at 2.

¹⁵⁹ In some instances, a parent may receive a Founded finding as a result of the investigation, but the child may be deemed Safe in the safety assessment. CHILD WELFARE INFO. GATEWAY, *supra* note 30, at 5. Alternatively, a parent may receive an Unfounded finding as a result of the investigation, but the child may be deemed Unsafe in the safety assessment. *Id.* There are other instances where the findings and safety assessment align with one another (i.e., an Unfounded finding and a “Safe” safety assessment or a Founded finding and an “Unsafe” safety assessment) CHILD WELFARE INFO. GATEWAY, *supra* note 39, at 2.

¹⁶⁰ CHILD WELFARE INFO. GATEWAY, *supra* note 30, at 5.

¹⁶¹ CHILD WELFARE INFO. GATEWAY, *supra* note 39, at 2.

¹⁶² *Id.*

¹⁶³ This information is typically a “description of the severity of harm or injuries and the condition of the child.” *Id.*

¹⁶⁴ This may include any history with the state’s child welfare agency, including previous reports of abuse or neglect, Founded or Unfounded findings, services or treatment previously offered by the agency, or previous juvenile court involvement. *Id.*

¹⁶⁵ The investigator will gather information about the parent or caregiver pertaining to mental health, substance use, domestic violence, criminal history, employment or other financial income, relevant medical history, and history of abuse or neglect as a child. *Id.*

functioning,¹⁶⁶ parenting practices,¹⁶⁷ and disciplinary practices.¹⁶⁸ The assigned investigator collects all this information and reviews it with a supervisor before the agency determines whether the child is “Safe” or “Unsafe.”¹⁶⁹ A child considered “Safe” may remain in the home with the parent or caregiver because no safety threats have been identified.¹⁷⁰ When one or more safety threats are identified, the child will be deemed “Unsafe” and may be at risk of removal from the home if an appropriate plan to ensure their safety cannot be developed or implemented.¹⁷¹ Whether a child is found “Safe” or “Unsafe” prompts the agency to respond according to its state policies and procedures.¹⁷²

C. Safety Threat Criteria

CAPTA requires that each state is responsible for defining what constitutes abuse and neglect.¹⁷³ State civil laws, therefore, “define the conduct, acts, and omissions that constitute child abuse or neglect that must be reported to child protective agencies.”¹⁷⁴ Each state may have a similar definition of abuse and neglect, though there may also be instances where the meaning varies greatly.¹⁷⁵ Because each state can have different definitions of what constitutes abuse and neglect, each state may also have varying safety threats listed on its safety assessment.¹⁷⁶ The number of identifiable safety threats varies from state to state. For example, Alaska,¹⁷⁷ California,¹⁷⁸ and Colorado¹⁷⁹ each have ten safety threats on their assessments. Nevada’s assessment identifies twelve safety threats.¹⁸⁰ Washington State has one of the highest amounts of safety threats, naming seventeen different threats on

¹⁶⁶ Child functioning includes physical and mental health, education, intellectual and behavioral ability, growth and development, communication skills, and relationships with others. *Id.* at 3.

¹⁶⁷ This may include “overall parenting styles, perception of the child, tolerance as a parent, interaction patterns with the child, ability to meet the child’s basic needs, ability to put the child’s needs before their own, parenting knowledge and skills, ability to protect, etc.” *Id.* at 2.

¹⁶⁸ This section of the safety assessment includes household rules, chores, and expectations for the child. *Id.* at 3. It also includes how and when a parent or caregiver disciplines a child, as well as cultural practices. *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ 42 U.S.C.A. § 5106a (West).

¹⁷⁴ CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT 2 (2022).

¹⁷⁵ *Id.*

¹⁷⁶ CHILD WELFARE INFO. GATEWAY, *supra* note 39, at 2.

¹⁷⁷ STATE OF ALASKA, OFF. OF CHILD. SERVS., SAFETY THREATS GUIDE: IMPENDING DANGER 2–12 (Sept. 2010).

¹⁷⁸ EVIDENT CHANGE, <https://ca.sdmdata.org/Definitions/SA> (last visited Jan. 25, 2025).

¹⁷⁹ COLO. DEP’T OF HUM. SERVS., *supra* note 112.

¹⁸⁰ DIV. OF CHILD & FAM. SERVS., NEVADA SAFETY ASSESSMENT 2–3 (2007).

its assessment.¹⁸¹ With varying identifiable safety threats, what may be considered a safety threat in one state may not necessarily be considered a threat in another.¹⁸²

Child protection agencies essentially use a checklist to identify whether a safety threat exists.¹⁸³ If the investigator and supervisor “check yes” that a safety threat is present, the child is found Unsafe, and the next steps must be taken in accordance with the agency’s policies and procedures to ensure the child’s safety and well-being.¹⁸⁴ If there are “no checked” safety threats, this indicates that the investigator did not identify an active safety threat; therefore, the agency no longer has the authority to require further involvement with the child or family.¹⁸⁵

¹⁸¹ WASH. DEP’T OF CHILD., YOUTH & FAMS., *supra* note 25, at 1.

¹⁸² CHILD WELFARE INFO. GATEWAY, *supra* note 39, at 3.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ If no safety threats are identified, the child is deemed “Safe” and may remain in their home. *Id.*

SECTION 1. SAFETY ASSESSMENT
Part A. Safety Threat Identification

Directions: The following list of threats is behaviors or conditions that may be associated with a child being in immediate danger of moderate to severe harm. **NOTE: At the initial safety assessment, all alleged child victims and all other children residing in the home are to be seen, and if verbal, interviewed out of the presence of the caretaker and alleged perpetrator. If some children are not at home during the initial investigation, do not delay the safety assessment. Complete a new safety assessment on the children who are not home at the earliest opportunity only if the safety assessment changes. If there is no change, indicate so in the "Reclassify Participant" box in PART B.2. For all other safety assessments, all children residing in the home are to be seen, and if verbal, interviewed out of the presence of the caregiver and alleged perpetrator.** When assessing children's safety, consider the effects that any adults or members of the household who have access to them could have on their safety. Identify the presence of each factor by checking "Yes," which is defined as "clear evidence or other cause for concern."

1.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household whose behavior is violent and out of control.
2.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household is suspected of abuse or neglect that resulted in moderate to severe harm to a child or who has made a plausible threat of such harm to a child.
3.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household has documented history of perpetrating child abuse/neglect or any person for whom there is reasonable cause to believe that he/she previously abused or neglected a child. The severity of the maltreatment, coupled with the caregiver's failure to protect, suggests child safety may be an urgent and immediate concern.
4.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Child sex abuse is suspected and circumstances suggest child safety may be an immediate concern.
5.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household is hiding the child, refuses access, or there is some indication that a caregiver may flee with the child.
6.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Child is fearful of his/her home situation because of the people living in or frequenting the home.
7.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household describes or acts toward the child in a predominantly negative manner.
8.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household has dangerously unrealistic expectations for the child.
9.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household expresses credible fear that he/she may cause moderate to severe harm to a child.
10.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household has not, will not, or is unable to provide sufficient supervision to protect a child from potentially moderate to severe harm.
11.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household refuses to or is unable to meet a child's medical or mental health care needs and such lack of care may result in moderate to severe harm to the child.
12.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household refuses to or is unable to meet the child's need for food, clothing, shelter, and/or appropriate environmental living conditions.
13.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household whose alleged or observed substance abuse may seriously affect his/her ability to supervise, protect or care for the child.
14.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour or member of the household whose observed or professionally diagnosed or documented mental/physical illness or developmental disability seriously impairs his/her ability to meet the immediate needs of the child.
15.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	The presence of violence, including domestic violence, that affects a caregiver's ability to provide care for a child and/or protection of a child from moderate to severe harm.
16.	Yes <input type="checkbox"/>	No <input type="checkbox"/>	A caregiver, paramour, member of the household or other person responsible for a child's welfare engaged in or credibly alleged to be engaged in human trafficking poses a safety threat of moderate to severe harm to the child.

State of Illinois Department of Children and Family Services Safety Threat Checklist¹⁸⁶

D. Domestic Violence Safety Threat Criteria

Safety threats related to domestic violence in the household are one of the most inconsistent among the nation's safety assessments, which also results in inconsistencies in any given child welfare agency's ability to intervene when domestic violence is the sole safety concern. For example, several states do not recognize any form of domestic violence as a safety

¹⁸⁶ ILL. DEP'T OF CHILD. & FAM. SERVS., *supra* note 41, at 3.

threat.¹⁸⁷ In other cases, certain states do not list domestic violence specifically as a safety threat but instead define criteria that a parent or caregiver is “violent” in general.¹⁸⁸ Some states only consider domestic violence as a safety threat if a child has been physically harmed during a domestic violence incident.¹⁸⁹ Other states recognize domestic violence as a safety threat to children only if the violence impacts the primary caregiver’s ability to meet the child’s basic needs.¹⁹⁰ On the other hand, some states identify domestic violence as a safety threat and also recognize that the threat is “active” if a child is at risk of physical or emotional harm as a result of the violence.¹⁹¹ Because states define domestic violence safety threats differently, each state’s child welfare agency has varying degrees of jurisdiction and authority to intervene when domestic violence is present in a child’s home.¹⁹² These differences lead to child welfare agency responses that are inconsistent with the needs of adult and child victims of domestic violence.¹⁹³

1. States That Do Not Identify Domestic Violence as a Safety Threat to Children

Several states, like Arkansas and Kansas, do not recognize domestic violence as a safety threat to children and therefore do not include it in their safety assessments.¹⁹⁴ The Arkansas Division of Children and Family Services’ safety assessment includes fourteen different safety threat criteria, none of which are related to domestic violence.¹⁹⁵ The safety assessment includes threats related to physical abuse, the family’s refusal to allow the agency access to the child, lack of supervision, neglect, sexual abuse, parental substance abuse, and parental mental health issues.¹⁹⁶

¹⁸⁷ See, e.g., ARK. DEP’T OF HUM. SERVS., *supra* note 44, at 5; STATE OF KAN. DEP’T FOR CHILD. & FAMS., *supra* note 44, at 1.

¹⁸⁸ See, e.g., STATE OF ALASKA, *supra* note 177, at 3; FLA. DEP’T OF CHILD. & FAMS., CORE SAFETY CONCEPTS 4 (2021).

¹⁸⁹ See, e.g., KY. CABINET FOR HEALTH & FAM. SERVS., SDM INTAKE ASSESSMENT: POLICY AND PROCEDURES MANUAL 12 (2021); N.M. CHILD., YOUTH & FAM. DEP’T, SAFETY ASSESSMENT POLICY AND PROCEDURES MANUAL 9 (2018).

¹⁹⁰ See, e.g., ILL. DEP’T OF CHILD. & FAM. SERVS., *supra* note 41, at 3.

¹⁹¹ See, e.g., COLO. DEP’T OF HUM. SERVS., *supra* note 112; CONN. DEP’T OF CHILD. & FAM., *supra* note 45, at 2; N.Y. ADMIN. FOR CHILD.’S SERVS., SAFETY AND RISK ASSESSMENT RESOURCE GUIDE 9 (2013).

¹⁹² CHILD WELFARE INFO. GATEWAY, *supra* note 39, at 3.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., ARK. DEP’T OF HUM. SERVS., *supra* note 44, at 5; STATE OF KAN. DEP’T FOR CHILD. & FAMS., *supra* note 44, at 1.

¹⁹⁵ ARK. DEP’T OF HUM. SERVS., *supra* note 44, at 5–6.

¹⁹⁶ *Id.*

The Kansas Department for Children and Families identifies seven safety threats in the Family Service Risk and Safety Assessment.¹⁹⁷ These threats focus on concerns of physical abuse, sexual abuse, social/emotional/intellectual abuse or neglect, general neglect, lack of supervision, and abandonment.¹⁹⁸

2. States That Do Not Specify Domestic Violence as a Safety Threat to Children

Other states do not specifically list domestic violence as a safety threat in their safety assessment, but they do list other safety threats that could encompass some form of domestic violence.¹⁹⁹ This type of safety threat criteria is seemingly unclear or vague, which may pose a risk of confusion or misapplication to those who use or rely upon the safety assessment for decision-making (e.g., child protection investigators and their supervisors, parents, and the juvenile court). Child protection investigators must rely on their state's internal safety assessment guide or manual to effectively and appropriately apply this type of safety threat.²⁰⁰ In other words, child protection investigators cannot rely on the text of the safety threat criteria in the safety assessment alone but must thoroughly comprehend the internal safety assessment guide to address domestic violence situations.²⁰¹

For example, Alaska does not expressly list domestic violence in its criteria but instead lists a vaguely worded safety threat that could encompass domestic violence.²⁰² One of its criteria reads that "one or both caregivers are violent and/or acting dangerously."²⁰³ It further defines violence as "aggression, fighting, brutality, cruelty, and hostility."²⁰⁴ The agency's safety threat guide²⁰⁵ provides additional in-depth descriptions as to what the

¹⁹⁷ STATE OF KAN. DEP'T FOR CHILD. & FAMS., *supra* note 44, at 1.

¹⁹⁸ *Id.*

¹⁹⁹ See, e.g., STATE OF ALASKA, *supra* note 177, at 3; FLA. DEP'T OF CHILD. & FAMS., *supra* note 188, at 4.

²⁰⁰ See, for example, New York's Safety and Risk Assessment Resource Guide, which states that the guide is "used to support the process of effectively assessing for safety and risk, and accurate [documentation]." N.Y. ADMIN. FOR CHILD. SERVS., *supra* note 191, at 8. See also COLO. DEP'T OF HUM. SERVS., *supra* note 45, at 1. The Pennsylvania Department of Public Welfare uses The Safety Assessment and Management Reference Manual "to assist the transfer of knowledge gained from training to actual casework practice." PA. DEP'T OF PUB. WELFARE, THE SAFETY ASSESSMENT AND MANAGEMENT REFERENCE MANUAL 4 (2012).

²⁰¹ *Id.*

²⁰² STATE OF ALASKA, *supra* note 177, at 3.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ A safety threat guide is commonly used in child welfare agencies. *Id.* at 1. It serves as a manual for investigators and other agency workers to gain a better understanding of how to appropriately apply and assess each safety threat criterion. *Id.* Alaska's safety threat guide reads "the safety threats and examples identified within this handout are consistent with the Alaska safety model. While the

violence may include, such as hitting or beating someone in the home, throwing things, bantering weapons, driving recklessly, aggressively intimidating, and terrorizing.²⁰⁶ The guide does highlight examples of domestic violence that may impact the child;²⁰⁷ however, these examples only focus on the potential physical risks of harm to the child and do not include any risks related to the child's emotional or psychological safety as a result of the exposure to the domestic violence.²⁰⁸

Florida's seventh safety threat becomes active when a "parent/legal guardian or caregiver is violent, impulsive, or acting dangerously in ways that seriously harmed the child or will likely seriously harm the child."²⁰⁹ The agency's safety assessment manual notes that these criteria only apply when the caregiver lacks self-control and places the child at risk of harm.²¹⁰ It further advises that the investigator should carefully assess domestic violence in the home due to the investigator being unlikely to observe the violence directly.²¹¹ The manual provides no additional insight or direction in evaluating a child's overall safety (physical, emotional, psychological, or otherwise).²¹² However, the manual generally states that the agency's concerns should be heightened when there are indicators that the child is a victim of abuse, as well as another parent or caregiver.²¹³

3. States That Only Recognize a Safety Threat When There is Physical Harm/Injury to a Child

The CAPTA Reauthorization Act highlights the importance of addressing the safety of children "exposed" to domestic violence rather than only children who are physically abused or at risk of physical harm.²¹⁴ Despite extensive research and evidence that children suffer significant mental, emotional, and psychological effects as a result of exposure to

safety threats contained within the Alaska model enable a worker to identify either present or impending danger, the safety threats in this guidebook are written in such a way so as to apply to impending danger. Regarding any family condition being considered as a safety threat, remember that the safety threshold criteria must always apply." *Id.*

²⁰⁶ *Id.* at 4.

