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Not All Violence in Relationships Is “Domestic Violence”

Tamara Kuennen[†]

INTRODUCTION

The occurrence of violence between intimate partners is a fact.¹ “Domestic violence,” however, is something different. According to practitioners, as well as anti-domestic violence activists and advocates, domestic violence is a pattern of acts that may (or may not) include physical violence, perpetrated by one person in an intimate relationship for the specific purpose of gaining power and control over the other.² When anti-domestic violence activists and feminist legal academics use the term “domestic violence,” we refer to this social construct.³

Despite this discerning construct, requiring both a pattern and a motive, the term “domestic violence” has come to be synonymous with a single act of physical violence in an

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¹ I acknowledge that my use of the word “fact” in an article about social constructs might be distracting. The notion that violence is a fact rather a highly contested construct, in and of itself, is the subject of many articles. For the purposes of this article, I do not opine on what the term violence means but start from the premise that it is a human activity that has been documented throughout history. What I am interested in are how and why the public understands its existence as a social problem at this particular juncture in time.

² “Domestic violence (also called intimate partner violence (IPV), domestic abuse or relationship abuse) is a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship.” *What Is Domestic Violence?*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/is-this-abuse/abuse-defined/> [<https://perma.cc/7Z65-EWRW>]; *see also infra* Part 0 for further discussion.

³ *See, e.g.*, Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 356 (2008) (“The core concept is the exercise of power and control”); Edward S. Snyder & Laura W. Morgan, *Domestic Violence Ten Years Later*, 19 J. AM. ACAD. MATRIM. LAW. 33, 33 n.2 (2004) (“‘Domestic violence’ occurs when one intimate partner uses physical violence, threats, stalking, harassment, or emotional or financial abuse to control, manipulate, coerce, or intimidate the other partner.”).

intimate relationship.⁴ Law enters the picture because activists have long viewed it as one of the most important tools of social change.⁵ In law, one act of violence, regardless of an intimate partner's intent, is domestic violence.⁶ Neither a pattern nor a motive is required. At the same time, many acts of coercion that do not rise to the level of physical violence may go unrecognized by law.⁷ Thus, a woman who slaps her partner once out of exasperation theoretically could be treated more harshly by law than a man who uses the threat of a slap to everyday intimidate and control her. To address the mismatch between law and construct, feminist legal scholars for years have argued for reforms to law.⁸ This article argues for reform of the construct.

I draw on the methodology of sociologist Donileen Loseke. In the late 1970s, Loseke examined the then newly named social problem "wife abuse," the newly identified victim of it, the "battered woman," and the newly created social service designed to serve her, the "battered woman's shelter."⁹ Loseke argued that when activists defined wife abuse as extreme rather than ordinary, everyday violence against women, and confined the category of battered women to only blameless women in dire circumstances, activists transformed a previously acceptable behavior into a serious public problem. They simultaneously, however, perpetuated rather than challenged the cultural

⁴ ELLEN PENCE & SHAMITA DAS DASGUPTA, PRAXIS INT'L, RE-EXAMINING 'BATTERING': ARE ALL ACTS OF VIOLENCE AGAINST INTIMATE PARTNERS THE SAME? 2 (2006) (discussing the difference between the law's view of domestic violence, as "any violence between partners occurring in the context of the home" and battered women's activists intent when they coined the terms "domestic violence" as "the space where [battering] occurred," battering being "a pattern of coercive control, intimidation, and oppression that women often experienced at the hands of their male lovers and spouses"); see also *infra* Part 0 (discussing legal definitions of domestic violence and how these differ from activists' construct for domestic violence).

⁵ See *infra* Part 0.

⁶ See *infra* Section IV.0 (discussing criminal definitions of domestic violence).

⁷ See *infra* Section IV.0.

⁸ See, e.g., A. Renée Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117, 152 (1994); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975-76 (1995); Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 961-62 (2004); Julie Goldscheid, *Gender Neutrality, The "Violence Against Women" Frame, and Transformative Reform*, 82 UMKC L. REV. 623, 659 (2014); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 40-53 (2012).

⁹ See generally DONILEEN R. LOSEKE, THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE (1992); Donileen R. Loseke, *Lived Realities and the Construction of Social Problems: The Case of Wife Abuse*, 10 SYMBOLIC INTERACTION 229, 229-30 (1987) [hereinafter *Lived Realities*]; Donileen Loseke & Spencer E. Cahill, *The Social Construction of Deviance: Experts on Battered Women*, 31 SOC. PROBS. 296 (1984).

acceptability of “normal” violence by partners.¹⁰ This occurred because people, such as shelter workers, tasked with determining eligibility excluded those who did not fit. As Loseke put it: when confronted with too many customers for too few beds, shelter workers had to be selective; ordinary violence would not do.¹¹

Today’s main service provider for domestic violence victims¹² is the criminal justice system.¹³ Feminist legal scholars have well documented that legal decision makers (judges, prosecutors, jurors, and police) struggle when confronted with victims who are not blameless, passive, and entrapped by a pattern of power and control.¹⁴ This article argues that, like the shelter workers in Loseke’s study, legal decision makers exclude from relief those victims who do not fit the current social construct. As stated by Dan Kahan, they balk.¹⁵

I argue that activists’ messaging currently broadcasts, explicitly and implicitly, that *all* violence in relationships is a

¹⁰ Loseke does not judge but rather explains this process in her work. For example, claims-makers generally use cases involving extreme conditions, and this is understandable as “any use of violence’ as a social problem would likely not gain mass public acceptance, but persons who approve of or who at least tolerate ‘normal’ violence are still mobilized against . . . ‘wife abuse.’” See *Lived Realities*, *supra* note 9, at 239. Loseke does not argue that “the extreme acts advanced in such social problem official definitions are absent from social life,” but rather that “[c]ases used to illustrate and define social problems are selected from the larger populations of potentially similar cases.” *Id.* As Loseke notes, “We can, of course, understand why definitions emphasizing extreme conditions might be a necessary and sometimes unavoidable aspect of social problem construction. Such definitions best illustrate why a condition is negative, and further, it is only at extremes that we would expect enough social member agreement to yield successful claims-making [of a social problem].” *Id.*

¹¹ *Id.* at 235–36.

¹² In this article, I use the term “victim” to describe a person who is experiencing abuse in their relationship. Because this article examines anti-domestic violence activists’ construct of domestic violence, which has long relied upon a victimhood paradigm (discussed *infra* Parts 0 and 0), I use the term “victim” to describe the party in the relationship who experiences, rather than perpetrates, a pattern of acts conducted for the purpose of obtaining power and control over a partner. I recognize that the term “victim” and the “victimhood paradigm” are deeply problematic. As eloquently stated by Professor Deborah Weissman: “Although a victim’s rights are first and foremost enumerated as a right to dignity, privacy, and to be treated with empathy and compassion, the stories of victims have been fashioned into narratives that act to essentialize victims in ways that are often inaccurate, demeaning, and pathologizing.” Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1495 (2017).

¹³ See GOODMARK, *supra* note 8, at 18–25 (providing an overview of law and policy reform, and criticizing anti-domestic violence activists for their over-reliance on the criminal justice system as the primary solution to the problem of domestic violence in the United States today).

¹⁴ *Id.* at 64 (discussing the paradigmatic victim, who is “expected to cooperate with the legal system—with police who want to arrest and prosecutors who want to convict her abuser”); see also *id.* (“By all accounts, the paradigmatic victim comports with societal notions of the ‘victim.’”).

¹⁵ My argument draws on the work of Dan Kahan. See *infra* Section IV.0.

pattern of behaviors perpetrated for the purpose of gaining power and control, and therefore that *all* violence between parties is “domestic violence.” Activists should do the opposite. We should be explicit that *not* all violence in relationships is a pattern of acts perpetrated for the purpose of power and control. Rather, *some* is, and we want to target that particular type of violence because it is most psychologically damaging to women¹⁶ and other marginalized groups, and it is the type that exploits gender and other privilege.¹⁷ We could then refocus on this gendered violence that is used for, and results in, the subordination of people based on their gender. Finally, being explicit that our current construct is a subtype, rather than the only type, of relationship violence would diminish backlash by legal decision makers and victim blaming by the public.

The concern over the subset of relationship partner violence called “coercively controlling” violence by social scientists and “domestic violence” by anti-domestic violence advocates and activists is well-placed. In this article I argue merely that the construct would better serve the social change goal of ending this particular type of violence if we were careful not to overstate its prevalence and over-generalize its consequences.

More broadly, viewing “domestic violence” as a social construct makes room for examining what about the construct is true versus what is wrongly taken for true, and reminds us that, as with other social constructs, such as gender, we have come to believe certain attributes about and expect certain behaviors of the “domestic violence victim.” These include that she is biologically and performatively female and heterosexual,¹⁸ and that she is “entrapped,” meaning that the relationship dynamic

¹⁶ It is also damaging to men in intimate relationships, when male or female partners perpetrate coercive control. See Denise A. Hines & Emily M. Douglas, *Sexual Aggression Experiences Among Male Victims of Physical Partner Violence: Prevalence, Severity, and Health Correlates for Male Victims and Their Children*, 45 ARCHIVES SEXUAL BEHAV. 1133, 1134 (2016); see also *infra* Section III.0.

¹⁷ As stated by Evan Stark, whose work is discussed *infra* Section III.0., “Coercive control is most prevalent and has its most devastating consequences in heterosexual relationships where it is ‘gendered’ in its aim (male privilege) and its object (female subordination) by its link to structural inequalities in the larger economy. But the process of coercive control is not per se gender specific, need not be legally specified as such, and may play off a host of vulnerabilities, including those associated with race, sexual orientation, sexual identity, age or immigration status that have been socially marginalized.” Evan Stark, *The “Coercive Control Framework:” Making Law Work for Women*, in CRIMINALISING NON-PHYSICAL FAMILY VIOLENCE: COERCIVE CONTROL AND AUTONOMY CRIMES (forthcoming Springer Int’l, Brisbane, Austl., 2019) (Manuscript on file with author).

¹⁸ See, e.g., Goldscheid, *supra* note 8, at 623 (arguing that the current “woman-specific frame” reinforces gender and sexual orientation binaries).

of male power and control (that is unique to the construct) is such that the domestic violence victim is unable to escape the abusive relationship.¹⁹ By being entrapped, she is deserving of help to escape. Conversely, when she does not fall within the construct, we deem her undeserving of help.²⁰ The beauty of constructs is that they are malleable, and we may change them when we get them wrong. I conclude that if the messaging about our current construct remains unchanged, there must be a significant downward shift in what the law can be expected to accomplish.

The article proceeds in four parts. Part I describes in more detail the work of Donileen Loseke, and Part II applies her methodology by taking stock of the constructs as they currently exist. Part III examines social science data available since Loseke published her study, demonstrating that the current construct reflects, in reality, only a subset of relationship violence and a subset of the people who experience it. Part IV examines whether the main service designed to help people experiencing relationship violence today—law—perpetuates, rather than challenges norms. I argue that it does the former, because legal decision makers, like the shelter workers in Loseke's study, exclude from the social community of domestic violence victims those who do not fit the construct. This Part suggests changing the construct to explicitly reflect that *not* all violence in relationships is "domestic violence," and suggests proposed reforms to the law of domestic violence through this lens.

I. THE HISTORICAL SOCIAL CONSTRUCTIONS OF "WIFE ABUSE" AND THE "BATTERED WOMAN"

A number of scholars have persuasively argued that the problem of domestic violence has not been adequately "framed"²¹ or "constructed,"²² and many within this strand acknowledge explicitly that domestic violence is "socially constructed."²³

¹⁹ Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 1010 (2014) ("[W]hen we fail to discern coercive control from other forms of [intimate partner violence] . . . we inadvertently imply not only that all women who experience [intimate partner violence] . . . are entrapped in their relationships. This is particularly problematic because of the connotations of the word 'entrapment.'").

²⁰ See *Lived Realities*, *supra* note 9 at 235–36 (explaining problems, such as denial of social services, when a victim appears to bear some responsibility for the violence rather than appearing as a "pure" or guiltless victim).

²¹ See Goldscheid, *supra* note 8, at 626.

²² See Weissman, *supra* note 12, at 1500.

