

Soft Misogyny: The Subtle Perversion of Domestic Violence “Reform”

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I. INTRODUCTION

It's hardly news—domestic violence¹ is universally condemned. Society is no longer actively colluding with batterers. As one family court judge put it: society has withdrawn its consent to domestic violence.² Further, efforts to combat intimate terrorism and its ill effects can be seen everywhere. And these efforts have yielded results, as evidenced by some estimating domestic violence to be down by sixty-four percent.³

The progress towards stemming domestic terrorism includes increased services, new and expanded legislation, domestic violence specialists in law enforcement and child abuse agencies, increased funding, and societal opprobrium. There is a Domestic Violence Awareness Month and a Teen Dating Violence Awareness Month;⁴ buses and billboards exhort men to help stop the violence; and the National Football League created a domestic violence commission to deal with its internal and public mishandling of NFL players' violence towards their intimate partners.⁵ In addition, the *New York Times* features botched domestic violence investigations above the fold on its front page,⁶ and a presidential proclamation recognizes the right to be

¹ Domestic violence is perhaps the most common term presently used for this phenomenon. Other phrases include intimate partner violence and intimate terrorism. The various terms will be used interchangeably throughout.

² Judge Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 425 (1990) ("It has only been a relatively short time since society has withdrawn its consent to domestic violence.").

³ Shannan Catalano, *Intimate Partner Violence, 1993–2010*, U.S. DEP'T JUST. 1 (2012), <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf> ("From 1994 to 2010, the overall rate of intimate partner violence in the United States declined by 64%, from 9.8 victimizations per 1,000 persons age 12 or older to 3.6 per 1,000."). What one counts as intimate partner violence affects the statistics; some would suggest that this sixty-four percent statistic is wildly optimistic. But, in a quote that has been attributed to Mark Twain, Benjamin Disraeli and others, "[t]here are . . . lies, damned lies, and statistics." See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 333 (Suzy Platt ed., 1989).

⁴ See "CDC Features," CDC, (last updated Feb. 3, 2016); "Domestic Violence Awareness Month," NNEDV, <http://nnev.org/getinvolved/dvam.html> (last visited Feb. 29, 2016) (noting this information under the "Get Involved" tab).

⁵ See Sam Farmer & Nathan Fenno, *Roger Goodell Names Four Women to Guide NFL Domestic Violence Policy*, L.A. TIMES (Sept. 15, 2014, 9:05 PM), <http://www.latimes.com/sports/nfl/la-sp-nfl-violence-goodell-20140916-story.html>.

Further, NFL Commissioner Roger Goodell was subject to an investigation of his amply criticized investigation and punishment of former player Ray Rice's acts of domestic violence. This latter investigation was itself a high profile and publicized investigation conducted by former Federal Bureau of Investigation director Robert Mueller. See *id.*

⁶ See Walt Bogdanich & Glenn Silber, *Two Gunshots on a Summer Night*, N.Y. TIMES (Nov. 24, 2013), <http://www.nytimes.com/projects/2013/two-gunshots/>. This was also made into a documentary: "A Death in St. Augustine." See *id.*

free from intimate partner abuse as a human right.⁷

In addition to news features and public service campaigns, the acknowledged scourge of intimate terrorism is displayed in popular culture through social media, books, movies, and television.⁸ Thankfully, some evidence of shifting attitudes is visible. Although it still may be acceptable to use the term “wife beater” for those sleeveless T-shirts,⁹ asking “Have you stopped beating your wife yet?” as the classic unfair question has more or less fallen into disuse.¹⁰

All of this is indeed an improvement from the time when domestic violence was mandated or at the very least condoned by the law¹¹ and held permissible by religious teachings¹²—a time, in short, when societal consent was full-throated. The widespread efforts to declare domestic violence unacceptable, and to provide remedies and services to combat it, are clear signs of progress. Although this progress is good to appreciate, roughly forty years into the work,¹³ it is too soon to sit back and bellow “Mission Accomplished!” Work remains to be done. One aid in figuring out what needs to be done is to reflect on what has

⁷ Proclamation No. 9337, 80 Fed. Reg. 60,263 (Sept. 30, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-10-05/pdf/FR-2015-10-05.pdf>.

⁸ See, e.g., ANNA QUINDLEN, *BLACK AND BLUE: A NOVEL* (1998); @Whyileft, TWITTER, <https://twitter.com/whyileft> (last visited Feb. 24, 2016); see also PAULA SHARP, *CROWS OVER A WHEATFIELD* (1996); *SLEEPING WITH THE ENEMY* (20th Century Fox 1991).

⁹ See Elizabeth Hayt, *Noticed; An Undershirt Named . . . What?*, N.Y. TIMES (Apr. 22, 2001), <http://www.nytimes.com/2001/04/22/style/noticed-an-undershirt-named-what.html>. Of course, the term’s use has been challenged. See Janet Kornblum, *Feminists Decry Online Sale of ‘Wife Beater’ T-Shirts*, USA TODAY (Feb. 8, 2002, 11:42 AM), <http://usatoday30.usatoday.com/tech/news/2001-04-25-ebrief.htm> (“Calling a white ribbed sleeveless undershirt a ‘wife beater’ appears to have come from the TV show *Cops*, where a surprising number of men are arrested wearing them.”).

¹⁰ Former NBA Commissioner David Stern used it to call out what he believed to be an unfair question. NBA’s Finest Vids, *David Stern Jim Rome Radio Argument Have You Stopped Beating Your Wife Yet?*, YOUTUBE (June 13, 2012), <https://www.youtube.com/watch?v=73vGdCaC048>; see also *Transcript of McCain Interview*, LAS VEGAS SUN (June 26, 2008, 8:10 AM), <http://lasvegassun.com/blogs/ralstons-flash/2008/jun/26/transcript-mccain-interview>.

¹¹ See Beirne Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. 241, 241–48 (1917); see also *id.* at 241 (“Under the early Roman law the marital power of the husband was absolute, and he could chastise his wife even to the point of killing her.”) (footnote omitted).

¹² See generally Rev. Dr. Marie Fortune & Rabbi Cindy Enger, *Violence Against Women and the Role of Religion*, NAT’L RESOURCE CTR. ON DOMESTIC VIOLENCE, http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=411 (last visited Feb. 24, 2016).

¹³ See generally PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, <http://pcadv.org> (last visited Feb. 29, 2016) [hereinafter Pennsylvania Coalition]. It is generally accepted that the first state statute authorizing protective order relief against domestic violence was passed in Pennsylvania in 1976.

already been done and how effective those efforts have been.

This Article will take a critical look at past “reforms” and their results. To that end, Part II will summarize some key areas where efforts at reform have yielded perverse results. Part III will examine the unanticipated consequences of these reforms in more detail. The Article will conclude with Part IV’s effort to understand the reasons for the perverse results: why the ideas, laws, and policies that are intended to assist victim-survivors have at times become tools to further harm them.

This examination will take into account that unanticipated consequences in domestic violence reform can be caused by various factors, some of which are benign.¹⁴ It will also explore the possibility that the repeated occurrence of these consequences are the result of “soft misogyny,” a term used here to mean the bias, often implicit, that operates in people who are not, at core, misogynists but who nonetheless attribute substantial culpability to the domestic violence victim.¹⁵ In addition, soft misogynists use, often unawares, subtle ways to punish that perceived culpability.¹⁶

This soft misogyny is reflected in the phrase offered up by *New York Times* columnist Nicholas Kristof: “misogyny without misogynists.”¹⁷ Akin to sociologist Eduardo Bonilla-Silva’s phrase “racism without racists,”¹⁸ soft misogyny is behaviors and beliefs dismissive of and harmful to women that occur without the conscious knowledge of the belief-holder. As Kristof asserts, “there are die-hard . . . misogynists out there, but the bigger problem seems to be well-meaning people who believe in equal rights yet make decisions that inadvertently transmit . . . sexism.”¹⁹

¹⁴ See Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 895 (1936) (“Furthermore, *unforeseen* consequences should not be identified with consequences that are necessarily undesirable (from the standpoint of the actor). For though these results are unintended, they are not upon their occurrence always deemed axiologically negative.”).

¹⁵ “Victim” is often and appropriately perceived as a pejorative term with the word “survivor” sometimes used instead. Author uses either of the two terms or a combined phrase interchangeably throughout the Article.

¹⁶ Implicit bias is well-documented. See *Project Implicit Publications*, PROJECT IMPLICIT, <https://www.projectimplicit.net/papers.html> (last visited Feb. 29, 2016).

¹⁷ Nicholas Kristof, *Straight Talk for White Men*, N.Y. TIMES (Feb. 21, 2015), http://www.nytimes.com/2015/02/22/opinion/sunday/nicholas-kristof-straight-talk-for-white-men.html?_r=0.

¹⁸ See generally EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (2009).

¹⁹ See Kristof, *supra*, note 17.

II. OVERVIEW OF UNANTICIPATED CONSEQUENCES

Unanticipated consequences are consequences that are set in motion by an action that is intended to yield a particular result.²⁰ The intended result may occur but so too flow unexpected and often undesired results.²¹ In other words, these consequences result from a good idea that has, in some way, gone bad.

Efforts to combat intimate terrorism have led to many unanticipated consequences. Too often, an idea or legal reform offered with the best motive of assisting victims-survivors has ended up harming them.²² Scholars and activists now decry the unfortunate consequences that battered women may face as a result of mandatory arrest and no-drop prosecution policies.²³ Similarly, scholars lament the over-criminalization of domestic violence, and both the inaccuracy and lack of success of the battered woman's syndrome.²⁴ Others critique specialized domestic violence courts, which were once heralded as a panacea.²⁵

The author of this Article has earlier explored the harms that result from the misapplication of child abuse laws and practices. Initially, those laws and practices ignored instances of intimate partner violence. The laws and practices then shifted to removing children

²⁰ See Merton, *supra* note 14. Merton writes:

Furthermore, *unforeseen* consequences should not be identified with consequences which are necessarily undesirable (from the standpoint of the actor). For though these results are unintended, they are not upon their occurrence always deemed axiologically negative The intended and anticipated outcomes of purposive action, however, are always, in the very nature of the case, relatively desirable to the actor, though they may seem axiologically negative to an outside observer.

²¹ Often, unanticipated consequences may be used in common parlance to refer especially to those consequences that are negative—perverse, even. Merton cautions, however, that “[u]nforeseen consequences should not be identified with consequences which are necessarily undesirable (from the standpoint of the actor). For though these results are unintended, they are not upon their occurrence always deemed axiologically negative.” *Id.* (emphasis removed).

²² See generally Justine A. Dunlap, *Intimate Terrorism and Technology: There's an App for That*, 7 U. MASS. L. REV. 10 (2012); see also Lisa Bolotin, *When Parents Fight: Alaska's Presumption against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA L. REV. 264 (2008); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996); Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133 (1993).

²³ See discussion *infra* Parts III.B.2 & 3.

²⁴ See discussion *infra* Parts III.B.1 & 4.

