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RECOGNIZING AND REMEDYING THE HARM OF BATTERING: A CALL TO CRIMINALIZE DOMESTIC VIOLENCE

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I. INTRODUCTION

Domestic violence as defined by our criminal justice system bears little resemblance to the abuse inflicted on over half a million women by intimate partners each year.[1] The disconnect between battering as it is practiced and battering as it is criminalized is vast and it is significant.[2] Law's failure to define accurately the nature and harm of domestic violence

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[1] The Department of Justice estimates that in the year 2001, close to 600,000 women were reportedly victims of intimate partner violence. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 (Feb. 2003), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ipv01.html. This number reflects an underestimation of the true incidence of domestic violence. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990,* 83 J. CRIM. L. & CRIMINOLOGY 46, 50 (1992) ("Battered women who reported assaults have typically represented a small portion of the total number of victims."). A battered woman may perceive that involving the state is not in her best interest for any number of reasons. Apart from the obvious safety concerns, domestic violence victims often struggle with economic dependence, immigration issues, child care and child custody, emotional ties to the abuser, and hostility toward the criminal justice system. *See generally* Sarah Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999).

[2] *See infra* Part II.A.

negates the experiences of victims[3] and effectively places battering outside the reach of criminal sanctions.[4] The criminal justice system's structurally deficient response to harms suffered largely by women[5] percolates outside the boundaries of law, warping social understandings of domestic violence.

Premised on a transactional model of crime that isolates and decontextualizes violence, the law applied to domestic abuse conceals the reality of an ongoing pattern of conduct occurring within a relationship

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[3] Tensions surround the linguistic construction of victims of battering. Elizabeth Schneider observes that the term "battering" inevitably gives rise to the descriptive phrase "battered woman," which in turn "raises critical questions of definition and strategy":

> In contrast with other descriptions of harm to women, "battered woman" describes the victim and focuses on her qualities. A woman is or is not a "battered woman." The phrase is reductive in that it implies the total life experience of the particular woman: a "battered woman" can be no more than a woman who has been battered.

ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 61 (2000). Both "battered woman" and "victim" problematically suggest "images of helplessness and defeat rather than survival and resistance." *Id.* at 62. *See* Martha Mahoney, *Victimization or Oppression? Women's Lives, Violence and Agency, in* THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 59 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (exploring the "challenge of analyzing structures of oppression while including an account of the resistance, struggles, and achievements of the oppressed").

Hopeful that contextualizing women's experience of battering will expose the falsity of the victim/agent dichotomy, I use the terms "battered woman" and "victim" to emphasize the basic proposition that women are indeed harmed by battering.

[4] *See infra* Part II.C.

[5] In the vast majority of cases, women are the victims of domestic violence and men the perpetrators. Approximately eighty-five to ninety percent of heterosexual partner violence reported to law enforcement is perpetrated by men. *See, e.g.*, BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., SPECIAL REPORT: INTIMATE PARTNER VIOLENCE 2 (2000); PHYSICAL ASSAULTS BY HUSBANDS: A MAJOR SOCIAL PROBLEM, CURRENT CONTROVERSIES ON FAMILY VIOLENCE 89-90 (R.J. Gelles & D.R. Loeske eds., 1993). I will therefore use the female pronoun when referring to victims of intimate partner violence and the male pronoun when referring to its perpetrators.

Much of the discussion in this Article is generally applicable to violence in intimate relationships, including elder abuse, battering in same-sex relationships, and female violence against males. *See generally* Barbara Hart, *Lesbian Battering: An Examination, in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 173 (Kerry Lobel & National Coalition Against Domestic Violence Lesbian Task Force eds., 1986) (defining lesbian battering as "that pattern of violent and coercive behaviors whereby a lesbian seeks to control the thoughts, beliefs or conduct of her intimate partner or to punish the intimate for resisting the perpetrator's control over her"). I am particularly focused, however, on male-on-female abuse and the criminal justice system's response to it. See *infra* Part II.B for a discussion of the ways in which criminal law has been uniquely non-responsive to the concerns of women battered by men. *See also* Cheryl Hanna, *No Right to Choose*, 109 HARV. L. REV. 1849, 1856 n.24 (1996) (author's scholarly attention to male violence against women related to "historic and institutional marginalization of intimate violence against women").

characterized by power and control. In this Article I explore the rupture between women's experiences of battering[6] and the remediation offered by the criminal law. I conclude that statutory descriptions of battering are inapt and require an overhaul to capture the practice of domestic violence.[7]

Domestic violence is generally understood—outside the criminal law—as patterned in nature and largely defined by non-physical manifestations of domination. Part Two describes the dynamics of domestic abuse, focusing on the centrality of power and control to the battering relationship. This Part then examines how criminal law paradigms, developed when violence against wives was lawful, operate to obscure defining characteristics of domestic violence. By situating the criminal justice response to battering in historical context, this Part allows current systemic limitations to be better understood. Viewing the criminalization of domestic violence as an evolutionary process also suggests the potential for further reform.