²³ See, e.g., Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored*, 11 L. & INEQ. 1, 21 (1993) (stating without further explanation

Sociologist Donileen Loseke was among the first. Based on data gathered in the late 1970s and early 1980s, she thoroughly documented the existence of two overlapping, though not coextensive social constructs: “wife abuse,” and the “battered woman.”²⁴ She argued that the primary service designed to help battered women at that time was shelter, and that shelters reproduced rather than challenged the then existing construct of battered women.²⁵

Social constructionism proposes that the world and everything in it exists because we as human beings agree that they do.²⁶ According to this school of thought, the existence of objects is not contingent upon their material or biological constituency; their existence is contingent upon the social

that “the social and legal constructs [of marriage and battered women], combined with lack of state enforcement of the theoretical social compact, reinforce and perpetuate the inequalities in the abusive marriage and fail to allow battered women adequate opportunity to fulfill their human or civil rights to safety of their person, liberty and life itself”); Bethany A. Corbin, *Goodbye Earl: Domestic Abusers and Guns in the Wake of United States v. Castleman—Can the Supreme Court Save Domestic Violence Victims?*, 94 NEB. L. REV. 101, 108 (2015) (stating that “[t]he characterization and interpretation of domestic violence alters with the changing social constructs, and denotes a spectrum of behaviors committed by intimate partners”); Julie Goldscheid, *Gender Violence and Work in the United States and South Africa: The Parallel Processes of Legal and Cultural Change*, 19 AM. U. J. GENDER SOC. POL’Y & L. 921, 953 (2011) (“Instead of framing the problem as a social construct reflecting gender bias, domestic and sexual violence often is framed in terms of personal dynamics of relationship.”); Vanessa E. Munro, *Violence Against Women, ‘Victimhood’ and the (Neo)Liberal State*, in THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 233, 233 (Margaret Davies & Vanessa E. Munro eds., 2013) (“But despite its importance within feminist theorizing, the meaning and parameters of the concept of ‘violence’ are malleable and fluctuating; though grounded in a very real experience of harm or wrongdoing, they are heavily socially constructed, relating in complex and mutually-affirming ways to observers’ normative responses.”); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 522, 567 (1992) (making repeated references to domestic violence or battered women as being socially constructed without explaining these conclusions); Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 328 (2011) (arguing “[t]he survivor struggles to understand the problem [of domestic violence], including its cause and potential solutions, but may resist self-identifying as ‘abused’ or defining the situation as domestic violence based on social constructs”); Daniel P. Whitmore, Note, *Enforcing the Equal Protection Clause on Behalf of Domestic Violence Victims: The Impact of Doe v. Calumet City*, 45 DEPAUL L. REV. 123, 159 (1995) (referring to domestic violence as a social construct and examining how the response to “domestic violence has been conditioned through our culture, particularly our legal culture”).

²⁴ See LOSEKE, *supra* note 9, at 13–14 (explaining first data examined was from 1974).

²⁵ *Id.* at 158–59 (“In brief, social problems work in this instance does not challenge cultural interpretations surrounding the moral evaluation of violence and people. Indeed, it confirms these interpretations.”).

²⁶ KENNETH J. GERGEN, AN INVITATION TO SOCIAL CONSTRUCTION 2 (3d. ed. 2015).

process of defining them.²⁷ We perceive objects; our perceptions enter an intra- and inter-personal communicative space; a series of communicative acts occurs; the object then exists in a social context and has meaning. Thus "[m]eaning and our perceptions of 'reality' are socially constructed Through this process we define objects, enabling them to exist in a social context."²⁸

Loseke describes her analysis as one that "lies in the social construction tradition of the study of public problems. In this tradition, social problems . . . are not assumed to be mirrors or reflections of objective conditions. They rather are understood to be the results of human activity."²⁹ In the 1980s, Loseke worked in a shelter for battered women as she completed her graduate studies. She was curious about whether wife abuse, a historic social norm recently garnering the status of a social problem, and the battered woman as "a collective representation for a woman with a particular type of experience, biography, motivation, and subjectivity," were served by the primary social service that the movement designed: the battered women's shelter.³⁰

Loseke set about the task of documenting wife abuse and the battered woman by first proving the existence of the constructs. In addition to her observations of workers at a shelter, she used "academic [] articles, transcripts of public policy hearings, and mass media magazine articles" as her texts.³¹ She examined both the explicit and implicit messages of battered women's activist organizations, which she calls "claims-makers."³² With numerous pages of examples, Loseke convincingly demonstrated that the social construct of wife abuse is "a label for severe, frequent, and continuing violence that escalates over time and is unstoppable. Such violence is that in which unrepentant men intentionally harm women and where women are not the authors of their own experiences which they find terrifying."³³

Loseke observed that the construct, created by activists and advocates for abused women, raises a central fundamental question: why is it necessary for such violence to be repeated?³⁴ Is not one act of violence enough? Not according to activists and

²⁷ Shaughan A. Keaton & Graham D. Bodie, *Explaining Social Constructivism*, 25 COMM. TCHR. 192, 195 (2011).

²⁸ *Id.*

²⁹ See LOSEKE, *supra* note 9, at 2.

³⁰ *Id.* at 3.

³¹ *Id.*

³² *Id.* at 14.

³³ *Id.* at 20.

³⁴ *Id.*

advocates in the late 1970s: “Most certainly, no claims-maker argues that one act of violence is acceptable, but it remains that in their emphases and explicit definitions, wife abuse is about *continuing, escalating, and unstoppable* victimization.”³⁵

For this construct to gain traction as a social problem, it had to be different from “normal” violence occurring in relationships.³⁶ It had to happen more than once and it also had to be serious enough in nature to be accepted by the public as a real problem.³⁷ As a result, claims-makers argued that the goal of public and social service policy should be to “help the battered woman leave the situation” and “terminate the relationship.”³⁸

Loseke notes that the requirement for violence to be repeated might have been interpreted to be a question about “[w]hy such a man persists in [the] despicable behavior,” but both the public and the claims-makers transformed this question into one about women victims: “Why do they stay?”³⁹ Loseke observes that the question is reasonable, given the framing of the problem:

After all, by definition, women victims are terrified of their abuse, which is extreme and repeated and consequential and only grows worse over time. Since the prognosis that a man will change is poor, it is justified for claims-makers to label a woman’s hope for such change as a “false and futile dream.” The collective representation of wife abuse leads to the common sense conclusion that a woman *should* leave [her] relationship, and this prescription is a part of the collective representation: A woman experiencing wife abuse must leave her relationship In the process of accounting for a woman’s behavior of staying in a relationship containing wife abuse, claims construct a new type of person—a “battered woman”—a woman whose unexpected behavior of staying in a relationship containing wife abuse supports rather than challenges claims about the content of this public problem.⁴⁰

Thusly sprung the social construct of the “battered woman.” Key to this construct is that the woman is entrapped. She must be trapped, Loseke argues, because her behavior of staying must be defined as unreasonable for the extreme conduct known as wife abuse to remain unchallenged.⁴¹ The most common reason for her entrapment is economic dependency,

³⁵ *Id.* at 19 (emphases in original).

³⁶ *Id.* at 18–21.

³⁷ *Id.* at 18–19. Amongst other sources, Loseke cites the testimony of renowned activists Marjorie Fields and Marta Segovia-Ashley at 1978 public policy hearings before the U.S. Commission on Civil Rights. *Id.* at 21 n.30.

³⁸ *Id.* at 21.

³⁹ *Id.* at 20.

⁴⁰ *Id.* at 20–21 (emphasis in original).

⁴¹ *Id.* at 22.

followed very closely by additional factors such as having no place else to go, being isolated, feeling embarrassed, and being unable to rely upon mainstream agencies other than shelters.⁴²

Loseke's analysis focuses on the question of whether the service that claims-makers fought for—shelters—accomplished one of the goals that activists desired: to challenge cultural beliefs about both the acceptability of violence against women by their partners, as well as the moral evaluation of battered women as blameworthy for their own victimization. In other words, their goal was to raise consciousness of the societal problems and inequities posed by intimate partner violence. What she found was that rather than challenging these cultural beliefs, shelters instead reproduced the constructs. When confronted with too many customers and too few beds, workers denied entry to women who experienced violence that was not sufficiently severe, escalating, and unstoppable.⁴³ Similarly, when workers found that the woman was somehow at fault, such as when she was the first aggressor, they again denied entry.⁴⁴ Only "battered women," as the construct defined them, became part of the social community.⁴⁵ Hence, the reproduction of the socially constructed problem: only women suffering severe, escalating, and unstoppable violence who were not at fault for this violence and who were willing to terminate their relationships could become members of the social community of "battered women." The role of shelters became that of changing women's subjective definitions so that they conformed to the socially constructed reality, rather than changing reality.⁴⁶

II. CURRENT CONSTRUCTIONS OF DOMESTIC VIOLENCE AND ITS CONSEQUENCES

Replicating Loseke's methodology, my inquiry now turns to the current construction of public images of domestic violence and domestic violence victims. What is the construct put forward

⁴² *Id.* at 22–23.

⁴³ *See Lived Realities*, *supra* note 9, at 235–36.

⁴⁴ *Id.*

⁴⁵ *See LOSEKE*, *supra* note 9, at 155 (discussing how only some women achieve official inclusion into the battered woman social community).

⁴⁶ *Id.* at 165 ("The experiences and characteristics of women residing in [shelters]—supported, of course, by the understandings of social service providers assisting these women—become the evidence supporting the social construction of wife abuse as severe, repeated, unstoppable behavior; they are the evidence supporting the construction of the battered woman as a pure victim who is unable to act on her own behalf; they are the evidence justifying the correctness of shelter organizations. In turn, the work in [shelters] reproduces the cultural belief that only some violence is morally intolerable and that only some victimized women deserve public sympathy.").

today? As Loseke would put it, what must be subjectively apprehended about an individual in order to classify them as a victim of domestic violence?⁴⁷

A. *It's All About "Power and Control"*

1. Messages Sent by Anti-Domestic Violence Organizations

Claims-makers' public messaging about intimate partner violence plays an important role in contemporary social constructions of domestic violence. Most of the national, well-recognized anti-domestic violence organizations promote the following definition of domestic violence: an abusive partner's desire to exert power and control over their partner. In a Google search of the words "domestic violence," the first site to pop up is The National Domestic Violence Hotline (The Hotline) website, which answers the question "Why do people abuse?" as follows:

Domestic violence and abuse stem from a desire to gain and maintain power and control over an intimate partner. Abusive people believe they have the right to control and restrict their partners, and they may enjoy the feeling that exerting power gives them. They often believe that their own feelings and needs should be the priority in their relationships, so they use abusive tactics to dismantle equality and make their partners feel less valuable and deserving of respect in the relationship.⁴⁸

The Hotline's definition of abuse states: "Domestic violence (also called intimate partner violence (IPV), domestic abuse or relationship abuse) is a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship."⁴⁹ Next to it is an image of a wheel with spokes, a center and a rim (Power and Control Wheel). In the center are the words "power and control"; at the rim are the words physical and sexual violence.⁵⁰ In the eight spokes that lie between the rim and the center of the wheel are behaviors, including but not limited to: using intimidation, using male

⁴⁷ *Id.* at 3–4 ("What must be subjectively apprehended about an individual experience in order to classify it as one of 'wife abuse?'").

⁴⁸ *Why Do People Abuse?*, NAT'L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/is-this-abuse/why-do-people-abuse/> [<https://perma.cc/SBK7-5KDZ>].

⁴⁹ *See What Is Domestic Violence?*, *supra* note 2.

⁵⁰ *Id.*

privilege, minimizing, denying and blaming.⁵¹ The Hotline says of this image: "Think of the wheel as a diagram of the tactics an abusive partner uses to keep their victim in the relationship. While the inside of the wheel is comprised of subtle, continual behaviors, the outer ring represents physical, visible violence."⁵²

The theory underlying the Power and Control Wheel is the predominant way that advocates working on behalf of victims in the field of domestic violence understand violence between intimate partners.⁵³ It is also known as the Duluth Model, because it was developed by staff of the Domestic Abuse Intervention Project in Duluth, Minnesota. A bit of history from the Domestic Violence Intervention Program's (DVIP) webpage explains:

In 1984, staff at the Domestic Abuse Intervention Project (DAIP) began developing curricula for groups for men who batter and victims of domestic violence. We wanted a way to describe battering for victims, offenders, practitioners in the criminal justice system and the general public. Over several months, we convened focus groups of women who had been battered. We listened to heart-wrenching stories of violence, terror and survival. After listening to these stories and asking questions, we documented the most common abusive behaviors or tactics that were used against these women. The tactics chosen for the wheel were those that were most universally experienced by battered women.⁵⁴

The DVIP notes on this same webpage how prevalent and extensive use of the Power and Control Wheel is, noting that it has been seen by "millions" across various media.⁵⁵

The National Coalition Against Domestic Violence (NCADV) similarly states: "Violence in relationships occurs when one person feels entitled to power and control over their partner and chooses to use abuse to gain and maintain that control."⁵⁶ Both the Domestic Violence Awareness Project and

⁵¹ *Id.* The other five spokes include using emotional abuse, using isolation, using children, using economic abuse, and coercion and threats. *Id.*

⁵² *Id.* (emphasis omitted).