²⁰⁷ Some of the listed examples include: "family violence involves the physical and verbal assault on a parent in the presence of a child, the child witnesses the activity and is fearful for self and/or others; family violence is occurring and a child is assaulted; family violence is occurring and a child may be attempting to intervene; family violence is occurring and a child could be inadvertently harmed even though the child may not be the actual target of the violence." *Id.*

²⁰⁸ *Id.*

²⁰⁹ FLA. DEP'T OF CHILD. & FAMS., *supra* note 188, at 4.

²¹⁰ *Id.*

²¹¹ *Id.* at 5.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ CAPTA Reauthorization Act of 2010, 42 U.S.C.A. Ch. 67 (West).

domestic violence,²¹⁵ many child welfare agencies only recognize domestic violence as a safety threat when a child has been physically injured or is at risk of physical injury as a result of domestic violence.²¹⁶ For example, Kentucky's Safety Assessment lists physical abuse as one of its safety threat criteria.²¹⁷ It defines this threat as "[a] caretaker caused a physical injury with intent to harm, AND the injury was more than superficial."²¹⁸ Kentucky's assessment provides examples of what may constitute physical abuse according to the criteria.²¹⁹ One example states that physical abuse includes when a "[c]hild receives injury during a domestic violence incident."²²⁰

In New Mexico, the Children, Youth, and Families Department lists nine different safety threat criteria.²²¹ The first threat reads: "Caregiver caused serious physical harm to the child or made a credible threat to cause serious harm as indicated by the following[:]. . . d) Domestic violence likely to injure child."²²² New Mexico's Safety Assessment Policy and Procedures Manual further explains that this safety threat is only considered active if there have been

[I]ncidents of household physical violence that created danger of serious physical injury to the child, AND there is reason to believe that this may occur again (e.g., alleged domestic violence perpetrator and victim are still involved in relationship, or a pattern of household physical violence continues to exist).²²³

Policies and practices in states such as Kentucky and New Mexico seem antiquated in that they do not encompass the various ways that domestic violence can present in a household.²²⁴ Instead, the safety threats only focus on children physically impacted, excluding the nearly 15.5 million children who are directly or indirectly exposed to violence.²²⁵

²¹⁵ Hamby et al., *supra* note 34, at 1.

²¹⁶ See, e.g., KY. CABINET FOR HEALTH & FAM. SERVS., *supra* note 189, at 12; N. M. CHILD., YOUTH AND FAMS. DEP'T, *supra* note 189, at 9.

²¹⁷ KY. CABINET FOR HEALTH & FAM. SERVS., *supra* note 189, at 12.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ N. M. CHILD., YOUTH & FAMS. DEP'T, *supra* note 1, at 13–18.

²²² *Id.*

²²³ *Id.* at 13.

²²⁴ Society often only thinks of domestic violence as physical violence; however, it also includes sexual violence, reproductive control, stalking, threats, economic abuse, and emotional/psychological abuse. BREIDING ET AL., *supra* note 53, at 22; *Domestic Violence Statistics*, *supra* note 50.

²²⁵ McDonald et al., *supra* note 82, at 138.

4. States that Only Recognize a Domestic Violence Safety Threat When it Impacts the Caregiver's Ability to Meet the Child's Needs

Some states consider the direct impact of domestic violence or the indirect impact of exposure to domestic violence on children but through the lens of the primary caregiver and their ability to meet the child's needs.²²⁶ Similar to those states that list no domestic violence safety threat criteria,²²⁷ states that solely focus on the child's primary caregiver completely disregard the impacts and risks to children harmed or exposed to domestic violence.²²⁸

In Illinois, the Department of Children and Family Services includes a caregiver-focused domestic violence safety threat in its Safety Assessment.²²⁹ The threat is considered active when there is a "presence of violence, including domestic violence, [which] affects a caregiver's ability to provide care for a child and/or protection of a child from moderate to severe harm."²³⁰

Washington State identifies multiple aspects of domestic violence in its seventeen Safety Threats; however, there is not an element of the safety threat that addresses the emotional or psychological harm that children suffer from mere exposure to domestic violence.²³¹ Here, the agency has created a domestic violence checklist, which the investigator should complete if there has "been an incident of domestic violence that impacts child safety."²³² This checklist includes:

- a. The domestic violence perpetrator has caused serious harm or threats of harm against the adult victim/caregiver of the child.
- b. The domestic violence perpetrator has seriously harmed or threatened serious harm to the child.
- c. The level of violence and/or threats towards either the adult victim or child is increasing so that serious harm is likely to occur.

²²⁶ See, e.g., ILL. DEP'T OF CHILD. & FAM. SERVS., *supra* note 41, at 3; WASH. DEP'T OF CHILD., YOUTH & FAM., *supra* note 25, at 1.

²²⁷ See, e.g., ARK. DEP'T OF HUM. SERVS., *supra* note 44, at 5; STATE OF KAN. DEP'T FOR CHILD. & FAMS., *supra* note 44, at 1.

²²⁸ Hamby et al., *supra* note 34, at 1.

²²⁹ ILL. DEP'T OF CHILD. & FAM. SERVS., *supra* note 41, at 3.

²³⁰ *Id.*

²³¹ WASH. DEP'T OF CHILD., YOUTH & FAMS., *supra* note 25, at 1.

²³² *Id.*

- d. There are other indicators of increased dangers from the domestic violence perpetrator such as suicide threat or attempts, substance abuse or threats with weapons.²³³

5. States that Recognize a Domestic Violence Safety Threat When It Impacts the Physical or Emotional Well-being of the Child

Some states have reformed their safety threat criteria to ensure that their safety assessments encompass the concerns for children being physically or emotionally harmed as a result of domestic violence between one or more of their caregivers.²³⁴ Not only does this safety threat criterion comply with the CAPTA Reauthorization Act,²³⁵ but it also addresses the complex and varietal impacts that domestic violence exposure can have on children.²³⁶

Out of its twelve safety threat criteria, Connecticut's ninth safety threat is "[d]omestic violence exists in the home and poses a risk of serious physical and/or emotional harm to the child."²³⁷ Similarly, Colorado's Family Safety Assessment Tool identifies its fifth safety threat as when the "[c]aregiver(s) is engaged in domestic violence in the home and places the child/youth in danger of physical harm, emotional harm, or both."²³⁸

In New York, domestic violence constitutes a safety threat if a "[c]hild(ren) has experienced or is likely to experience physical or psychological harm as a result of domestic violence in the household."²³⁹ The New York Administration for Children's Services' safety assessment resource guide provides examples of direct threats to children.²⁴⁰ These threats include:

- (1) Observed or alleged batterer is confronting and/or stalking the caretaker/victim and child(ren) and has threatened to kill, injure, or abduct either or both.
- (2) Observed or alleged batterer has had recent violent outbursts that have resulted in injury or threat of injury to the child(ren) or the other caretaker/victim.

²³³ *Id.*

²³⁴ CONN. DEP'T OF CHILD. & FAMS., *supra* note 45, at 2; COLO. DEP'T OF HUM. SERVS., *supra* note 112; N.Y. ADMIN. FOR CHILD.'S SERVS., *supra* note 191, at 9–10.

²³⁵ CAPTA Reauthorization Act of 2010 42 U.S.C.A. Ch. 67 (West).

²³⁶ Hamby et al., *supra* note 34, at 1.

²³⁷ CONN. DEP'T OF CHILD. & FAMS., *supra* note 45, at 2.

²³⁸ COLO. OFF. OF CHILD., YOUTH & FAM. DIV. OF CHILD WELFARE, COLORADO FAMILY SAFETY ASSESSMENT INSTRUCTIONS 7 (2016).

²³⁹ N.Y. ADMIN. FOR CHILD.'S SERVS., *supra* note 191, at 9.

²⁴⁰ *Id.*

(3) Parent/Caretaker/victim is forced, under threat of serious harm, to participate in or witness serious abuse or maltreatment of the child(ren).

(4) Child(ren) is forced, under threat of serious harm, to participate in or witness abuse of the caretaker/victim.

(5) Caretaker/victim appears unable to provide basic care and/or supervision for the child because of fear, intimidation, injury, incapacitation, forced isolation, fear or other controlling behavior of the observed or alleged batterer.²⁴¹

6. Summary

These varying definitions, or lack thereof, of the threat posed by domestic violence create confusion and concern for both the families and children impacted by the violence, as well as the child welfare agencies who use these tools as a means to ensure child safety. Safety threat criteria that do not encompass the various ways that domestic violence can impact a child and/or their caregiver are dangerous because they may not capture when a child is actually “Unsafe” as a result of the violence in the home. Further, unclear and vague safety threat criteria may cause investigators to misinterpret or misuse the safety assessments, leaving children vulnerable to future abuse or neglect. In any case, a child welfare agency may be limited in its ability to intervene if the domestic violence safety threat criteria are absent or insufficient.

III. PROPOSAL

Compared to adult victims, there is less research showing the impact of domestic violence on children;²⁴² however, the current evidence undeniably demonstrates how exposure to domestic violence, in any form, is detrimental to children’s overall safety, health, and well-being.²⁴³ It is in the best interest of all children that child welfare agencies address these concerns by 1) adopting and using a domestic violence screening tool that informs case decision-making for all child protection investigations and 2) reforming safety threat criteria to encompass the various ways that domestic violence impacts children, allowing for intervention and treatment services.

²⁴¹ *Id.* at 9–10.

²⁴² U.N. CHILD.’S FUND, *supra* note 75, at 3.

²⁴³ *See generally* Hamby et al., *supra* note 34; KELEHER ET AL., *supra* note 34.

A. Required Domestic Violence Screening Tools That Align with a State's Domestic Violence Safety Threat Criteria

Most child welfare agencies conduct domestic violence screenings during the investigative process.²⁴⁴ For example, Washington State's child welfare agency conducts a "universal [domestic violence] screening" for every child protection investigation.²⁴⁵ Washington's policy requires that each investigator ask, "Has any adult used or threatened to use physical force against an adult in the home? . . . If so, who did what to whom?"²⁴⁶ If any household member answers in the affirmative, the investigator must follow the "Specialized [Domestic Violence] Assessment Interview Protocol" by conducting an in-depth domestic violence assessment and interview with each of the victims.²⁴⁷ Investigators gather extensive information during these specialized assessments and apply it to the agency's domestic safety threat criteria when assessing the child's safety.²⁴⁸

As it stands, depending on the state's safety threat criteria, this may or may not address any safety concerns for the children pertaining specifically to domestic violence. Consider the case example discussed at the beginning of this Note. In that case, the children were never physically injured during the domestic violence incidents; however, the children were directly exposed to their father injuring and threatening their mother on numerous occasions.²⁴⁹ Though this case example indicated that the mother did not cooperate with the investigator in speaking further about the incidents,²⁵⁰ suppose an investigator had been able to conduct a universal and specialized domestic violence assessment with the mother and children. If so, the investigator would have learned more about the severe ongoing domestic violence in the household, despite the active protection order, and likely would have developed a concern for the mother and children's safety, health, and well-being. Nonetheless, the children would be deemed safe in conducting the safety assessment because they were never physically injured during an altercation.

Most child welfare agencies can indeed offer an array of community-based domestic violence services or support to adult and child victims based

²⁴⁴ See, e.g., *Domestic Violence*, WASH. DEP'T OF CHILD., YOUTH & FAMS., <https://www.dcyf.wa.gov/1100-child-safety/1170-domestic-violence> (last visited Feb. 21, 2025).

²⁴⁵ *Id.*

²⁴⁶ *Intake Process and Response*, WASH. DEP'T OF CHILD., YOUTH & FAMS., <https://www.dcyf.wa.gov/policies-and-procedures/2200-intake-process-and-response> (last visited Feb. 11, 2025).

²⁴⁷ *Domestic Violence*, *supra* note 244.

²⁴⁸ *Id.*

²⁴⁹ Interview with Anonymous Child Protection Investigator, *supra* note 1.

²⁵⁰ *Id.*

on the results of the screening.²⁵¹ However, as seen in the case example, service referrals and community support may be declined or refused by a family if an agency is unable to determine, per the safety threat criteria, that a child is “Unsafe” as a result of the violence.²⁵² This creates a dilemma for child welfare agencies who become aware of concerns of domestic violence through screening or otherwise but are limited to taking action based on the state’s safety threat criteria. This issue is especially pronounced in states where the community-based domestic violence services offered and the safety threat criteria are misaligned.²⁵³ For example, Illinois is a state whose domestic violence safety threat is only considered active when there is a “presence of violence, including domestic violence, [which] affects a caregiver’s ability to provide care for a child and/or protection of a child from moderate to severe harm.”²⁵⁴ Yet, the Illinois Department of Child and Family Services domestic violence screening tool highlights that children can be both the primary and secondary victims of domestic violence.²⁵⁵ On its child welfare domestic violence tool for families, the agency states that:

As primary victims, research connecting domestic violence and child maltreatment is strong:

* Child Abuse is 15 times more likely to occur in families where domestic violence is present (citation omitted).

* Domestic Violence is often linked to severe and fatal cases of child abuse (citation omitted).

* Perpetrators sometimes use children to establish or maintain power and control over the victim by physically, emotionally, or sexually attacking the children (citation omitted).

As the secondary victims, research shows exposure to trauma increases the risk of such things as:

* Eating and sleeping disorders

²⁵¹ See e.g., *Intimate Partner Violence (IPV)*, UTAH DEP’T OF CHILD & FAM SERVS., <https://dcfs.utah.gov/services/domestic-violence-services/> (last visited Jan. 26, 2025); *Child Welfare*, ILL. DEP’T OF CHILD. & FAM. SERVS., <https://www.dhs.state.il.us/page.aspx?item=38466> (last visited Jan. 26, 2025).

²⁵² Interview with Anonymous Child Protection Investigator, *supra* note 1; see, e.g., ILL. DEP’T OF CHILD. & FAM. SERVS., WHAT YOU NEED TO KNOW ABOUT DOMESTIC VIOLENCE AND CHILD WELFARE 2–3 (rev. Jan. 2019).

²⁵³ *Id.* at 2; ILL. DEP’T OF CHILD. & FAM. SERVS., *supra* note 41, at 3.

²⁵⁴ ILL. DEP’T OF CHILD. & FAM. SERVS., *supra* note 41, at 3.

²⁵⁵ ILL. DEP’T OF CHILD. & FAM. SERVS., *supra* note 252, at 2–3.

- * Verbally or physically aggressive behaviors
- * Feelings of guilt believing themselves to be the cause of domestic violence
- * Poor school performance
- * Children under five may frighten easily or become anxious, clingy, or cry a lot
- * Alcohol and drug abuse in adolescents[.]²⁵⁶

The agency subtly highlights the discrepancy between its safety assessment and the screening tool by informing families that “[i]f *your case is opened* [emphasis added], your worker will continue to screen for domestic violence dynamics during your family’s involvement with DCFS.”²⁵⁷ The agency further acknowledges that not all domestic violence incidents will require DCFS intervention services.²⁵⁸

The importance of the domestic violence screening tool is that it allows child welfare agencies to gather more information about violence that the child(ren) may be exposed to.²⁵⁹ This is done by evaluating patterns of behavior, lethality, and the safety needs of child and adult victims.²⁶⁰ Allegations of child maltreatment alone do not provide an agency with sufficient information to complete a safety assessment.²⁶¹ Agency workers must implement their interviewing skills and agency tools, like a domestic violence screen, to obtain knowledge of crucial variables that determine a child’s safety.²⁶² Therefore, these assessments are “instrumental in determining family dynamics” and should be used by all child welfare agencies.²⁶³

B. Expansive Domestic Safety Threat Criteria

To ensure the safety of children, agencies must include specific domestic violence safety threats in their safety assessments. This change is the only means for agencies to retain jurisdiction to monitor children’s safety

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 3.