Part Three maps the contours of the gap between battering as it is practiced and battering as it is criminalized. To illustrate how law functions

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[6] There is considerable inter- and intra-disciplinary confusion regarding the meaning of the terms "battering," "domestic violence" and "domestic abuse." *See generally* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome,* 21 HOFSTRA L. REV. 1191, 1204 (2003) (explaining that in the scientific field, "spouse abuse, domestic violence, marital assault, woman abuse, and battering . . . are used interchangeably to refer to the broad range of behaviors considered to be violent and abusive within an intimate relationship"); Jennifer Wriggins, *Domestic Violence Torts,* 75 S. CAL. L. REV. 121, 122-23 n.2 (2001) (noting the terminological debate and adopting a definition of domestic violence that includes "the establishment of control and fear in a relationship through the use of physical violence, intimidation, and other forms of abuse") (citing FREDERICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE § 1.3, at 1-7 (1997)).

From a criminal justice perspective, domestic violence is defined exclusively by existing criminal statutes. For further analysis of this limitation, see *infra* Part II.C. Although an isolated incident of violence between intimates might conceptually fall within the category of "domestic violence" but not "battering," this distinction is more theoretical than real. Particularly in the criminal context, it is highly unlikely for a first-time incident of abuse to come to the attention of law enforcement. We know that the criminal justice system—calibrated as it is to physical abuse—is not intervening in the early stages of domination. *See infra* notes 27-43 and accompanying text. Since the theoretical isolated incident will rarely if ever come within criminal law's purview, the behaviors encompassed by the terms "battering" and "domestic violence" are for all practical purposes overlapping, and the descriptors will be used synonymously throughout this Article. *See generally* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases,* 46 SMU L. REV. 2117 (1993).

[7] This Article, in contrast to previous scholarship addressing the intersection of domestic violence and the criminal justice system, advances a fundamental critique of traditional criminal law structures as applied to battering and proposes a course of conduct battering statute to reflect the ongoing, patterned nature of violence in intimate relationships.

to provide a diminished measure of justice, I consider how a domestic violence case progresses through the criminal process. This Part particularly attends to the ways in which flawed paradigms warp the trial stage of the proceedings. Criminal law's myopic focus on transaction-based physical violence critically impacts the ability of jurors to function effectively. Law's failure to account for the practice of domestic violence undermines the victim's credibility, obscures the batterer's motive and breeds juror apathy.

Given this gaping disconnect between the suffering of battered women and the legal apparatus in place to redress harm, we might wonder whether the system manages imperfectly to negotiate the chasm described by Part Three. Part Four addresses this inquiry, positing that the realities of domestic violence exert pressure on incompatible legal structures, creating tensions and contradictions within existing criminal evidentiary law. This Part explores areas of law that have been shaped by the actualities of battering: the admission of "prior bad acts" evidence in the context of domestic violence prosecutions, expert testimony on battering, and the application of anti-stalking laws to prosecute abusers. These pressure points function as mechanisms for a limited measure of legal accommodation to the dynamics of domestic violence. I will suggest that the sites where law is sufficiently malleable to yield are significant less for their remedial power than for what they mark: both the rigidity of fundamental structures and the force of discordant stories yet unheard.

Part Five discusses the normative implications of criminal law's failure to define domestic violence as it is practiced and experienced. I contend that law's legitimacy in this realm is challenged by the location of battering outside the reach of criminal sanctions. In this Part, I also consider how victims are impacted individually and collectively by this (mis)location, as well as how societal understandings of battering are constructed by the legal definition of domestic violence.

Finally, Part Six suggests that to connect law to the lives of battered women, criminalization of domestic violence must reflect the on-going and patterned nature of battering. This Part urges a reconceptualization of the crime of domestic violence: battering should be criminalized in a manner that accurately reflects its true nature and harm.

II. DISCONNECT

A. DYNAMICS OF DOMESTIC VIOLENCE

Outside the criminal law context, domestic violence is widely understood as an ongoing pattern of behavior defined by both physical and

non-physical manifestations of power.[8] This is a remarkably uncontroversial proposition.[9] For women whose lives it describes, the oft-described "power and control" dynamic is ubiquitous. Yet the boundaries of criminal law have remained largely impermeable to this accepted characterization of battering.[10] To the extent that the law functions in denial of the experiential realities of domestic violence victims, it does not fully condemn and cannot truly remedy the harm of battering.[11]

Social scientists, women's advocates and feminist legal scholars have long recognized that the "struggle for power and control—*the batterer's quest for control* of the woman—[lies] at the heart of the battering process."[12] As psychologist Mary Ann Dutton explains:

> Abusive behavior does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an

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[8] Meaningful discussion of domestic violence and its victims does not deny that intra-group differences may construct the practice and experience of battering. *See generally* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,* 43 STAN. L. REV. 1241 (1991). "In the context of violence against women, [the] elision of difference is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class." *Id.* at 1242. Crenshaw explores what she calls "intersectionality" in the lives of battered women, concluding that diverse structures of power—particularly race, gender and class, but also immigrant status and language barriers—converge to impact the lives of battered women. She writes: "Intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment." *Id.* at 1249.