⁵³ Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 478 (2008) (describing the power and control wheel as the "model that is used extensively in women's shelters and support groups" and noting that "[m]any women's advocates use the term domestic violence for this pattern").

⁵⁴ *FAQs About the Wheels*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> [<https://perma.cc/2ARZ-CQFU>].

⁵⁵ *Id.* ("The wheel is used in many settings and can be found in manuals, books, articles, and on the walls of agencies that seek to prevent domestic violence. It has even been seen by millions on national television shows and soap operas!").

⁵⁶ *Dynamics of Abuse*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/dynamics-of-abuse> [<https://perma.cc/Y9CJ-WPLR>].

the National Network to End Domestic Violence similarly define domestic violence as a pattern of controlling behaviors used by abusers to gain power in a relationship.⁵⁷ Indeed, the most prominent anti-domestic violence agencies promote the theme of the Power and Control Wheel.

Public service announcements (PSA) seeking to raise awareness about domestic violence are a common tool of non-profits, private foundations, and even recently of men's professional sports leagues.⁵⁸ These, too, operate on the premise that domestic violence is about an abuser exerting power and control over a victim. The National Football League's (NFL) 2015 Super Bowl PSA depicted a terrified woman pretending to order a pizza from a 911 operator in order to escape her abusive relationship.⁵⁹ The Allstate Foundation's PSA for their Purple Purse campaign depicted a female victim of domestic violence as being trapped in a literal jail cell.⁶⁰ These messages perpetuated by large organizations and anti-domestic violence groups have, understandably, informed the public's opinion and perception of victims, abusers, and partner violence.

2. Public opinion

Further underscoring presently prevailing constructions of domestic violence, several studies have specifically questioned survey participants on their thoughts about power and control within abusive relationships. For example, a 2005 study by professors at SUNY Albany found that many respondents considered an abuser's anger and loss of control as one of the

⁵⁷ See *About DV*, DOMESTIC VIOLENCE AWARENESS PROJECT, <https://www.dvawareness.org/about-dv> [<https://perma.cc/X5UU-WBN2>] ("Domestic violence is best understood as a pattern of abusive behaviors—including physical, sexual, and psychological attacks as well as economic coercion—used by one intimate partner against another (adult or adolescent) to gain, maintain, or regain power and control in the relationship."); *What is DV?*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/about-dv/what-is-dv/> [<https://perma.cc/6CQJ-ESPG>] ("Domestic violence is a pattern of coercive, controlling behavior that can include physical abuse, emotional or psychological abuse, sexual abuse, or financial abuse (using money and financial tools to exert control).").

⁵⁸ For a recent discussion of men's professional sports' public ad campaigns, see Chelsea Augelli & Tamara Kuennen, *Domestic Violence & Men's Professional Sports: Advancing the Ball*, 21 U. DENV. SPORTS & ENT. L.J. 27 (2018).

⁵⁹ Wall Street J., *Super Bowl 2015: Domestic Violence PSA*, YOUTUBE (Jan. 27, 2015), https://www.youtube.com/watch?v=5Z_zWIVRIWk [<https://perma.cc/98WW-ML77>] [hereinafter *Domestic Violence PSA*].

⁶⁰ The Allstate Foundation, *The Allstate Foundation Launches "America's Largest Prison Break" to Free Women Trapped by Domestic Violence*, PR NEWSWIRE (June 14, 2016, 10:28 AM), <https://www.prnewswire.com/news-releases/the-allstate-foundation-launches-americas-largest-prison-break-to-free-women-trapped-by-domestic-violence-300284333.html> [<https://perma.cc/HHX8-X2QN>].

chief reasons for domestic violence.⁶¹ Another 2005 study by the Allstate Foundation asked participants to define domestic violence in their own words, and several of the respondents defined domestic violence as being about power and control.⁶² Similarly, in a 1997 Family Violence Prevention Fund study, survey participants most frequently mentioned “the husband’s need to control the wife and get his way”⁶³ as a cause of domestic violence.

Modern social media public outreach trends emphasize the findings of these studies. In 2014, following the Ray Rice incident, victims of domestic violence began using “#WhyIStayed” to explain why they stayed in abusive relationships.⁶⁴ One central theme throughout many of these tweets was that the victims felt trapped and unable to escape their partner’s abuse.⁶⁵

Anecdotal evidence also suggests that the average person thinks that domestic violence is about a male abuser exerting power and control over a trapped female victim. In 2017, a New York City domestic violence shelter asked its followers on social media to list the words that came to mind when they thought about domestic violence.⁶⁶ Two of the words that came to mind the most were “power” and “women.”⁶⁷

⁶¹ Alissa Pollitz Worden & Bonnie E. Carlson, *Attitudes and Beliefs About Domestic Violence: Results of a Public Opinion Survey*, 20 J. INTERPERSONAL VIOLENCE 1219, 1226 (2005).

⁶² ALLSTATE FOUND., FIRST ANNUAL ALLSTATE FOUNDATION NATIONAL POLL ON DOMESTIC VIOLENCE EXECUTIVE SUMMARY 2 (2006), <http://www.ncdsv.org/images/1stAnnualAllstateNationalPollDVExecSum.pdf> [<https://perma.cc/VQ4D-RZ7E>] (“It’s a power grab by one over the other . . . I’m a victim of domestic violence and it’s the worst thing . . . Sometimes the people don’t believe you and that’s why a lot of women are scared to go to the police. You go back and continue to be a victim because it’s better than trying to get people to help you . . .”).

⁶³ Bonnie E. Carlson & Alissa Pollitz Worden, *Public Opinion About Domestic Violence* 9 (Nat’l Inst. Just., Working Paper No. 198319, 2001), <https://www.ncjrs.gov/pdffiles1/nij/grants/198319.pdf> [<https://perma.cc/P5HE-F2C9>].

⁶⁴ See Olga Khazan, *Why They Stayed*, ATLANTIC (Sept. 9, 2014), <https://www.theatlantic.com/health/archive/2014/09/why-they-stayed/379843/> [<https://perma.cc/U8CY-AC9G>].

⁶⁵ See *id.* (“I had to plan my *escape* for months before I even had a place to go and money for the bus to get there.”(emphasis added)); Jared Keller, *19 #WhyIStayed Tweets that Everyone Needs to See*, MIC (Sept. 8, 2014), <https://mic.com/articles/98326/19-why-stayed-tweets-that-everyone-needs-to-see#.I8P5hDlmE> [<https://perma.cc/7FYU-DUUQ>]. For more #WhyIStayed tweets, see #WhyIStayed, TWITTER, <https://twitter.com/hashtag/WhyIStayed?src=hash> [<https://perma.cc/8ERK-G844>].

⁶⁶ URINYC, *What Words Come to Mind When You Think of Domestic Violence?*, MEDIUM (Dec. 7, 2017), <https://medium.com/unshelteredvoices/what-words-come-to-mind-when-you-think-of-domestic-violence-61c6aa75f7bb> [<https://perma.cc/6RPY-XSTE>].

⁶⁷ *Id.* Other words that came to mind the most for those who responded to the shelter’s request included anger, children, abuse, dangerous, and pain. *Id.*

Interestingly, there is also data indicating that the average person does not hold victims of violence blameless. In a Georgia State University study, researchers found that about 51% of those surveyed believed that it was “difficult to understand why victims stay in violent relationships,” indicating that at least a sizeable chunk of those who participated in this study did not think that domestic violence was totally inescapable.⁶⁸ And the 2005 SUNY Albany study also found that nearly one in four of those surveyed “agreed that some women want to be abused,” and that “nearly two thirds believed that women [could] exit violent relationships ‘if they really wanted to.’”⁶⁹ A 2002 National Criminal Justice Reference Service study likely put it best when it stated, “[f]or the most part, the public does not blame female victims for abuse, although they [do] hold women accountable for exiting abusive relationships.”⁷⁰ Such beliefs are informed by the concept that leaving the abuser is the only rational action victims of domestic violence can take.

B. *Victims Want (or Should Want) to Leave, But Cannot*

As the section below demonstrates, many believe that domestic violence victims want to, need to, or should end their relationships. Although this belief is occasionally qualified with comments like “when she’s ready” or “when she decides to leave,” the construct stresses that leaving is the only rational solution.

1. Messages Sent by Anti-Domestic Violence Organizations

Anti-domestic violence organizations—both local and national—attempt to make it clear to victims and their supporters that leaving an abusive relationship is hard. But most of these organizations either imply or overtly stress that the victim wants or needs to leave. The organization Break the Silence Against Domestic Violence advances this construct quite aggressively by highlighting an article titled *Why Staying in an Abusive Relationship is Worse than Leaving* on their website.⁷¹

⁶⁸ Christina Policastro & Brian K. Payne, *The Blameworthy Victim: Domestic Violence Myths and the Criminalization of Victimhood*, J. AGGRESSION, MALTREATMENT & TRAUMA 329, 337–38 (2013).

⁶⁹ See Worden & Carlson, *supra* note 61, at 1229.

⁷⁰ See Carlson & Worden, *supra* note 63, at 9.

⁷¹ Amy Thomson, *Why Staying in an Abusive Relationship is Worse than Leaving*, BTSDAV (Sept. 12, 2017), <https://www.breakthesilencedv.org/staying-abusive-relationship-worse-leaving/> [<https://perma.cc/5WWF-8ZBS>].

This article emphasizes the emotional, spiritual, physical, and financial damage that staying in an abusive relationship can do, and concludes with the advice that while “leaving gives you an opportunity to reclaim and rebuild your life, [s]taying only prolongs your suffering with escalation of abuse over time.”⁷²

Other organizations encourage domestic violence victims to leave in a less aggressive manner. For example, Safe Horizon’s webpage on domestic violence starts with the tagline “Afraid to stay, afraid to leave?” and then proceeds to encourage those in abusive relationships to find the help they need to leave their abusers.⁷³ Similarly, New Hope for Women, a Maine-based domestic violence organization, focuses their entire “Safety Plan” webpage on the steps that a victim should take to leave the relationship.⁷⁴ Healing Abuse Working for Change (HAWC), a Massachusetts-based domestic violence organization makes it clear that leaving should be a domestic violence victim’s ultimate goal:

“Leaving an abusive relationship means gradually recognizing that you are in control of your life, no matter what. The first step . . . is acknowledging a need for help. Whether you want to discuss this issue and make a plan, or you seek an immediate emergency shelter, HAWC is ready to help.”⁷⁵

The NCADV states that there are “many reasons victims of domestic violence . . . choose to stay in abusive relationships,” but it stresses that the decision stems from a variety of forces working against the victim (e.g., lack of money, unsupportive family and friends, nowhere else to go, pets they do not want to leave behind, etc.) beyond their control, and not from the victim’s desire to preserve her relationship.⁷⁶ The National Network to End Domestic Violence does the same.⁷⁷ These messages, which

⁷² *Id.*; see also Sydney Martin, *Eliminate that Seven Times Statistic, How to Stay Away For Good*, BTSDAV (JAN. 15, 2017), <https://www.breakthesilencedv.org/beat-that-seven-times-statistic/> [<https://perma.cc/M3RW-SVKH>] (“[E]ven though a survivor returns to their abuser an average of seven times before leaving for good, we hope that these tips can help you find ways to overcome obstacles and say goodbye to your abuser forever.”).

⁷³ *Domestic Violence*, SAFE HORIZON, <https://www.safehorizon.org/get-help/domestic-violence/overview/> [<https://perma.cc/3L4F-TEWF>].

⁷⁴ *Safety Plan*, NEW HOPE FOR WOMEN, <https://newhopeforwomen.org/safety-plan> [<https://perma.cc/77SZ-SDEP>].

⁷⁵ *Why Leaving is Hard*, HEALING ABUSE WORKING FOR CHANGE, <https://hawcdv.org/get-help-now/about-domestic-violence/why-leaving-is-hard/> [<https://perma.cc/4PCZ-LZTN>].