²⁵ See generally Kathryn Gillespie Wellman, *Taking the Next Step in the Legal Response to Domestic Violence: The Need to Reexamine Specialized Domestic Violence Courts from a Victim Perspective*, 24 COLUM. J. GENDER & L. 444 (2013).

from the survivors of abuse because of the alleged harm caused by exposure to intimate terrorism.²⁶ Other critics have catalogued problems in the child custody system, which likewise ignored the occurrence of domestic violence for years before beginning to consider it, oft times in ways harmful to women.²⁷

Finally, protection order statutes were long considered to be needlessly restrictive in limiting the population entitled to relief.²⁸ For instance, early protection order statutes often required a victim to be married to her abuser in order to obtain legal relief. This narrow coverage excluded many who needed protection from intimate partner violence. The limitations were glaring: couples living together, those with a child in common, ex-spouses, and same sex couples were all excluded.

Accordingly, expanding the relationships covered in protection order statutes has been a desired good. Over time, states changed their statutes to encompass unmarried couples living together and, in some states, those in a dating or intimate relationship.²⁹ Many of the expansions have been a welcome addition and appropriately grant protection to those terrorized by their intimate partners.

Unfortunately, problems occur when this expanded coverage fits within its large tent non-intimate relationships.³⁰ This was the case when, in 2014, news headlines proclaimed: “Soccer Star Hope Solo Arrested on Domestic Violence Charges.”³¹ The victims were Solo’s sister and Solo’s seventeen-year-old nephew. Should this assault have happened? Of course not. Is it helpful to lump star athletes Hope Solo and Ray Rice together as domestic violence perpetrators?³² Again, of

²⁶ See, e.g., Justine A. Dunlap, *The Pitiless Double Abuse of Battered Mothers*, 11 AM. U. J. GENDER SOC. POL’Y & L. 523, 525 (2003); see generally Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565 (2004) [hereinafter Dunlap, *Motherless Child*].

²⁷ See discussion *infra* Part III.C.3.

²⁸ See discussion *infra* Part III.A.

²⁹ Both legislatures and courts applying statutes have toiled over definitions of both “dating” and “intimate.” See discussion *infra* Part III.A.2.

³⁰ See, e.g., *Bonbrake v. Lee*, No. 43989–1–II, 2014 WL 465642 (Wash. Ct. App. Feb. 4, 2014) (affirming grant of domestic violence protection order to roommates); *Everitt v. Everitt*, No. 24860, 2010 WL 816615 (Ohio Ct. App. Mar. 10, 2010) (affirming grant of domestic violence civil protection order against father protecting son); *Reynolds v. White*, No. 43989–1–II, 1999 WL 754496 (Ohio Ct. App. Sept. 23, 1999) (affirming grant of domestic violence civil protection order for daughter against father).

³¹ Sam Frizzell, *Soccer Star Hope Solo Arrested on Domestic Violence Charges*, TIME (June 21, 2014), <http://time.com/2908322/hope-solo-arrested/>.

³² NFL player Ray Rice was suspended when videos of him punching his fiancé in an elevator were made public. Ken Belson, *A Punch Is Seen, and a Player Is Out*, N.Y. TIMES (Sept. 8, 2014), <http://www.nytimes.com/2014/09/09/sports/football/ray->

course not. In short, expanding relationships that are covered by protection order statutes is a good thing—until it gets taken to an illogical conclusion, at which point it operates to diminish intimate partner violence.

Progress does not occur in an unbroken plane. Changes and reforms inevitably have effects not expected or unintentionally minimized. Nor could it be otherwise. The perfect is indeed the enemy of the good; if a perfect solution is the goal, no good solution will ever be advanced. This truth notwithstanding, it remains fruitful to take a hard look at the unanticipated consequences that harm survivors of intimate partner violence. If an understanding can be gained of some of the reasons that reforms intended to benefit survivors of intimate terrorism are transformed into tools that further harm them,³³ then progress with fewer perverse consequences might be the result.

III. COMMON UNANTICIPATED CONSEQUENCES IN DOMESTIC VIOLENCE REFORM

A. *Expanded Protection Order Coverage*

1. Introduction

Civil protection orders are a mainstay for domestic violence survivors, with every state having statutory authority for them.³⁴ Many advocates against domestic violence believe that civil protection orders have numerous advantages over criminal remedies, for the reasons enumerated below.³⁵

First, the civil protection order process is instituted and controlled by the survivor.³⁶ Second, civil orders can outlast the criminal process and offer greater protection to a survivor, not the least

rice-video-shows-punch-and-raises-new-questions-for-nfl.html?emc=eta1.

³³ Often their children are also harmed. See Dunlap, *Motherless Child*, *supra* note 26, at 585–86.

³⁴ Indeed, these orders are often viewed as the single best choice for survivors.

³⁵ See Sally Goldfarb, *Reconceiving Civil Protection Orders*, 29 CARDOZO L. REV. 1487, 1508 (2008).

³⁶ Even though the survivor institutes the process, there may be pressure on the survivor to do so. Some service providers, including shelters, may require that a domestic violence survivor, in order to be eligible for services, pursue a civil protection order. Similarly, child protection workers may threaten to remove the survivor's children from the home unless the survivor pursues a protection order. These policies, whatever the arguments in their favor, force the survivor's hand, thus undercutting her autonomy. See Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment*, 11 WASH. U. J. L. & POL'Y 157, 158–59 (2003).

of which in circumstances where the criminal charges are dismissed. Third, civil protection order remedies are, generally, broad. This wider array of remedies, which include child custody and financial support, may help provide the necessary support to allow the survivor to escape the coercive control of the intimate terrorist.³⁷

An extant civil protection order can also be beneficial to the criminal side of the process. Increased police attention and power often accompany a violation of a protection order. For instance, some mandatory arrest statutes are triggered only when there has been a violation of a protection order.³⁸ Mandatory arrest at this later stage avoids many of the pitfalls of mandatory arrest earlier in the process, including, one hopes, less of a likelihood of dual arrest.³⁹

In sum, there are multiple benefits to civil protection orders. Because this remedy is available in every state and has many advantages, it is important that it be as effective as possible. Moreover, it should be used to address the problem for which it was conceived: intimate partner abuse.

2. Evolution of Coverage under Protection Order Statutes

The first wave of protection order statutes often excluded groups of people in need of protection. For instance, some statutes literally limited relief to spouses; others that appeared at first blush to apply more broadly turned out to be equally as narrow.⁴⁰ The 1979 Washington Revised Code, for instance, granted the right to relief to cohabitants.⁴¹ But, it then unusually cabined the definition of cohabitant to a spouse or persons living together as husband and wife—either in the past or present. The statute also included within its ambit persons having a child in common whether or not they were

³⁷ See MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 16, 53–54, 75, 82 (2008); see generally Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973 (1995); Jane K. Stoever, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303 (2011). Professor Jane Stoever has proposed using a “stages of change” model to help understand why survivors do not “just leave” at the first hint of intimate coercive control and terrorism. See generally Stoever, *supra*. Further, her application of this psychological counseling theory to domestic violence settings can assist both the survivor and her advocates to set in place the supports necessary to enable successful disentanglement from an intimate terrorist.

³⁸ See, e.g., MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 2016).

³⁹ See *infra* Part III.B.2 for a discussion regarding the problems associated with dual arrests.

⁴⁰ The frequently used term of the day—wife abuse—was in vogue for good reason.

⁴¹ Wash. Rev. Code § 10.99.020(2) (1979).

ever married or resided together.⁴²

Pennsylvania, often cited as the first state to legislate protection orders,⁴³ threw in an additional element. It provided protection for family or household members who “reside together.”⁴⁴ It then defined family or household members as: “spouses, persons living as spouses, parents and children, or other persons related by consanguinity or affinity.”⁴⁵ Thus, Pennsylvania added non-romantic relationships into the pool of those entitled to relief. Early versions of the Massachusetts statute also defined the statutorily protected “[f]amily or household member” as: “household member, a spouse, former spouse or their minor children or blood relative.”⁴⁶

Today, many protection order statutes have a larger class of protected persons as, over time, state legislatures realized that many of the limitations excluded those who needed protection from intimate partner violence. Common expansions include gay and lesbian couples, those who have a child in common, or persons in a dating relationship.⁴⁷

Enacting these changes has not been easy; nor has judicial application of the law been entirely smooth as courts struggle to discern legislative intent.⁴⁸ The imprecision of the term “dating relationship” is a good example. To provide guidance in this area, some statutes, for instance, specify that dating relationships exclude casual relationships or “ordinary fraternization.”⁴⁹

Some states have been slow to change; this is true even in states that might be considered progressive.⁵⁰ For instance, it was not until 2008 that New York broadened its statute to include dating relationships, same-sex or otherwise.⁵¹ Although advocates had sought for years to expand the coverage, the change had been long met with

⁴² § 10.99.020(1).

⁴³ See generally Pennsylvania Coalition, *supra* note 13.

⁴⁴ S. 1243, Gen. Assemb. 1976 Sess. (Pa. 1976).

⁴⁵ *Id.*

⁴⁶ MASS. GEN. LAWS ch. 209A, § 1 (1978).

⁴⁷ Most states enacted laws covering married couples; some extended their laws to include opposite-sex couples living together or in a marriage-like relationship.

⁴⁸ For a discussion on defining intimacy, see Sarah Lawson, Note, *Expanding the Scope of Who May Petition for Domestic Violence Protective Orders in Kentucky*, 102 KY. L.J. 527, 534–35 (2013–2014).

⁴⁹ See, e.g., TEX. FAM. CODE ANN. § 71.0021(c) (West 2015).

⁵⁰ See, e.g., Judith A. Smith, *Battered Non-wives and Unequal Protection-order Coverage: A Call for Reform*, 23 YALE L. & POL'YREV. 93, 93 (2005).

⁵¹ See Jennifer Cranstoun et al., *What's an Intimate Relationship, Anyway? Expanding Access to the New York State Family Courts for Civil Orders of Protection*, 29 PAGE L. REV. 455, 455 (2009).

resistance that prevented its passage. One unspoken objection appeared to be a concern that allowing protection against same-sex intimate partner violence would serve to advance the argument for gay marriage.⁵² Another concern raised by those opposing expansion was the burden that would be placed on the family court system.⁵³

a. Intimate Partner Abuse vs. Family Violence

Expanding protection to include all survivors of intimate terrorism has long been called for and is warranted.⁵⁴ A survivor should not be excluded from receiving a civil protection order because she is neither married to nor a *de facto* spouse of her abuser.

Even some of the older statutory relationship definitions included non-intimate partners, such as: roommates; household members; or those related by consanguinity or affinity. These broader terms may have found their way into statutes based upon the way in which the federal government focused on these issues in the 1980s. At that time, there was increased concern for child abuse as well as intimate partner violence; often times, the two were joined under the label of family violence.⁵⁵

The first federal law to address domestic violence was the Family Violence Prevention and Service Act (FVSPA). Predating the Violence Against Women Act by a decade, the FVSPA focuses on “family violence,” which includes “many types of family relationships.”⁵⁶ It specifically separates domestic violence as a sub-type of family violence that involves intimate partners.⁵⁷ The Act also deals separately with dating violence, which it defines as violence committed by one who is or was “in a social relationship of a romantic or intimate nature with the victim.”⁵⁸ It gives guidance on how to assess that relationship by considering “the length of the relationship, the type of relationship, and the frequency of interaction between” those involved in the relationship.⁵⁹

⁵² *See id.* at 456–57.