This Article proceeds on the assumption that effective legal intervention must be responsive to these and other intersecting structures of oppression. *See id.* at 1296; *see also* Donna Coker, *Piercing Webs of Power: Identity, Resistance, and Hope in Latcrit Theory and Praxis: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color,* 33 U.C. DAVIS L. REV. 1009 (2000). Meaningful theory recognizes and incorporates this same diversity of experience.

[9] *See infra* notes 12-43 and accompanying text. Those to whom this assertion is virtually self-evident may find its justification unnecessary. It is nevertheless important to articulate *why* this understanding of the battering dynamic is crucial, particularly if the agenda includes reform.

[10] *See infra* note 315 (challenging the existence of any such boundary between law and society).

[11] *See infra* Part V.

[12] Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 MICH. L. REV. 1, 5 (1991). As early as 1979, one seminal study of wife abuse observed that physical violence is a manifestation of a pattern of control and domination by battering husbands. R. EMERSON DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY, at ix (1979). Given that our understanding of the dynamics of domestic violence is not new, it should be clear that the criminal justice system's failure to mirror that which is socially known should not be viewed merely as a "time lag" problem.

> understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with on-going psychological abuse—is to fail to recognize what some battered woman experience as a continuing 'state of siege.'[13]

This continuing state of siege has become the focus of much scholarly commentary within both the social scientific community[14] and the feminist legal academy.[15] As a matter of both theory and practice, an accurate description of battering is "premised on an understanding of coercive behavior and of power and control—including a continuum of sexual and

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[13] Dutton, *supra* note 6, at 1208 (quoting Sue Osthoff, Director, National Clearinghouse for the Defense of Battered Women).

[14] *See, e.g., id.* at 1204-10 (discussing broader social science definitions of violence and abuse, including psychological battering and a focus on patterns of abuse); Fischer et al., *supra* note 6, at 2121 (advocating a more sophisticated understanding of domestic violence that reflects the full range of abusive conduct typified by batterers, including sexual abuse, restricted access to money, property destruction, humiliation and degradation, threats to harm or kill the victim and her children/extended family); Evan Stark, *Framing and Reframing Battered Women, in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 290 (Eva Buzawa & Carl G. Buzawa eds., 1992) (observing that understanding the battering relationship requires consideration of the abuser's control over money and food, control over social relationships, control over sexuality, and control over aspects of daily life); Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control,* 58 ALB. L. REV. 973, 986 (1995) (suggesting that physical violence may not be the most significant characteristic of most battering relationships and that battered women generally "have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children, and friends; and work").

[15] *See, e.g.*, Jane Maslow Cohen, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?,* 57 U. PITT. L. REV. 757, 768 (1996) (framing the battering relationship as an on-going regime of private tyranny); Joan Erskine, Note, *If it Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion,* 65 BROOK. L. REV. 1207, 1216-20 (1999) (asserting that need for control motivates domestic violence); Mahoney, *supra* note 12, at 34 ("[F]eminist activists writing about heterosexual battering have . . . defined power and control, rather than incidents of violence, as the heart of the question."); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice,* 21 HOFSTRA L. REV. 1295, 1317 (1993) (observing "a growing emphasis in the literature and community on understanding battering not as violence, per se, but rather, as a larger pattern of dominance and control"); Shannon Selden, *The Practice of Domestic Violence,* 12 UCLA WOMEN'S L.J. 1, 11 (2001) (conceptualizing domestic abuse as torture, and noting that "intimate violence involves separate attacks of physical injury, strung together by patterns of domination, coercion, and control. . . . [T]he violence that occurs may be merely one tool of domination among many.").

verbal abuse, threats, economic coercion, stalking, and social isolation—rather than 'number of hits.'"[16]

The batterer's desire to dominate his victim functions as the animating force behind his abusive behaviors. The effort to subordinate also represents the conceptual "link between the conduct of the batterer and the experience of the woman."[17] Recognizing that power and control lie at the heart of battering necessarily broadens our understanding of what conduct constitutes the scheme of domestic violence. This expanded definition in turn challenges a narrow construction of the harm of battering.[18]

The most powerful evidence of the validity of these assertions is found in victims' accounts of the abusive relationship. These accounts are inevitably distorted by applicable structures—legal[19] and extralegal.[20] But hearing the stories that battered women tell about their lives is essential to meaningful discourse on domestic violence.[21] The methodological imperative common to the social scientific literature and scholarly legal commentary discussed above[22] is the crediting of women's accounts of the violence they have experienced.[23]

In this same spirit, my own intuitions about the practice of battering are informed largely by what I have learned from domestic violence victims about their lives.[24] In hundreds of interviews, each one obviously unique,[25]

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[16] SCHNEIDER, *supra* note 3, at 65.

[17] Mahoney, *supra* note 12, at 43 (framing this notion of linkage to advocate for law reform exposing the batterer's "quest for power and control" as necessary for the development of fuller understandings of battered women who kill in self-defense).

[18] *See infra* notes 27-28 and accompanying text.

[19] For a discussion of the ways in which legal structures pervert the narratives of domestic violence victims, see *infra* Part II.B.1.

[20] Social scientific research methodologies would be considered extra-legal structures.