⁷⁶ See *Dynamics of Abuse*, *supra* note 56.

⁷⁷ *Frequently Asked Questions About Domestic Violence*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/content/frequently-asked-questions-about-domestic-violence/> [<https://perma.cc/47UZ-Z59B>](explaining that victims of domestic violence largely stay because they’re trapped, not because they want to). *But see id.*

are disseminated by groups on the front lines of domestic violence education and prevention and which demand that the victim terminate their abusive relationship in order to end the cycle of abuse against them, serve to enshrine the construct's sole solution to the societal problem of domestic violence.

2. Messages Sent by Government Agencies

More so than anti-domestic violence organizations, national, state, and local government agencies overtly tell victims that they must leave their abusive relationships. King County in Washington State remarks on their domestic violence webpage, in large bold letters, "There's No Excuse. Don't wait until you and the ones you love get hurt."⁷⁸ King County also uses victim's children in their messaging, warning that victims who stay put their children at risk of abuse.⁷⁹ The Clark County's Prosecuting Attorney publishes guidance to victims of domestic violence, which essentially boils down to this: if you're a victim of domestic violence, you need to leave.⁸⁰ The State of Nebraska does acknowledge that some victims will decide to stay,⁸¹ but later also proceeds to explain why staying is not the best idea.⁸² And the City of Kingsport, Tennessee also makes it explicit that victims need to leave their abusive relationships stating, "DON'T BE A VICTIM" and "TAKE A STAND."⁸³

Although the U.S. Department of Health & Human Services states that it's "best to let [the victim] decide [whether] to stay, leave or seek help," the Department also remarks that

("Survivors often report that they want the abuse to end, not the relationship. A survivor may stay with or return to an abusive partner because they believe the abuser's promises to change.").

⁷⁸ *Domestic Violence*, KING COUNTY, <https://www.kingcounty.gov/depts/prosecutor/victim-community-support/domestic-violence.aspx> [<https://perma.cc/BC89-GJTE>].

⁷⁹ *Id.*

⁸⁰ *What to Do If You Are a Victim of Domestic Violence*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/domviol/domvic.htm> [<https://perma.cc/R5JP-CJLZ>].

⁸¹ NEB. DEPT. OF HEALTH & HUMAN SERVS., BREAKING THE SILENCE: A HANDBOOK FOR SURVIVORS OF DOMESTIC VIOLENCE 1, http://dhhs.ne.gov/children_family_services/Documents/BreakingtheSilenceBooklet.pdf ("Identifying your partner as an abuser does not mean that you are to blame for what is happening in any way, *regardless if you stay in the relationship or if you leave*. Sometimes staying in the relationship is the safest option at the moment. Identifying that you are being abused does not mean that you should automatically leave.").

⁸² *Id.* at 13.

⁸³ *Domestic Violence*, CITY OF KINGSPORT, TENN., https://www.kingsporttn.gov/city-services/police-department/operations_bureau/criminal_investigation/investigations/domestic_violence/ [<https://perma.cc/W9C6-ZNUP>] (emphasis in original).

“[i]f a friend or loved one is being abused, it is important to help them get out of the relationship and get to safety.”⁸⁴ And while the federal Office on Women’s Health also does not explicitly tell victims to leave their abusers, it does hint that the victim should consider leaving, remarking that “[y]ou do not have to leave today or do it all at once. But a safety plan can help you know what to do when you are ready to leave. Having a plan in place can help you get out safely later if you do decide to leave.”⁸⁵ These messages from government agencies, when viewed with the messages from anti-domestic violence organizations, reinforce society’s notion that the only way to end intimate partner violence is for the victim to leave the relationship. By staying, the notion continues, the victim continues the cycle of violence against them.

C. *Victims Who Do Not Leave are Entrapped*

In cases where domestic violence victims choose not to end a relationship, anti-domestic violence advocates and activists argue that the failure to leave is because the victim is trapped, and never because the victim chooses to stay in the relationship. The notion that victims, like people in non-abusive relationships, might feel conflicted about ending their intimate partnerships is largely ignored.

1. Anti-Domestic Violence Organizations

More so than other sources, anti-domestic violence organizations acknowledge love as a reason for why domestic violence victims choose to stay with their abusers. The Hotline, the NCADV, and the National Network to End Domestic Violence all cite love as one of the reasons that domestic violence victims stay.⁸⁶ The Hotline states that “[s]o often, the victim feels love for their abusive partner. They may have children with them and want to maintain their family They may only

⁸⁴ *Tips for Helping a Loved One or Friend Get Out of an Abusive Relationship*, U.S. DEP’T HEALTH & HUM. SERVS.: FED. OCCUPATIONAL HEALTH, <https://foh.psc.gov/NYCU/domesticviolence2.asp> [<https://perma.cc/6FTA-5EUD>].

⁸⁵ *Leaving an Abusive Relationship*, OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/relationships-and-safety/domestic-violence/leaving-abusive-relationship> [<https://perma.cc/GC5W-W576>].

⁸⁶ See *Frequently Asked Questions About Domestic Violence*, *supra* note 77; *Why Do People Stay in Abusive Relationships?*, NAT’L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/is-this-abuse/why-do-people-stay-in-abusive-relationships/> [<https://perma.cc/A936-DJZQ>]; *Why Do Victims Stay?*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/why-do-victims-stay> [<https://perma.cc/7DVX-8JQH>].

want the violence to stop, not for the relationship to end entirely.”⁸⁷ Similarly, the NCADV remarks that a victim might stay because “the relationship is a mix of good times, love[,] and hope along with the manipulation, intimidation[,] and fear.”⁸⁸ And the National Network to End Domestic Violence similarly recognizes that survivors may simply want the violence to stop, not the relationship to end.⁸⁹

However, at the same time, all three of these organizations also state that victims of domestic violence stay in relationships because they are trapped.⁹⁰ And, these organizations dedicate substantially more space on their websites to explaining that victims of domestic violence stay because they are trapped than they do to explaining that victims stay because they love their partners and want to stay in the relationships.⁹¹ These organizations’ failure to fully recognize that the victim may in fact be making the choice to stay in an abusive relationship for reasons other than feeling trapped perpetuates society’s current construct of the “entrapped victim.”

2. Empirical Data

Studies about domestic violence often assert that victims of domestic violence remain in their abusive relationships because they are trapped. A 2013 study by professors at the University of Alabama noted the following:

Perhaps the best way to decrease the number of abusive relationships is by educating women before they find themselves *trapped* in one. If more women knew about the factors—including social influence, the scientific study of the influence of external factors on individuals’ attitudes and behavior—that *may lead one to become trapped* in a violent relationship by their own consistency, they would be able to

⁸⁷ See *Why Do People Stay in Abusive Relationships?*, *supra* note 86.

⁸⁸ See *Why Do Victims Stay?*, *supra* note 86.

⁸⁹ See *Frequently Asked Questions About Domestic Violence*, *supra* note 77.

⁹⁰ See *id.* (asserting that victims stay because they’re afraid of their partners, they think the abuse is their fault, and they don’t think they can survive on their own); *Why Do People Stay in Abusive Relationships?*, *supra* note 86 (citing fear, language barriers, and lack of money or resources as additional reasons why domestic violence victims remain with their abusers); *Why Do Victims Stay?*, *supra* note 86 (“A victim’s reasons for staying with their abusers are extremely complex and, in most cases, are based on the reality that their abuser will follow through with the threats they have used to keep them trapped: the abuser will hurt or kill them, they will hurt or kill the kids, they will win custody of the children, they will harm or kill pets or others, they will ruin their victim financially . . .”).

⁹¹ See *Frequently Asked Questions About Domestic Violence*, *supra* note 77; *Why Do People Stay in Abusive Relationships?*, *supra* note 86; *Why Do Victims Stay?*, *supra* note 86.

avoid such factors and place themselves in positions that are not favorable to abuse.⁹²

Additionally, in a 1996 book that looked at the psychology of domestic violence victims through interviews with abused women, the author found that many of the victims surveyed chose to stay in their abusive relationships because they were trapped by everything from the stigma of divorce, to the feeling that they could not survive on their own, to simple fear of their abuser.⁹³ And, more recently, in a 2009 article about why victims stay, the authors noted that domestic violence victims remained in abusive relationships because they were trapped by a myriad of things, including financial dependency, a complicated legal system, and ineffective police assistance.⁹⁴

Some studies conclude that love is one of the reasons why victims of violence stay. For example, a 2000 study about domestic violence victims explicitly noted that some victims do stay with their abuser because of love and concluded that a woman's decision to stay because of that love was a legitimate choice that she was free to make and one that should be supported.⁹⁵ This study also highlighted the importance of recognizing the small degree of free choice that domestic violence victims have and noted that that choice "may be an integral part of an empowerment-based feminist perspective advocating support of women's strengths, autonomy, and control over their lives in the context of multiple constraints and despite them."⁹⁶

Similarly, a 2003 study about gay male victims of domestic violence considered the cyclic nature of violence and found that many victims stay because of the "violence-free time frame" in that cycle, which often works to reinforce the victim's feelings of love towards their abusive partner.⁹⁷ However, the

⁹² Brandon Dare et al., *Commitment: The Key to Women Staying in Abusive Relationships*, 6 J. INTERPERSONAL REL., INTERGROUP REL. & IDENTITY 58, 63 (2013) (emphasis added).

⁹³ VALERIE NASH CHANG, I JUST LOST MYSELF: PSYCHOLOGICAL ABUSE OF WOMEN IN MARRIAGE 102–03, 106 (1996).

⁹⁴ Darrell Payne & Linda Wermeling, *Domestic Violence and the Female Victim: The Real Reason Women Stay!*, 3 J. MULTICULTURAL, GENDER, & MINORITY STUD. 1, 2–3 (2009).

⁹⁵ See Einat Peled et al., *Choice and Empowerment for Battered Women Who Stay: Toward a Constructivist Model*, 45 SOC. WORK 9, 11, 15 (2000).

⁹⁶ *Id.* at 11.

⁹⁷ J. Michael Cruz, "Why Doesn't He Just Leave?" *Gay Male Domestic Violence and the Reasons Victims Stay*, 11 J. OF MEN'S STUD. 309, 316–17 (2003) ("James (34) also said, 'I stayed in it because . . . I mean I loved him. I love him. I don't love him today, I just won't take any of that crap.' John (25) in addition to talking about his lack of experience with gay relationships also said that he stayed with his partner because ' . . . just the fact that I think I was really and truly in love with him.' Last, Mike (31)

same study also found that many gay victims of domestic violence chose to stay in their relationship because they are trapped, often because of financial dependence.⁹⁸ In another 2003 study that focused on female victims of violence, and which permitted respondents to give multiple reasons for staying with their abusers, 53.8 percent of those who stayed did so in part because they loved their partner.⁹⁹ Yet, sizeable portions of these respondents also indicated that they stayed because they were trapped; more specifically, 45.9 percent remarked that they stayed in part because of a lack of money, 36.7 percent stayed because they were afraid of their partner, and 28.5 percent stayed because they had nowhere else to go.¹⁰⁰ So while this study noted that love was one reason victims of violence stayed, the study also found that those feelings of love often intersected with feelings of being trapped.¹⁰¹

In sum, while some sources acknowledge that many victims of domestic violence want, rather than need or are forced, to maintain their intimate relationships, few explicitly legitimize victim reasoning. When they do, they qualify the legitimacy with the explanation that victims also are entrapped.

III. PROBLEMS WITH THE CURRENT CONSTRUCT AND MESSAGING

A. *Not All Domestic Violence is Motivated by Power and Control*

For more than two decades, social scientists in the field of intimate partner violence have demonstrated that there are distinct typologies of violence that occur within intimate relationships, only one of which involves the motive to exert power and control.¹⁰² In particular, sociologist Michael Johnson argues that there are four main types of relationship violence,

said, 'Because I thought I was really in love with the person,' while Rob (30) stated plainly, 'I loved him.'").

⁹⁸ *Id.* at 310.

⁹⁹ Michael A. Anderson et al., "Why Doesn't She Just Leave?": A Descriptive Study of Victim Reported Impediments to Her Safety, 18 J. FAM. VIOLENCE 151, 154–55 (2003).

¹⁰⁰ *Id.* at 154.