⁵³ *Id.* at 456.

⁵⁴ *See, e.g.,* Smith, *supra* note 50.

⁵⁵ See Adrienne L. Fernandes-Alcantara, *Family Violence Prevention and Services Act (FVPSA): Background and Funding*, CONG. RES. SERV. (Oct. 14, 2015), <https://www.fas.org/sgp/crs/misc/R42838.pdf> for a comprehensive review of these aspects of the FVSPA.

⁵⁶ *Id.* at 2.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

The FVSPA appropriately distinguishes between intimate partner abuse and broader family violence. Domestic violence statutes should be especially targeted for a rather particular purpose—to protect current and former intimate partners from coercive control, and physical and emotional battery and abuse. Persons who are not intimate partners should not be included in domestic violence protection order laws designed to protect those in intimate partner relationships.⁶⁰

There are several reasons why expanded coverage to non-intimates is not appropriate. First, it is unnecessary, as other legal protections are available—often in addition to standard criminal proceedings.⁶¹ Therefore, persons will still have legal recourse even if they do not fall within the purview of a protection order statute.⁶² Second, affording relief to non-intimate partners under domestic violence protection order statutes creates an issue of “fit”: protection order remedies typically have been designed—or at least ought to have been designed—to address situations of intimate terrorism.

The fit issue is important, but it has been insufficiently scrutinized as the statutory reach has undergone expansion. The array of remedies available to victims and offenders of domestic violence are less effective—i.e., not a good “fit”—when applied to people who are not involved in an intimate partner relationship. This forced and improper fit can lead to several problems.

First, it can create remedy confusion. It is well accepted by now that the classic case of domestic violence—a.k.a. intimate partner violence or intimate terrorism—centers on control.⁶³ The perpetrator attempts to coercively control all aspects of the victim’s life. This explains, among other things, the increased risk of danger to a survivor when she has left or is in the process of leaving. Shucking the perpetrator’s bonds can result in the perpetrator increasing, through violent assault, attempts to control his target.

⁶⁰ Not all will agree, however, that the scope of domestic violence statutes should be limited to intimate partners. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women*, 21 HOFSTRA L. REV. 801, 816–18 (1993), where the authors argue that expanding coverage to include “a wide range of extended family relationships” is an appropriate reflection of the “reality of American family life.”

⁶¹ For example, Maryland has a “Peace Orders” statute. MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1501–10 (West 2016). Likewise, Massachusetts has a “Harassment Prevention Orders” statute that is available to anyone who proves that certain acts have occurred, without need for a special relationship. See MASS. GEN. LAWS ANN. ch. 258E, § 1 (West 2016).

⁶² See *supra* note 61 and accompanying text.

⁶³ See generally EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (INTERPERSONAL VIOLENCE) (2009).

Further, certain remedies might appear facially appropriate but are in fact not because of the coercive control that defines intimate partner abuse. Joint counseling, for instance, is frequently harmful as it gives the batterer more tools with which to control the survivor. Likewise, anger management, a remedy still frequently ordered for perpetrators, has little to do with addressing coercive control. With roommates, siblings, or parent/children confrontations, on the other hand, either of these two choices might be helpful. In other words, Hope Solo might benefit from anger management; Ray Rice or Greg Hardy will not.

One argument, of course, is to put all possible relationships and remedies in the statute and let the judge sort out what is appropriate. There are, however, several problems with this response. First, protection order proceedings often involve *pro se*, or self-represented, litigants. Even if a non-lawyer advocate is available to help the victim-survivor fill out the protection order form, the risk of selecting an inappropriate or potentially harmful remedy is high.⁶⁴ Also, judges often handle crowded calendars and may lack the time to scrutinize the remedies sought in the petition. Further, although the judging of protection order proceedings has improved over the years, due largely to judicial training and increased public attention,⁶⁵ not all judges have the training, time, or temperament to sort it through and get it right.⁶⁶

Second, including relationships that do not fit even a broad definition of intimate partner will result in a dilution of resources and systems capacity. New York Court of Appeals Chief Judge Judith Kaye raised this concern when the New York legislature was considering expanding the reach of that state's protection order statute.⁶⁷ Although Judge Kaye supported broadening the statute to include dating relationships, she noted the burden that expanded coverage would have on the court system and urged appropriations for additional judges to handle the increased caseload.⁶⁸ In doing so, Judge Kaye recognized the need for appropriate expansion, but also wisely raised concern about having sufficient judicial resources to

⁶⁴ Many jurisdictions have trained advocates to assist petitioners in completing the forms necessary for seeking a protection order. These advocates are typically not trained in the consequences or efficacy of certain legal remedies.

⁶⁵ See, e.g., Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, 76 ALB. L. REV. 1417, 1430 (2012–2013).

⁶⁶ JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM 170 (1999).

⁶⁷ See Cranstoun et al., *supra* note 51, at 468–69.

⁶⁸ See *id.*

handle the expansion.

The dilution of resources argument should not be used against persons who should benefit from protection order coverage. It was so used in 2013, when some opponents of reauthorizing the Violence Against Women Act (VAWA) argued that the proposed expanded coverage to gay, lesbian, and Native American communities would dilute services to others already covered.⁶⁹ The dilution argument, however, should not be used to avoid providing services to those subject to intimate terrorism.

The politics of VAWA aside, it is axiomatic that having additional persons covered affects the resources available. The solution is to exclude from protection order coverage those not involved in intimate relationships, rather than excluding under-served groups, such as gay, lesbian, and Native American communities. Finite resources should be conserved for those in the greatest need. Thanks to VAWA, monetary resources for things such as victims' services, police training, service of protection orders, and legal services are dedicated to the fight against domestic violence. Those resources, however, are far from infinite. It is therefore critically important to define the problem carefully and funnel the resources appropriately.⁷⁰

Another concern that arises from including non-intimate terrorism cases in the coverage offered by civil protection laws is the trivialization of intimate terrorism, which may, in turn, undercut efforts to combat it. Roommate spats or mother-daughter arguments—serious though they may be—are not of a kind with intimate partner domestic violence cases. They are not fueled by coercive control and would generally score low on any valid lethality assessment.⁷¹

⁶⁹ See William H. Manz, *Introduction to 1 VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013: A LEGISLATIVE HISTORY OF PUBLIC LAW NO. 113-4*, at v, v (William H. Manz ed., 2014). An attempt to finally approve the VAWA reauthorization bill was abruptly halted when some members of Congress insisted on removing provisions that would provide expanded protections for gay and lesbian individuals who are the victims of domestic abuse. See *id.* These arguments often were nothing more than thinly veiled bias. The bill was finally approved on March 7, 2013. *Id.* at Doc. No. 1. Interestingly, each reauthorization of VAWA, coming at approximately four-year intervals, has come up against significant opposition. Is some version of soft misogyny at work?

⁷⁰ See, e.g., Kate Pickert, *What's Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), <http://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/>.

⁷¹ See Press Release, Jeanne Geiger Crisis Center, Jeanne Geiger Crisis Center Receives Unprecedented Funding to Prevent Domestic Violence Homicides Throughout the U.S. (Mar. 18, 2013), <http://jeannegeigercrisiscenter.org/wp-content/uploads/2015/07/JGCC-Receives-Unprecedented-Funding.pdf>. Even with

Further, the misplacing of non-intimate partner cases within the domestic violence system can create additional secondary trauma for those working with survivors.⁷² This limits the capacity of those working in the system to respond effectively and compassionately when needed. This lowered capacity will negatively affect survivors and may discourage them from further voluntary participation with the system or cooperating with any involuntary participation.⁷³ In addition to creating challenges among first responders, having roommate fights adjudicated under domestic violence statutes could lead to the public at large trivializing the seriousness of intimate terrorism.

3. Court Interpretations of Statutory Expansion

College dormitory suitemates,⁷⁴ brothers against sisters,⁷⁵ brothers against brothers,⁷⁶ rooming house residents,⁷⁷ stepdaughters against stepmothers,⁷⁸ unrelated adult in whose home a twenty-year-old is living against the twenty-year-old's parents,⁷⁹ grandmother against grandchild's father (*de facto* son-in-law?),⁸⁰ woman against ex-brother-in-law⁸¹—these are all non-intimate relationships that state courts have found to fit within the class of persons entitled to seek protective order relief. This is, at least in part, the result of legislative expansion of the relationship requirement over the past several decades. Legislatures have done this to increase protection to those affected by intimate

intimate partner violence, there is a necessary triaging of resources.

⁷² See *Vicarious Trauma*, AM. COUNSELING ASS'N, <http://www.counseling.org/docs/trauma-disaster/fact-sheet-9—vicarious-trauma.pdf> (last visited Feb. 29, 2016) (defining “vicarious trauma,” or “secondary traumatic stress,” as the trauma experienced by the caregivers of trauma victims).

⁷³ See Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 NYU REV. L & SOC. CHANGE 191, 247–50 (2008).

⁷⁴ *Hamilton v. Ali*, 795 A.2d 929, 934 (N.J. Super. Ct. Ch. Div. 2001).

⁷⁵ *Olivieri v. Olivieri*, 678 A.2d 393, 394 (Pa. Super. Ct. 1996), *overruled by* *Custer v. Cochran*, 933 A.2d 1050 (Pa. Super. Ct. 2007) (going further and disposing of the single-household requirement of *Olivieri*).

⁷⁶ See *Jutchenko v. Jutchenko*, 660 A.2d 1267, 1268 (N.J. Super. Ct. App. Div. 1995) (reversing a restraining order between two middle-aged brothers only on the grounds that they did not live together since reaching adulthood), *abrogation recognized in* *M.P. v. K.K.*, No. A-2902-13T4, 2014 WL 7475213 (N.J. Super. Ct. App. Div. Jan. 7, 2015) (stating that *Jutchenko's* “rationale has been eroded’ and that a more expansive, fact-sensitive analysis is required”).

⁷⁷ *S.P. v. Newark Police Dep’t*, 52 A.3d 178, 189 (N.J. Super. Ct. App. Div. 2012).

⁷⁸ *Sepesi v. Gorski*, No. WD-02-028, 2003 WL 1702505, at *1 (Ohio Ct. App. Mar. 31, 2003).

⁷⁹ *Rzeszutek v. Beck*, 649 N.E.2d 673, 674–76 (Ind. Ct. App. 1995).

⁸⁰ *South v. North*, 698 A.2d 553, 558 (N.J. Super. Ct. Ch. Div. 1997).