²⁵⁸ *Id.*

²⁵⁹ CHILD.’S BUREAU: CAPACITY BUILDING CENTER FOR STATES, DOMESTIC VIOLENCE AND THE CHILD WELFARE PROFESSIONAL: TIPS FOR ASSESSMENT 1 (2017).

²⁶⁰ *Id.*

²⁶¹ NAT’L ASS’N OF PUB. CHILD WELFARE ADMIN., A FRAMEWORK FOR SAFETY IN CHILD WELFARE 14 (2009).

²⁶² *Id.*

²⁶³ CHILD.’S BUREAU: CAPACITY BUILDING CENTER FOR STATES, *supra* note 259, at 1.

through safety plans, offer agency-based services and treatment, or seek to remove children from the home when domestic violence is so significant that it can no longer be remedied with short-term interventions.²⁶⁴

It is unacceptable for a child welfare agency to ignore or insufficiently address the safety concerns of children surrounded by household domestic violence.²⁶⁵ Child welfare agencies, in particular, have a unique position to be able to help support victims of domestic violence, including both the targeted victim and the children exposed to the violence.²⁶⁶ This unique position stems from a child welfare agency's ability to assess children's safety as it relates to domestic violence and child maltreatment.²⁶⁷

1. *Proposed Threat Language*

States that do not identify a domestic violence safety threat and states whose current domestic violence safety threat criteria insufficiently address safety concerns should reform their threat criteria. The reformed safety threat could be modeled after states whose current safety threat criteria sufficiently address domestic violence safety concerns.²⁶⁸ The criteria must be carefully worded to deter “false positives” and “false negatives.”²⁶⁹ This issue may occur if the language of the safety threat is too vague or too narrow, potentially leading to traumatic consequences for families and children.²⁷⁰

An example of a safety threat criterion that effectively addresses domestic violence could read as follows: “Child(ren) has experienced or is likely to experience physical harm, emotional harm, or neglect as a result of domestic violence in the household.”

This language encompasses safety concerns that might arise as a result of a child being physically harmed, intentionally or unintentionally, during a domestic violence altercation. Examples may include a child being either actually or potentially physically injured by direct physical force by the perpetrator (slapped, punched, kicked, shoved, bitten, stabbed, shot), objects thrown during altercations (furniture, household items, weapons), and household safety hazards that result from violent events (such as a child getting injured from broken glass or furniture or exposure to weapons). This

²⁶⁴ CHILD WELFARE INFO. GATEWAY, *supra* note 39, at 2.

²⁶⁵ McDonald et al., *supra* note 82, at 138.

²⁶⁶ Children who are exposed to domestic violence are thirty to sixty percent more likely to be victims of abuse and neglect by a parent. U.N. CHILD.'S FUND, *supra* note 75, at 3.

²⁶⁷ MILLER & ROBUCK, *supra* note 115, at 3.

²⁶⁸ See, e.g., CONN. DEP'T. OF CHILD. & FAMS., *supra* note 45, at 2; COLO. DEP'T OF HUM. SERVS., *supra* note 112; N.Y. ADMIN. FOR CHILD.'S SERVS., *supra* note 191, at 9–10.

²⁶⁹ A determination that a child is “Safe” when a child should be deemed “Unsafe.” Annemiek Vial et al., *Safety Assessment in Child Welfare: A Comparison of Instruments*, 108 CHILD. & YOUTH SERVS. REV. 1, 3 (2020).

²⁷⁰ *Id.*

language also encompasses any secondary physical harm that a child may experience as a result of domestic violence (physical ailments such as allergies, asthma, gastrointestinal problems, headaches, the flu,²⁷¹ substance use, obesity).²⁷² While it may be more difficult for an agency to attribute these secondary physical harms as a result of household domestic violence, the research shows that these harms should be recognized as concerns for the child's safety.²⁷³

This safety threat language also captures any safety concerns that might arise as a result of a child being emotionally harmed by the mere presence of domestic violence in the household or witnessing violent events. "Emotional harm" encompasses the impacts or potential impacts that domestic violence may have on a child's safety, health, or well-being, including, but not limited to, impacts on a child's mental or psychological health (emotional distress, excessive irritability, sleep problems, separation anxiety, immature behavior,²⁷⁴ night terrors, low self-esteem, depression, suicidal tendencies, aggression, feelings of guilt),²⁷⁵ cognitive growth and development (brain development, sensory growth,²⁷⁶ concentration skills, toilet training and bed-wetting,²⁷⁷ speech and language), and social well-being (fewer friends, lack of participation in extracurricular activities, lower levels of social competence).²⁷⁸

Lastly, "neglect" captures the safety concerns that result from the violence's impact on the primary caregivers' ability to meet the child's basic care needs or any impacts that result from the perpetrator's significant violence. Basic care needs include adequately providing food, clothing, sleeping arrangements and shelter, hygiene, educational needs, medical needs, and age-appropriate supervision. For example, neglect by the primary caregiver where the primary caregiver is the victim of the violence may include her inability to meet the child's basic care needs as a result of fear, intimidation, incapacitation, injury, unavailability (such as forced isolation or hospitalization), or other controlling behavior. Neglect by the primary caregiver, where the primary caregiver is the perpetrator, may include the inability to meet the child's basic care needs due to unavailability, such as incarceration or protective orders preventing contact.

²⁷¹ Graham-Bermann & Seng, *supra* note 93, at 351.

²⁷² FUTURES WITHOUT VIOLENCE, *supra* note 35, at 1.

²⁷³ Graham-Bermann & Seng, *supra* note 93, at 351; FUTURES WITHOUT VIOLENCE, *supra* note 35, at 1.

²⁷⁴ U.N. CHILD.'S FUND, *supra* note 75, at 7.

²⁷⁵ See generally Fantuzzo & Mohr, *supra* note 100.

²⁷⁶ U.N. CHILD.'S FUND, *supra* note 75, at 7.

²⁷⁷ *Id.*

²⁷⁸ *Effects of Domestic Violence on Children*, *supra* note 36.

2. Proposed Threat Structure

It is important to highlight that the language in this proposed threat criterion identifies that a child is “Unsafe” if the child has experienced or *is likely to experience* physical harm, emotional harm, or neglect. This is a preventative measure that helps ensure that child welfare agencies are not limited to intervening only when a child has already been harmed or neglected as a result of domestic violence. In other words, this language allows child welfare workers to respond proactively rather than retroactively.

Additionally, the threat posed by domestic violence should be its own safety threat criterion on the safety assessment. This change ensures that the threat is assessed independently from other potential safety threats, eliminating concerns about families, child welfare workers, or courts misapplying or misinterpreting the criteria. A separate criterion also emphasizes the importance of thoroughly assessing concerns for domestic violence in the household. In conjunction with the domestic violence screening tool, this encourages in-depth conversations between child welfare workers and families about domestic violence. This step is important for several reasons. First, it helps the agency worker build a relationship and rapport with the family that is being assessed. Not only does this yield a more in-depth and accurate assessment of the household, but it also inspires and strengthens a working relationship between the worker and the agency. Second, these more meaningful conversations with children and families better allow child welfare workers an opportunity to assess for true safety threats to the child.

3. Proposed Threat Summary

While states do not necessarily have to adopt the exact language in the proposed safety threat criterion, it is essential that states include its key elements. Each of these elements is critical in allowing child welfare agencies to effectively address child safety concerns resulting from household domestic violence. Ultimately, states should include language addressing concerns related to a child’s physical and emotional safety. It is equally vital that states grant child welfare agencies the authority to intervene in circumstances where a child has been harmed or neglected or where a child is likely to be harmed or neglected by domestic violence. Moreover, states should ensure that the domestic violence safety threat is an independent safety assessment criterion.

C. Enforcement and Implementation

While child welfare agencies operate under the authority of each state, it is the federal government that holds the power to enforce and implement reformation of domestic violence safety threats.²⁷⁹ Under the Domestic Violence provisions in CAPTA, the federal government should require states to apply a particular definition of what constitutes a domestic violence safety threat regarding a child.²⁸⁰ Many of the domestic violence provisions of the CAPTA Reauthorization Act are “authorizing provisions and not mandates;” therefore, the provisions allowing for increased collaboration between child welfare and domestic violence services are optional and not mandatory for states to implement.²⁸¹ CAPTA should require states to address child safety as it pertains to domestic violence in a particular manner. This solution would create a more uniform and effective approach for states to address domestic violence in the child welfare system.

Alternatively, the federal government should provide additional funding to state child welfare agencies to promote and provide for greater inter-agency collaboration, dissemination of new knowledge, and hands-on technical assistance.²⁸² The federal government has attempted to address the intersection of child safety and domestic violence by providing states with tools, resources, strategies, and data-sharing.²⁸³ However, there is still significant room for improvement.²⁸⁴ Some of these efforts have already been attempted but have fallen short due to a lack of funding.²⁸⁵ Under CAPTA, states are granted a base amount of \$50,000, with the possibility of additional funds depending on the population of children in the state.²⁸⁶ The current limited funding available to implement CAPTA provisions provides the federal government little leverage over the states.²⁸⁷

The 2010 CAPTA Reauthorization Act created additional funding for states to address domestic violence in child welfare agencies.²⁸⁸ However, this funding was part of a series of program options that states may or may not choose to enroll in.²⁸⁹ This program enrollment should be mandatory. Out of the fourteen program areas, only fifteen states decided to enroll in

²⁷⁹ CAPTA Reauthorization Act of 2010, 42 U.S.C.A. Ch. 67 (West).

²⁸⁰ CAPTA has used language such as “safety and services to children exposed to domestic violence;” however, this definition should be expanded. *Id.*

²⁸¹ MILLER & ROBUCK, *supra* note 115, at 2.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 3.

²⁸⁵ *Id.* at 7.

²⁸⁶ CHILD. BUREAU, HEALTH & HUM. SERVS. DEP’T, REPORT TO CONGRESS ON THE EFFECTIVENESS OF CAPTA STATE PROGRAMS AND TECHNICAL ASSISTANCE 1 (2013).

²⁸⁷ MILLER & ROBUCK, *supra* note 115, at 9.

²⁸⁸ CHILD. BUREAU, *supra* note 286, at 8.

²⁸⁹ *Id.*

“Program Area 14,” which was designated for “[d]eveloping and implementing procedures for collaboration among CPS, domestic violence services, and other agencies in . . . the provision of service[s] that assist children exposed to domestic violence”²⁹⁰ One of the suggested strategies and activities to support improvement included “[s]upport/enhance current policies, practices, and/or practice models, such as revising state’s CPS guidance manual to include tools on how to more accurately and consistently assess initial child safety and risk, including factors such as domestic violence, mental health issues, and substance abuse.”²⁹¹ Other strategies included providing funding for external trauma-informed or evidenced-based services to children who have been exposed to domestic violence, enhancing collaboration and coordination between child welfare and domestic violence services, providing additional support and training to child welfare workers and mandated reporters, and establishing new practice models in cases of co-occurring child abuse/neglect and domestic violence.²⁹²

All of these strategies are meaningful ways to help promote and improve child safety. However, it is critical to recognize that if a child welfare agency does not have the authority or jurisdiction to implement these programs with children and families, then the programs are significantly less effective. In other words, it may all come down to an agency’s safety threat assessment that ultimately determines whether a child is “Safe” or “Unsafe.” Therefore, the federal government should also require, or at the least further advocate for, safety assessment practices and policies that effectively and sufficiently address all aspects of child safety concerning household domestic violence. Through the effective implementation of existing laws, like CAPTA, the federal government can require uniform and innovative strategies that promote the safety of children harmed by domestic violence.²⁹³

²⁹⁰ Program Area 1 was the most selected program, with forty-four states choosing to enroll in “the intake, assessment, screening, and investigation of reports of child abuse and neglect.” *Id.* at 8–10. Program Area 4 was the second most selected program, with thirty-eight states choosing to enroll in “developing, improving, and implementing risk and safety assessment tools and protocols, including the use of differential response.” *Id.*

²⁹¹ *Id.* at 34.

²⁹² *Id.* at 35.

²⁹³ MILLER & ROBUCK, *supra* note 115, at 18.

CONCLUSION

In conclusion, this Note advocates for a comprehensive reform of safety threat criteria within the child welfare system, with a specific focus on domestic violence. Child welfare agencies are sometimes the only protection for children who are abused or neglected by their parents or caregivers.²⁹⁴ Therefore, these agencies need the authority to ensure the safety of children in households where domestic violence is present. Reformation will not only promote the safety, health, and well-being of children exposed to domestic violence, but it will also allow agencies to provide support and services to adult victims and perpetrators. It is unacceptable that a child protection agency has “its hands tied”²⁹⁵ and is unable to protect a vulnerable child who witnesses a parent strangle the other repeatedly²⁹⁶ or a child who feels obligated to protect siblings during a domestic violence altercation to ensure that they are not harmed by bottles or furniture being thrown.²⁹⁷ Domestic violence can look different in every household, but simply because a child is not physically injured during the altercation does not mean that the child is unharmed or that the child is safe in the home.²⁹⁸

The current state-by-state variations in safety threat criteria, ranging from narrowed definitions²⁹⁹ to more expansive ones,³⁰⁰ highlight the need for standardized and inclusive measures to enhance the overall safety and well-being of children and caregivers in households. States that presently acknowledge only physical threats to child safety must broaden their criteria to encompass emotional threats. The distinction between these criterion types is significant, as the more expansive approach recognizes the impact of domestic violence on children beyond physical harm, considering exposure and witnessing as threats to their safety as well. The research underscores the adverse effects of such exposure on children’s behavioral, social, and emotional well-being, comparable to those physically harmed.³⁰¹ Given that child maltreatment and domestic violence often coexist in households,³⁰² aligning safety threat criteria with this understanding is imperative.

This Note aligns with the CAPTA Reauthorization Act’s recognition of the high prevalence of this issue, advocating for intervention procedures that

²⁹⁴ See generally CHILD WELFARE INFO. GATEWAY, *supra* note 30.

²⁹⁵ Interview with Anonymous Child Protection Investigator, *supra* note 1.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ 42 U.S.C.A. § 5101 (West 1996).

²⁹⁹ See, e.g., ILL. DEP’T. OF CHILD. & FAM. SERVS., *supra* note 41, at 3.

³⁰⁰ See, e.g., COLO. DEP’T. OF HUM. SERVS., *supra* note 45, at 1; CONN. DEP’T OF CHILD. & FAMS., *supra* note 45, at 2.

³⁰¹ See generally CHILD WELFARE INFO. GATEWAY, DOMESTIC VIOLENCE: A PRIMER FOR CHILD WELFARE PROFESSIONALS (2020).

³⁰² 42 U.S.C.A. § 5101 (West 1996).

prioritize the safety of both children and adult victims of domestic violence.³⁰³ To accomplish this goal, the federal government, under CAPTA, should require states to expand or include additional protections for children harmed by domestic violence. States can implement these protections by conducting effective domestic violence screenings that correspond with specific domestic violence safety threat criteria, which include both the physical and emotional harm that may impact a child's safety, health, and well-being.