¹⁰¹ *Id.*

¹⁰² In addition to Michael Johnson and Evan Stark, discussed extensively in this section, see PENCE & DASGUPTA, *supra* note 4, at 5–14 (arguing that there are five categories of domestic violence: battering, resistive/reactive violence, situational violence, pathological violence, and anti-social violence).

yet only one of these types is prompted by an abuser's desire to control and coerce the victim.¹⁰³

Starting with Johnson's typologies that do not involve power and control, he describes "[s]ituational [c]ouple [v]iolence" as "partner violence that does not have its basis in the dynamic of power and control."¹⁰⁴ It is the most common type of violence in intimate relationships.¹⁰⁵ "Separation-[i]nstigated [v]iolence" is a type of partner violence that first occurs in the relationship at separation, related to the tensions and emotions that arise in that context but is not ongoing.¹⁰⁶ "Violent resistance" is violence that both men and women use in reaction to partners who have a pattern of coercive controlling violence, for the purposes of getting the latter to stop, or to stand up for themselves.¹⁰⁷

According to Johnson, "[c]oercively [c]ontrolling [v]iolence" is "a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners."¹⁰⁸ It is this type of violence that anti-domestic violence activists and advocates refer to when they use the term "domestic violence."¹⁰⁹ It is "the attempt to dominate one's partner and to exert general control over the relationship, domination that is manifested in the use of a wide range of power and control tactics, including violence."¹¹⁰

Sociologist Evan Stark also uses the term "coercive control" and (literally) wrote the book on it.¹¹¹ Though he uses different terms to describe other forms of violence in intimate partnerships—Stark uses "fights," "assaults," and "coercive control"—he largely agrees with Johnson's typologies,¹¹² and

¹⁰³ See Kelly & Johnson, *supra* note 53, at 477 (elaborating findings of MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE AND SITUATIONAL COUPLE VIOLENCE (2008)).

¹⁰⁴ See *id.* at 479.

¹⁰⁵ Michael P. Johnson et al., *Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required*, 20 VIOLENCE AGAINST WOMEN 186, 192 (2014).

¹⁰⁶ See Kelly & Johnson, *supra* note 53, at 487.

¹⁰⁷ *Id.* at 484.

¹⁰⁸ *Id.* at 478. In Johnson's earlier work he called this type of violence "[i]ntimate [partner] [t]errorism" but modified it because of resistance in the field. *Id.* at 478–79.

¹⁰⁹ *Id.* at 478.

¹¹⁰ Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322, 323 (2005).

¹¹¹ EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 4 (2007). The term was coined by Susan Schechter. SUSAN SCHECHTER, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES 4 (1987).

¹¹² See STARK, *supra* note 111, at 104 ("Johnson crystallized observations I and others had been making since the early 1980s.").

argues for one additional nuance. Stark argues that Johnson's "situational violence" does not sufficiently distinguish between the "ordinary fights that many couples view as legitimate ways to settle their differences, and frank assaults where violence is used to hurt, frighten, or subordinate a partner, but control tactics are not."¹¹³

What both leading sociologists also agree upon is that coercive control, the type of violence that anti-domestic violence activists simply call "domestic violence," is gendered. In heterosexual relationships, men are the primary perpetrators and women the victims.¹¹⁴

This conclusion has not been consistently replicated, however. Some data indicate that women use coercively controlling violence in heterosexual intimate relationships.¹¹⁵ Moreover, Johnson's typologies do not account for sexual violence in relationships.¹¹⁶ In a meta-review of the empirical data between 2002 and 2013, Hamberger and Larson found that both men and women are active participants in physical and emotional violence, *and* that both the purpose for and effect of the abuse was gendered.¹¹⁷ For example, women's use of physical violence was in response to violence used against them by men. Men's use of emotional abuse tactics tended to threaten women's safety and autonomy, whereas women's abuse tactics did not. Men were the primary perpetrators of sexual violence. Women were more highly victimized and fearful than men.¹¹⁸

Johnson's and Stark's works have generated numerous empirical studies aimed at discerning and measuring the distinct typologies of violence that occur between intimate partners.¹¹⁹ This body of work, which includes more than seventy

¹¹³ *Id.*

¹¹⁴ *Id.* at 102 ("[T]he pattern of intimidation, isolation, and control . . . is unique to men's abuse of women and . . . is critical to explaining why women become entrapped in abusive relationships in ways that men do not and experience abuse as ongoing. These tactics do not typify all forms of abuse."); *see also* Kelly & Johnson, *supra* note 53, at 482 (discussing the results of various surveys and stating that coercively controlling violence is largely male perpetrated).

¹¹⁵ *See* Hines & Douglas, *supra* note 16, at 1134.

¹¹⁶ Eryn Nicole O'Neal et al., *When the Bedroom is the Crime Scene: To What Extent Does Johnson's Typology Account for Intimate Partner Sexual Assault?*, 11 J. CHILD CUSTODY 278, 297 (2014).

¹¹⁷ Kevin L. Hamberger & Sadie E. Larson, *Men's and Women's Experience of Intimate Partner Violence: A Review of Ten Years of Comparative Studies in Clinical Samples: Part I*, 30 J. FAM. VIOLENCE 699, 717 (2015).

¹¹⁸ *Id.* at 715.

¹¹⁹ For a recent review of this literature, and cautions about its use by courts in child custody cases, *see* Joan S. Meier, *Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation*, 70 RUTGERS U. L. REV. 115 (2017); *see also infra* Section IV.C.

articles,¹²⁰ demonstrates empirically what sociologists Johnson and Stark proposed theoretically: that violence between intimate partners is “not a unitary phenomenon and that there are different types of [intimate partner violence] with different etiologies and outcomes.”¹²¹ Some argue there is “a continuum of violence experience” in relationships.¹²² Understanding a particular perpetrator’s intent in using violence and the impact that violence has on the person experiencing it are critical.¹²³

As a result, Kelly and Johnson conclude, “it is no longer considered scientifically or ethically acceptable to speak of domestic violence without specifying the type of partner violence to which one refers.”¹²⁴

B. *Not All People Subjected to Abuse Become Entrapped*

Overestimations of the prevalence of coercively controlling violence—the type that most anti-domestic advocates and the public simply call “domestic violence”—have serious and deleterious consequences. It is coercively controlling violence, and not other types of violence, that sociologists tell us entrap women in their daily lives.¹²⁵ Entrapment is at the heart of what anti-domestic violence advocates most want to prevent.¹²⁶ Entrapment occurs when men use the behaviors captured on the Power and Control Wheel (e.g., economic abuse, isolation, emotional abuse, etc.) against women in a sexist society.¹²⁷

¹²⁰ See Meier, *supra* note 119, at 132.

¹²¹ Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555, 555 (2010) (internal citations omitted).

¹²² Pauline Gulliver & Janet L. Fanslow, *The Johnson Typologies of Intimate Partner Violence: An Investigation of Their Representation in a General Population of New Zealand Women*, 12 J. CHILD CUSTODY 25, 40 (2015); see also Victoria Frye et al., *The Distribution of and Factors Associated With Intimate Terrorism and Situational Couple Violence Among a Population-Based Sample of Urban Women in the United States*, 21 J. INTERPERSONAL VIOLENCE 1286, 1303 (2006); Connie J. A. Beck et al., *Patterns of Intimate Partner Violence in a Large, Epidemiological Sample of Divorcing Couples*, 27 J. FAM. PSYCHOL. 743, 750 (2013).

¹²³ See STARK, *supra* note 111, at 205 (describing the importance of the intent of the perpetrator to dominate and control his or her partner; if a specific assault is part of a larger pattern of ongoing tactics used coercively to control another, it tips into the realm of abusive); see also PENCE & DASGUPTA, *supra* note 4, at 15–16 (arguing “as communities across the country continue to grapple with complexities of intimate partner abuse, we revisit the fundamental question, ‘who is doing what to whom and with what impact?’”); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 56 (1991) (describing “battering as a (violent) point on a continuum of domination in relationships,” she argues that the intent of the perpetrator should be the focus).

¹²⁴ See Kelly & Johnson, *supra* note 53, at 477.

¹²⁵ See STARK, *supra* note 111, at 129–30.

¹²⁶ See *supra* Section II.C.

¹²⁷ See STARK, *supra* note 111, at 129–30.

For social scientists such as Stark, entrapment is a term of art. It is the confluence of societal institutions that supports male privilege, sexism, *and* an individual man who uses coercively controlling tactics. Entrapment is “the unique experiential effect when structural exploitation, regulation, and other controls are personalized.”¹²⁸

For the public, entrapment means something different. It connotes the images that Loseke first described, and that persist today: those of the individual woman who is frozen, paralyzed, and helpless who, if given the resources, whether financial, legal, or emotional, would leave her partner if only she could.¹²⁹ Analysis of structural sexism is lost in this equation, for the equation assumes that a one-time bail out will equalize her access to resources and power generally. But this is not the case. “Men and women are unequal in battering not because they are unequal in their capacities for violence but because sexual discrimination allows men privileged access to the material and social resources needed to gain advantage in power struggles.”¹³⁰ We believe that police, judges, lawyers, advocates, social workers, friends, neighbors, and family can provide the necessary support, resources, and strength.¹³¹ They can help “entrapped” women by helping them leave. Helping individual women leave, then, has been and continues to be *the* solution. When women choose not to leave, they, rather than the phenomenon of entrapment, are to blame.¹³²

I have previously argued that feminist legal scholars have made the mistake of underrepresenting the empirical complexities of domestic violence.¹³³ We assume, when we write broadly about “intimate partner violence,” that we are all on the same page about what this term means.¹³⁴ Like anti-domestic violence activists and advocates, scholars usually mean coercive control; the statistics we cite, however, are about *all* forms of violence between partners, as Stark, Johnson, and others have set them out. We commonly cite large scale, national studies that fail to distinguish between the incidence and prevalence of

¹²⁸ *Id.* at 370.

¹²⁹ *See supra* Section II.C.

¹³⁰ *See* STARK, *supra* note 111, at 105.

¹³¹ *See* GOODMARK, *supra* note 8, at 81 (describing in detail the conflation of “separation with successful termination of the violence” as having “oriented domestic violence law and policy since the early days of the battered women’s movement” and arguing how law and policy development within the legal system unequivocally prioritizes separation as the only clear remedy to ending domestic violence).

¹³² *Id.* at 66–69 (describing skepticism of professionals when women do not act in conformity with stereotypes of victims as passive and desirous of leaving).

¹³³ *See* Kuennen, *supra* note 19, at 1007.

¹³⁴ *Id.* at 1008.

intimate partner violence, and then we use these studies to discuss both incidence and prevalence indiscriminately.¹³⁵ For example, based on the National Violence Against Women Survey, I mistakenly argued that “[t]he vast majority of [domestic violence] victims do not report the violence to the police” without differentiating amongst types of violence.¹³⁶ In fact, victims of coercive control versus victims of any other type of intimate partner violence are more likely to call the police.¹³⁷

Another problem with generalizing from a subset is that we overstate the problem of entrapment. Entrapment is a phenomenon unique to the subset of domestic violence that is about power and control, or coercive control.¹³⁸ Entrapment does not occur, for example, in the type of intimate partner violence that Kelly and Johnson label “[v]iolent [r]esistance.”¹³⁹ Nor does it occur in situational couple violence—the most widespread type of intimate partner violence.¹⁴⁰ Nor does it occur in the type of intimate partner violence that Stark labels “fights.”¹⁴¹

In short, by generalizing from a particular subset of violence in intimate relationships, we imply that all women who experience any form of relationship violence are coercively controlled and that all women who experience any form of relationship violence are entrapped.¹⁴² Because entrapment means something different to the general public than to the social scientists who coined the term, our overstatements contribute to, and perhaps even reproduce, the very images of women experiencing relationship violence that we most want to change.¹⁴³

¹³⁵ *Id.*

¹³⁶ Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 *FORDHAM L. REV.* 837, 839 (2012).

¹³⁷ Janel M. Leone et al., *Women’s Decisions to Not Seek Formal Help for Partner Violence: A Comparison of Intimate Terrorism and Situational Couple Violence*, 29 *J. INTERPERSONAL VIOLENCE* 1850, 1862 (2014) (finding that “70.2% of intimate terrorism victims sought some type of formal help versus 44.4% of situational couple violence victims”).

¹³⁸ See STARK, *supra* note 111, at 105–06 (explaining the co-occurrence of entrapment and coercive control).