⁸¹ *S.B. v. Z.H.*, No. A-2802-10T4, 2012 WL 222957, at *1, 3 (N.J. Super. Ct. App. Div. Jan. 26, 2012).

partner abuse.⁸² For example, a New Jersey court has said that the legislature intended to change of the word “cohabitant” to “household member” in order to “extend protection to any person who has a close relationship to his or her batterer.”⁸³

a. *Household Members*

Among the current definitions of the relationship needed to qualify for protection order relief, the term “household members” (past or present) is the term most likely to create problems. Courts, in their efforts to be faithful stewards of legislative intent, have wrestled with the definition of “household member,” and have come to a variety of conclusions. Some of those conclusions, however, border on the absurd.⁸⁴ Other times though, courts get it right, rejecting, for instance, the argument that residents of a group home belong to the class of individuals intended to be protected by domestic violence protection order statutes.⁸⁵

Amidst their wrestling, some courts have acknowledged the remedial and broad legislative intent behind domestic violence statutes.⁸⁶ Those courts may understandably feel bound to interpret the statutes expansively in order to fulfill legislative intent.⁸⁷ One court, in interpreting the term “household member” in New Jersey’s domestic violence protection order statute, declared that the parties need not reside together, but “more than a casual dating relationship” was required.⁸⁸ Despite an expansive reading of the term “household

⁸² *Silva v. Carmel*, 7 N.E.3d 1096, 1101 (Mass. 2014).

⁸³ *Hamilton v. Ali*, 795 A.2d 929, 930 (N.J. Super. Ct. Ch. Div. 2001) (citations omitted) (internal quotation marks omitted) (emphasis removed).

⁸⁴ *See id.* at 930 n.1 (citing *In re Lovell*, 572 N.W.2d 44, 45 (Mich. Ct. App. 1997) (Fitzgerald, J., dissenting) (regarding college roommates)).

⁸⁵ *Silva*, 7 N.E.3d at 1100. Determining who fits within the statutory definition of household member is challenging enough when a court is focusing on how to apply the statute in factual situations involving intimate partner abuse.

⁸⁶ *See, e.g.*, *Storch v. Sauerhoff*, 757 A.2d 836, 838 (N.J. Super. Ct. Ch. Div. 2000).

⁸⁷ *See generally Hamilton*, 795 A.2d 929.

⁸⁸ *Desiato v. Abbott*, 617 A.2d 678, 680 (N.J. Super. Ct. Ch. Div. 1992). In *Jutchenko v. Jutchenko*, 660 A.2d 1267 (N.J. Super. Ct. App. Div. 1995), *abrogation recognized in M.P. v. K.K.*, No. A-2902-13T4, 2014 WL 7475213 (N.J. Super. Ct. App. Div. Jan. 7, 2015), the court applied a narrowed definition of “former household member.” The court said:

Therefore, we do not believe that the Legislature could have intended the protections of the Act to extend to conduct related to a dispute between two persons who have not resided together in the same household for twenty years, at least in the absence of any showing that the alleged perpetrator’s past domestic relationship with the alleged victim provides a special opportunity for “abusive and controlling behavior.”

member,” this interpretation is consistent with the spirit of the law.⁸⁹ At some point, however, expansive interpretations risk stretching definitions beyond recognition and can warp a statute’s meaning.⁹⁰

Explaining this risk, one judge dissented from a determination that a mother-daughter fight fell within the Michigan law for a penalty enhancement for domestic assault. The judge argued that just because a statute targets “domestic” offenders does not mean that “the Legislature intended . . . to encompass all offenders who resided with the victim at or before the time of the assault regardless of the relationship between the offender and the victim.”⁹¹ Under the majority’s reasoning, the dissenting judge noted, “unrelated persons who reside together solely as college roommates could be charged with domestic assault [T]his would be *an absurd result*.”⁹² In light of the statutory purpose, the judge reasoned that the legislature intended the term “resident of his or her household” to have a romantic involvement component.⁹³

In Pennsylvania, the appellate courts have struggled with the residency requirement between adult brothers and sisters.⁹⁴ In *Olivieri v. Olivieri*,⁹⁵ the Pennsylvania Superior Court affirmed the denial of a protection order between siblings who were in a longstanding business dispute, even though one sibling had threatened the other.⁹⁶ In so doing, the court said:

We agree with the trial court that the Protection From Abuse Act simply does not apply to the dispute between Maria and Frank Olivieri. . . . “[T]he Protection from Abuse Act is a vanguard measure dealing with the problems of wife and child abuse. It is designed to protect against abuse . . . between family or household members who reside together [and] also between unmarried persons living together.”⁹⁷

Id. at 1268–69.

⁸⁹ *Desiato*, 617 A.2d. at 680.

⁹⁰ *Coleman v. Romano*, 908 A.2d 254, 258–59 (N.J. Super. Ct. Ch. Div. 2006). In this case, the court found that there was jurisdiction for a protection order for a mother against a daughter on the grounds that they were former household members. New Jersey does not include affinity or consanguinity as a basis for jurisdiction. *See id.*

⁹¹ *In re Lovell*, 572 N.W.2d 44, 46 (Mich. Ct. App. 1997) (Fitzgerald, J., dissenting).

⁹² *Id.* (emphasis added).

⁹³ *Id.* at 46–47.

⁹⁴ *See, e.g., Olivieri v. Olivieri*, 678 A.2d 393, 394–95 (Pa. Super. Ct. 1996).

⁹⁵ *Id.*

⁹⁶ *Id.*; *Olivieri v. Olivieri*, 32 Phila. Co. Rptr. 460, 462 (Ct. Com. Pl. 1995).

⁹⁷ *Olivieri*, 678 A.2d at 394 (alteration in original except the first) (citation omitted).

Eleven years later, however, the same court, in *Custer v. Cochran*,⁹⁸ affirmed a protection from abuse order between siblings, also stemming from a family-owned business dispute.⁹⁹ This time the court noted that the legislature had removed the requirement that the abuser reside in the same household with his or her victim.¹⁰⁰

b. *Intimacy*

Courts have also struggled with how to define intimacy or intimate relationships for the purpose of finding jurisdiction in protection order cases. A New York family court found that the legislature did not intend the term “intimate relationship” to include a child and her mother’s boyfriend.¹⁰¹ The appellate court reversed, finding that this “quasi-stepparent-stepchild” relationship, in which the child and the boyfriend were in the same home three weekends a month, was a “unique or special” relationship of the sort that subjects “persons to greater vulnerability and potential abuse.”¹⁰²

In general, both courts and legislatures have worked to ensure that protection order statutes are broad enough to cover all forms of intimate partner abuse. Thus, expansions to unmarried couples accurately reflect the need to protect gay and lesbian victims of intimate partner abuse. Likewise, expansions to romantic partners who do not live together, e.g., dating relationships, are warranted.

But what of the over-expansive definitions—either by legislation or judicial interpretation—that deflect focus from the peculiar dynamics and dangers of intimate terrorism? Are these examples of soft misogyny or of implicit bias? While that specific causation may be less clear here, it is clear that these expanding definitions expose a misunderstanding of intimate partner violence. And from that misunderstanding flows a failure to realize the harms that come from including Hope Solo in the same category as Ray Rice.

⁹⁸ 933 A.2d 1050 (Pa. Super. Ct. 2007).

⁹⁹ *Id.* at 1051–52.

¹⁰⁰ *Id.* at 1055.

¹⁰¹ *Jose M. v. Angel V.*, 951 N.Y.S.2d 195, 197 (App. Div. 2012).

¹⁰² *Id.* at 199 (citation omitted).

B. Domestic Violence Reform in the Criminal Justice System

1. Overuse of Criminal Justice System

After years of having domestic violence officially ignored by state actors, abused women and their advocates welcomed increased responsiveness by law enforcement.¹⁰³ Now, however, many observe that the response to domestic violence has been over-criminalized.¹⁰⁴ Some of the critique focuses on the often uneasy alliance between actors of the criminal justice system and domestic violence survivors.¹⁰⁵ Other critical assessment highlights the way in which mandatory policies denigrate the validity of a survivor's choice.¹⁰⁶

Professor Margaret Drew suggests that the increased use of criminal procedures has been detrimental to the interaction between the civil and criminal court systems.¹⁰⁷ First, Drew asserts that civil courts unduly accord leadership and authority to the criminal proceeding/system.¹⁰⁸ In addition, courts and individuals often misapprehend or misinterpret what happens in the criminal prosecution, which results in diminishing the survivor's credibility.¹⁰⁹ For instance, Drew notes that if a defendant is found not guilty or the case is dismissed for lack of prosecution, civil judges often use that outcome to discredit the survivor's testimony on the civil side.¹¹⁰ This is so even though a survivor may not be timely informed of the date of the criminal trial.¹¹¹ In sum, Drew argues, cooperation and, ultimately,

¹⁰³ See generally Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).

¹⁰⁴ See generally LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM (2012); Coker, *supra* note 103; Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007).

¹⁰⁵ Gruber, *supra* note 104, at 797 n.241 ("This process simultaneously criminalizes whole populations of lower class, urban males, usually racial minorities, while discounting the socially destructive behavior of more powerful groups.") (quoting Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 788 (2005)).

¹⁰⁶ See generally Coker, *supra* note 103.

¹⁰⁷ E-mail from Margaret Drew, Professor, Univ. of Mass. Sch. of Law, to author (Jan. 27, 2015, 9:00 PM) (on file with author).

¹⁰⁸ See *id.* In some states, civil protection order full hearings are continued until the criminal matter is resolved. That ensures, of course, that the judge will inquire as to the results on the criminal side. And in states where judges have access to all criminal records online, the results typically are with the judge before the civil hearing even begins.

¹⁰⁹ See *id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* Professor Drew describes a client whose first notice of the criminal proceeding was a subpoena served the night before the scheduled trial. She did not attend because she could not arrange childcare on such short notice. Her absence

success in the criminal justice system has become a *de facto* standard by which a survivor's credibility is measured.¹¹²

The criminal justice system that is appropriate for stranger violence—or even acquaintance violence—may not always be the remedy of choice between former or current intimate partners. Survivors may want to be free from intimate partner abuse without turning their batterer into a convicted criminal. The batterer may be their current or ex-spouse or lover or the father of their children—in short, someone they once loved. Indeed, it may be someone whom they still love and with whom they retain hopes for a continued relationship.¹¹³

There are hard choices embedded in every domestic violence situation. The experiences of the past several decades demonstrate the value of some solutions and the harm of others. A criminal justice system one-size-fits-all response has severe limitations.¹¹⁴ Having a variety of options on the table, rather than overuse of the criminal justice system, may result in more and safer solutions.

2. Mandatory Arrest

In the early- to mid-1980s, police departments around the country began to take a different tack when handling domestic violence calls. After years of according domestic violence calls low priority and, when responding, trying to be a peacemaker at best and concluding that the woman must enjoy the battery at worst,¹¹⁵ police departments began implementing mandatory arrest or pro-arrest policies. Mandatory arrest policies require police to arrest alleged batterers. Pro-arrest policies favor arrest as the preferred choice but do not mandate it.

This new police approach to domestic violence arrests coincided roughly with two distinct events. First, in 1984, a landmark case, which held a police department liable for not protecting a victim who was killed by her batterer, motivated other police departments to respond more appropriately.¹¹⁶ Second, that same year saw the release of a study

was used against her in the civil hearing.

¹¹² *Id.*

¹¹³ See Sally Goldfarb, *Reconceiving Civil Protection Orders: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1499–1503 (2008).

¹¹⁴ See, e.g., Emily J. Sack, *Battered Women and the State: the Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1675 (2004).

¹¹⁵ See Joan Zorza, *Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47–50 (1992).