³⁰³ *Id.*

“I’M NOT THAT KIND OF LAWYER” NO LONGER CUTS IT: A CALL FOR MANDATORY DOMESTIC VIOLENCE CLES ACROSS THE LEGAL PROFESSION

Ashley N. Dorsey*

INTRODUCTION¹

All attorneys should know about domestic violence. The misconception that it appears only in family law matters is not only mistaken,² it is downright fatal.³ Domestic violence is a pervasive, stigmatized crime,⁴ affecting more than twelve million people annually.⁵ The nature of this hidden crime invites myriad crossover legal issues with nearly every area of the law.⁶ Because of this, every attorney should be familiar with domestic violence and know how to recognize the warning signs. While there are the more obvious indications, such as bruises and unexplainable injuries, education is necessary to recognize the numerous subtle signs that often go undetected.⁷ Some of these include clients canceling or failing to show to

* Ashley N. Dorsey is a third-year student at Southern Illinois University Simmons Law School (May 2025). She received her bachelor’s degree in Political Science from Indiana University East. She wishes to thank Angela Upchurch and Sheila Simon for their support and guidance while writing this Note. She also wishes to thank her career mentor, Derrick McDowell, for his unwavering encouragement throughout her law school journey and beyond. Finally, she thanks her son, E.J., for being her motivation for attending law school and for being her inspiration behind this Note.

¹ Any female-specific pronouns used in this Note to reference a victim or survivor of domestic violence are not intended to imply that only females experience domestic violence. Similarly, any male-specific pronouns used in this Note to reference a perpetrator of domestic violence are not intended to imply that all perpetrators of domestic violence are male. Use of these pronouns is only intended to illustrate that eighty-five percent of domestic violence victims or survivors are female. *Domestic Violence/Intimate Partner Violence Facts*, EMORY UNIV. SCH. OF MED., https://med.emory.edu/departments/psychiatry/nia/resources/domestic_violence.html (last visited Feb. 2, 2025).

² John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 217 (2003).

³ Julie Saffren, *Professional Responsibility in Civil Domestic Violence Matters*, 24 HASTINGS WOMEN’S L.J. 3, 3 (2013).

⁴ Sarah M. Buel, *A Lawyer’s Understanding of Domestic Violence*, 62 TEX. BAR J. 936, 937, 939 (1999).

⁵ Merritt L. Dublin, *Trauma-Informed Lawyering and Implications to Lawyer Competency and Professional Integrity*, ADVOC, Jan. 2023, at 26, 26.

⁶ Saffren, *supra* note 3, at 15.

⁷ See *The Subtle Signs Domestic Violence*, SYNERGY SERVS., <https://synergyservices.org/blog/subtle-signs-domestic-violence/> (last visited Feb. 2, 2025).

scheduled appointments or meetings,⁸ a nearly-always-present partner,⁹ or the client's phone receiving frequent notifications when the partner is not present.¹⁰ While each of these subtle signs is not absolute proof that domestic violence is occurring, a lawyer must recognize them as potential red flags and adjust his response accordingly.¹¹

Imagine a personal injury attorney meets with a prospective client who explains that he was repeatedly punched and kicked by a stranger at a local grocery store, stemming from a road rage incident in the parking lot. Because most lawyers in this position are sympathetic to the crime victim and eager to assist,¹² the attorney immediately begins instinctively applying the client's provided facts to the elements of assault and battery. The attorney asks numerous follow-up questions to uncover all potentially relevant information that the attorney needs to file suit.

Alternatively, imagine a bankruptcy attorney meeting with a prospective client who explains that her financial condition is out of control and that she is completely unaware of her amount of debt because her partner handles the finances. While discussing her situation, her phone receives seemingly constant notifications, and her demeanor changes with each chime of her ringtone. When the client reaches for something in her purse, the neckline of her shirt shifts and reveals a linear bruise. The attorney notices but chooses not to inquire because he feels as though it is none of his business.¹³ Attorneys in such a situation mistakenly believe that if it were severe enough, she would reach out to someone for help.¹⁴

Why does an attorney's response depend on whether the perpetrator is a stranger or an intimate partner? Domestic violence perpetrated by a male partner has become the leading cause of serious injury to women in the United States.¹⁵ In fact, over half of female homicides are committed by a

⁸ Something that undoubtedly every lawyer has encountered. Kimberly A. Hardtke, *A Practical Guide to Trauma-Informed Lawyering*, WIS. LAW., July 20, 2023, at 20, 22–23; Susan Ayres, *Trauma-Informed Advocacy: Learning to Empathize with Unspeakable Horrors*, 26 WM. & MARY J. RACE, GENDER, & SOC. JUST. 225, 253 (2020).

⁹ Megan Thielking, *Dentists Are Pushed to Screen Patients for Domestic Abuse—and Offer Help*, STAT (May 31, 2017), <https://www.statnews.com/2017/05/31/domestic-abuse-dentists/>.

¹⁰ *The Subtle Signs Domestic Violence*, *supra* note 7.

¹¹ Hardtke, *supra* note 8, at 20, 23.

¹² Buel, *supra* note 4, at 937.

¹³ See Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REC. 31, 43–44 (2008) (explaining that the courts' treatment of domestic violence matters as "relationships gone bad" and "bothersome and difficult" has directly influenced how lawyers perceive these situations as well).

¹⁴ See Thomas L. Hafemeister, *If All You Have is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 923, 962, 965 (2011) (explaining that victims or survivors are often hostages isolated from ordinary means of help who are hesitant to seek assistance from medical professionals and law enforcement).

¹⁵ Buel, *supra* note 4, at 937.

current or former intimate partner of the victim.¹⁶ Including male homicide victims, domestic violence accounts for one in five murders in the United States.¹⁷ Yet, the justice system and lawyers alike have failed to mitigate this crime.¹⁸

Domestic violence law has made significant advancements since the 1980s.¹⁹ Despite these advances, victims²⁰ still experience substantial barriers to justice through the legal system and remain unaware of available community resources.²¹ Part of this gap stems from lawyers—as a whole—choosing to ignore the prevalence of domestic violence even within their clientele.²² Victims may find themselves in an attorney’s office for any number of reasons, from estate planning to filing bankruptcy to employment discrimination.²³ Even though unrelated, victims are more likely to disclose domestic violence to an attorney as opposed to other professionals, such as doctors or police officers, because of the confidential nature of the relationship.²⁴ Yet, even when a victim directly asks the lawyer about her options on an unrelated domestic violence issue, many are met with the response, “*I’m not that kind of lawyer.*”²⁵ While the lawyer may feel as though he was just informing her that he is not competent in that area of law to provide advice, the victim likely experiences hopelessness at such a response and may feel that *even attorneys* cannot help.²⁶

What’s more, an attorney who desires to assist likely finds that he does not know how to approach the topic or, even worse, may advise her to immediately file a protective order without first assessing the lethality of the

¹⁶ *About Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 16, 2024), https://www.cdc.gov/intimate-partner-violence/about/?CDC_AAref_Val=https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html.

¹⁷ *Id.*

¹⁸ See Ayres, *supra* note 8, at 228.

¹⁹ Elizabeth Lehmann, Note, *One Family, One Judge, Ten Lawyers: The Need for Attorney Training in the New York Integrated Domestic Violence Courts*, 69 SYRACUSE L. REV. 635, 640 (2019).

²⁰ Although there has been much discussion surrounding the uses of the terms “victim” and “survivor” in the context of domestic violence, such discussions are outside the scope of this Note. As such, the author does not intend to connote any negative meaning behind her usage of the term “victim” throughout. Instead, the author only intends to illustrate that in these situations, the abuse is ongoing and has not ceased, therefore signs of active abuse are still present.

²¹ Kristen Olsen, *What All Attorneys Should Know About Assisting Victims of Domestic Violence in Utah*, UTAH BAR J., July–Aug. 2023, at 17, 17.

²² Burman, *supra* note 2, at 209; see also Ayres, *supra* note 8, at 228.

²³ Saffren, *supra* note 3, at 15.

²⁴ In some states, medical professionals are mandatory reporters for instances of domestic violence. Victims or survivors may be less likely to seek medical treatment because they do not want police involved. Victims or survivors are reluctant to report to the police because of fear of retaliation from the abuser and police ineffectiveness in dealing with such matters. Hafemeister, *supra* note 14, at 923, 952–53.

²⁵ See Olsen, *supra* note 21, at 17.

²⁶ Craig-Taylor, *supra* note 13, at 33–35.

situation or forming a safety plan.²⁷ Further, victims may be too afraid to come forward with this information at all,²⁸ and the attorney, in his association with the client, might be the first outsider with the opportunity to recognize warning signs. This squarely places the attorney in a position to act or not act, with the result of the latter potentially leading to the client's death.²⁹ As such, ignorance of such an evasive and fatal legal issue may lead to ethical violations³⁰ and could constitute forms of legal malpractice.³¹

Lawyers are ethically required to be competent in their representation of clients.³² While lawyers are not expected nor required to practice in areas where they are not competent,³³ the Model Rules of Professional Conduct explicitly suggest that lawyers act "with commitment and dedication" to their client's interests.³⁴ Acting with "commitment and dedication" to the client's interests may include a well-rounded consideration of all factors that may alter an attorney's advice during the representation.³⁵ Additionally, competence includes recognizing other legal issues that may arise during the representation.³⁶ In these situations, lawyers are expected to identify potential crossover legal issues, which could consist of a referral to another attorney or organization that is best suited to address that legal problem.³⁷

Lawyers must maintain competency by staying abreast of legal developments and complying with jurisdictional continuing legal education (CLE) requirements.³⁸ Almost all states require lawyers to complete a specified number of continuing legal education credits annually to help

²⁷ Buel, *supra* note 4, at 938.

²⁸ See Hafemeister, *supra* note 14, at 923, 962, 965 (explaining that victims or survivors are often hostages isolated from ordinary means of help who are hesitant to seek assistance from medical professionals and law enforcement).

²⁹ Saffren, *supra* note 3, at 3.

³⁰ *Id.*; Craig-Taylor, *supra* note 13, at 32–36; Katherine M. Sharkey, *Ethical Considerations: Representing accused batterers in domestic relations proceedings*, MICH. BAR J., Jan. 2023, at 24, 26.

³¹ While this has not yet constituted legal malpractice, scholars opine that the potential exists, and it is where we are headed. See Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7, 7 (2005); Buel, *supra* note 4, at 938; Sharkey, *supra* note 30, at 26. To clarify, attorneys are not expected to practice in areas with which they are unfamiliar. See MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023). However, many attorneys may still find themselves in situations where they need to consider how a client's experience with domestic violence will affect the subject matter of representation. Additionally, attorneys may accept clients outside their practice areas so long as the requisite competence level "can be achieved by reasonable preparation." *Id.* at r. 1.1 cmt. 4. Moreover, attorneys are permitted to provide limited advice or assistance in emergency situations in which they lack competence. *Id.* at r. 1.1 cmt. 3.

³² MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

³³ See *id.*

³⁴ *Id.* at r. 1.3 cmt. 1.

³⁵ See Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 204 (2018).

³⁶ MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2023).

³⁷ *Id.* at r. 1.1 cmt. 1; Drew, *supra* note 31, at 8.

³⁸ MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2023).

“maintain a level of professionalism in the industry” and to ensure practicing lawyers stay informed of new developments in the law.³⁹ Within that annual requirement, most states have specified that a certain number of credits be devoted to ethics-related topics.⁴⁰ Responding to the increased prevalence of substance abuse in the legal profession, some states have instructed attorneys to complete a specified number of credits in mental health and substance abuse,⁴¹ including Illinois.⁴² Similarly, some states, including Illinois, have responded to recent diversity, equity, and inclusion initiatives by requiring CLEs to address those concerns as well.⁴³

Despite the increased prevalence of domestic violence nationwide, particularly the record-high spikes since the COVID-19 pandemic and associated lockdowns,⁴⁴ and a lawyer’s intimate connection with the legal system, lawyers remain the only legal profession not required to receive any training in the subject matter.⁴⁵

This Note proposes implementing a requirement for annual domestic violence training through continuing legal education to give all attorneys surface-level competency in the complexities of domestic violence law, information on how to screen for domestic violence in their clientele, and instructions on how to appropriately respond to clients who may need preliminary assistance. Part I provides a brief history and overview of the Model Rules of Professional Conduct, continuing legal education, and domestic violence generally. Part II identifies the consequences of not requiring domestic violence education for all attorneys. Finally, part III proposes implementing an annual mandatory continuing legal education requirement in domestic violence topics for all practicing attorneys.

³⁹ *Minimum CLE Hours by State*, LORMAN, <https://www.lorman.com/Minimum-CLE-Hours-by-State#:~:text=The%20courses%20are%20required%20to,developments%20in%20the%20legal%20system> (last visited Mar. 13, 2025).

⁴⁰ *Mandatory CLE*, AM. BAR ASS’N, <https://www.americanbar.org/events-cle/mcle/> (last visited Jan. 27, 2025).

⁴¹ *Id.*

⁴² ILL. SUP. CT. R. 794 (2024).

⁴³ *Id.*

⁴⁴ Liz Mineo, *Law School’s Marianna Yang Examines Rise in Factors, Hurdles in Courts for Victims*, HARV. GAZETTE (June 29, 2022), <https://news.harvard.edu/gazette/story/2022/06/shadow-pandemic-of-domestic-violence/>.

⁴⁵ See Lehmann, *supra* note 19, at 651.

I. BRIEF HISTORY AND OVERVIEW

A. The Model Rules of Professional Conduct and Continuing Legal Education

What is now known as the Model Rules of Professional Conduct first began in 1908 as the Canons of Professional Ethics.⁴⁶ From there, it developed into the Model Code of Professional Responsibility in 1969.⁴⁷ According to former White House counsel John W. Dean III, a whistleblower in the Watergate scandal in 1972,⁴⁸ “legal ethics boiled down to: ‘Don’t lie, don’t cheat, don’t steal, and don’t advertise.’”⁴⁹ Up until 1973, ethics courses were not mandatory in law schools.⁵⁰ At the time, lawyer ethics were sounded in “vaguely worded platitudes” that lawyers were not obligated to learn.⁵¹ Ethics and professionalism played “almost no role in any lawyer’s mind,” but Watergate changed that.⁵² Twenty-one lawyers were indicted in the Watergate scandal in 1973, which sparked calls for enhanced regulation of the legal profession.⁵³

Following Watergate, in 1983, the American Bar Association replaced the Model Code of Professional Responsibility with the Model Rules of Professional Conduct (“Model Rules”).⁵⁴ The Model Rules replaced the “vaguely worded platitudes” with “rigid, enforceable rules” accompanied by comments to guide practicing lawyers.⁵⁵ Now, the Model Rules have been adopted in forty-nine states.⁵⁶

⁴⁶ Emily Holland, *ABA Model Rules: The Laws Governing Lawyers*, ADR TIMES (June 8, 2023), <https://www.adrtimes.com/aba-model-rules/>.

⁴⁷ *Id.*

⁴⁸ The Watergate scandal of 1972 began when several members of President Nixon’s reelection campaign were caught wiretapping phones and stealing documents from the Democratic National Committee office located in the Watergate complex in Washington, D.C. *Watergate Scandal*, HIST., <https://www.history.com/topics/1970s/watergate> (last updated Aug. 1, 2024). Nixon attempted to cover up the crimes, but it led to his eventual resignation from office in August 1974. *Id.* This scandal was highly scrutinized and caused many to question the presidency and legal leaders alike. *Id.*

⁴⁹ Mark Hansen, *1965-1974: Watergate and the Rise of Legal Ethics*, AM. BAR ASS’N J. (Jan. 1, 2015, 5:10 AM), https://www.abajournal.com/magazine/article/1965_1974_watergate_and_the_rise_of_legal_ethics.