[21] "Feminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said about us." Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 764 (1989) (reviewing CATHARINE A. MCKINNON, FEMINISM UNMODIFIED (1987)).

[22] *See supra* notes 12-17 and accompanying text.

[23] *Cf.* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 5 (1987) ("[F]eminism is built on believing women's accounts of sexual use and abuse by men.").

[24] For five years I prosecuted domestic violence cases in the New York County District Attorney's Office. During my last year in the office, in my capacity as domestic violence supervisor, I assembled a more complete picture of the hundreds of domestic violence cases handled every month by the office.

[25] Victims whose cases are handled by the New York County District Attorney's office are remarkably diverse along many dimensions, particularly with respect to race, ethnicity, class, age and educational background.

certain themes and patterns reappeared time and time again. The stories of these women—and the failure of the legal system to hear them and in turn provide a full measure of justice—are deeply embedded in my ideas and their expression.[26]

Women's divulgences about the experience of abuse reveal that context is essential to understanding the nature and harm of battering. Episodic physical violence, while often a devastating manifestation of the abuser's control, does not fully define its contours or map its reaches.[27] This vast range of suffering—amidst and beyond the physical abuse—is a place where the criminal law "does not go."[28] The suffering takes many forms:[29]

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[26] Another way of making this point is to observe that the doctrinal critique and theoretical assertions advanced by this Article are grounded in what I have been able to glean of the practice of battering from those victimized by it. *See* Catharine A. MacKinnon, *From Practice to Theory*, 4 YALE J.L. & FEMINISM 13, 14 (1991) ("We who work with law need to be about the business of articulating the theory of women's practice—women's resistance, visions, consciousness, injuries, notions of community, experience of inequality. By practical I mean socially lived.").

For a general observation about the critical functioning of the personal in academic writing, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE & RIGHTS 92 (1991):

> What is "impersonal" writing but denial of self? If withholding is an ideology worth teaching, we should be clearer about that as the bottom line of the enterprise. We should also acknowledge the extent to which denial of one's authority in authorship is not the same as elimination of oneself; it is ruse, not reality.

Id.

[27] Fischer et al., *supra* note 6, at 2128-29:

> [V]iolence does not need to be a constant presence for the victims to feel threatened that it could erupt at any point, nor does the explosion always have to be physical. Violence need only symbolize the threat of future abuse in order to keep the victim in fear and control her behavior. . . . In fact, physical abuse may only be utilized by abusers who are too unsophisticated to be able to control their victims with verbal or sexual violence.

Id. (internal citations omitted).

[28] I am alluding here to Mari Matsuda's searing insight: "The kinds of injuries and harms historically left to private individuals to absorb and resist through private means is no accident. The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321-22 (1989).

[29] Given the importance of fully contextualizing women's experiences of battering, it should be noted that each of the victims providing the narrative accounts that follow was physically abused by the batterer. For a discussion of the significance of physical violence in the context of criminalizing domestic violence, see *infra* notes 360-64 and accompanying text.

> He used to fine me if I said anything considered out of order. All these sort of weird things, trying to get control, power.[30]

> He almost burnt my work one time—three years of research and writing. He had lots of my papers out in the garden and the incinerator was burning. I had to beg and plead and agree to various conditions to get it off him.[31]

> Within a couple of weeks, he started snarling at me about the way I laid the breakfast table. It was something *stupid* like the marmalade on the wrong side of the table . . . I got to the stage of wondering about everything, if I was going to get it right or wrong.[32]

> Things *really* started to go down hill when I went to university, there's no doubt about that. . . . I don't think there'd been any need for him to be violent to me [to that point in the relationship] because he had me so much in his control in other ways, financially, at home with the children.[33]

> He would say things like "It took all my self-control last night not to get the bread knife and come upstairs and knife you." I never knew how far he could go. I just knew that I was in fear for my life."[34]

> He always found something wrong with what I did, even if I did what he asked. No matter what it was. It was never the way he wanted it. I was either too fat, didn't cook the food right. . . . I think he wanted to hurt me. To hurt me in the sense . . . to make me feel like I was a nothing.[35]

> The physical stuff was bad though, but I think the silences were worse. They were psychological torture. You could never predict what would send him into one of these silences. Or how to get him out of them. These silences were the ultimate control.[36]

Discussions of battering relationships contained in the case law generally reflect a far less textured understanding of the abusive dynamic.[37]

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[30] LIZ KELLY, SURVIVING SEXUAL VIOLENCE 129 (1988). Liz Kelly's study of a range of sexual violence, based on interviews with sixty women, is a rich source of first-hand accounts of battering.

[31] *Id.* at 129-30.

[32] *Id.* at 131.

[33] *Id.* at 129.

[34] *Id.* at 133.

[35] Fischer et al., *supra* note 6, at 2117 (quoting Karla Fischer, The Psychological Impact and Meaning of Court Order of Protection for Battered Women (1992) (unpublished Ph.D. thesis, University of Illinois (Urbana-Champaign) (on file with Karla Fischer)) (text of interview conducted with one of eighty-three battered women seeking court protection from their abusers).