¹¹⁶ See *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). Sadly, some thirty years later, another Connecticut town lost a similar lawsuit. See *Notice v. Town of Plainville*, 56 Conn. L. Rptr. 640, at *1 (Super. Ct. 2013).

conducted in Minneapolis, Minnesota that posited beneficial effects from arresting a batterer at the scene.¹¹⁷

The convergence of these separate events helped elevate the mandatory arrest movement. States, municipalities, and police departments rushed to enact mandatory arrest or pro-arrest policies. These enactments were often supported by advocates for domestic violence survivors.¹¹⁸

Mandatory arrest or pro-arrest policies also resonated for other reasons. First, they fit into a trend that adhered to the premise that domestic violence should not be treated differently, e.g., less seriously, than stranger violence. So, the theory went: if a stranger would be arrested, so should an intimate batterer.¹¹⁹ Second, these policies provided—in that moment at least—safety to the victim. Third, an arrest, in addition to offering temporary safety, provided a window of time in which the victim could plan and perhaps execute an escape.¹²⁰ Finally, mandatory arrests were a way to transmit a strong new message—to survivor, batterer, and society at large: domestic violence is no longer to be tolerated, and the state will bring its power to bear to halt it. In short, together the perceived benefits of mandatory arrest, the Minnesota mandatory arrest study, and police department concerns about liability created ripe conditions for mandatory arrest or pro-arrest policies.

Before long, however, the downsides of these policies grew apparent. It turned out that the victim's desire to be safe was not necessarily matched by an equivalent desire to have the batterer

¹¹⁷ Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

¹¹⁸ This alliance between the battered women's movement and law enforcement was, and is often, an uneasy one. Sack, *supra* note 114. See also Gruber, *supra* note 104. Professor Gruber notes the "political and philosophical lines" crossed in the alliance between feminists and law enforcement. *Id.* at 747.

¹¹⁹ See Sack, *supra* note 114, at 1667. The comparison of domestic violence to stranger violence allowed for additional strange alliances. Treating domestic violence as one would treat stranger violence has roots in early federal policy regarding "family violence." The 1984 U.S. Attorney General's Task Force on Family Violence, Final Report, located the concern for the victims of domestic assault in a conservative concern over crime. Stranger arrest analogy was flawed, of course, because warrantless arrests—the emerging prime authority for domestic violence arrests—were no more allowed in stranger violence than domestic violence. See Gruber, *supra* note 104, at 794.

¹²⁰ Sack, *supra* note 114, at 1671. At that time and even, although to a lesser extent, now, the victim's leaving was the only societally acceptable response. This is illustrated by the outrage focused on Janay Palmer, Ray Rice's then-fiancé, for failing to leave her abuser.

arrested.¹²¹ In the past, victim-survivors might have been outraged that their batterers were told to take a walk around the block, but many were now upset that their batterers were being arrested.¹²² This could lead to police being criticized at the scene by the very person they sought to protect. Quite understandably, none of the actors in this new drama was happy with the newly rewritten ending.¹²³

In addition to general dissatisfaction at the scene, mandatory arrest caused at least two other negative outcomes. First, rather predictably, batterers did not take getting arrested lightly. So, while survivors were temporarily safe, they might have been at more of a risk rather quickly, i.e., the next day, when the batterer was released from jail. Another unanticipated consequence of mandatory arrest was the dramatic increase of dual arrests at the scene.¹²⁴ Police officers would arrive at the scene to hear conflicting stories as to who did what to whom. Moreover, officers might observe wounds on both parties.¹²⁵ Therefore, they would arrest both parties, either because it was the easier course or because they genuinely did not know what other action to take.

Inappropriate dual arrests have many negative results. Prime among them is the batterers' new and rather effective tool against their survivors: casting them as perpetrators. After a dual arrest, the survivors are now, in the eyes of the law, wrongdoers in equal measure

¹²¹ This could be particularly true in minority communities, where interactions with police were already tension-fraught. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

¹²² There is, of course, never a universal description of how a victim-survivor will respond.

¹²³ It seems likely that one reason for negative police attitudes towards domestic violence victims flowed from this new, negative interaction between victim and officer. That subject will be explored further, *infra* Part III.B.2. See Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence: A Preliminary Analysis of Officer Characteristics*, 10 J. INTERPERSONAL VIOLENCE 147, 147 (1995) ("Underlying anti-victim behavior by the police may be particular attitudes about victims, women in general, and the acceptability of violence.").

¹²⁴ Final Report from David Hirschel et al. to U.S. Dep't of Justice, Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases iv-v (Apr. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf> [hereinafter Final Report]. Hirschel et al.'s report stated:

In addition, while the overall dual arrest rates were low (1.3%), the existence of a mandatory arrest law significantly increased the likelihood of dual arrest for all three of the relationship categories (intimate partner, other domestic, and acquaintance) examined. Thus, this study provides support for the hypothesis that mandatory arrest laws produce higher rates of dual arrest in a range of relationship types.

¹²⁵ An intimate batterer—or anyone committing an assault for that matter—may end up with defensive wounds inflicted by the victim-survivor.

to the batterers. The arrests of the survivors could, of course, lead to their prosecution. The arrests could also lead to the entry of mutual civil protection orders, the violation of which could have criminal consequences for the survivor.¹²⁶

As the ills of dual arrests became apparent, police departments wisely began to implement training and policy on how to determine the identity of the primary aggressor.¹²⁷ Officers at the scene were then equipped with the skills necessary to discern who was the aggressor. If they chose to use those skills, they could then arrest that person, rather than taking the path of least resistance and arresting both.

Moreover, as the problems with mandatory arrests emerged, one of the core rationales that led to their institution waned. Attempts to replicate the Minnesota study that had demonstrated positive results from mandatory arrests failed.¹²⁸ Hence, the salutary effect behind mandatory arrests was called into question. The safety of the survivor is often cited as the most important goal in intimate partner violence intervention.¹²⁹ It now appeared that arrest was having, at best, a mixed impact on survivor safety.¹³⁰

Further, the idea that crimes of domestic violence could or, indeed, should be treated like crimes between strangers was being challenged. That intimate partner abuse is serious and can constitute a crime is not to be gainsaid. The survivor and the batterer, however, are not strangers, and the resolution to the crime is unlikely to be the same as it would be for stranger violence.¹³¹

Mandatory arrest or pro-arrest policies led to unanticipated consequences. Some of those consequences are understandable and, with hindsight, predictable. Police went from making few arrests to

¹²⁶ Mutual protection orders—often entered by consent—are not a benign way to resolve a disputed matter, as some victims may believe. Operating under the notion that they do not want to see the batterer and certainly have no interest in committing physical violence, victim-survivors might think that entering consensual mutual protection orders get them what they need—a stay away order or other appropriate relief against the batterer—with no cost to themselves. Mutual protection orders, however, are one way batterers use the legal system to exert control over their victims. Violations of protection orders are, in all jurisdictions, a separate criminal offense, in addition to subjecting the violator to contempt of court. *See generally* Elizabeth Topiffe, *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039 (1992).

¹²⁷ *See* Final Report, *supra* note 124, at 12.

¹²⁸ *Id.* at iv–v.

¹²⁹ *See* Sack, *supra* note 114, at 1678.

¹³⁰ *See id.* at 1678–79.

¹³¹ Often, the victim-survivor and the batterer have children together, which creates a life-long tie that renders remedies available in stranger violence cases ineffectual for intimate terrorism.

arresting both persons on the scene. These multiple problems with mandatory arrest have forged a growing consensus among domestic violence experts against the utility of mandatory arrest, at least in its present form.¹³² It is an issue that continues to divide the community,¹³³ and the laws remain in force in many jurisdictions.¹³⁴ Ultimately, women want to be safe from their coercive partners but do not wish to have them incarcerated.

The tensions between police and battered women are not of recent making.¹³⁵ Whether one is a proponent or opponent of mandatory arrest, the embedded soft misogyny is glaring. Well-meaning police officers might become flummoxed when survivor and batterer alike oppose arrest. This could in turn feed into compassion fatigue and help fuel a belief on the part of police that survivors are not interested in—or worse yet, do not deserve—protection. Officers frustrated with the survivor not having the “correct” response now were possessed of a new tool: arrest them both.

3. Mandatory (No-Drop) Prosecution

As policies and laws changed to compel police to arrest accused batterers,¹³⁶ so too were efforts to mandate prosecution as well.¹³⁷ Many jurisdictions adopted mandatory prosecution policies, sometimes referred to as “no-drop” policies.¹³⁸ One reason behind this shift was

¹³² *But see* Sack, *supra* note 114, at 1690. Sack argues that even with all of the problems associated with mandatory arrest and other mandated criminal justice policies, a return to discretionary policies would not alleviate the problems but rather restore the problems of the *status quo ante*.

¹³³ *See generally* David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. CRIM. L. & CRIMINOLOGY 255 (2007); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237 (2005).

¹³⁴ *See Domestic Violence Arrest Policies*, AM. BAR ASS’N (Mar. 2014), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resource/statutorysummarycharts/2014%20Domestic%20Violence%20Arrest%20Policy%20Chart.authcheckdam.pdf (providing statutory summary charts, listing by state).

¹³⁵ *See, e.g.*, Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 178–79 (2009).

¹³⁶ Generally a change of law was required because the arrests were often on misdemeanor charges, and the common law only permitted arrests for misdemeanors committed in the presence of police officers. Rarely did batterers commit their crimes in the presence of law enforcement. Accordingly, criminal laws had to be changed to allow for arrests in these circumstances. Sack, *supra* note 114, at 1669–70.

¹³⁷ Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1857–58 (2002).

¹³⁸ Sack, *supra* note 114, at 1672–73.

to prevent intimidation of the survivor.¹³⁹ After a domestic violence arrest, prosecutors must decide whether to bring criminal charges. In many domestic violence cases, the survivor is the primary witness. As a consequence, a batterer often puts coercive pressure on the survivor to not cooperate with the prosecution. This pressure, of course, includes threats of violence or other consequences as a backdrop.¹⁴⁰

A primary perceived benefit of no-drop policies, then, was that the batterer would know that the survivor had no control over “dropping the charges,” as, indeed, the charges could not be dropped.¹⁴¹ If the prosecutor owned the case and would go forward regardless of the survivor’s views, the hope was that the batterer would see the futility in pressuring the survivor to drop the charges. Another important, though perhaps more attenuated, hope was that the batterer would not blame the survivor upon release and thus not administer a severe punishment for her failure to comply with his edict that she drop the charges.

Other benefits, too, were thought to flow from no-drop prosecution policies. They permit the state to demonstrate that it will vigorously pursue domestic violence cases through its prosecutorial agency. This sends an important societal response to the question: “Why do we permit him to batter?” This societal response is: “We don’t. All batterers will be prosecuted always. No exceptions.”

Although no-drop policies have always been controversial,¹⁴² the criticism of them has been on the rise. One of the significant criticisms of mandated prosecution is that the system now stands in the stead of the batterer by imposing its will on the survivor.¹⁴³ The state’s stripping of the survivor’s autonomy can lead to dire results. For instance, it is well acknowledged that it takes a victim multiple attempts to leave before the leaving sticks.¹⁴⁴ The ability to leave permanently may be

¹³⁹ Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN’S L.J. 173, 179–80 (1997).