⁵⁰ Hannah Hayes, *Professional Ethics Compliance: From Watergate to Today*, AM. BAR ASS’N (July 10, 2015), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2015/summer/professional_ethics_compliance_watergate_today/?login.

⁵¹ Hansen, *supra* note 49.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ California is the lone hold-out, although its professionalism rules are substantively the same as those provided in the Model Rules. *Id.*

The first rule outlined in the Model Rules is a lawyer's duty of competence.⁵⁷ Specifically, it states that "[a] lawyer shall provide competent representation to a client [which requires] the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."⁵⁸ When determining whether the lawyer has the requisite skill, factors such as the complexity and specialized nature of the matter and the lawyer's training and experience in the field are considered.⁵⁹ Further, the Model Rules explain that the lawyer may handle matters with which he is unfamiliar, but "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve"⁶⁰ The last comment to this rule emphasizes the need for attorneys to maintain competence by keeping abreast of developments in the law and engaging in continuing legal education requirements.⁶¹

Continuing legal education, or CLE, has become the primary method for lawyers to receive education and training after law school.⁶² CLE first began as a voluntary program to assist attorneys returning from World War II in familiarizing themselves with changes in the law brought about by President Roosevelt's New Deal.⁶³ Minnesota was the first state to adopt mandatory CLE requirements in 1975.⁶⁴ As of today, all but five states within U.S. jurisdictions require annual CLEs for all practicing attorneys.⁶⁵

Mandatory CLEs have their critics.⁶⁶ Opponents argue that there is "no evidence" that mandatory CLEs accomplish their purpose of improving attorney competency.⁶⁷ Others argue that voluntary CLEs would be more effective than mandatory ones.⁶⁸ However, "mandatory education is effective [] because it reaches the significant number of people who do not take courses unless required."⁶⁹ While some attorneys may not seriously consider the information in every mandatory CLE course, implementing such a requirement still nets a more educated legal profession.⁷⁰ Mandatory CLEs are the most feasible way to promote competency and will continue to play a

⁵⁷ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

⁵⁸ *Id.*

⁵⁹ *Id.* at r. 1.1 cmt. 1.

⁶⁰ *Id.* at r. 1.1 cmt. 2.

⁶¹ *Id.* at r. 1.1 cmt. 8.

⁶² Cheri A. Harris, *MCLE: The Perils, Pitfalls, and Promise of Regulation*, 40 VAL. U. L. REV. 359, 359 (2006).

⁶³ *Id.* at 361.

⁶⁴ *Id.*

⁶⁵ *Mandatory CLE*, *supra* note 40.

⁶⁶ Harris, *supra* note 62, at 366–71.

⁶⁷ *Id.* at 370.

⁶⁸ *Id.* at 369–70.

⁶⁹ *Id.* at 370.

⁷⁰ *See id.*

crucial role in fostering the skills necessary for practice.⁷¹ Lawyers must commit to lifelong learning to safeguard the U.S. justice system effectively.⁷² This is perhaps most illustrated in how the justice system has consistently treated domestic violence⁷³ and why this mandatory requirement should be expanded to include this complex topic.

B. The Development of Domestic Violence Law in the United States

Domestic violence is more than just physical violence; it “is a pattern of coercive control that one person exercises over another.”⁷⁴ Abusers maintain control over their victims through numerous forms of violence, including physical abuse, sexual assault, manipulation, stalking, isolation, limiting access to finances, threats, humiliation, and more.⁷⁵ Domestic violence has been a recurring theme “since recorded history began.”⁷⁶ In fact, a husband striking his wife was not considered wrongful behavior in the fifteenth century; it was encouraged by the early Catholic Church as a way for a husband to exert control over his wife to “benefit her soul.”⁷⁷ This practice was subsequently endorsed by American common law in the early nineteenth century, which permitted a man to beat his wife without subjecting himself to criminal prosecution.⁷⁸ U.S. courts recognized this right and permitted a husband to beat his wife as long as he did not “use a switch any bigger around than his thumb,”⁷⁹ giving birth to the still-popular phrase “rule of thumb.”⁸⁰

This widespread acceptance of domestic abuse persisted until 1871, when the Alabama Supreme Court punished George Fulgham for assaulting his wife, holding for the first time in American history⁸¹ that a husband

⁷¹ *Id.* at 363, 368.

⁷² *Id.* at 365.

⁷³ See generally *A History of Domestic Violence: Has Anything Changed?*, BETTERHELP, <https://www.betterhelp.com/advice/domestic-violence/a-history-of-domestic-violence-how-much-have-things-changed/> (last updated Feb. 19, 2025) (providing an overview of how domestic violence has historically been treated).

⁷⁴ *What is Domestic Violence?*, ILL. COAL. AGAINST DOMESTIC VIOLENCE, <https://www.ilcadv.org/what-is-domestic-violence/> (last visited Feb. 23, 2025); see also *Domestic Violence*, U.S. DEP’T OF JUST., <https://www.justice.gov/ovw/domestic-violence> (last visited Feb. 23, 2025).

⁷⁵ *Domestic Violence*, *supra* note 74; *Types of Abuse*, ILL. COAL. AGAINST DOMESTIC VIOLENCE, <https://www.ilcadv.org/types-of-abuse/> (last visited Feb. 23, 2025).

⁷⁶ *A History of Domestic Violence: Has Anything Changed?*, *supra* note 73.

⁷⁷ *Id.*

⁷⁸ *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1528 (D. Conn. 1984).

⁷⁹ Del Martin, *Battered Women: Issues of Public Policy*, U.S. COMM. C.R. 6 (Jan. 30-31, 1978), <https://www.ojp.gov/pdffiles1/Digitization/53356NCJRS.pdf>.

⁸⁰ Sheila Simon, *Greatest Hits: Domestic Violence in American Country Music*, 82 OR. L. REV. 1107, 1108 (2003).

⁸¹ *A History of Domestic Violence: Has Anything Changed?*, *supra* note 73.

beating his wife is a “relic of barbarism.”⁸² In *Fulgham v. State*, George Fulgham was excessively punishing the couple’s child, causing the child to run away from the father.⁸³ George then chased the child while his wife, Matilda, protested the father’s actions.⁸⁴ Reacting to his wife’s protest, George struck Matilda twice on her back with a board and was subsequently charged with assault and battery.⁸⁵ He requested the court provide a jury instruction explaining that “a husband can not be convicted of a battery on his wife unless he inflicts a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness.”⁸⁶ The court refused to give this instruction, holding that it was a “relic of barbarism” and had no place in Alabama law.⁸⁷

Despite this, it was not until the 1970s that significant progress began with the opening of the first domestic violence shelter in New York City.⁸⁸ Before the 1970s, many police departments had “hands off” policies when dealing with these “domestic disputes,” in which they were trained to avoid arresting the abuser.⁸⁹ Instead, they were instructed to mediate the dispute on the scene because it was an “interpersonal conflict unsuited for police attention and inappropriate for prosecution”⁹⁰ Women could finally obtain protective orders against their violent partners in the 1970s; however, “enforcement was weak, penalties for violations were minor, and use in emergencies was not possible.”⁹¹ The 1980s brought reform, with forty-seven states passing domestic violence legislation, which called for changes and improvements in the legal enforcement of the crime.⁹²

Among those states was Illinois.⁹³ The Illinois Domestic Violence Act was enacted in 1986.⁹⁴ In passing this Act, the Illinois Legislature recognized that domestic violence has been ineffectively dealt with in the legal system.⁹⁵ The Act provides examples of such ineffectiveness, such as allowing abusers to escape criminal or financial liability and failing to acknowledge the criminal nature of domestic violence.⁹⁶ It also recognized that despite new

⁸² *Fulgham v. State*, 46 Ala. 143, 144 (1871).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *A History of Domestic Violence: Has Anything Changed?*, *supra* note 73.

⁸⁹ Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, NAT’L INST. JUST. 8 (Jan. 1996), <https://www.ojp.gov/pdffiles/crimdom.pdf>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 9.

⁹³ 750 ILL. COMP. STAT. ANN. 60/101 (West 1986).

⁹⁴ *Id.*

⁹⁵ *Id.* at 60/102.

⁹⁶ *Id.*

laws geared toward improving these inefficiencies, there is still “widespread failure” to protect victims.⁹⁷

Louisiana passed its Protection from Family Violence Act in 1982.⁹⁸ In it, the Louisiana Legislature made statutory findings of an increased prevalence of domestic violence while simultaneously being the “single most unreported crime” in Louisiana.⁹⁹ Additionally, Louisiana’s Act highlighted the inadequacy of its marriage dissolution laws in protecting domestic violence victims.¹⁰⁰ Further, it noted that engrained societal attitudes about domestic abuse had been reflected in law enforcement and prosecutorial policies, resulting in “different treatment” of victims of family violence when compared to violence between strangers.¹⁰¹ In passing this act, the Louisiana Legislature intended to emphasize the need to recognize domestic abuse as a crime that will not be tolerated.¹⁰²

Tennessee echoed the concerns of other states when enacting its domestic violence laws.¹⁰³ Specifically, the Tennessee Legislature recognized the lack of enforcement of its criminal domestic abuse laws as compared to violent crimes between strangers.¹⁰⁴ Additionally, it emphasized the seriousness of domestic violence and sought to ensure that its laws provide “enhanced protection” from domestic abuse.¹⁰⁵ It further reinforced that such violence is not tolerated in the state.¹⁰⁶

Along with the passage of numerous state statutes, police departments began changing their procedures in response to successful litigation by women suing police departments for failure to protect them from their violent partners.¹⁰⁷ Police departments adopted mandatory arrest policies,¹⁰⁸ and

⁹⁷ *Id.*

⁹⁸ LA. STAT. ANN. § 46:2121 (2018).

⁹⁹ *Id.*

¹⁰⁰ LA. STAT. ANN. § 46:2131 (2015).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See* TENN. CODE ANN. § 36-3-618 (West 2024).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Fagan, *supra* note 89; *see, e.g.*, Thurman v. City of Torrington, 595 F. Supp 1521 (D. Conn. 1984) (holding that the City’s motion to dismiss should not be granted because the plaintiff, Ms. Thurman, showed the police department’s repeated refusal to protect her from her abusive partner following the guidance of the department’s administrative regulation to not arrest batterers if they are intimately involved with their victims).

¹⁰⁸ Whether these mandatory arrest policies have remained successful is another matter entirely. *See* Myrna S. Raeder, *Preserving Family Ties for Domestic Violence Survivors and Their Children by Invoking a Human Rights Approach to Avoid the Criminalization of Mothers Based on the Acts and Accusations of Their Batterers*, 17 J. GENDER, RACE & JUST. 105, 110 (2014); *see generally* Peter S. Hovmand et al., *Women Arrested for Domestic Violence: Unintended Consequences of Pro and Mandatory Arrest Policies*, 25 SYS. DYNAMICS REV. 161 (2009) (discussing the negative impacts of mandatory arrest policies and how these policies have resulted in an increase in the number of domestic violence victims also getting arrested alongside their violent partners); *see also* Sandy

prosecutors' offices created domestic violence units.¹⁰⁹ Many states also revised legislation to allow *ex parte* emergency relief for protective orders.¹¹⁰ By 1994, Congress passed the Violence Against Women Act, which provided significant funds for “investigating and prosecuting violent crimes against women, stepped up requirements for restitution to survivors, and made civil litigation possible where the criminal justice system fell short.”¹¹¹

Despite significant progress made toward the recognition and development of domestic violence laws across the United States, the past indifference and acceptance of domestic violence remain ingrained in modern jurisprudence.¹¹² Courts tend to equate domestic violence with private family problems stemming from “relationships gone bad” and “anger and jealousy.”¹¹³ The treatment of domestic violence cases as “low status” and “bothersome and difficult” in the courts has also directly influenced how lawyers approach these matters.¹¹⁴ The sad reality is that domestic abuse remains a pervasive and stigmatized crime,¹¹⁵ with an estimated twelve million victims annually and more that go unreported.¹¹⁶

II. THE FATAL CONSEQUENCES WITHOUT MANDATORY DOMESTIC VIOLENCE EDUCATION

A. Domestic Violence is Nuanced and Requires Particularized Training

Specialized training in domestic violence is necessary because of the potentially dangerous misconceptions of it¹¹⁷ and the drastic underreporting of the crime.¹¹⁸ Many state statutes calling for required domestic violence training for judges and police officers recognize the need to consult domestic abuse experts to create and implement their training programs.¹¹⁹ Training is

Chesnut, *The Practice of Dual Arrests in Domestic Violence Situations: Does it Accomplish Anything?*, 70 MISS. L.J. 971, 976–78 (2001) (discussing how mandatory arrest policies resulted in an unofficial policy of arresting both parties if the police could not ascertain who was the aggressor and leaving it to the court to sort out later); *but see* Joan Zorza, *Mandatory Arrest for Domestic Violence: Why it May Prove the Best First Step in Curbing Repeat Abuse*, 10 CRIM. JUST. 2, 51 (1995) (suggesting ways to reduce instances of arrests of domestic violence victims while favoring the overall mandatory arrest scheme).

¹⁰⁹ Fagan, *supra* note 89, at 9.

¹¹⁰ *Id.*

¹¹¹ *A History of Domestic Violence: Has Anything Changed?*, *supra* note 73.

¹¹² Craig-Taylor, *supra* note 13, at 43.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Lehmann, *supra* note 19, at 637.

¹¹⁶ Dublin, *supra* note 5, at 26.

¹¹⁷ Hafemeister, *supra* note 14, at 969.

¹¹⁸ Dublin, *supra* note 5, at 26.

¹¹⁹ *See, e.g.*, 750 ILL. COMP. STAT. ANN. 60/301.1 (West 2017); KY. REV. STAT. ANN. § 15.334 (West 2020); MINN. STAT. ANN. § 480.30 (West 2024).

necessary for attorneys to effectively counsel and represent their clients, regardless of their practice areas.¹²⁰ Educating attorneys on the background and intricacies of domestic violence is a crucial first step to providing competent representation to clients.¹²¹

The nuances of domestic violence are vast, and one commonly overlooked issue in family and criminal law is the power dynamic between the abuser and the victim, especially in a court setting.¹²² Victims of domestic abuse do not behave in a way that society or courts expect.¹²³ Many experience feelings of powerlessness when near their abuser.¹²⁴ As explained:

The abuser is likely to be confident, assertive, calm, and “in control.” He puts on a good appearance in court. Conversely, the victim is likely to be frightened, shaken, nervous, uncertain and often depressed. Knowing that the abuser has successfully managed to manipulate others to maintain control, the victim realistically fears the abuser can also manipulate the legal system; consequently, the victim may appear paranoid when she is merely fearful that the abuser will again be successful in the manipulation of those around him. *Judges, law guardians, attorneys, forensic evaluators and all other actors in the legal and social services system must be aware of this problem in order to stop the cycle of manipulation.*¹²⁵

More generally, any untrained lawyer is likely to cause more harm to a client who is involved with domestic abuse, regardless of whether it is the subject matter of the representation or not.¹²⁶ For example, when confronted with a direct request for assistance, untrained attorneys tend to believe that counseling a client to “just leave” the abuser is the logical solution to resolve the abuse.¹²⁷ However, victims are approximately seventy-five percent more likely to be murdered by their abusers while fleeing the relationship or soon after leaving.¹²⁸ This concept is called “separation violence,” and it is the typical pattern of abusers who wish to reassert control over their victims when they feel they are losing that control.¹²⁹ Extensive safety planning is imperative for all legal matters involving domestic violence¹³⁰ because

¹²⁰ Saffren, *supra* note 3, at 6.