¹³⁹ See Kelly & Johnson, *supra* note 53, at 479 (describing violent resistance as an act of violence in reaction to the partner’s use of coercive control, rather than as an act that is motivated by the desire to control, or entrap, the partner).

¹⁴⁰ See *id.* (defining situational violence as having no basis in the motive of power and control); *id.* at 481 (stating that situational violence is far more common than coercively controlling violence).

¹⁴¹ See STARK *supra* note 111, at 105–06 (explaining that entrapment when one party is successful in their efforts to control the other, and distinguishing that context from ordinary “fights” in intimate partnerships).

¹⁴² See discussion *supra* Section II.C.

¹⁴³ See discussion *supra* Part I.

C. *A Clearer Construct*

Loseke claimed that in the social problems industry, claims-makers use extreme examples and images, and that the use of extremes is understandable, perhaps even necessary, in the process of putting a social problem on the public's radar.¹⁴⁴ She observed, however, that to maintain integrity, the use of extremes must be acknowledged by those who use them.¹⁴⁵

Today's anti-domestic violence activists know that there are many types of violence, and that domestic violence is not limited to a pattern of behaviors perpetrated for the purpose of power and control.¹⁴⁶ One need not look further for evidence of this than to look at the explanations we offer to justify women's use of violence against male intimate partners. When heterosexual women commit violence against their partners, we justify its use on numerous grounds: self-defense; provoking an attack to get it over with; sending a clear message that a partner's ongoing abuse will no longer be tolerated; and leveling the power imbalance, to name but a few.¹⁴⁷

I do not take issue with such justifications, many of which provide nuanced, contextualized depth that foster our understanding of the dynamics of the particular intimate relationship within which violence occurs.¹⁴⁸ Rather, I point out that in many contexts, activists have already made the case that

¹⁴⁴ See *Lived Realities*, *supra* note 9, at 239.

¹⁴⁵ *Id.* ("I am not arguing that the extreme acts advanced in such social problem official definitions are absent from social life I am arguing only the obvious: Cases used to illustrate and define social problems are selected from the larger populations of potentially similar cases.")

¹⁴⁶ See PENCE & DASGUPTA, *supra* note 4.

¹⁴⁷ See, e.g., Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1378 (2002); Lisa Young Larance, *When She Hits Him: Why the Institutional Response Deserves Reconsideration*, 5 VIOLENCE AGAINST WOMEN NEWSL. 10, 14 (2007); Martha McMahon & Ellen Pence, *Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence*, 9 VIOLENCE AGAINST WOMEN 47, 51–52 (2003); see also ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 114 (2000) ("The goal of this work has been to expand defense options in order to equalize women's rights to trial and afford women equal opportunity to present an effective defense. It has not rested on the claim that all battered women are entitled to self-defense, or that there should be a special defense for battered women, either as self-defense or as a special 'battered woman defense.' To the contrary, the argument is that battered women, like all criminal defendants, have to be included within the traditional framework of the criminal law in order to guarantee their equal rights to trial.")

¹⁴⁸ Many justifications such as these explain "the gendered nature of violence and the meaning of pursuing equality in social contexts in which people are clearly not equal in power or social resources." See McMahon & Pence, *supra* note 147, at 71. For a comprehensive explanation of analyzing women's use of violence within an equality framework, see SCHNEIDER, *supra* note 147, at 113–25.

some relationship violence is *not* “domestic violence,” as constructed by the Power and Control Wheel and broadcast by anti-domestic violence organizations.¹⁴⁹

Political scientist Kristen Bumiller recently observed about the Duluth model that generated the Power and Control Wheel:

The study of domestic violence policy was and continues to be profoundly influenced by early activists’ conception of the problem. Most activists portrayed fundamentally important theoretical and empirical issues as settled, and the Duluth Model has had a strong hold on the field. This uniform understanding of the problem and its solution likely contributed to the failure of the movement to develop a multifaceted picture of domestic violence and a tendency to underrepresent the empirical complexities of domestic violence situations.¹⁵⁰

Ellen Pence, one of the co-founders of the Duluth Abuse Intervention Project that produced the Power and Control Wheel, acknowledged precisely this. In an almost uncited article written in 2006, *Re-Examining ‘Battering’: Are All Acts of Violence Against Intimate Partners the Same?*, Pence argued that there are at least five different categories of domestic violence.¹⁵¹ But, she argued, domestic violence has become conflated with “any violence between partners occurring in the context of the home” rather than what it was intended by activists to mean: “a pattern of coercive control, intimidation, and oppression” that “could include physical and sexual abuses.”¹⁵² By arguing that there are distinct categories of domestic violence, Pence and her co-author Shamita Das Dasupta clarified that they, as “Duluth advocates,” had not discarded the centrality of power and control from their theory of male violence against women, but rather intended to address “the fact that not every act of domestic violence, violence that is perpetrated within the home, is battering.”¹⁵³

My argument is that we (activists) would be better served by being explicit about these complexities, and that we do so not merely in defense of women perpetrators. The current messaging, described *supra* Part II, fails to acknowledge that

¹⁴⁹ See McMahon & Pence, *supra* note 147, at 49–52.

¹⁵⁰ Kristin Bumiller, *The Nexus of Domestic Violence Reform and Social Science: From Instrument of Social Change to Institutionalized Surveillance*, 6 ANN. REV. L. & SOC. SCI. 173, 175 (2010).

¹⁵¹ See PENCE & DASGUPTA, *supra* note 4, at 5–14 (arguing that the types included: battering, resistive/reactive violence, situational violence, pathological violence, and anti-social violence).

¹⁵² *Id.* at 2.

¹⁵³ *Id.* at 4.

there are multiple types of violence in relationships. In fact, it implies that there is only one type, the type that Pence calls “battering” and social scientists call “coercive control.”

Anti-domestic violence advocates’ specific message should be that while we take all violence in relationships seriously, we target the subset of relationship violence used by one person to gain power and control over another. Specifically, we believe that the intent of the person defines what is or is not “domestic violence” and that a pattern of behaviors, rather than a one-off incident of violence, demonstrates this intent.¹⁵⁴

When we speak of changing the norm of the acceptability of gender-based violence, we are not talking about eradicating fights in intimate relationships—even those fights that become physical. What we seek to end is the particular type of violence based on power and control, that is perpetrated by both men and women but that has disproportionately damaging effects on women and other socially marginalized groups in a society that promotes homogeneous norms regarding sex, gender, and gender identity, to name but a few. Hence, our construct might be:

Not all violence in relationships is “domestic violence.” Domestic violence is a pattern of behaviors used by one person in an intimate relationship over another for the purpose of exerting power and control over them.

This construct does not deny that women in heterosexual and non-heterosexual relationships have the capacity to use, and do use, many forms of violence, including coercive control.¹⁵⁵

¹⁵⁴ Pence and Dasgupta argue that not just the perpetrator’s intent, but also the impact on the victim, should be taken into account. The purpose of this type of differentiated analysis “is to suggest that as communities across the country continue to grapple with complexities of intimate partner abuse, we revisit the fundamental question, ‘who is doing what to whom and with what impact?’ The answer to this query should inform our responses as well as our continued refinement of social and legal public policies regarding domestic violence. For those of us who have worked to coordinate a community response that leads to the protection of victims of ongoing abuse, our current challenge is to address these differences and incorporate them in our interventions.” *Id.* at 15–16. Others agree that the critical question involves analyzing the effect of the abuse on the victim. *See, e.g.,* Loretta Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 *FAM. CT. REV.* 523, 525 (2008) (“Because the purpose, meaning, and effect of the violence are critical factors in determining what interventions are most effective and protective, any screening for domestic violence should be designed to explore all three of these aspects of the context for the violence.”); *see also* Gabrielle Davis, *A Systematic Approach to Domestic Abuse—Informed Child Custody Decision Making in Family Law Cases*, 53 *FAM. CT. REV.* 565, 569 (2015) (“[I]t is not enough for practitioners to simply identify domestic abuse. They must delve deeper to understand the specific nature and context of domestic abuse that is occurring in each individual case. In short, they must determine who is doing what to whom and to what effect.”).

¹⁵⁵ *See supra* Section III.A.

Denial and minimization of women's use of violence in relationships has been a longstanding critique of the construct.¹⁵⁶ A more discerning construct would, without denying women's capacity and power, nonetheless target the type of abuse that is supported by sexist institutions and culture. And as argued below, being explicit about what domestic violence is not would advance the effectiveness of law as a vehicle for social change.

IV. CONSTRUCTS AND LAW

Sociologist Loseke argued that the specific content of constructs "furnish[ed] warrants for a particular type of social service—shelters for the battered woman."¹⁵⁷ While shelters still exist, today's primary service provider for victims is the criminal legal system.¹⁵⁸

A. *Criminal Law*

With rare exceptions, the legal system's solution to the problem of domestic violence is to physically separate the perpetrator and victim.¹⁵⁹ This occurs through a host of interventions, including mandatory arrest at the scene of a domestic disturbance, aggressive prosecution of domestic violence cases, and the widespread issuance of restraining orders preventing perpetrators from contacting victims.¹⁶⁰

If domestic violence, as constructed, is a pattern of acts in which the perpetrator dominates and controls their partner, and the victim is entrapped, a legal regime that removes and keeps away the perpetrator makes sense. Mandatory arrest,

¹⁵⁶ See, e.g., STARK, *supra* note 111, at 92 (observing "feminist-oriented researchers[']" discomfort in recognizing that "large numbers of women use force in relationships, including the types of force classified as severe or abusive" but noting that this is "incontrovertible" and is a reality that must be acknowledged); see also Kelly & Johnson, *supra* note 53, at 479 (criticizing women's advocates for their reluctance to accept the fact that many women use violence in relationships that are not violent); *id.* at 482 (noting that women in heterosexual relationships use coercive control in particular).

¹⁵⁷ See LOSEKE, *supra* note 9, at 3.

¹⁵⁸ LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE 1 (2018) [hereinafter GOODMARK, DECRIMINALIZING] ("For the last thirty years, the United States has relied primarily on one tool to combat intimate partner violence—the criminal legal system."); see also GOODMARK, *supra* note 8, at 18.

¹⁵⁹ Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2, 10 (2006) ("In this [criminal justice] system, the government (rather than one of the parties) initiates and dictates the end of the intimate relationship as a solution to [domestic violence].").

¹⁶⁰ These interventions are the subject of a deep well of feminist legal scholarship. For the most recent discussion of the current criminal justice regime and its history, see GOODMARK, DECRIMINALIZING, *supra* note 158, at 12–34.

aggressive prosecution, and mandatory criminal protection orders are all interventions that physically remove the perpetrator from the victim. They simultaneously provide a solution to both the continued exertion of power and control, and entrapment, at least in the short-term if not indefinitely. As such, these remedies are justified by current constructs.¹⁶¹

But what about the many varieties of relationship violence that are far more common, such as situational violence, that have nothing to do with power and control?

There is a mismatch between the conduct for which offenders are arrested, restrained, and prosecuted, and the current construct of domestic violence. The federal Violence Against Women Act defines domestic violence as any “felony or misdemeanor crime” perpetrated by one person against another in an intimate or familial relationship.¹⁶² The felony or misdemeanor is set forth in states’ criminal codes.¹⁶³

No state statute criminalizes a “pattern of behavior for the purpose of gaining power and control” in a relationship. Indeed, few states have codified a standalone offense of “domestic violence.” Instead, states label, categorize, or enhance the penalties for numerous crimes such as assault, battery, and kidnapping in one circumstance: when perpetrated in a relationship.¹⁶⁴ Few state statutes mention, let alone require

¹⁶¹ See Bumiller, *supra* note 150, at 175 (“The fundamental presumption [of the Power and Control Wheel] was that legal deterrents were always the appropriate response to violence in the home. The model emphasized the need for consistency in police and administrative response to incidents of domestic abuse. This laid the foundation for the advocacy of mandatory arrest policies.”).

¹⁶² 34 U.S.C. § 12291(a)(8) (“The term ‘domestic violence’ includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”).