¹⁴⁰ The threat of violence may be implicit, based on prior violence or threats thereof. Remember that coercive control is the goal of the batterer; it is possible that that control can be carried out from jail. *Id.* at 179.

¹⁴¹ Sack, *supra* note 114, at 1673.

¹⁴² See, e.g., Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 876 (1994).

¹⁴³ See Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 415 (2001). See also Coker, *supra* note 103, at 813.

¹⁴⁴ Stoeber, *supra* note 37, at 330–31. Rarely does any attempt at change succeed at first effort. The reality that relapse is part of recovery, for instance, is by now well-known. Further, leaving may not always be the action that the victim-survivor is striving for or that is best for her. See Angela R. Gover et al., *When Abuse Happens Again: Women’s*

aided by services or protection offered by the state.¹⁴⁵

Unfortunately, however, the system's manhandling of the survivor may impede her making a future successful effort to leave if that effort requires help from state actors. The way in which a victim-survivor is treated by police and prosecutorial personnel may dictate whether she voluntarily seeks their help again. If police presence on the scene is not a result of the survivor's choice, e.g., a call from neighbors or bystanders,¹⁴⁶ the police and prosecutorial response may influence whether the survivor cooperates or is hostile.

Aside from the issue of how the survivor is treated by first responders and the impact that treatment has on survivors, a mandatory prosecution policy telegraphs to survivors that the prosecutor knows best. A survivor's valid concerns about safety, the batterer's capacity to maintain employment, or the possibility of deportation fall on officially deaf ears in the case of no-drop policies.¹⁴⁷ So, always pursuing prosecution against the survivor's wishes may put her, and perhaps her children, at increased risk in any number of ways.

Further, and more controversially, a survivor may be against prosecution for reasons that are deemed less compelling: a survivor simply may want to move on or may want to keep her job, with which one or more court appearances may interfere. Even in those circumstances, where safety may not be so obviously in play, forcing prosecution against a survivor's will silences her voice and continues to force her into a submissive role.

Reasons for Not Reporting New Incidents of Intimate Partner Abuse to Law Enforcement, 23 WOMEN & CRIM. JUST. 99, 114 (2013), <http://mysite.du.edu/~adeprinc/goverweltonetal2013.pdf> ("Therefore, many abused women are making a conscious decision that the quality of life for themselves and their children would be negatively impacted by their efforts to engage the system."). See also Alexandra Pavlidakis, *Mandatory Arrest: Past Its Prime*, 49 SANTA CLARA L. REV. 1201, 1204 (2009) ("A woman may choose not [sic] leave her batterer for a number of reasons. She may have a desire to keep her family intact, have a strong emotional attachment to her batterer, or be unable to leave for economic or financial reasons.").

¹⁴⁵ JOHNSON, *supra* note 37, at 54.

¹⁴⁶ See, e.g., Nancy Cohen, *Training Men and Women on Campus to 'Speak Up' to Prevent Rape*, NPR (Apr. 30, 2014, 3:31 AM), <http://www.npr.org/2014/04/30/308058438/training-men-and-women-on-campus-to-speak-up-to-prevent-rape> (reporting that the White House recommends ways to prevent sexual assault and relationship violence on college campuses through, among other things, "bystander intervention").

¹⁴⁷ Some jurisdictions have "soft" no-drop policies, which are essentially a strong preference for proceeding with prosecution but which do permit prosecutors the discretion not to proceed under some circumstances. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1863 (1996); Kirsch II, *supra* note 143, at 386.

An extreme example of the state actively coercing the survivor by means of a no-drop policy occurs when the state subpoenas an unwilling survivor and takes coercive measures—such as the threat or actuality of jail—to enforce the subpoena.¹⁴⁸ Survivors also have been prosecuted for perjury for recanting the version of events they told at the scene.¹⁴⁹ The solution is not to ignore perjury, to be sure; rather, the solution is to not put survivors in the position where their testimony is at odds with prior statements.¹⁵⁰

The soft misogyny in mandatory prosecution is obvious. Survivors receive this message: Father (the state) knows best. Women cannot be trusted to make decisions,¹⁵¹ and the system, through its prosecutors, must do it for them. Further, one cannot discount that police and prosecutorial frustration with survivors who do not comply with traditional criminal justice processes may be an underlying motivation for some mandatory prosecution policies. In those cases, the misogyny might not be so soft.

4. Battered Women's Syndrome

Current legal theory regarding defenses for survivors who kill their abusers has evolved since the trial of Francine Hughes in 1977.¹⁵² In a case later placed into the national spotlight by the book and movie, *The Burning Bed*, Ms. Hughes killed her ex-husband following twelve years of abuse.¹⁵³ The case captured so much attention because Ms. Hughes set fire to the bed in which her husband was sleeping.¹⁵⁴ Her lawyer relied on a defense of temporary insanity, and Ms. Hughes was acquitted.¹⁵⁵ Although it garnered significant attention, the

¹⁴⁸ Kirsch II, *supra* note 143, at 402.

¹⁴⁹ Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 153–57 (2009).

¹⁵⁰ *Id.* at 192–94.

¹⁵¹ Some suggest instituting guardianship proceedings against abused women. Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 609, 628–29 (2000).

¹⁵² Faith McNulty, *Michigan Woman Acquitted in Ex-Husband's Slaying*, N.Y. TIMES, Nov. 4, 1977, at 14.

¹⁵³ *Id.*

¹⁵⁴ See Louise Knott Ahern, “*The Burning Bed*”: A Turning Point in Fight Against Domestic Violence, LANSING ST. J., <http://www.lansingstatejournal.com/story/news/local/2014/10/27/burning-bed-domestic-violence/16224277/> (last visited Feb. 24, 2016). The case has had staying power. See Susan Grigsby, “*The Burning Bed*, 30 Years Later. And Ray Rice, Now,” DAILY KOS (Sept. 14, 2014, 9:20 AM), <http://www.dailykos.com/story/2014/09/14/1328420/—The-Burning-Bed-30-years-later-And-Ray-Rice-now#>.

¹⁵⁵ McNulty, *supra* note 152.

Hughes case, and others involving sleeping abusers,¹⁵⁶ are atypical in that they involve women killing their abusive husbands while not amidst an immediate confrontation.¹⁵⁷ In the vast majority of cases in which an abuse victim kills her batterer, it is during an active confrontation.¹⁵⁸

A successful self-defense claim requires both a threat of death or grievous bodily harm and imminence.¹⁵⁹ These factors are likely to be present in the more typical case. It is, however, in only the unusual cases, such as Hughes, that self-defense may not be available due to the perceived lack of imminent fear of death or grave bodily harm.¹⁶⁰ The development of the battered women syndrome (BWS) expanded the possibility of this defense option for women defendants by helping to demonstrate imminence.¹⁶¹ The defense provides a mechanism for expert testimony that helps survivors of intimate terrorism to demonstrate to the jury how the danger was, in fact, imminent.¹⁶²

BWS is neither a defense nor a syndrome, notwithstanding its common pairing with those terms.¹⁶³ It typically refers to a cluster of symptoms experienced by abused women, such as hyper-vigilance and learned helplessness.¹⁶⁴ It can be used at trial through the admission of expert testimony that explains to the jury why a battered woman would have behaved in a particular manner. Without the expert testimony, a jury may not have the information necessary to understand why the behavior makes sense in context of an abusive

¹⁵⁶ See, e.g., *State v. Norman*, 378 S.E.2d 8, 9–10 (N.C. 1989).

¹⁵⁷ See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposal*, 140 U. PA. L. REV. 379, 397–98 (1991). At least seventy percent of women who kill their abusers do so during an active confrontation. *Id.* at 398 n.69.

¹⁵⁸ *Id.*

¹⁵⁹ See *Self-Defense*, BLACK'S LAW DICTIONARY (9th ed. 2009); *Self-Defense*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2nd ed. 2008).

¹⁶⁰ Katelyn E. Keegan, Note, *The True Man & the Battered Woman: Prospects for Gender-Neutral Narratives in Self-Defense Doctrines*, 65 HASTINGS L.J. 259, 267–68 (2013). See also *id.* at 270 (“Generally, the law considers BWS as a psychological condition apart from other legal defenses.”).

¹⁶¹ CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW 93 (1989) (“The ultimate question in a self-defense case is whether the defendant’s act was a reasonable one. Even if she can successfully negotiate the legal hurdles of seriousness, imminence, retreat, and the like, she must still convince the jury of two things: that her belief that she was in imminent danger of death or serious injury was reasonable under the circumstances and that her response to that perceived danger was a reasonable one, not an overreaction.”).

¹⁶² Jane K. Stoeber, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 507 (2013).

¹⁶³ LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 7 (1984).

¹⁶⁴ *Id.*

relationship.¹⁶⁵

For many years following its 1979 introduction, courts routinely excluded evidence of BWS. The reasons for exclusion included the argument that BWS lacked scientific credibility.¹⁶⁶ Over a series of years and hard-fought battles, it is now admissible in nearly all states.¹⁶⁷ Thus, in theory at least, abused women have an increased chance of demonstrating to fact finders that the homicide of their batterer was justified. Admissible evidence, however, does not make an acquittal. Even now, when evidence regarding BWS is admissible, its use is often unsuccessful.¹⁶⁸ This lack of success captures the suspicion that often accompanies battered women, the legitimacy of their stories, and their predicament. To augment successful outcomes for battered women, advocates looked for other avenues to achieve relief and mounted clemency or pardon campaigns on behalf of many imprisoned battered women.¹⁶⁹

Abused women have a long history of being disbelieved or discredited.¹⁷⁰ First, as part of the coercive control exercised by abusers, abused women are told they are imagining things or making things up.¹⁷¹ Worse yet, their batterers tell them that no one will believe their accusations.¹⁷² Law Professor Sarah Buel, a former prosecutor and survivor of intimate terrorism, recounts chillingly how she stood in a laundromat, having escaped from her abusive husband, who found her and had come to claim her.¹⁷³ “Call the police,” she urged those in the laundromat, “this man caused these bruises on my face.” “No, don’t call,” he responded to those present, “she is my wife.” No one

¹⁶⁵ See generally Mary Helen Wimberly, Law Student Competition Submission, *Defending Victims of Domestic Violence Who Kill Their Batterers: Using the Trial Expert to Change Social Norms*, AM. BAR ASS’N (2007), <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Wimberly.authcheckdam.pdf>.

¹⁶⁶ See David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 633–36 (1986).

¹⁶⁷ See Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN’S L.J. 75, 83–86 (1996).

¹⁶⁸ See Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31, 38–47 (2009).

¹⁶⁹ See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN’S L.J. 217, 317–19 (2003).

¹⁷⁰ See Stoeber, *supra* note 162, at 509.

¹⁷¹ This is sometimes referred to as “gaslighting.” *What is Gaslighting?*, THE NAT. DOMESTIC VIOLENCE HOTLINE (last updated May 29, 2014), <http://www.thehotline.org/2014/05/what-is-gaslighting/>.

¹⁷² See, e.g., DEFENDING OUR LIVES (Cambridge Documentary Films 1993).

¹⁷³ *Id.*

called.¹⁷⁴ Thus, it is no stretch to imagine how, at some point, abused women might begin to wonder what alternative universe they live in, or if what they believe to be true is not in fact true. The process of being constantly told that no one will believe you inevitably takes its toll.