¹²¹ See Buel, *supra* note 4, at 937.

¹²² Lehmann, *supra* note 19, at 653.

¹²³ See Nancy S. Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 FORDHAM URBAN L.J. 817, 831–32 (2000).

¹²⁴ Craig-Taylor, *supra* note 13.

¹²⁵ Erickson, *supra* note 123, at 832 (emphasis added).

¹²⁶ Craig-Taylor, *supra* note 13, at 32.

¹²⁷ Buel, *supra* note 4, at 937.

¹²⁸ *Id.* at 937–38.

¹²⁹ *Id.* at 937.

¹³⁰ See *id.*

separation violence is triggered any time the abuser perceives any loss of control over his victim.¹³¹ Abusers use many tactics to assert control and dominance over their victims, and not all of them are physical.¹³² Other forms of control include isolation, over-protection, threats, and financial control.¹³³ Not all lawyers need to be trained to conduct safety planning for every possible situation.¹³⁴ However, all lawyers should be familiar with available community resources to connect the client with and ensure the client's safety is considered at every step in the legal matter.¹³⁵

The untrained attorneys' misconceptions are likely rooted in society's response to domestic violence.¹³⁶ Society tends to blame the victim by asking, "Why don't they leave?"¹³⁷ Aside from separation violence, there are numerous reasons why a victim may struggle to separate from her abuser.¹³⁸ From fear of homelessness to having unsupportive friends and family, the barriers are enough to keep victims stuck in a perpetual cycle of abuse.¹³⁹ Further, victims feel a lack of support from police officers who tend to treat the crime as a "domestic dispute" and prosecutors who are reluctant to prosecute domestic violence cases.¹⁴⁰ Some victims may experience emotional abuse, which not only destroys their self-esteem but makes them feel hopeless in ever being able to escape.¹⁴¹ Additionally, abusers threaten to take custody of their children if they ever try to leave, and because of the victim's already low confidence in the legal system, she believes him.¹⁴²

The psychology and nuances underlying domestic violence require attorneys to be trauma-informed.¹⁴³ Through trauma-informed lawyering, attorneys learn how to identify trauma, how trauma affects victims, and how to adjust their representation accordingly.¹⁴⁴ Training in the trauma-informed approach is particularly crucial for attorneys because they are trained in law school to separate emotions from the law when analyzing legal problems.¹⁴⁵

¹³¹ *Id.*

¹³² *Abuse and Manipulation Tactics*, WOMEN'S RURAL RES. CTR., <https://wrrcsa.org/education/how-to-hide-your-tracks-online/> (last visited Jan. 28, 2025).

¹³³ *Id.*

¹³⁴ Buel, *supra* note 4, at 938.

¹³⁵ *Id.*

¹³⁶ *See generally 11 Reasons Why People in Abusive Relationships Can't "Just Leave,"* ONELOVE, https://www.joinonelove.org/learn/why_leaving_abuse_is_hard/ (last visited Jan. 28, 2025).

¹³⁷ *Id.*

¹³⁸ *Why People Stay*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/support-others/why-people-stay-in-an-abusive-relationship/> (last visited Jan. 28, 2025).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *11 Reasons Why People in Abusive Relationships Can't "Just Leave,"* *supra* note 136.

¹⁴² *Why People Stay*, *supra* note 138.

¹⁴³ Lehmann, *supra* note 19, at 653.

¹⁴⁴ Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 371 (2016).

¹⁴⁵ *Id.*

However, having emotions and empathy are imperative to representing a client with a history of trauma, regardless of whether the trauma is the subject of the immediate representation.¹⁴⁶

B. Attorneys in All Practice Areas Should Be Educated

Upon being admitted to the bar, lawyers are sworn into the legal profession, with many swearing-in ceremonies including an oath to do no harm to the profession, the client, or the community.¹⁴⁷ Without proper education and training, lawyers may harm victims of domestic violence in their efforts, or lack of efforts, to help.¹⁴⁸ In fact, one 1994 study found that attorneys and judges mishandle domestic violence cases partially because of their lack of knowledge of the subject matter.¹⁴⁹ This case mismanagement is present in both the high-incidence practice areas of family and criminal law as well as other practice areas not traditionally associated with domestic violence victims.¹⁵⁰

1. Family Law and Criminal Law Are Undoubtedly the High-Incidence Practice Areas

Because of the nature of domestic violence, there is no doubt that family lawyers and criminal lawyers routinely encounter victims during their practice lifetimes.¹⁵¹ Family lawyers are intertwined with the personal relations of their clients, helping them navigate the court system to obtain marriage dissolutions or modifications to child custody orders. Because of their intimate connection with their clients, family lawyers likely see more victims of domestic violence than any other civil lawyer.¹⁵² Despite this, family law attorneys are not required to receive domestic violence training, although training and best practice guides are available to lawyers who voluntarily educate themselves.¹⁵³

¹⁴⁶ *Id.*

¹⁴⁷ Allan Head, *First, Do No Harm*, 29 BAR LEADER, Jan.–Feb. 2005, https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2004_05/2903/harm/#:~:text=The%20challenge%20here%20is%20to,place%20all%20over%20the%20country.

¹⁴⁸ Craig-Taylor, *supra* note 13.

¹⁴⁹ Buel, *supra* note 4, at 937.

¹⁵⁰ *Id.*

¹⁵¹ Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1028 (1995).

¹⁵² *Id.*

¹⁵³ See, e.g., E. Nicole Carrion, *A Best Practices Guide for Attorneys Representing Victims of Domestic Violence*, 13 ILL. ST. BAR ASS'N (Mar. 2008), [https://www.isba.org/committees/women/newsletter/2008/03/abestpracticesguideforattorneysrepr#:~:text=PDF%20version%20\(for%20best%20printing\);The%20Commission%20on%20Domestic%20&%20Sexual%20Violence,AM.BAR.ASS'N,https://www.americanbar.org/groups/domesticviolence/](https://www.isba.org/committees/women/newsletter/2008/03/abestpracticesguideforattorneysrepr#:~:text=PDF%20version%20(for%20best%20printing);The%20Commission%20on%20Domestic%20&%20Sexual%20Violence,AM.BAR.ASS'N,https://www.americanbar.org/groups/domesticviolence/) (last visited Jan. 27, 2025).

This lack of training may cause family lawyers to mishandle cases involving domestic violence.¹⁵⁴ For example, the nature of domestic violence requires a constant and repetitive need for safety planning with each step in the litigation process.¹⁵⁵ Safety planning involves the attorney and client discussing whether an action or inaction would increase or decrease the likelihood of subsequent abuse and then putting plans in place to prepare for the abuser's reaction.¹⁵⁶ An inexperienced family lawyer may obtain an order of protection for their client and believe they have sufficiently addressed and resolved the abuse, but that protective order could be what triggers separation violence because it threatens the abuser's power and control over his victim.¹⁵⁷

Additionally, a well-intentioned family attorney may fail to recognize that even a standard request for child support may subject his client to further abuse.¹⁵⁸ This was illustrated in *Arizona v. Ketchner*, in which the batterer shot his girlfriend, Jennifer, in the head after violently stabbing her daughter to death during a sibling's birthday party.¹⁵⁹ The gruesome attack came just four months after the abuser threatened to "slit [Jennifer's] throat" if she sued him for child support.¹⁶⁰ The frightening reality for family lawyers is that they must engage in thoughtful safety planning at every step in litigation to avoid exposing their clients to further risks.

Risks of future harm are not the only considerations that family attorneys should have when dealing with domestic violence. Family lawyers should also be trained on how abusers use the legal system to inflict further abuse on their victims, such as through mediation that is usually court-ordered in most contested domestic relations matters.¹⁶¹ Mediation in domestic violence situations is often counterproductive and dangerous to the victim because of the power imbalance between the abuser and victim.¹⁶² Moreover, it places victims in situations where abusers may feel as if their ability to control is threatened, resulting in an increased risk of violence.¹⁶³ Abusers also routinely use the civil discovery process with an intent to harass or intimidate their victims,¹⁶⁴ such as using the judicial system to require their

¹⁵⁴ Drew, *supra* note 31, at 13.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Arizona v. Ketchner*, 339 P.3d 645, 646–47 (Ariz. 2014).

¹⁶⁰ *Id.* at 646.

¹⁶¹ Drew, *supra* note 31, at 20.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ PROTECTING CRIME VICTIMS FROM DISCOVERY REQUESTS IN CIVIL PROCEEDING DURING THE PENDENCY OF A RELATED CRIMINAL CASE, NAT'L CRIME VICTIM L. INST., 4–5 (2023), https://ncvli.org/wp-content/uploads/2023/08/Protecting-Crime-Victims-From-Civil-Discovery-Bulletin_Final_8.2023.pdf.

victims turn over text message chains or the victim's mental health therapy records.¹⁶⁵ Armed with this knowledge, an attorney could provide more targeted legal advocacy in an effort to diminish the harassment and intimidation.

Additionally, family lawyers may fail to address violations of court orders, such as protective orders or custody agreements, because of their mistaken assumption that the client's abuse waned when the order went into effect.¹⁶⁶ The attorney may perceive the violations as "minor" and, therefore, not worth addressing.¹⁶⁷ However, abusers often use these minor violations to prove to their victims that they are still powerful and that they can violate court orders without consequences.¹⁶⁸ A lawyer's failure to address these violations may further signal to the abuser that court orders will not be strictly enforced, therefore also decreasing future compliance.¹⁶⁹

Family attorneys should also know how their discussions with the victim-client impact the attorney-client relationship.¹⁷⁰ Violence in the home often leads to significantly diminished self-esteem, a loss of voice, a loss of control, and invasive feelings of hopelessness.¹⁷¹ Family attorneys are involved in some of the most intimate details of their clients' lives.¹⁷² Despite being just another day at the office for the attorney, the attorney must recognize that his every uttered remark to the victim-client can potentially destroy the foundation of the attorney-client relationship.¹⁷³ Dismissing a

¹⁶⁵ An abuser often controls who the victim contacts and monitors her phone calls and text messages during the relationship. See *Power and Control*, THE HOTLINE, <https://www.thehotline.org/identify-abuse/power-and-control/> (last visited Mar. 15, 2025). Though separated, the abuser is still able to monitor the victim's correspondence through civil discovery rules because of the broad scope of potentially relevant information. FED. R. CIV. PROC. 26(b)(1). Additionally, mental health therapy records are generally discoverable in child custody cases. Ike Vanden Eykel & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases*, 25 J. AM. ACAD. MATRIM. LAWS. 453, 460–61 (2013). The fact that the abuser can obtain those records could chill the victim's mental health progress, fearing that anything her therapist types in her appointment notes winds up in the hands of her abuser.

¹⁶⁶ Drew, *supra* note 31, at 15.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Interview with Sheila Simon, Assoc. Professor of L., S. Ill. U. Simmons L. Sch., in Carbondale, Ill. (Feb. 21, 2024).

¹⁷¹ Craig-Taylor, *supra* note 13; *11 Reasons Why People in Abusive Relationships Can't "Just Leave," supra* note 136.

¹⁷² See generally Ayse Guler et al., *Self-Esteem in the Context of Intimate Partner Violence: A Concept Analysis*, 57 NURSING F. (Sept. 13, 2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10087188/pdf/NUF-57-1484.pdf> (analyzing self-esteem in connection with domestic violence and how it includes attributes such as self-affirmation and self-respect); see also Gregory L. Jantz, *The Damaging Effects of Emotional Abuse*, PSYCH. TODAY (May 28, 2024), <https://www.psychologytoday.com/us/blog/hope-for-relationships/202405/the-damaging-effects-of-emotional-abuse>.

¹⁷³ Interview with Sheila Simon, *supra* note 170.

victim's experiences damages the trust between attorney and client, which could result in a lost client for the attorney.¹⁷⁴

During an interview with Professor Sheila Simon,¹⁷⁵ Professor Simon discussed one woman who witnessed domestic violence against her child¹⁷⁶ and reported that all the progress she made rebuilding her self-esteem, finding her voice and sense of control, and remediating her feelings of hopelessness were irreparably shattered following a harsh remark made to her by her family law attorney.¹⁷⁷ She was the mother of a six-week-old infant who was physically abused by his father, resulting in contusions, fingernail marks, and a fractured collarbone.¹⁷⁸ As soon as she discovered the abuse, she sought medical attention for her son, met with law enforcement and child protective services, and filed for divorce.¹⁷⁹ After a period of time, the father was allowed supervised parenting time, which eventually led to being able to take the child to public places unsupervised when the child was approximately fourteen months old.¹⁸⁰ However, this father frequently found loopholes in their settlement agreements to justify his violations.¹⁸¹ One such occasion, he purported that the language permitting him to take the child to public places actually meant that he could take the child to his friends' private homes without his court-ordered supervisors.¹⁸² At their next parenting time exchange, he boasted to the mother that he had done just that while also informing her that the child was injured there when the father and the child allegedly fell down the stairs together.¹⁸³ Naturally, the mother called her attorney, expressing justifiable concern over the lack of supervision in a private home contrary to their settlement agreement which resulted in injury to the child.¹⁸⁴ Not only did the attorney tell the mother to "pick her battles," (thus reaffirming the father's ability to violate their agreement without consequences¹⁸⁵) but she included stern rhetoric that forever altered the

¹⁷⁴ *Id.*

¹⁷⁵ Sheila Simon is an Associate Professor of Law with the Southern Illinois University Simmons Law School in Carbondale, Illinois. *Id.* Prior to her role in higher education, Professor Simon worked at Land of Lincoln Legal Aid and as a State Prosecuting Attorney in Illinois. *Id.* She then transitioned to higher education by starting the domestic violence legal clinic at Southern Illinois University Simmons Law School. *Id.* In total, Professor Simon has worked with at least 500 domestic violence survivors in her approximate ten years of experience handling domestic violence cases. *Id.*

¹⁷⁶ A misnomer is that domestic violence is only perpetuated against intimate partners; however, many state statutes define domestic violence to include family and household members, such as children who also reside in the home. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 60/103 (West 2013).

¹⁷⁷ Interview with Sheila Simon, *supra* note 170.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Drew, *supra* note 31, at 15.

attorney-client relationship.¹⁸⁶ The attorney raised her voice and harshly responded, “Seems to me like he could just as easily smack your son around in a McDonald’s bathroom as he could in his friend’s basement, so how is a public place much better anyway!?”¹⁸⁷ The mother’s jaw dropped, and her voice was once again silenced.¹⁸⁸ It was then that she realized that her attorney was not confident that the public places provision could protect her son, even after her attorney encouraged her to sign off on it to settle the dispute and prevent going to trial.¹⁸⁹ All the feelings of hopelessness returned, fearing that neither her attorney nor the legal system could protect her son from his abusive father.¹⁹⁰

This is one example, and many victim-clients echoed these experiences and more.¹⁹¹ The difference between a routine client and a domestic violence victim is that the victim-client has often dealt with a wide variety of people who have let them down, and “lawyers are definitely on that list.”¹⁹² Even some family lawyers have informed clients that they are only representing them in the divorce itself and nothing involving the domestic violence issues because “claiming abuse won’t help” the family law matter.¹⁹³ Such comments lead to the victim concluding that her abuser was right—no one is going to help her.¹⁹⁴ Lawyers should strive to foster open communication with their clients, but such remarks often chill the clients’ speech, making them hesitant to inform their lawyers of their abusers’ future behaviors.¹⁹⁵ Attorneys who represent domestic violence victims should routinely engage with resources that remind them of the psychological traumas involved in such cases and how the attorney’s interactions with the client affect the victim’s recovery and the attorney-client relationship.¹⁹⁶

Similarly, prosecutors and criminal defense attorneys also regularly encounter domestic violence victims; however, they, too, are not uniformly required to receive domestic violence training, although training is available if they voluntarily choose to educate themselves.¹⁹⁷ Prosecutors and criminal

¹⁸⁶ Interview with Sheila Simon, *supra* note 170.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*; see also Craig-Taylor, *supra* note 13 (emphasizing that domestic violence victims are individuals who the system has failed which has caused victims to feel betrayed and deceived by the “allusion of justice”).