[36] CHARLOTTE FEDDERS & LAURA ELLIOT, SHATTERED DREAMS: THE STORY OF CHARLOTTE FEDDERS 92-93 (1987). Fedders's account of her seventeen-year marriage contains vivid descriptions of non-physical, as well as brutal physical, abuse.

And yet the law is not wholly impermeable to the fuller accounts of victims.[38] Descriptions of the non-physical facets of battering can be found in the fissures of appellate decisions.[39] For instance, the law concerns itself with what led a woman named Judy Norman to kill her husband John,[40] and so broadens its focus to include the following facts about a batterer's domination:

> John Norman asked Judy Norman to make him a sandwich; when Judy brought it to him, he threw it on the floor and told her to make him another. Judy made him a second sandwich and brought it to him; John again threw it on the floor, telling her to put something on her hands because he did not want her to touch the bread. Judy made a third sandwich using a paper towel to handle the bread. John took the third sandwich and smeared it in Judy's face.[41]

Victims of domestic violence often identify non-physical abuse as a critical component of the battering dynamic. Indeed, "some battered women have described psychological degradation and humiliation as the most painful abuse they have experienced."[42] Manifestations of power and control in the battering relationship, regardless of whether they are physical

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[37] *See infra* Part II.C.

[38] We will see that these stories penetrate to varying degrees at systemic "pressure points"; that is, sites where legal doctrine has proved sufficiently malleable to accommodate imperfectly the incoming, incompatible realities of domestic violence. *See infra* Part IV.

[39] *See* Mahoney, *supra* note 12, at 35-36:

> Ironically, the most complete description of women's suffering from domestic violence has entered our case law and legal literature at the point where violence against women finally harms men—when battered women kill in self-defense. . . . Expert testimony on battered woman syndrome was developed by feminist litigators and psychologists to explain the experiences of abused women and the way women were affected by abuse.

Id.

[40] In this case, Judy Norman was tried for the murder of her husband. A victim of brutal battering over the course of the marriage, Judy Norman was not permitted to argue self-defense to the jury despite having presented abundant evidence relevant to justification. The trial court's refusal to instruct on self-defense was overturned by the Court of Appeals, 366 S.E.2d 586 (N.C. Ct. App. 1988), which was in turn reversed by the Supreme Court of North Carolina, 378 S.E.2d 8, 57 (N.C. 1989). Judy Norman was convicted of voluntary manslaughter and her sentence was ultimately commuted by the Governor. For a discussion of the case and a critique of the Supreme Court's holding, see Mahoney, *supra* note 12, at 89-93. *See generally* Victoria F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691 (2003).

[41] State v. Norman, 366 S.E.2d 586, 588 (N.C. Ct. App. 1988). Note that under existing criminal law statutes, which decontextualize battering, this behavior could not be prosecuted. *See infra* notes 60-67 and accompanying text (describing transactional model of crime); Part III.A (applying criminal law paradigms to case of Molly and Jim). Viewed in isolation, the conduct is both lawful and incomprehensible. *See infra* Part III.B.2 (discussing function of motive in criminal trial).

[42] Fischer et al., *supra* note 6, at 2123.

in nature, harm victims.[43] This injury, uniquely suffered by battered women, is not redressed by law.

B. CRIMINALIZATION IN HISTORICAL CONTEXT

The failure of criminal law to remedy domestic violence is best understood in historical context. So viewed, this failure is neither atypical nor coincidental, but rather one of many tangible proofs of the oft-quoted proposition that "criminal law is, from top to bottom, preoccupied with male concerns and male perspectives."[44]

The evolution of sociolegal conceptions of battering is well chronicled.[45] My intention is not to revisit this complex narrative in its entirety, but rather to employ it to situate (in time and social space) the limitations of the current legal regime. Ambivalence surrounding criminalization efforts has enduring roots in the Anglo-American common law, which until the late nineteenth century "structured marriage to give a husband superiority over his wife in most aspects of the relationship."[46] This structurally sanctioned superiority encompassed the husband's right to "command his wife's obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority."[47] Integral to law's construction of the marital relationship was its defense of hierarchy, of which physical abuse was but one component.

The formal demise of the chastisement right in the late nineteenth century[48] foretold the criminalization of domestic violence. By 1920 all

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[43] "[T]he unique profile of the 'battered woman' arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma." Stark, *Re-Presenting Woman Battering*, *supra* note 14, at 986; *see also* Kelly, *supra* note 30, at 130 ("Many of the women in this study also stressed the atmosphere of threat and fear in which they lived and the impact of mental violence on them."). In the words of one battered woman interviewed by Liz Kelly:

> It's like a drip on your head. . . . And I got to believe by the end that I was hopeless at everything, that everything he said about me was actually true. Which is another reason why I didn't leave, because if I was that hopeless how on earth was I going to exist on my own without him. . . . That's the ploy of course.

Id. at 131.

[44] Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2151 (1995).

[45] For thorough scholarly accounts critiquing the historical response to domestic violence, see generally LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE (1988); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

[46] Siegel, *supra* note 45, at 2122.

[47] *Id.* at 2123.