More significantly, society has been caught up in batterers' campaigns to discredit women. Whether the reasons are a by-product of soft misogyny or are more pernicious, they too have taken their toll. The occurrence of domestic violence works its way into culture through news venues and popular media alike.¹⁷⁵ While ostensibly condemning domestic violence, media portrayals of survivors often are not positive.¹⁷⁶ And, indeed, abused women do not comply by being the "perfect victim." They come with all manner of human failings and do not necessarily invite sympathy. Batterers, on the other hand, are often persuasive and charming.¹⁷⁷ Their charm, after all, may be what initially attracted the victim.

BWS theories helped initiate further study of battered women. The theories gave defense counsel and their abused clients a way to explain attacks on their abusers. Eventually, however, the theories and methodology both came under attack.¹⁷⁸ Further research demonstrated that many abused women are resisters, not helpless women.¹⁷⁹ They are survivors, not victims. Furthermore, they are neither mentally ill, nor deserving of a "syndrome" label.

Moreover, the phrase "battered women syndrome" has itself been criticized. First, the stereotypical characteristics it brings to mind have been refuted, are outdated, or are simply too limited to be accurate.¹⁸⁰

¹⁷⁴ *Id.*

¹⁷⁵ See generally Jarrett Bell, *Video Surfaces of Ray Rice's Domestic Violence Incident*, USA TODAY (Sept. 8, 2014, 11:27 AM), <http://www.usatoday.com/story/sports/nfl/ravens/2014/09/08/ray-rice-tmz-video-roger-goodell/15272689/>; Eric Moskowitz, *Jared Remy Pleads Guilty to Murder of Jennifer Martel*, THE BOSTON GLOBE (May 27, 2014), <http://www.bostonglobe.com/metro/2014/05/27/jared-remy-due-woburn-courtroom-today-latest-hearing-jennifer-martel-murder-case/QRdly01jtYjZFPtZccI9VN/story.html>; Hilary Russ, *Cape Doctor Cleared in Fatal Shooting*, CAPE COD TIMES (Aug. 18, 2007, 2:00 AM), <http://www.capecodtimes.com/article/20070818/NEWS/708180334>.

¹⁷⁶ Sack, *supra* note 114, at 1658–59.

¹⁷⁷ Lundy Bancroft, *Understanding the Batterers in Custody and Visitation Disputes*, LUNDY BANCROFT, <http://www.lundybancroft.com/articles/understanding-the-batterer-in-custody-and-visitation-disputes> (last visited Jan. 7, 2016).

¹⁷⁸ See Stoeber, *supra* note 162, at 508.

¹⁷⁹ See generally EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 91, 93 (1988).

¹⁸⁰ It has been urged that the term should be abandoned because it "fails to adequately convey the nature and breadth of scientific knowledge available about

Further, its wording is exclusive and would eliminate its effective use in gay male relationships. Some states have recognized these shortcomings and have adopted new labels.¹⁸¹ This criticism notwithstanding, the phrase seems firmly entrenched in the lexicon.

There is soft misogyny in the development, use, and misuse of the term “battered women’s syndrome.” While its efforts to explain the effects of battering were intended to help achieve a better understanding of the battering phenomenon, it did so by diminishing women, their strength, and their resolve. This diminishment dovetailed nicely with existing patriarchal views. Moreover, there is not much other than misogyny—hard or soft—to explain why women who kill their batterers receive longer sentences than do men who kill intimate partners.¹⁸²

C. Reforms Regarding Children

1. Introduction

The effect of violence on children is well-documented.¹⁸³ There exists an obvious risk of harm to children warriors, children otherwise exposed to war zones, and children living day-to-day in violent neighborhoods.¹⁸⁴ What is obvious now, however, was not so apparent in the early days of the family law system’s approach to domestic violence. For years, domestic violence survivors and their advocates argued unsuccessfully that domestic violence had a profound impact on children who lived in close proximity to it. Finally, in the 1990s, courts began to officially recognize the impact of adult intimate

battering and its effects.” Carrie Hempel, *Battered and Convicted: One State’s Efforts to Provide Effective Relief*, 25 CRIM. JUST., Winter 2011, at 24, 26 (citing U.S. DEP’T JUSTICE & U.S. DEP’T OF HEALTH AND HUMAN SERVS., NCJ 160972, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (May 1996), <https://www.ncjrs.gov/pdffiles/batter.pdf>).

¹⁸¹ See, e.g., CAL. EVID. CODE § 1107 (West 2015) (referring to “intimate partner battering” and its effects).

¹⁸² See James Alan Fox & Marianne W. Zawitz, *Homicide Trends in the United States*, BUREAU OF JUST. STAT., <http://bjs.gov/content/pub/pdf/htius.pdf> (last visited Jan. 25, 2010).

¹⁸³ See generally Deseriee Kennedy, *From Collaboration to Consolidation: Developing a More Expansive Model for Responding to Family Violence*, 20 CARDOZO J.L. & GENDER 1 (2013). But see Dunlap, *Motherless Child*, *supra* note 26, at 583 (discussing how such documentation of harm to children can be misused).

¹⁸⁴ See generally KAETHE WEINGARTEN, COMMON SHOCK: WITNESSING VIOLENCE EVERY DAY: HOW WE ARE HARMED, HOW WE CAN HEAL (2003). See also Erwin Randolph Parson, *Inner City Children of Trauma: Urban Violence Traumatic Stress Response Syndrome (U-VTS) and Therapists’ Responses*, in COUNTERTRANSFERENCE IN THE TREATMENT OF PTSD 151, 157 (John P. Wilson & Jacob D. Lindy eds., 1994).

violence on the children around it.¹⁸⁵ About that time, sociologists were uncovering data about the effects of intimate abuse on children.¹⁸⁶ In response, courts began considering information regarding domestic violence when making child custody decisions.¹⁸⁷ This was often as a result of legislative changes in custody laws.

2. Failure-to-Protect Charges

A parent has a legal obligation to protect a child from abuse. The parent (or person acting *in loco parentis*) must take reasonable measures to protect the child from harm.¹⁸⁸ The parent's culpability does not occur any time there is injury to a child, as parental responsibility is not a strict liability obligation; rather, culpability attaches when the parent fails to act *reasonably* to protect the child from injury.¹⁸⁹ A cause of action for failure-to-protect has long existed in the child abuse and neglect/child dependency sphere.¹⁹⁰

The typical failure-to-protect case targets an "observing parent" who watches on as another person injures a child. The other person could be the other parent or an intimate partner of the observing parent. In 1987, the New York City death of six-year-old Lisa Steinberg brought the concept of failure-to-protect into the public eye in a sad and sensational way. Lisa was beaten to death by her lawyer father, Joel Steinberg.¹⁹¹ Her mother, Hedda Nussbaum, failed to protect her while Steinberg administered many beatings. Both Steinberg and Nussbaum were arrested and charged with second-degree murder. It was quickly revealed that Nussbaum had been subjected to extreme

¹⁸⁵ Dunlap, *Motherless Child*, *supra* note 26, at 568–72.

¹⁸⁶ BETSY MCALISTER GROVES, CHILDREN WHO SEE TOO MUCH: LESSONS FROM THE CHILD WITNESS TO VIOLENCE PROJECT 54 (2003) ("Services for the children of battered women began to grow in the early 1990s.").

¹⁸⁷ See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1062 (1991) (explaining that state courts and legislatures have recently begun to incorporate domestic violence into custody decisions); see also Lindsay Cadwallader, *Mandating Batterers' Treatment Programs as a Condition to Granting Custody or Visitation Rights to Batterers*, 14 PROB. L.J. 1, 11 (1997) ("Many state legislatures have . . . reform[ed] existing custody and visitation legislation to include consideration of domestic violence. Most states either require that courts consider domestic violence as a factor in custody decisions or create a presumption against awarding custody to batterers.").

¹⁸⁸ Dunlap, *Motherless Child*, *supra* note 26, at 581.

¹⁸⁹ See *id.*

¹⁹⁰ See Jeanne A. Fugate, *Who's Failing Whom?: A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 278 (2001) ("Since the first failure-to-protect case was tried forty years ago, states have codified the duty to protect.").

¹⁹¹ The question of whether Nussbaum should have been legally excused divided many who work to combat domestic violence.

intimate terrorism at the hands of Steinberg. Steinberg's violence made Nussbaum fear for her life¹⁹² and at least partially accounted for Nussbaum's failure to protect Lisa. In exchange for agreeing to testify against Steinberg, criminal charges against Nussbaum were dropped.¹⁹³

In addition to the foregoing "traditional" form of a failure-to-protect charge, where an observing parent is unwilling or unable to protect a child from the abuse of another, a new version of a failure-to-protect claim has arisen based on the notion that *exposure* to domestic violence *per se* harms children.¹⁹⁴

Not long after the hard-fought recognition that witnessing domestic violence can harm children, child protective services agencies began to use allegations of this harm against abused women themselves. Of particular note, the Administration for Children's Services in New York City charged many battered women with failure to protect their children if the children had witnessed or had otherwise been exposed to the intimate terrorism of their mothers.¹⁹⁵ In contrast to the Steinberg case, these charges were brought when the children were not physically harmed and even at times when the children were not physically present during their mothers' abuse.¹⁹⁶ Not only were charges brought, but also in nearly all circumstances, the children were removed from their homes—in some cases while their mothers were still in the hospital recovering from their wounds of domestic violence.¹⁹⁷ New York City argued that a woman who was abused in front of her children was considered to have caused *per se* harm that renders her legally culpable.

Assuming arguendo that children suffer harm stemming from their exposure to abuse,¹⁹⁸ the person being accused of causing that harm was the domestic violence *victim*, not the perpetrator.¹⁹⁹ In short,

¹⁹² Steinberg's reign of terror over Nussbaum was so great that when Steinberg was released from jail twenty years later, she was still afraid of him. See generally HEDDA NUSSBAUM, *SURVIVING INTIMATE TERRORISM* (2005).

¹⁹³ See Ronald Sullivan, *Steinberg Companion Willing to Testify in Girl's Death*, N.Y. TIMES (May 9, 1988), <http://www.nytimes.com/1988/05/09/nyregion/steinberg-companion-willing-to-testify-in-girl-s-death.html>.

¹⁹⁴ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 197–98 (E.D.N.Y. 2002).

¹⁹⁵ See, e.g., *id.* at 173–75.

¹⁹⁶ See, e.g., Dunlap, *Motherless Child*, *supra* note 26, at 611 n.300 (citing *In re C.A.S.*, 828 A.2d 184, 191–92 (D.C. 2003)).

¹⁹⁷ *Nicholson*, 203 F. Supp. 2d at 169–70.

¹⁹⁸ No one doubts that exposure to adult domestic violence is harmful, but the nature and extent of that harm is very case specific. See Dunlap, *Motherless Child*, *supra* note 26, at 570.

¹⁹⁹ From time to time, the batterer would also be charged but the lasting impact was most often against the mother, from whose custody the children were generally

the mother was being held legally responsible because she did nothing to prevent her own abuse. This is vastly different from the circumstance in which a mother fails to intervene to stop the physical abuse of her children. And even in *those* cases, the mother's choice may be a protective one, based on an experienced assessment that her intervention will only increase the resulting harm.