¹⁹³ Interview with Sheila Simon, *supra* note 170.

¹⁹⁴ *Id.*

¹⁹⁵ Drew, *supra* note 31, at 14; Interview with Sheila Simon, *supra* note 170.

¹⁹⁶ See Katz & Haldar, *supra* note 144, at 371.

¹⁹⁷ See, e.g., *Protocol for Law Enforcement & Prosecutors Responding to Victims of Domestic Violence*, ILL. CRIM. J. INFO. AUTH. (June 2020), https://ilfamilyviolence.icjia-api.cloud/uploads/DV_Protocols_FINAL_996a73d029.pdf.

defense attorneys alike should receive training in domestic violence, especially as it relates to the victim testifying as a witness in court.¹⁹⁸ Prosecutors may be prosecuting the abuser and need to call the victim as the primary witness.¹⁹⁹ Alternatively, criminal defense attorneys may be defending the abuser.²⁰⁰ When representing a victim of domestic violence, criminal defense attorneys may need to use the battered woman syndrome as a defense.²⁰¹ Survivors of intimate partner violence often experience symptoms of post-traumatic stress disorder, and this may intensify while they recount their story in a courtroom for all to hear.²⁰² Moreover, the judge's and jury's expectations of how a victim should appear often differ from how the victim actually appears when testifying as a witness.²⁰³ This leads to the inaccurate interpretation of a victim's courtroom demeanor as untruthful.²⁰⁴

It is human nature to believe good storytellers and those with captivating charisma who recount a story seamlessly from start to finish.²⁰⁵ However, survivors respond to their post-traumatic stress in a variety of ways, with few ways being identical.²⁰⁶ One way a domestic violence victim may respond to trauma is by becoming emotionally numb.²⁰⁷ A victim's emotionally numb testimony recounting her story of domestic assault, much like how she would describe the weather outside, often leads to decreased credibility in the courtroom.²⁰⁸ Alternatively, a domestic violence victim may respond to trauma by reliving the violence through flashbacks as she recounts her story.²⁰⁹ This often results in the victim's testimony being jumbled and non-sequential, further damaging her credibility in the courtroom.²¹⁰ Additionally, post-traumatic stress may cause hyperarousal in the victim, where she is perceived as highly paranoid and manic.²¹¹ A similar reaction may occur when the abuser gives the victim a familiar, threatening look just before she takes the stand, which triggers her fight or flight mode.²¹² This results in her testimony being perceived as chaotic, leaving her to fit the

¹⁹⁸ See Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399, 421 (2019).

¹⁹⁹ See generally *id.*

²⁰⁰ See generally *id.*

²⁰¹ See generally *id.*

²⁰² *Id.* at 421.

²⁰³ *Id.* at 405.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 406.

²⁰⁶ Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 733 (2003).

²⁰⁷ Epstein & Goodman, *supra* note 198, at 421.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 422.

²¹⁰ *Id.*

²¹¹ *Id.* at 421.

²¹² *Id.*

stereotype of a hysterical, paranoid female, all while discounting her credibility and the likelihood of conviction.²¹³

Educating prosecutors with this information will help them navigate courtroom testimony more effectively, as they can prepare their victim-witnesses with this information in mind. However, preparing a witness for courtroom testimony only applies to those victims who choose to report the abuse and participate in the criminal prosecution.²¹⁴ Many are so fearful for their lives that they recant statements, which creates further credibility issues of which prosecutors should also be aware.²¹⁵

2. All Practice Areas Encounter Domestic Violence Victims

Domestic violence is widespread and does not discriminate.²¹⁶ It affects every race, gender, culture, religion, socioeconomic class, and age group.²¹⁷ Annually, more than twelve million women and men are victims of rape, physical violence, or stalking by an intimate partner in the United States.²¹⁸ Those are just the reported numbers; it is well-known that many instances of domestic violence go unreported.²¹⁹ Despite the prevalence of domestic violence and cause for concern, lawyers continue to dangerously assume that because they do not practice family law, they will never encounter domestic violence victims in their practice.²²⁰ This erroneous belief fails to recognize that domestic violence encompasses more than the physical violence of hitting, choking, and rape; it also includes intimidation, stalking, isolation, manipulation, and economic control.²²¹

Given the pervasiveness of domestic violence, it is not only possible but very likely that every lawyer will encounter domestic violence in his or her career.²²² The nature of domestic violence invites crossover legal issues between nearly all practice areas.²²³ “[T]he possibilities for encountering domestic violence situations are endless.”²²⁴ Some possibilities may include an estate planning lawyer preparing estate plans for each spouse, one of whom desires to exert considerable control over the property and assets.²²⁵ A tax lawyer might encounter a client unaware that her spouse was not filing

²¹³ *Id.* at 422.

²¹⁴ *See* Saffren, *supra* note 3, at 7.

²¹⁵ *Id.*

²¹⁶ Buel, *supra* note 4, at 939.

²¹⁷ *Id.*

²¹⁸ Dublin, *supra* note 5, at 26.

²¹⁹ *Id.* at 26–27.

²²⁰ Burman, *supra* note 2, at 217.

²²¹ Hafemeister, *supra* note 14, at 945.

²²² Burman, *supra* note 2, at 217.

²²³ Saffren, *supra* note 3, at 15.

²²⁴ Craig-Taylor, *supra* note 13, at 35.

²²⁵ Burman, *supra* note 2, at 217.

their joint tax returns.²²⁶ A battered mother may face other legal issues, such as eviction and debt collection.²²⁷ A victim may seek the financial relief that a bankruptcy lawyer can provide because her spouse, or former spouse, controlled the finances.²²⁸ A corporate or business services lawyer may need to advise his business client on terminating an employee who has missed several days of work because the employee's spouse has been prohibiting her from leaving the house.²²⁹ That same employee may seek the assistance of an employment lawyer for wrongful termination due to the victim's domestic violence situation at home.²³⁰ A real estate lawyer may represent intimate partners in the selling of their primary residence, where signs of ongoing violence may appear.²³¹ A general practice lawyer could encounter all these situations and more.²³² The chances of a general practice lawyer never representing a domestic violence victim are "infinitesimally low."²³³ Moreover, a lawyer may need to recognize warning signs when his receptionist, legal assistant, paralegal, associate, or partner²³⁴ misses work or is unable to work effectively because of her own experiences with domestic violence at home.²³⁵

Even lawyers who dedicate their entire practice to representing only other lawyers need to understand domestic violence. In *Nebraska ex rel. v. Castrejon*, the Nebraska Supreme Court acknowledged an "alarming trend" of reported domestic violence within the legal profession.²³⁶ In response, the Nebraska Lawyers Assistance Program began providing resources to lawyers who experience intimate partner violence.²³⁷ Dazmi Castrejon was an attorney in Nebraska who faced discipline resulting from her mismanaging her Interest on Lawyers Trust Account, her failure to provide adequate accounting fees to a former client, and her delays in responding to inquiries relating to those matters.²³⁸ The novel issue before the Nebraska Supreme Court was whether the attorney's status as a victim of domestic violence

²²⁶ *Id.*

²²⁷ Buel, *supra* note 4, at 938.

²²⁸ Saffren, *supra* note 3, at 15.

²²⁹ *Id.*

²³⁰ *Id.* Some states have enacted laws that specifically address this employment concern by providing the victim-employee with a specified time of protected leave so that she may get the support, medical attention, and counseling she needs to safely leave her abuser. *See, e.g.*, 820 ILL. COMP. STAT. ANN. 180/20 (West 2025).

²³¹ Burman, *supra* note 2, at 217.

²³² *Id.*

²³³ Craig-Taylor, *supra* note 13, at 35.

²³⁴ Abusers do not discriminate based on socioeconomic class, profession, race, gender, religion, or sexual orientation. Domestic violence can impact *anyone*. Buel, *supra* note 4, at 939.

²³⁵ Burman, *supra* note 2, at 217.

²³⁶ State of Neb. *ex rel.* Couns. for Discipline Neb. S. Ct. v. Castrejon, 973 N.W.2d 701, 709 (Neb. 2022).

²³⁷ *Id.*

²³⁸ *Id.* at 704.

could serve as a mitigating factor for her discipline.²³⁹ The court held that it could.²⁴⁰ Specifically, the court relied on Castrejon's medical evidence, which showed that she was impacted by numerous traumas related to sexual assault and domestic violence, and the testimonial evidence, which linked the violence as a contributing cause of her misconduct.²⁴¹ The Nebraska court found "extraordinary mitigating factors" and lessened her discipline appropriately.²⁴²

Additionally, in *Oklahoma ex rel. v. Zannotti*, an Oklahoma lawyer was suspended for two years after his *nolo contendere* plea to criminal domestic violence charges.²⁴³ The attorney, Mark Zannotti, was charged with misdemeanor domestic abuse, assault and battery, and malicious injury to property stemming from Zannotti's violent attack against his girlfriend.²⁴⁴ During the attack, Zannotti smashed his girlfriend's cell phone, dragged her from her vehicle into the bedroom, threw her against a wall, head-butted her in the face, forced her on the bed, and choked her, all while demanding the last name of her male friend and threatening to kill him.²⁴⁵ The Oklahoma Supreme Court held that Zannotti violated 8.4(b) of the Oklahoma Rules of Professional Conduct.²⁴⁶ Relying on a comment to the rule, the court found that a lawyer's act of domestic violence demonstrates his unfitness to practice law.²⁴⁷ The Model Rules of Professional Conduct have a similar comment, which states that a lawyer is professionally answerable to offenses that indicate a lack of characteristics relevant to the practice of law, including "[o]ffenses involving violence."²⁴⁸ The Oklahoma court further noted that because of the rise of domestic abuse reports, it needed to send a message to other lawyers that "this misconduct is considered a serious breach of a lawyer's ethical duty and will not be tolerated."²⁴⁹

It is well-documented that attorneys in all practice areas encounter victims of domestic violence.²⁵⁰ From employment, tax, business services, estate planning, debt collection, and real estate, the chances remain "infinitesimally low" that an attorney never represents an abuse victim.²⁵¹

²³⁹ *Id.* at 708–09.

²⁴⁰ *Id.* at 709.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ State of Okla. *ex rel.* Okla. Bar Ass'n v. Zannotti, 330 P.3d 11, 12 (Okla. 2014).

²⁴⁴ *Id.* at 13.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 17.

²⁴⁷ *Id.* at 15.

²⁴⁸ MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 2 (AM. BAR ASS'N 2023).

²⁴⁹ *Zannotti*, 330 P.3d at 17.

²⁵⁰ Buel, *supra* note 4, at 937.

²⁵¹ Craig-Taylor, *supra* note 13, at 35.

This squarely places attorneys where they can identify the warning signs and provide preliminary assistance.²⁵²

3. Lawyers Remain the Only Legal Actors Not Required to Receive Domestic Violence Education

Legal organizations have recognized the need for domestic violence training in their respective fields, including police officers.²⁵³ Many states now require police officers to receive training or implement other special requirements in domestic violence situations.²⁵⁴ Illinois enacted a law in 2017 requiring new and existing law enforcement officers to receive education and training in domestic violence every five years.²⁵⁵ There, the law itself describes the need for police officers to better understand the psychology of domestic violence and to look beyond the physical evidence when assessing such situations.²⁵⁶ It suggests that officers consider the dynamics of the aggressor-victim relationship and the long-term effects of domestic violence and aim to prevent further victimization.²⁵⁷ Additionally, it indicates that the training should be developed in conjunction with community organizations with expertise in domestic violence to ensure the training is appropriate and effective.²⁵⁸

Similarly, Kentucky enacted a law requiring law enforcement students to receive domestic violence training as part of their basic training programs.²⁵⁹ Specifically, the training must cover the dynamics of domestic violence, its effects on adult and child victims, legal remedies, lethality issues, and available community resources.²⁶⁰ Kentucky also recognizes the importance of developing the training in consultation with social agencies with expertise in domestic violence matters.²⁶¹

In response to the high-profile murder of Gabby Petito in 2021,²⁶² Utah enacted a law in 2023 that provides for an extensive list of duties that law

²⁵² See Buel, *supra* note 4, at 937.

²⁵³ *Domestic Violence 101: How Should a Law Enforcement Agency Respond?*, CMTY. POLICING DISPATCH (COPS Office, D.C.), Oct. 2020, available at: https://cops.usdoj.gov/html/dispatch/10-2020/domestic_violence_101.html.

²⁵⁴ See, e.g., 750 ILL. COMP. STAT. ANN. 60/301.1 (West 2017); UTAH CODE ANN. § 77-36-2.1 (West 2023); KY. REV. STAT. ANN. § 15.334 (West 2020); IND. CODE ANN. § 5-2-1-9 (West 2023).

²⁵⁵ 750 ILL. COMP. STAT. ANN. 60/301.1 (West 2017).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ KY. REV. STAT. ANN. § 15.334 (West 2020).

²⁶⁰ *Id.*

²⁶¹ *Id.* at § 15.334(1)(b).

²⁶² Nada Hassanein, *Police Officers Can Help Prevent Domestic Violence Killings by Asking the Right Questions*, MD. MATTERS (December 11, 2023), <https://www.marylandmatters.org/2023/12/11/police-officers-can-help-prevent-domestic-violence-killings-by-asking-the-right-questions/>. The 2021 murder of Gabby Petito by her boyfriend, Brian Laundrie, was a highly publicized view of the

enforcement officers have when responding to domestic violence reports.²⁶³ When responding to a domestic violence call, a Utah officer is statutorily required to “use all reasonable means to protect the victim and prevent further violence”²⁶⁴ This includes confiscating weapons, arranging for emergency shelter for the victim and children, arranging for medical treatment, and providing the victim with a notice of rights, remedies, and services available.²⁶⁵ The law further requires the officer to complete a lethality assessment if the allegation is against an intimate partner.²⁶⁶ The lethality assessment is included in the statute itself, listing the twelve precise questions that an officer must ask the victim on-site to determine her risk of lethality.²⁶⁷ The questions are:

- (a) if the aggressor has ever used a weapon against the victim or threatened victim with a weapon;
- (b) if the aggressor has ever threatened to kill the victim or the victim’s children;
- (c) if the victim believes the aggressor will try to kill the victim;

nuances of domestic violence. Tamara Weitzman, et al., *Gabby Petito-Brian Laundrie Case: The Full Story Behind the High-Profile Deaths*, CBS NEWS (May 25, 2023, 11:05 AM), <https://www.cbsnews.com/news/gabby-petito-brian-laundrie-case-story-deaths/>; Aaron Katersky & Ivan Pereira, *Gabby Petito’s Family Contends in Lawsuit Utah Cops Treated Laundrie Like Victim*, ABC NEWS (Mar. 2, 2023, 6:49 PM), <https://abcnews.go.com/US/gabby-petitos-family-contentends-lawsuit-utah-cops-treated/story?id=97593426>. Petito and Laundrie were on a four-month cross country trip where they explored various national parks and camped in their van while documenting their trip on social media. *Id.* In Utah, a 911 call led to police officers conducting a traffic stop on Laundrie and Petito after the caller stated he witnessed Laundrie strike Petito. *Id.* The Utah officers revealed that Laundrie exhibited “more red flags than a Chinese communist rally,” and yet, no arrests were made, and the officers failed to conduct a lethality assessment while on scene. *Id.* Approximately two weeks later, Petito went missing in Wyoming, and Laundrie returned to his Florida home without her. *Id.* After Laundrie was named as a person of interest, he shot himself but left behind a notebook that contained a written confession of the murder and ultimately led to the discovery of Petito’s body. *Id.* The autopsy confirmed that she was strangled to death. *Id.* Petito’s parents filed a lawsuit against the Utah Police Department, among others, alleging that her death could have been prevented if the officers handled the situation appropriately. *Id.* Gabby’s story captured the hearts of many and even resulted in Netflix releasing a three-party documentary series that details her final moments. Taylor Ardrey, *‘American Murder: Gabby Petito’ is Available on Netflix: How to Watch*, USA TODAY (Feb. 17, 2025), <https://www.usatoday.com/story/entertainment/tv/2025/02/17/american-murder-gabby-petito-brian-laundrie-netflix-docuseries/78949918007/>.