[48] *Id.* at 2129.

states had made wife beating illegal.[49] Yet, as Reva Siegel writes: "[I]t would be misleading to look to the repudiation of chastisement doctrine as an indicator of how the legal system responded to marital violence. . . . [D]uring the Reconstruction era, jurists and lawmakers vehemently condemned chastisement doctrine, yet routinely condoned violence in marriage."[50]

Ultimately the rhetoric of marital privacy grew to take the place of a chastisement prerogative explicitly grounded in hierarchical norms.[51] Until recently, privacy-based rationales for non-intervention in domestic crimes saturated the criminal justice system at all levels—police,[52] prosecutor[53] and bench.[54] Confronting a legal apparatus wholly unresponsive to battering, domestic violence advocates focused their reform efforts, quite sensibly, on forcing police and prosecutors to enforce the laws already on the books;[55] that is, to treat crimes "equally" whether the victim and perpetrator were strangers or intimates.[56] Proponents of mandatory arrest and "no drop"

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[49] Hanna, *supra* note 5, at 1857.

[50] Siegel, *supra* note 45, at 2130.

[51] *Id.* at 2150-74; *see infra* notes 355-59 and accompanying text (discussing continuing power of privacy discourse in contemporary criminal law debates).

[52] *See generally* Hanna, *supra* note 5, at 1857 ("Prior to the 1970s, the typical police response to domestic violence was to mediate the situation; advising the husband or boyfriend to 'take a walk around the block' was often the extent of police intervention."); Zorza, *supra* note 1, at 47 ("Throughout the 1970s and early 1980s, officers believed and were taught that domestic violence was a private matter, ill-suited to public intervention.").

[53] "For battered women and their advocates, prosecutors' offices have often been a major impediment to improving the overall response of the criminal justice system. Indeed, some prosecutors admit that they simply do not take domestic violence as seriously as other crimes." Naomi Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview, in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 290 (Eva Schlesinger & Carl G. Buzawa eds., 1992); *see also* Hanna, *supra* note 5, at 1860-61 ("[P]rosecutors may also resist pursuing cases because they believe that battering is a minor, private crime.").

[54] *See, e.g.*, People v. Brown, 632 P.2d 1025 (Colo. 1981). *Brown* upheld the constitutionality of Colorado's martial rape exemption based on "the legitimate state interest in encouraging the preservation of family relationships" and a desire to "avert[ ] difficult emotional issues and problems of proof inherent in this sensitive area." *Id.* at 1027.

[55] Marital rape is the exception to this generalization. Not until 1990 was marital rape considered a crime in every state. Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution,* 48 STAN. L. REV. 677, 681-82 (1996). Even now, in a majority of states the criminal justice system treats marital rape differently than non-marital rape. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape,* 88 CAL. L. REV. 1373, 1375 (2000).

[56] *See* Zorza, *supra* note 1, at 53 (In the 1970s, "it became clear that [advocates] needed to concentrate their efforts on forcing the police to enforce the few laws that did exist to help battered women."); Hanna, *supra* note 5, at 1860-61:

prosecution policies[57] argued that constraining law enforcement discretion would tend to result in fuller enforcement of existing substantive criminal laws.[58]

In sociolegal context this strategy seems eminently reasonable.[59] And to a significant degree it has proven successful—if success is defined, at least in part, as forcing criminal justice system actors to apply existing laws to domestic violence. Yet the evolution of criminal law's response to battering is incomplete. As we will see, legal paradigms in place when chastisement was a right are still intact, functioning effectively to negate the quintessentially patterned practice of battering. Operation of these paradigms must be confronted if the criminal justice system is to move to the next stage of reform.

C. CRIMINAL LAW PARADIGMS

Laws applied to prosecute domestic violence[60] are generally characterized by a narrow temporal lens and a limited conception of harm.

> Once police started to arrest alleged batterers, advocates began to focus reform efforts on prosecution practices. Prosecutors often fail to initiate charges and to follow through with criminal prosecution in domestic violence cases. . . . Within the past ten years domestic violence advocacy groups have urged prosecutors to follow through with legal intervention.

Id.

[57] As Cheryl Hanna suggests:

> The term "no-drop" is something of a misnomer. Pro-prosecution policies are often characterized as either "hard" or "soft" no-drop policies. Under "hard" policies, cases proceed regardless of the victim's wishes when there is enough evidence to go forward. . . . Under soft policies, prosecutors do not force victims to participate in the criminal process; rather, victims are provided with support services and encouraged to continue the process.

Hanna, *supra* note 5, at 1863 (citations omitted).

[58] *See* Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor,* 20 W. ST. U. L. REV. 297, 308-09 (1993); Hanna, *supra* note 5; Zorza, *supra* note 1, at 48-50; *see also* SCHNEIDER, *supra* note 3, at 184-88.

[59] *Cf.* SCHNEIDER, *supra* note 3, at 182 (discussing ambivalence with which many feminist legal reformers viewed state).