New York City's Administration for Children's Services finally put a halt to this practice after a class action lawsuit found it to be illegal.²⁰⁰ Those in child welfare vowed to be more sensitive to the plight of the adult victim. Some agencies even placed domestic violence specialists within child protection offices.²⁰¹ These more enlightened efforts seem to have slacked off, and still, the call to child welfare authorities may be the first call that the police make from the scene of an incident of intimate terrorism. This bureaucratic response fails to account for the harm caused by removing children.²⁰² Thus, battered women and their children remain subject to pitiless double abuse.²⁰³

Of course, child protection agencies are mandated to protect children. But the practice of bringing failure-to-protect charges against battered women often harms the children as well.²⁰⁴ They are removed from their homes, generally without explanation, and may be sent to live with strangers in a foster home or, worse yet, placed in a group home or other congregate care facility pending the location of a foster home. The children may be separated from their siblings, switched out of their schools, and/or forced to endure any number of disabling consequences in addition to removal from their primary caregiver. Legally, the mother and child become adversaries, each represented by his or her own lawyer, all in the name of child protection and at the battered woman's expense. Soft misogyny is the generous assessment.

3. Child Custody

The acknowledgement of the impact that witnessing domestic violence can have on a child also occurs in child custody cases. Obviously, custody disputes are much more common than state-initiated failure-to-protect charges. For many years, however, intimate

removed and who had to jump through many hoops—imposed by the agency “just because it could,” to get the children back. *Nicholson*, 203 F. Supp. 2d at 216.

²⁰⁰ Justine A. Dunlap, *Judging Nicholson: An Assessment of Nicholson v. Scoppetta*, 82 DENV. U. L. REV. 671, 672 (2005).

²⁰¹ See Dunlap, *Motherless Child*, *supra* note 26, at 593.

²⁰² See *id.* at 584.

²⁰³ *Nicholson*, 203 F. Supp. 2d at 163.

²⁰⁴ See Dunlap, *Motherless Child*, *supra* note 26, at 585–86.

partner violence was not considered relevant to custody determinations. Among the successes of the fathers' rights movement was convincing courts and others that violence by one adult toward another adult in the home was immaterial to the issue of who received custody.²⁰⁵

All states now have case law or statutory authority that permits or requires a judge to take into account domestic violence by one adult against another in the household.²⁰⁶ Gone are the days when a judge would sustain a relevance objection against a party attempting to introduce evidence of intimate terrorism during a custody dispute.

As a theoretical development, it is sound law and policy for courts to take into account that one parent is an abuser while awarding custody and, generally, to hold this against the batterer when rendering the custodial decision. The devil, however, is indeed in the details, and the ways in which these changes in custody laws play out varies greatly, both *de jure* and *de facto*. Several issues are considered below.

First, what must the abuse survivor show in order for intimate partner abuse to be taken into account during the custody proceeding? A common standard requires the abuse survivor to demonstrate a pattern of abuse or a serious incident of abuse. Next, how does the abuse survivor prove this pattern or serious incident? Ideally, the mother should not have to relive the abuse by having to prove it a second time after having first established it in a protection proceeding.²⁰⁷ In some states, however, the existence of a protection order is not sufficient for a judge to accord a custodial presumption to the person protected.²⁰⁸

²⁰⁵ See Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 671-75 (2003).

²⁰⁶ Cahn, *supra* note 187.

²⁰⁷ The system is replete with examples of how the legal system is indifferent or even actively hostile to the battered woman. See Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?; Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 21-28 (2004).

²⁰⁸ See, e.g., MASS. GEN. LAWS ANN. ch. 209A, § 3(d) (West 2015) (codifying a rebuttable presumption against custody to the abuser, but also providing that:

[f]or the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact

While it is reasonable to ensure that the evidence is accurate, it is just as important to be aware of the ways in which the batterer uses the legal system to continue his coercive control against the survivor.²⁰⁹ Batterers are likely to use the court system as an extended tool in their efforts to continue to exert control over their victims.²¹⁰ Abusers are twice as likely to contest custody as non-abusers.²¹¹ It is the custody judge's obligation to do everything that he or she can to halt this continued abuse. Judges must be educated about the misinformation spread about how mothers "game the system" by falsely alleging prior abuse in order to secure an advantage in custody cases.²¹² Even though this notion is largely untrue, the perception remains. Sometimes those already thinking the worst of battered women hold this view,²¹³ and sometimes those who believe themselves to be more neutrally situated hold it.²¹⁴

Finally, assuming that evidence demonstrating a pattern or serious incident of abuse is available and admissible, do judges use it properly? Do they analyze this evidence and apply it appropriately?²¹⁵ If the laws on the books are not being implemented properly, then they are of little use.²¹⁶

occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred).

²⁰⁹ Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1061 (2011).

²¹⁰ Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 187 n.97 (2009) (quoting Linda C. Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 FAM. CT. REV. 411, 420 (2004)).

²¹¹ Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES' J. 38, 39 (1997).

²¹² Both Massachusetts and Arizona have "Battered Mothers' Testimony Projects" that have revealed some of the challenges battered mothers face in court custody battles. See generally Carrie Cuthbert et al., *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts*, AMNESTY INTERNATIONAL USA'S WOMEN'S RIGHTS PROGRAM (Nov. 2002), <https://www.wcwonline.org/vmfiles/execsumm4.pdf>; Diane Post & Ariz. Coal. Against Domestic Violence, *Arizona Battered Mothers Testimony Project*, BATTERED WOMEN, BATTERED CHILDREN, CUSTODY ABUSE (Jan. 19, 2010), <http://ncmbts.blogspot.com/2010/01/arizona-battered-mothers-testimony.html>.

²¹³ See Meier, *supra* note 205, at 686.

²¹⁴ For example, while working in a legal services office, a student of the author formed the belief that many of the women seeking protection orders were doing so solely to obtain an advantage in pending or subsequent custody litigation.

²¹⁵ See Conner, *supra* note 210, at 207-08.

²¹⁶ *Id.* at 200.

Soft misogyny runs throughout the issues of intimate partner abuse and child custody. Reforms allowing the consideration of evidence of intimate partner abuse are surely beneficial—a well-intended start. But these reforms remain far from reaching their potential. Judicial resistance to a fuller understanding of the dynamics of intimate partner abuse, and its effects on children is inexcusable.

IV. CONCLUSION

Why does abuse of women by their intimate partners elude positive efforts toward eradication? Abuse of women is indeed grounded in centuries of tradition—centuries in which women were legally irrelevant. But for this time and place, efforts to eradicate it have failed. It has been reduced, yes, but outrageous examples still abound.

There is progress to be seen in many of the changes in the criminal law system's arrest and prosecution laws and policies. Many of these "reforms," however, have either gone too far by exerting their own version of coercive control or have aggressively asserted their superiority as the proper recourse of choice.²¹⁷

Likewise, the changes in child custody laws, policies, and attitudes when intimate terrorism is involved are intended to help—and sometimes do help—survivors and their children. Acknowledging the presence and relevance of domestic violence in a child custody case is a necessary start. But inartfully or reactively drawn laws and resistance to or misapplication of well-crafted legislation significantly undercut progress, perhaps leading to further discounting of abused women's narratives.

The efforts to help protect domestic violence victims by expanding the class of persons included within the scope of civil protection order laws are appropriate and overdue when the expansion covers those in intimate relationships with their abusers. But over-expansion to include college roommates or first cousins dilutes resources and—more significantly—creates a mismatch of remedies. Also, developing legal theories and permitting expert testimony to explain how domestic violence survivors reasonably respond to threats that are literally incomprehensible to others are useful developments until they are distorted and misused against the victim-survivors that they are intended to aid.

²¹⁷ Funding through VAWA has contributed to this overextension of the criminal justice system in resolving intimate partner abuse. See Margaret E. Johnson, *Changing Course in the Anti-domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 161 (2015).

How, in short, in the name of progress, have there been so many missteps and misfires, and so much backlash?²¹⁸ One answer is relatively benign: unintended consequences happen. Sometimes, they even happen a lot. Survivors, legislators, judges, lawyers, and other advocates cannot possibly anticipate all the ways in which forward movement might sometimes go awry.²¹⁹ The inevitability of unanticipated consequences, however, does not grant a free pass to legislators and those in search of legislative reform to proceed in haste without thorough consideration of the consequences of their actions.²²⁰ Sometimes legislation can be rushed through in an effort to resolve a perceived problem in the public spotlight.²²¹ It is likely that less reactive and more deliberative lawmaking will make for fewer unanticipated consequences.

Another path to understanding these unfortunate consequences relies on something deeper and more challenging: the presence of soft misogyny. Of course, there are still straight-out misogynists whose hateful screed can easily be dismissed or laid bare—pure and simple. But that known hatred is easier to combat because it is obvious.²²²

Misogyny without misogynists. An implicit bias against women. This possibility must be considered as a way to explain why so many “reforms” have been turned against intimate terrorism survivors.

New reforms will be instituted. Will those reforms also result in unanticipated consequences? Will they be tarnished by soft misogyny? Of course they will; that is inevitable. The soft misogyny borne of implicit bias will be nigh on impossible to erase. This is because it occurs without conscious awareness. Therefore, we must first name it in order to have a chance at defeating it. Once it is named, opportunities arise. By naming it, we acknowledge and make real its

²¹⁸ Backlash is not a new phenomenon to the battered women’s movement. See Sack, *supra* note 114, at 1699.

²¹⁹ After all, “[t]he road to Hell is paved with good intentions.” HENRY G. BOHN, *A HAND-BOOK OF PROVERBS* 514 (AMS Press 1968).

²²⁰ See Jill Lepore, *Baby Doe*, *THE NEW YORKER* (Feb. 1, 2016), <http://www.newyorker.com/magazine/2016/02/01/baby-doe> 2/1/16. Lepore writes of the scandal-reform cycle that has dominated the child protection system. The intimate partner abuse system has its own problematic cycle of crisis-reform. A high-publicity domestic violence incident often fuels cries for reform. Some of the demanded reforms may be unnecessary or even harmful; but that is obvious only after considered reflection. Other times, reform may be wise but should be done thoughtfully, not reactively. *Id.*

²²¹ See Dunlap, *supra* note 22, at 22–28 (discussing GPS legislation enacted quickly after high-profile intimate partner murders in Kentucky and Illinois).

²²² To say that direct misogyny is easier to combat is not to suggest that it is any less harmful or that it should continue; rather, it is merely a recognition of the more subtle challenges presented by *soft* misogyny.

presence. By naming it and then going a step further to understand and counter it, we have the hope of moving toward a new understanding of soft misogyny's perverse effects. By naming it, perhaps we will create the willingness to listen honestly to survivors, rather than twist and discount their narratives so that they fit into our own misunderstandings.²²³ By naming it, perhaps we create societal ears that can hear and acknowledge the deep roots of intimate partner abuse.

²²³ See Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 712 (2005). In this article, Professor Goodmark examines the use of narrative in reform and discusses how easily narrative can be discounted. *Id.* at 738–44. See generally Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993).