²⁶³ UTAH CODE ANN. § 77-36-2.1 (West 2024).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

- (d) if the aggressor has ever tried to choke the victim;
- (e) if the aggressor has a gun or could easily get a gun;
- (f) if the aggressor is violently or constantly jealous, or controls most of the daily activities of the victim;
- (g) if the victim left or separated from the aggressor after they were living together or married;
- (h) if the aggressor is unemployed;
- (i) if the aggressor has ever attempted suicide, to the best of the victim's knowledge;
- (j) if the victim has a child that the aggressor believes is not the aggressor's biological child;
- (k) if the aggressor follows or spies on the victim, or leaves threatening messages for the victim; and
- (l) if there is anything else that worries the victim about the victim's safety and, if so, what worries the victim.²⁶⁸

The law also provides that depending on the assessment results, the officer must advise the victim of the results and refer the victim to an advocate at a domestic violence organization.²⁶⁹

Many states also require judges to receive domestic violence training.²⁷⁰ For example, in Kentucky, all circuit judges, district judges, and domestic relations and trial commissioners must receive training on the dynamics of domestic violence at least once every two years.²⁷¹ The training must include information on the effects of domestic violence on victims, the legal remedies available, lethality issues, and available community resources.²⁷²

Similarly, district court judges in Minnesota are required to receive ongoing training on domestic abuse, sexual violence, harassment, stalking, and related civil and criminal issues.²⁷³ The statute further states that the training program must include information on the needs of the victims, the

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Mandatory Domestic Violence Training for Judges*, RES. CTR. ON DOMESTIC VIOLENCE: CHILD PROT. & CUSTODY, https://redvcpc.org/index.php?option=com_mtree&task=att_download&link_id=50&cf_id=39 (Dec. 31, 2014).

²⁷¹ KY. REV. STAT. ANN. § 21A.170 (West 2024).

²⁷² *Id.*

²⁷³ MINN. STAT. ANN. § 480.30 (West 2024).

causes of such violence, and the impacts on children, and must emphasize the need for the court system to coordinate with victim advocacy services and to learn the policies within law enforcement agencies.²⁷⁴

New Jersey judges were recently mandated to undergo enhanced training on sexual and domestic violence matters following controversial remarks made by judges in sexual assault cases.²⁷⁵ One judge resigned after ruling that a sixteen-year-old boy charged with sexual assault should not be tried as an adult because he comes from a “good family,” was doing “extremely well” in school, would be a candidate for a “good college,” and being tried as an adult would have a “devastating effect” on his future.²⁷⁶ Ethical charges were brought against another judge who asked a rape victim if “she could have avoided forced sex by closing her legs.”²⁷⁷ These judges’ comments sparked outrage and protests and resulted in many New Jersey judges being required to receive enhanced training that focuses on sexual assault, domestic violence, and implicit bias and diversity.²⁷⁸ In 2022, New Jersey enacted a law requiring all municipal and superior court judges responsible for adjudicating domestic violence matters to participate in the training.²⁷⁹ The training includes the impact of domestic violence on children, risk factors and lethality, issuing temporary emergency restraining orders, child custody and parenting plans, and trauma-informed danger assessments.²⁸⁰

The Texas Legislature recently amended its judicial training requirements to require all judges to receive education on issues of family violence, regardless of whether they oversee domestic violence issues or not.²⁸¹ Before, the statute included an exemption for judges who certified that they did not hear matters related to family violence.²⁸² The legislature noted that it is “imperative that our judicial system recognizes the signs of domestic violence and recommend appropriate resources for victims” because such situations could turn lethal if victims fear revealing the extent of their abuse in court settings.²⁸³ The amendment’s purpose was to expand judicial training to mitigate harm and lethality to domestic violence victims.²⁸⁴ Further, it

²⁷⁴ *Id.*

²⁷⁵ Debra Cassens Weiss, *State Orders Training for Judges After Rape Comment Controversies: ‘Good Family’ Judges Resigns*, AM. BAR ASS’N J. (July 18, 2019, 1:30 PM), <https://www.abajournal.com/news/article/state-orders-training-for-judges-after-rape-comment-controversies-good-family-judge-resigns>.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ N.J. STAT. ANN. § 2C:25-20 (West 2022).

²⁸⁰ *Id.*

²⁸¹ TEX. GOV’T CODE ANN. § 22.110 (West 2023).

²⁸² *Id.*

²⁸³ S.B. 855, 88th Leg. Reg. Sess. (Tex. 2023).

²⁸⁴ *Id.*

provides that judges who routinely hear such matters receive additional training every two years.²⁸⁵ The Texas Legislature further instructed courts to consult with domestic violence experts when developing the training programs.²⁸⁶ The programs must include information about protecting victims, available community resources, gender bias in the judicial process, and the dynamics of family violence.²⁸⁷

Because of the rising concern for domestic violence and its impact, many non-legal professions have also begun implementing training programs to raise awareness.²⁸⁸ One of the recent pushes has been aimed at dental professionals.²⁸⁹ In 2015, Maryland enacted a regulation that requires dentists to complete two hours of continuing education in abuse and neglect when seeking license renewal.²⁹⁰ Since then, at least four other states have begun efforts to enact similar requirements for dental professionals.²⁹¹ One article estimated that seventy percent of abuse injuries occur on the head and neck.²⁹² Because dentists focus their attention on the mouth and teeth, they are in a unique position to detect signs of intimate partner violence, especially when coupled with routine cleaning occurring on a semi-annual basis.²⁹³ While not all domestic violence victims can visit a dentist regularly, one article estimated that half of the surveyed victims visited a dentist while signs of abuse were present.²⁹⁴ Ninety percent of those victims were not questioned about their injuries despite their hope that the dentist would.²⁹⁵ Some signs are apparent, including bruises or other physical injuries, but others may not be so visible—this is where training and education come in.²⁹⁶ Some of the less obvious signs of abuse include the victims missing appointments, being particularly jumpy in the dentist’s chair, or their partner not leaving their side during the appointment.²⁹⁷ Because of these concerns, some states have begun requiring dentists to take continuing education courses in abuse and neglect to renew their licenses.²⁹⁸

²⁸⁵ TEX. GOV’T CODE ANN. § 22.110 (West 2023).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See, e.g., Thielking, *supra* note 9; Nina Feldman, *Hair Stylists Often Hear Stories of Abuse from Clients. Why Not Offer Help at the Salon?*, WHYY (June 19, 2019), <https://whyy.org/articles/women-struggling-with-domestic-abuse-find-help-at-the-hair-salon/>.

²⁸⁹ Thielking, *supra* note 9.

²⁹⁰ MD. CODE REGS. 10.44.22.04(C) (2024).

²⁹¹ Thielking, *supra* note 9.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

Another surprising profession that has joined this trend is cosmetology.²⁹⁹ Women form such strong relationships with their stylists that it becomes natural to talk about things happening in their personal lives, such as recent breakups, new jobs, and even abuse.³⁰⁰ This puts stylists in a unique position to learn of the abuse and do something about it.³⁰¹ As such, Illinois was the first state in the nation to require domestic violence training for cosmetologists.³⁰² In 2017, Illinois enacted a requirement that cosmetologists take one hour of continuing education in domestic violence and sexual assault awareness to receive their new or renewed license.³⁰³ Similarly, Tennessee recently implemented a requirement that all new applicants for a cosmetologist's license,³⁰⁴ and currently licensed cosmetologists seeking renewal,³⁰⁵ must show proof of completion of domestic violence training.³⁰⁶

Many states have recognized the importance of training in this subject matter by implementing education requirements for police officers,³⁰⁷ judges,³⁰⁸ and even non-legal professionals such as cosmetologists³⁰⁹ and dentists.³¹⁰ Yet, lawyers remain without any training requirements despite their direct connection to victims and the legal system.³¹¹ Attorneys are in a unique position to help victims of domestic violence³¹² because of their “extraordinary power” to detect and stop abuse.³¹³ Even if domestic violence is outside a lawyer's practice area, a lawyer who is educated about domestic violence can, at a minimum, inform victims where to begin, such as by referring them to available community resources.³¹⁴

Just as with any problem, ignoring domestic violence will not resolve the issue.³¹⁵ Despite rising societal awareness, reports of domestic violence are increasing.³¹⁶ Victims continue to be unaware of or unable to obtain

²⁹⁹ *New Domestic Violence Education Training for Licensed Cosmetologists and Barbers May Save Lives in Tennessee*, TENN. DEPT. COM. INS. (July 27, 2021, 12:13 PM), <https://www.tn.gov/commerce/news/2021/7/27/new-domestic-violence-education-training-for-licensed-cosmetologists-and-barbers-may-save-lives-in-tennessee.html>.

³⁰⁰ Feldman, *supra* note 288.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ 225 ILL. COMP. STAT. ANN. 410/3-7 (West 2017).

³⁰⁴ TENN. CODE ANN. § 62-4-110 (West 2023).

³⁰⁵ *Id.* at § 62-4-117.

³⁰⁶ *Id.*; § 62-4-110.

³⁰⁷ See, e.g., 750 ILL. COMP. STAT. ANN. 60/301.1 (West 2017); UTAH CODE ANN. § 77-36-2.1 (West 2023); KY. REV. STAT. ANN. § 15.334 (West 2020); IND. CODE ANN. § 5-2-1-9 (West 2023).

³⁰⁸ *Mandatory Domestic Violence Training for Judges*, *supra* note 270.

³⁰⁹ 225 ILL. COMP. STAT. ANN. 410/3-7 (West 2017); TENN. CODE ANN. § 62-4-110 (West 2023).

³¹⁰ Thielking, *supra* note 9.

³¹¹ See Lehmann, *supra* note 19, at 651.

³¹² Olsen, *supra* note 21, at 18.

³¹³ Buel, *supra* note 4, at 937.

³¹⁴ Olsen, *supra* note 21, at 18.

³¹⁵ Burman, *supra* note 2, at 209.

³¹⁶ Dublin, *supra* note 5, at 26.

resources and help.³¹⁷ Given the attorney's status in the mind of the average client, the client is likely to conclude that the attorney's failure to address the domestic violence matter is "evidence that no other options exist."³¹⁸ When, in reality, the attorney's failure to address this issue is likely the result of "ignorance and apathy."³¹⁹

According to researcher Dr. Bessel van der Kolk, "[w]e all want to live in a world that is safe, manageable, and predictable, and victims remind us that this is not always the case."³²⁰ As a result of this desire, the general population avoids reading or talking about trauma because it reminds them that the world is unsafe, unmanageable, and unpredictable.³²¹ Lawyers and judges are not immune to this natural desire, and as such, they, too, have shown a dismissal of traumatic events, including instances of domestic violence.³²²

C. The Training Must be Mandatory to Produce the Needed Results

It is well-known within the legal community that attorneys field a significant number of unsolicited legal questions from family, friends, neighbors, and strangers.³²³ Because of the nature of the legal profession, lawyers will remain the first point of contact for individuals needing any legal service, regardless of the attorney's chosen practice area.³²⁴ If a lawyer receives a question outside of his practice area, the individual is often met with the response, "I'm not that kind of lawyer."³²⁵ The difference between asking a question about the constitutionality of paying property taxes versus the legal resources available to a victim of domestic violence is that the response given by the lawyer to the latter could save lives.³²⁶

Attorneys and judges mishandle a wide variety of matters due to lacking education in domestic violence.³²⁷ It has been recommended that law schools and continuing legal education programs improve offerings on domestic violence issues with the hope that it would motivate all lawyers to voluntarily engage with the training because it is "well-documented" that domestic violence impacts most areas of practice.³²⁸ However, lawyers are not

³¹⁷ Buel, *supra* note 4, at 938.

³¹⁸ Craig-Taylor, *supra* note 13, at 56.

³¹⁹ Burman, *supra* note 2, at 209.

³²⁰ Ayres, *supra* note 8, at 228 (quoting BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 158–59 (2014)).

³²¹ *Id.*

³²² *Id.*

³²³ Olsen, *supra* note 21, at 17.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 17, 19.

³²⁷ Buel, *supra* note 4, at 937.

³²⁸ *Id.*; Craig-Taylor, *supra* note 13.

voluntarily rising to the occasion,³²⁹ and many remain unwilling to expand their knowledge to include this sensitive issue.³³⁰ As such, there remains “neither a systematic nor comprehensive approach to teaching” this topic to lawyers despite the overwhelming presence of domestic violence in society and the documented case mismanagement within the legal system.³³¹

III. A PROPOSAL FOR MANDATORY CLES FOR ALL PRACTICING ATTORNEYS

Implementing a training requirement through continuing legal education would raise each attorney’s surface-level competency in domestic violence matters.³³² Attorneys in most states are required to complete some continuing legal education credits already³³³ and most jurisdictions already have CLEs available on this topic.³³⁴ This solution would not add to an attorney’s annual requirement; it would simply require that out of the attorney’s continuing legal education hours that he must complete, he takes a specified number of hours in domestic violence education. The training courses could include background and statistical information about domestic violence, the warning signs, the dangers of not identifying warning signs in the legal context, and how to appropriately respond when a victim seeks help. This would transform an attorney’s dangerous response of “I’m not that kind of lawyer” to being able to provide a list of knowledgeable attorneys and available community resources to help with safety planning, housing, childcare, food security, and support.³³⁵ While a victim would perceive the untrained lawyer’s response as believing no options exist,³³⁶ this trained approach would inform the victim that she is not a hostage, and she is, in fact, capable of living a life without violence.³³⁷

CONCLUSION

The legal system can set a “tone of intolerance for domestic violence” in our society.³³⁸ It is time for the legal system, as a whole, to take the necessary steps to recognize that domestic violence is pervasive, it is a crime,

³²⁹ Lehmann, *supra* note 19, at 654.

³³⁰ *See id.* at 651.

³³¹ Buel, *supra* note 4, at 937.

³³² Lehmann, *supra* note 19, at 654.

³³³ *Mandatory CLE*, *supra* note 40.

³³⁴ Drew, *supra* note 31, at 25.

³³⁵ Olsen, *supra* note 21, at 19.

³³⁶ Craig-Taylor, *supra* note 13.

³³⁷ Olsen, *supra* note 21, at 19.

³³⁸ Buel, *supra* note 4, at 939.

and it must be dealt with seriously across the legal profession.³³⁹ Victims cannot stop the violence alone,³⁴⁰ and victims turning to the courts and judicial process for help should not be met with additional obstacles on their path to freedom. For victims of domestic violence, a competent legal system is the difference between life and death.³⁴¹

³³⁹ *Id.* at 937, 939.

³⁴⁰ *Id.* at 939.

³⁴¹ *See id.*