¹⁶³ *Id.*

¹⁶⁴ See ALA. CODE §§ 13A-6-130 to -138; ARIZ. REV. STAT. ANN. §§ 13-3601(A), -3601.02; ARK. CODE ANN. §§ 5-26-303 to -309; GA. CODE ANN. § 16-5-23(f); HAW. REV. STAT. ANN. § 709-906(1); IDAHO CODE ANN. § 18-918; 720 ILL. COMP. STAT. ANN. 5/12-3.2 to -3.3; IND. CODE ANN. § 35-31.5-2-76; IOWA CODE ANN. § 708.2A; KAN. STAT. ANN. § 21-5414; KY. REV. STAT. ANN. § 508.032; LA. STAT. ANN. §§ 14:35.3, :37.7; ME. REV. STAT. ANN. Tit. 17-A, §§ 207-A, 209-A, 210-B, 210-C, 211-A; MICH. COMP. LAWS ANN. § 750.81(2); MINN. STAT. ANN. §§ 609.2242, .2247; MISS. CODE ANN. §§ 97-3-7(3)(a), 99-3-7(5); MO. ANN. STAT. §§ 565.072 to .076; MONT. CODE ANN. § 45-5-206; NEB. REV. STAT. ANN. § 28-323; NEV. REV. STAT. ANN. §§ 33.018, 200.485; N.H. REV. STAT. ANN. § 631:2-b; N.J. STAT. ANN. § 2C:25-19; N.M. STAT. ANN. §§ 30-3-12 to -16; N.C. GEN. STAT. ANN. § 50B-1; OHIO REV. CODE ANN. § 2919.25; OKLA. STAT. ANN. tit. 21, § 644; 12 R.I. GEN. LAWS ANN. § 12-29-2; S.C. CODE ANN. §§ 16-25-20, -65; TENN. CODE ANN. § 39-13-111; UTAH CODE ANN. § 77-36-1(4); VT. STAT. ANN. tit. 13, § 1042; VA. CODE ANN. § 18.2-57.2;

proof of, any motive.¹⁶⁵ Nor does any state statute require that criminal acts of violence within an intimate relationship be part of a pattern, though repeated acts against the same partner might warrant enhanced penalties.¹⁶⁶

Thus *any* single criminal act committed by one partner against another, for *any* reason, can qualify as a crime subjecting the perpetrator to mandatory arrest, aggressive prosecution, and restraint. This treatment bears little resemblance to the predominant construct of domestic violence, which requires a pattern and a motive. An unintended consequence of this mismatch is that it detracts from our collective ability to target for punishment and moral condemnation the pattern of acts, both physical and nonphysical, aimed at diminishing the autonomy of a partner.

B. *Legal Decision Makers' Application of Construct*

Loseke argued that shelter workers weeded out applicants for their services by applying the constructs of "wife abuse" and "battered women."¹⁶⁷ If the violence was not severe, escalating and unstoppable, or the woman was not desirous of escaping her entrapment, she was denied entry to the shelter.¹⁶⁸ Women who reported violence, but not severe violence, were denied entry. So too were women who were complicit in the violence, such as by provoking it or striking back.¹⁶⁹ Consequently, women who experienced "ordinary violence" or

WASH. REV. CODE ANN. § 10.99.020(6); W. VA. CODE ANN. § 61-2-28; WIS. STAT. ANN. § 968.075; WYO. STAT. ANN. § 6-2-510 to -511.

¹⁶⁵ No state statute mentions "power and control," but some mention "coercion" and "control." *See, e.g.*, COLO. REV. STAT. ANN. § 18-6-800.3 (defining domestic violence for the purposes of sentence enhancement as "an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship," and as "any other crime against a person . . . when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship").

¹⁶⁶ *See* GA. CODE ANN. § 16-5-23.1; IND. CODE ANN. § 35-42-2-1.3(c)(4) (noting that "domestic battery" is a Class A misdemeanor, but the crime becomes a Level 5 felony if the person has a previous conviction for a battery offense against the same family or household member); MICH. COMP. LAWS ANN. § 750.81; N.M. STAT. ANN. § 30-3-17.

¹⁶⁷ *See* LOSEKE, *supra* note 9, at 71–94.

¹⁶⁸ *Id.* at 76–77 (discussing how important it is, in the minds of shelter workers, that a woman be a "battered woman" and that women "want to make a break from their husbands" to gain entry into the shelter).

¹⁶⁹ *Id.* at 44–45 (discussing how, to be worthy of public attention and sympathy, battering must be extreme and a battered woman must leave her batterer or be considered "complicit in creating her troubles").

who did not want to end their relationships did not become members of the social community of battered women.¹⁷⁰

Today, as states continue to cut funding for social services but criminal justice dollars abound, police, prosecutors, judges, and jurors decide who will be included or excluded in the community of domestic violence victims.¹⁷¹ Loseke's lesson is that the mismatch between law and construct, albeit unwitting, causes them to exclude real victims of domestic violence, and to include only constructed victims.

Dan Kahan, a professor of law and of psychology at Yale Law School and whose work in the area of social norm change is widely cited, argued that when legal decision makers feel that laws are too condemnatory, they refuse to enforce them.¹⁷² Specifically, "When states enact mandatory arrest policies, police departments refuse to implement them. When states raise the penalties for repeat offenders, prosecutors drop cases, juries acquit, and judges refuse to sentence severely. When judges make nonabuse a condition of probation, probation officers look the other way."¹⁷³

Kahan argued that a much milder law (a "gentle nudge") rather than a severely condemnatory one (a "hard shove") would better effect change of a widespread social norm.¹⁷⁴ He argued that in the field of domestic violence, "legislative reforms reflected strong, feminist-inspired critiques of norms that had not yet been fully repudiated by society at large."¹⁷⁵ Consequently, these laws are underenforced and do not create the norm change that reformers desired. Indeed, a number of feminist legal scholars lament that the criminal justice regime has fallen far short of achieving any real change in attitudes or norms about relationship violence.¹⁷⁶

¹⁷⁰ *Id.* at 4 (describing the worker activity of selecting some clients for shelter but not others as "the social problems work of allowing only some women to become official members of the battered woman social collectivity").

¹⁷¹ See GOODMARK, *DECRIMINALIZING*, *supra* note 158, at 2–3 (discussing disparity in funding for criminal justice interventions versus social services).

¹⁷² Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 609–10 (2000).

¹⁷³ *Id.* at 628.

¹⁷⁴ *Id.* at 610–11 (describing how, as the severity of punishment too significantly outweighs the severity of the wrong, judges will refuse to enforce the law, citizens will notice the under-enforcement and therefore not heed the law; thus a less drastic approach, or gentle nudge versus hard shove, makes more sense on the path to social change).

¹⁷⁵ *Id.* at 629.

¹⁷⁶ See GOODMARK, *DECRIMINALIZING*, *supra* note 158, at 8 ("Criminalization does little to prevent intimate partner violence . . . and exacerbates the conditions that contribute to intimate partner violence."); see also *id.* at 18–22; Weissman, *supra* note 12, at 1481 (arguing that anti-domestic violence movement has too closely aligned itself

Kahan's particular concern is the "sticky norms problem," which occurs when the prevalence of a social norm makes decision makers reluctant to carry out a law intended to change that norm.¹⁷⁷ Law on the books reflects a zero tolerance attitude toward violence in intimate relationships.¹⁷⁸ A zero tolerance attitude does not match the current construct of domestic violence.¹⁷⁹ Decision makers are willing to buy the construct, that domestic violence is about power and control and should be prosecuted, but they are not willing to buy that every act of violence in relationships amounts to a pattern of acts based on power and control.¹⁸⁰ Nor should they. This is why the messaging must be explicit: *not* all relationship violence is domestic violence, as constructed.

Thus the desire of activists to change the norm of violence against women may be thwarted by the very thing that was necessary to make it visible to begin with: the notion that relationship violence is *always* extreme or outside of the of the bell curve of the "normal violence and coercion" that exists in many intimate relationships. As a result, laws designed to change the cultural acceptability of violence against women have had less effect than they might otherwise have.

C. Proposed "Gentler Nudges" in Law

A number of feminist legal scholars have applied Kahan's gentle nudge theory in the context of intimate relationship violence.¹⁸¹ One of the most disarming, yet commonsensical,

with the criminal justice system and its narrative of victimhood to effect the social change it sought); SCHNEIDER, *supra* note 147, at 29–56.

¹⁷⁷ See Kahan, *supra* note 172, at 607.

¹⁷⁸ See discussion *supra* Section IV.A.

¹⁷⁹ See discussion *supra* Section II.A.

¹⁸⁰ See discussion *supra* Section IV.B.

¹⁸¹ See, e.g., Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1507–08, 1510 (2014) (arguing that "[r]ape law reform can only be effective if it bears a close connection to social norms" and that, based on Kahan's scholarship, radical reforms of rape law are largely ineffective); Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 143 (2017) ("As scholars have pointed out in relation to the criminal law of rape, law reforms that harshly punish conduct that is commonplace and within the range of widely shared social norms (including male pursuit of sex in circumstances which many men would perceive as implying consent) risk provoking backlash instead of shifting norms."); Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 370, 388–89 (2016) (using nudge theory to explain why the drastic rape and domestic violence legal reforms of the 1980s did not lead to corresponding "behavioral, institutional, [or] cultural changes" and noting that "it is increasingly acknowledged that changes to criminal justice law and policy have had limited impact on behaviors and attitudes about sexual assault"); Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1342 (2017) ("[A] 'gentle nudge' in the domestic violence context could occur outside the realm of statute (for example, educating

applications is that of Katherine Baker in the context of prosecuting rape. She argues that because the norm of rape and myths about gender and sex roles that support rape are deeply entrenched, only those rape cases that involve physical force should be criminally prosecuted.¹⁸² Baker's reasoning is that it is easier for the average juror to convict when physical force is involved because of the widespread acceptance of the immorality of physically forced rape, versus date or acquaintance rape where consent is unclear:

When a stranger with a weapon attacks a woman on a dark night and has intercourse with her, that is rape and everyone knows it. But when an acquaintance has sex with a woman who invited him into her house, many people are confused about whether that event could be rape. In neither situation do people doubt the biological fact that intercourse took place, but people are not sure whether the latter situation is rape as they have been taught to define it.¹⁸³

Baker of course does not argue that date or acquaintance rape go unpunished. Rather, she argues that cases involving a question of whether the victim consented should be treated more analogously to Title IX cases on college campuses.¹⁸⁴

Neither Deborah Tuerkheimer¹⁸⁵ nor David Zlotnick¹⁸⁶ cites to Kahan's gentle nudge theory explicitly, but both draw on its principles in the context of domestic violence law and policy reform.¹⁸⁷ Tuerkheimer argued for reform of the substantive crime of domestic violence. Rather than focus on a discrete, physical assault, prosecution should target two or more acts perpetrated with the intent to exert power or control over the

judges, prosecutors, police, and victims about the homicide risks posed by batterers' access to firearms."); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1698 (2004) (using nudge theory to help explain why domestic violence legal reforms have not been fully instituted by decision makers like police, prosecutors, and judges).

¹⁸² Katherine Baker, *Why Rape Should Not Always be a Crime*, 100 MINN. L. REV. 221, 221–25 (2015) (arguing for gender discrimination rather than rape finding in Title IX claims of sexual assault on campuses because neither men, women, nor society view much of what the criminal law calls "rape" as rape).

¹⁸³ Katharine K. Baker, *What Rape Is and What It Ought Not to Be*, 39 JURIMETRICS 233, 236–37 (1999).

¹⁸⁴ See Baker, *supra* note 182, at 224.

¹⁸⁵ See generally Tuerkheimer, *supra* note 8, at 1028.

¹⁸⁶ See generally David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1153–54 (1995).

¹⁸⁷ For example, Zlotnick argues that his proposal is counter to that of "pure criminalization advocates [who] are too far ahead of current cultural values. Given the high level of violence in our society, and especially in some communities, juries resist branding an individual a criminal when there is no act of violence, as in the violation of a stay-away order. Therefore, this attempt to transform public opinion through labeling all acts associated with a domestic violence as criminal simply goes too far." *Id.* at 1212.

other within an intimate or family relationship.¹⁸⁸ Reform of the criminal law in this manner fits precisely the social construct of domestic violence as anti-domestic violence activists and advocates envision it. The prosecution of domestic violence is not “zero tolerance” of any relationship violence, but rather targets what social scientists call “coercive control,”¹⁸⁹ creators of the Power and Control Wheel call “battering,”¹⁹⁰ and current anti-domestic violence activists simply call “domestic violence.”