[60] Traditional crimes that apply to episodic domestic violence include assault, battery, burglary, trespass, disorderly conduct, property destruction, harassment, violation of a restraining order, intimidation of a witness, kidnapping, homicide, rape, sexual assault, and an attempt to commit any of these crimes. *See* CLARE DALTON AND ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 564-65 (2001). Even where state legislation has ostensibly targeted domestic violence directly, statutes have essentially replicated already-existing structures for criminalizing violence. *See, e.g.*, Neal Miller, *A Review of State Domestic Violence-Related Legislation: A Law Enforcement and Prosecution Perspective*, INST. FOR LAW AND JUSTICE (2000), *available at* http://www.ilj.org/dv/dvvawa1.html (reviewing state legislation related to domestic violence).

Together these paradigms obscure defining aspects of battering: ongoing patterns of power and control are not addressed;[61] nor is the full measure of injury that these patterns inflict redressed.[62]

Statutes criminalizing violence do not account for the perpetration of continuing acts. Paradigmatic crimes are "transaction-bound," embodying principles "fundamental to our traditional law of crimes, criminal procedure and evidence."[63] At common law, crime was conceived as occurring at a discrete moment, and this template endures.[64] The incident-focused criminal law contemplates "an act or omission . . . taking place in an instant of time so precise that it can be associated with a particular mental state or intention."[65] A constricted temporal frame places patterns of abuse outside of criminal law's reach:[66] the law does not touch the pattern of conduct, for it cannot be captured by a moment in time.[67]

It should by now be evident that this common-law tradition is inimical to criminalization of the full spectrum of battering conduct.[68] Non-physical manifestations of power and control that characterize the abusive relationship are simply not recognized by the criminal law. The full extent of battering's harm is inflicted over time, yet crimes of violence are generally contingent on physical injury or the imminent threat of it.[69]

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[61] *See supra* Part II.A.

[62] *See supra* notes 27-43 and accompanying text.

[63] Gerald E. Lynch, *Rico: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 927, 932 (1987). Though exceptions to the transaction-bound model of crime exist, *see infra* notes 322-39 and accompanying text, its normative power must nonetheless be confronted.

[64] Lynch, *supra* note 63, at 933.

[65] *Id.*

[66] *See infra* note 95 (describing statutes defining assault).

[67] *Cf.* Victoria F. Nourse, *Law's Constitution: A Relational Critique*, 17 WIS. WOMEN'S L.J. 23, 34 (2002) for a critique of criminal law's treatment of time in the context of battered women's self-defense claims. Nourse writes:

> There seems no more 'natural' concept used by the law than time. Few lawyers however would stop to consider 'time' a legal concept. And, yet, if one thinks about it for more than a moment, time does play quite a common role in the law. And, in my field, the criminal law, time has come, quite literally, to construct the debate about women and the law of self-defense.

Id.

[68] Juxtapose the transaction-based, incident-focused criminal law template with this assertion by Elizabeth Schneider: "Defining battering as part of an ongoing continuum is essential. . . . [I]t is more inclusive and accurate to the experience of women in relationships with battering men; this definition recognizes that physical abuse does not exist in isolation." Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 538 (1992).

[69] In contrast to the spectrum of harm that results from battering, paradigmatic violence against strangers inflicts paradigmatic physical injury to its victims. *Cf. id.* at 536 (despite

Systemic blindness to conduct perpetrated on an ongoing basis disappears the injury that results from unseen patterns. In this manner, law's transactionalization of crime effectively functions to legalize non-physical battering behavior.[70]

Even where multiple episodes of physical violence are charged in a single indictment or complaint,[71] law disregards the space between these incidents, using physicality alone to ascribe meaning. By isolating and atomizing violence in intimate relationships, law renders context meaningless.[72] In theory and in practice this decontextualization is of critical importance.[73] As we have seen, relationship provides the terrain on which a batterer's system of domination is enacted;[74] relationship is

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feminists' recognition that "male domination within the martial relationship" is integral to woman abuse, "the early articulation of the experience of battered women and the translation of that experience into a legal concept [emphasized] the physical dimension of the abuse . . . because society was more willing to redress real, physical hurt"). Viewed in historical context, law's failure to account for non-physical injury suffered largely by women is unsurprising. *See supra* Part II.B.

[70] *See infra* Part V.A. In most jurisdictions, very little if any non-physical abuse is defined by statute as criminal. There may be sound prudential reasons not to criminalize this conduct taken in isolation. It is the law's failure to recognize and distinguish circumstances under which this conduct *cannot be understood in isolation* that is, in my view, problematic.

[71] The prosecution of multiple offenses in a single trial is governed by criminal procedure rules on pleading. For a summary of rules governing specificity, which generally require that an indictment refer to an event as having occurred 'on or about' a certain date, see WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 19.3(b) (4th ed. 2004). For discussion of rules governing severance, see, *e.g.*, Drew v. United States, 331 F.2d 85, 91 (D.C. Cir. 1964) (holding that separate crimes must be severed unless evidence of each would be admissible in trial of the other or evidence of each crime is "simple and distinct" from the other). In practice, the application of these procedural rules to the prosecution of domestic violence cases often raises important litigable issues.