To ensure it fits the transparent, explicit construct I have set forth, to Tuerkheimer’s proposal one might explicitly add that other crimes occurring in intimate or family relationships not be categorized in any manner, from charging to sentencing, as “domestic violence.” Consequently, a physical assault committed by one partner against another would not be charged as a “domestic violence” crime. No-drop prosecution policies would not apply. A criminal protection order would not automatically issue. Neither federal gun prohibitions nor enhanced sentencing would apply. But a pattern of behaviors—including but not limited to physical violence—perpetrated for the purpose of power and control would continue to be prosecuted with the full force, and with all of the attendant federal and state law protections and procedures, that the current legal regime provides to any crime committed by an intimate partner, even when these lack a pattern or a motive.

One potential critique of a transparent construct that embraces a discerning approach to domestic violence is that different typologies of violence overlap, and so it is not always easy at a given point in time in a relationship to discern who is doing what to whom, and with what intent or impact.¹⁹¹ For example, at the same time that one partner is engaged in coercively controlling violence, the other, in anticipation of it, may be engaged in violent resistance. Or an incident that looks to be situational at first blush may, in fact, be the start of a pattern of coercive control.¹⁹² A related critique is that, even if

¹⁸⁸ Specifically, her proposed “battering” legislation, within an intimate or household relationship would hold a person guilty of “battering when: [h]e or she intentionally engages in a course of conduct directed at a family or household member; and [h]e or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member; and [a]t least two acts comprising the course of conduct constitute a crime in this jurisdiction.” See Tuerkheimer, *supra* note 8, at 1019–20.

¹⁸⁹ See *supra* Section III.A.

¹⁹⁰ See *supra* Section III.C.

¹⁹¹ See Gulliver & Fanslow, *supra* note 122.

¹⁹² See generally Joan S. Meier, *Johnson’s Differentiation Theory: Is It Really Empirically Supported?*, 12 J. CHILD CUSTODY 4 (2015) (arguing that Michael Johnson’s typologies of domestic violence, when applied in the context of family law and

the violence is not coercively controlling violence but is merely situational, a severe incident of situational violence can nonetheless put the victim at risk of serious, if not fatal, injury.¹⁹³ Yet another critique is that research regarding typologies is still in its infancy, relatively speaking, and that the reliability of differentiated typologies as a whole must be approached cautiously.¹⁹⁴

For all of the above reasons, Professor Joan Meier advocates, at least in the context of courts' decision-making in child custody decisions, for a better safe than sorry approach. She argues that the "most important message that can be given to family courts is to *presume coercive control* until proven otherwise—and likewise to presume dangerousness, until proven otherwise."¹⁹⁵ One of her rationales is that courts will, when in doubt, not buck social norms but instead protect the status quo.¹⁹⁶ In family law litigation, this means that courts will minimize the violence, by presuming it to be situational rather than attributing an ill motive to the father or investigating the full impact of the violence on the mother and children.

Her point about legal decision makers, and courts generally, maintaining the status quo is well taken. Indeed, it is precisely the fodder for Dan Kahan's "gentle nudge" approach to law reform in the arena of domestic violence; legal decision makers can be expected to balk when the laws they are asked to enforce appear to deviate too substantially from current social norms.¹⁹⁷ A gentler nudge, in the family law context, is the approach advocated by Gabrielle Davis¹⁹⁸ and Loretta

particularly child custody decisions, have had a detrimental effect on mothers who claim that fathers are abusive).

¹⁹³ See Meier, *supra* note 119, at 149 ("[T]he research diverges from the typology's construct of two primary and distinct types of domestic violence, one of which is relatively more severe and dangerous, and the other of which is not. A fair quantity of research suggests instead that coercive control, severe violence, and fear are *each* profoundly harmful, and that severe violence and fear may occur without relationship-wide coercive control. If dangerousness and harmfulness cut across *both* [situational couple violence] and [intimate terrorism and coercive controlling violence], then a history of [situational couple violence] can also indicate real danger, contrary to the typology's implications." (emphasis in original)).

¹⁹⁴ *Id.* at 120.

¹⁹⁵ *Id.* at 151 (emphasis in original).

¹⁹⁶ *Id.* at 120 ("When the inherent fluidity and ambiguity of such a social science theory intersects with courts' specific needs and agendas, it can be expected to be deployed, as here, to further existing cultural norms or ideologies rather than to bring improved accuracy or better outcomes.").

¹⁹⁷ See *supra* Section IV.B.

¹⁹⁸ See Gabrielle Davis, *A Systematic Approach to Domestic Abuse-Informed Child Custody Decision Making in Family Law Cases*, 53 FAM. CT. REV. 565, 567–68 (2015).

Frederick.¹⁹⁹ They call for both practitioners and presiding courts to make no presumption about what type of violence is occurring but rather to investigate. Both Davis and Frederick are staff attorneys with the Battered Women's Justice Project.²⁰⁰ They also are consulting family members with the National Judicial Institute on Domestic Violence, which in partnership with the Office on Violence Against Women and the National Council of Juvenile and Family Court Judges, educates hundreds of judges each year regarding how to fact-find and make decisions in family, civil protection, and criminal proceedings involving domestic violence.²⁰¹

David Zlotnick proposed giving greater teeth to civil protection orders by holding violators in criminal contempt as a primary, and more effective, means of addressing domestic violence than either mandatory arrest or no-drop prosecution policies. His "criminal contempt sanction strategy"²⁰² outlines a number of distinct advantages, from a feminist perspective: it multiplies survivors' legal options, placing them rather than prosecutors at the center of the decision-making process.²⁰³ It garners less resistance by institutional actors, and by the general public, for it is a violation not merely of an individual victim's safety and liberty, but also of a court's authority.²⁰⁴ Contempt is a faster and easier remedy than criminal prosecution of the underlying crime.²⁰⁵ Finally, contempt empowers the people it protects because of their significant involvement in the case and their ability to literally rename what the perpetrator is doing as "contemptuous," a word that commands both lay and legal abhorrence.²⁰⁶

With regard to the motive of power and control, many state civil protection laws already contemplate its importance. For example, some states explicitly enumerate coercion or

¹⁹⁹ See Loretta Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 FAM. CT. REV. 523, 529–30 (2008).

²⁰⁰ *Staff and Leadership*, BATTERED WOMEN'S JUST. PROJECT, <https://www.bwjp.org/about-bwjp/staff-and-leadership.html> [https://perma.cc/K7T7-U8PM].

²⁰¹ *About Us*, NAT'L JUD. INST. ON DOMESTIC VIOLENCE, <https://www.njidv.org/about-us.html> [https://perma.cc/NBX4-6L9T].

²⁰² See Zlotnick, *supra* note 186, at 1190.

²⁰³ *Id.* at 1197–98.

²⁰⁴ *Id.* at 1197.

²⁰⁵ *Id.* at 1196–98 (outlining the self-help procedures available in many states).

²⁰⁶ Zlotnick discusses at length the transformative power of language, noting that the word contempt in its every day usage is "the act of despising," *id.* at 1187, and in its legal usage is the commission of the ultimate violation: withholding "[t]he extreme deference [customarily] paid to the court." *Id.* at 1189.

coercive acts as grounds for obtaining a protection order.²⁰⁷ Others explicitly mention the motive of control.²⁰⁸ Although no state requires a petitioner to prove a pattern of acts perpetrated for the specific purpose of gaining or maintaining power and control over another,²⁰⁹ in many states, to successfully obtain a civil protection order requires a person to prove a pattern of acts or the likelihood that the acts will recur as an element inherent to injunctive relief.²¹⁰

In this article, I am not making the case for specific legislation or law reform. Rather, I argue for the formulation of a legal framework that takes into account the social construct of domestic violence, as that construct has been laid out by anti-domestic violence activists and advocates.²¹¹ One that is true to the construct's underlying values, neither overemphasizing a single incident of physical violence nor underemphasizing an intentional pattern of deprivations of liberty. This formulation must draw on lessons, such as that in the arena of domestic

²⁰⁷ See, e.g., N.H. REV. STAT. ANN. § 173-B:1 (includes “[i]nterference with freedom” under definition of abuse); DEL. CODE ANN. tit. 10, § 1041(1) (definition of abuse includes “[e]ngaging in a course of alarming or distressing conduct in a manner which is likely to cause fear or emotional distress”); COLO. REV. STAT. ANN. § 13-14-101 (defining domestic abuse as including “compelling a person by force, threat of force, or intimidation to engage in conduct from which the person has the right or privilege to abstain, or to abstain from conduct in which the person has a right or privilege to engage”).

²⁰⁸ See, e.g., COLO. REV. STAT. ANN. § 13-14-100.2(2) (“[D]omestic abuse is not limited to physical threats of violence and harm but also includes mental and emotional abuse, financial control, document control, property control, and other types of control that make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs.”).

²⁰⁹ See Kristy Candela, Note, *Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes*, 54 FAM. CT. REV. 112, 113 (2016) (“[N]ot one state has encompassed the entirety of coercive control as abuse in their domestic violence statute.”); see also Ashley Hahn, Comment, *Toward a Uniform Domestic Violence Civil Protection Order Law*, 48 SETON HALL L. REV. 897, 897–98 (2018) (arguing that Congress adopt a uniform, comprehensive domestic violence civil protection order law that includes in its definition of domestic violence forms of abuse that are not physical, such as emotional and psychological abuse).

²¹⁰ See Tamara L. Kuennen, “No-Drop” Civil Protection Orders: *Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN’S L.J. 39, 54–56 (2007) (situating civil protection order remedies within the larger body of injunction law and practice).

²¹¹ I follow the lead of Evan Stark, who recently stated: “It’s not the law itself (a new offense) but the constellation of factors that surround its implementation: a coherent national strategic framework, an articulation of the current dilemma posed to the justice system by policing domestic violence, centralized coordination by justice professionals, activist pressure and exhibitions of political will . . . Rather [than advocating for a new offense] I am reiterating endorsement of the Coercive Control framework but conceived here as a comprehensive framework for approaching partner abuse, not a specific offense. Might include legislation but more important than the specific law is that the consensus that led to its passage depending on a confluence of related factors that make it likely to be implemented in ways that are consistent with the definition of the concept and its underlying value commitments.” See Stark, *supra* note 17.

violence law reform, that demonstrate that a gentle nudge rather than a hard shove might be more appropriate. The thrust of my argument is that a legal approach to intimate partner abuse must be preceded by clear constructs of the problem that are properly explained to the public.

A discerning, or differentiated, approach most closely resembles what activists call for now. We already target what social scientists call "coercively controlling" violence, and early anti-domestic violence activists called "battering."²¹² To make clearer our meaning, therefore, I have advocated merely that we be transparent and explicit about what domestic violence is not. My argument, like that of Ellen Pence, is that our definition has become synonymous to any act of violence in a relationship, rather than what it was intended to be: a honing in on the pattern of insidious acts that may, or may not, rise to the level of physical assault but that nonetheless erode a victim's physical liberty and autonomy.²¹³ If what anti-domestic violence activists wish is for our construct of domestic violence to be distinct from, rather than synonymous with, a single physical assault in a relationship, we must be explicit. And, as Donileen Loseke's work makes clear, we must do so before we seek further reform of policy and law.²¹⁴

CONCLUSION

Of battered women's activists in the 1970s, Loseke observed: "Most certainly, no claims-maker argues that one act of violence is acceptable, but it remains that in their emphases and explicit definitions, wife abuse is about *continuing*, *escalating*, and *unstoppable* victimization."²¹⁵ The same can be said of today's anti-domestic violence activists. One act of violence is not acceptable. But it also is not domestic violence as we have currently constructed it.

This article demonstrates that we, albeit unwittingly, send the message both implicitly and explicitly that *all* violence in relationships can be conceived of as one partner's pattern of acts designed to gain power and control over the other. Because this is not true in a substantial number of cases, and because

²¹² See discussion *supra* Section III.C (regarding the work of Ellen Pence).

²¹³ See discussion *supra* Section III.C (observing that Ellen Pence, a creator of the Power and Control Wheel, differentiated between types of violence that occur in intimate partnerships before sociologist Michael Johnson published his now famous writings about typologies).

²¹⁴ See discussion *supra* Part I.

²¹⁵ See LOSEKE, *supra* note 9, at 19 (emphases in original).

law, the primary intervention designed to address domestic violence, does not match reality, legal decision makers do not enforce domestic violence laws.

We should be explicit that *not* all violence in relationships is based on power and control, but that we emphasize that subset of violence that is, because of the seriousness with which we take it. It is the type of violence in intimate relationships that exploits gender privilege and is particularly dangerous both physically and psychologically to women and other marginalized groups. Until we are more explicit and transparent about what domestic violence is *not*, we must expect far less of the law as a tool for social change.