[72] Law's obfuscation of context is multi-dimensional. Martha Mahoney observes that law is:

> [F]ocus[ed] on the experience of individuals, stripping away the societal context of oppression and hiding the ways in which a relationship between individuals in a particular case is similar to other abusive relationships. Law especially emphasizes acts of physical violence, and this emphasis in turn hides broader patterns of social power, patterns of power within a given relationship, and complexity in the woman's life, needs, and struggles.

Mahoney, *supra* note 3, at 60. In this Article, recognizing that patterns of power overlap and interact, I am concerned particularly with criminal law's shrouding of relationship-context (what Mahoney refers to above as "patterns of power within a given relationship").

[73] For a more thorough discussion of the consequences of relying on existing criminal law structures to remedy domestic violence, see *infra* Part III.

[74] The intimacy of the relationship between perpetrator and victim in domestic violence cases thus subverts application of an "equal treatment" model of prosecution. *See infra* Part VI.B.1. The extent to which prosecutorial decision making should reflect the unique positionality of domestic violence victims—in relation to both the batterer and the state—has been explored by others and is outside the scope of this Article. *See, e.g.*, Hanna, *supra* note

essential to grasping the full measure of harm inflicted by the abuser and suffered by the victim;[75] relationship connects and organizes what might otherwise appear to be random acts.[76]

This legal discounting of non-transactional realities has important evidentiary implications.[77] In law, what gives life to a substantive criminal statute is the evidence that bears on its proof. Doctrinally, evidence is relevant only if it supports a factual proposition "of consequence" to the determination of the legal action.[78] Put differently, the elements of a crime—defined statutorily—dictate what is (and is not) meaningful from a criminal justice perspective. Relevance in turn depends on a decisionmaker's particular worldview, itself deeply embedded in a social context.[79]

The doctrinal tensions raised by evidence of "prior acts" of domestic violence will be examined in Part Four.[80] Here it is sufficient to observe that criminal law's failure to recognize patterns of power and control is compounded by the evidentiary prohibition on proof of "character"[81] or disposition. Structured to remedy paradigmatic violence between strangers, law negates context.[82]

We have seen that basic features of existing criminal law structures are in deep tension with remediation of battering.[83] We turn now to consider the contours of this breach.

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5 (for a comprehensive discussion of the issues surrounding no-drop policies). I wish to emphasize instead the failure of substantive criminal law to account for relationship.

[75] *Cf.* Schneider, *supra* note 68, at 546 (characterizing what she calls "'broad' descriptions of battering as attempting to capture interrelated aspects of coercion, power, and control . . . not limited to physical abuse").

[76] *See infra* Part III.B.2 (discussing proof of motive in criminal prosecutions of batterers).

[77] *See infra* Part IV.A.

[78] FED. R. EVID. 401.

[79] This dependence has been an important focus of the feminist critique of evidence law. *See, e.g.*, Ann Althouse, *The Lying Woman, The Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 924 (1994); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 131 (1996); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 430-35 (1991).

[80] *See infra* Part IV.

[81] *See infra* note 149.

[82] *See supra* note 69.

[83] Analogous structural critiques of the criminal justice system's treatment of time and context have been articulated by feminists commenting on the doctrine of self-defense as applied to battered women who kill. For instance, Martha Mahoney urges a broadening of the relevant temporal lens in prosecutions of batterers who kill their victims. Mahoney notes that "a short time frame favors men in these cases, as it does in many types of cases, by removing violence from a context of power and control." Mahoney, *supra* note 12, at 79.

III. CONTOURS OF THE BREACH

A. THE CASE OF MOLLY AND JIM

To fully appreciate the limitations of the current statutory regime, it is helpful to consider the movement of a domestic violence case through the criminal justice system. Because appellate decisions (and even trials themselves) reflect legal structures that distort the reality of battering[84]—thus inevitably reproducing those structures—we will examine the real lives of a batterer and his victim as they hypothetically encounter the criminal process.[85]

Jim and Molly were married less than a year after they met,[86] and Jim began raping and beating Molly within the year.[87] Throughout the course of the relationship, Molly was relentlessly subjected to Jim's domination, which functioned as the omnipresent backdrop to escalating physical abuse. Power and control were central to the battering dynamic. Molly was not permitted to go outside unless Jim was present.[88] He forbade her to talk to the neighbors.[89] He did not allow her to write to her family.[90] He warned her that if she ever tried to end their relationship, he would "see to it that she never managed to leave with the baby." "He would take the rifle down

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Jodi Armour suggests that:

> [W]omen's self-defense work presses criminal law doctrine to depart from its dominant tendency to focus narrowly on the criminal incident. Specifically, women's self-defense work presses criminal law doctrine to broaden its time frame to take account of earlier events leading up to the criminal incident. . . . Moreover, woman's self-defense work presses criminal law doctrine to consider the contextual obstacles to a woman leaving a battering relationship . . . .

Jody Armour, *Just Deserts: Narrative, Perspective, Choice and Blame*, 57 U. PITT. L. REV. 525, 527-28 (1996). *See generally* V. F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235 (2001).

[84] *See infra* discussion at Part III.B.

[85] The relationship between Molly and Jim is documented by Angela Browne in her description of interviews with women charged with killing or attempting to kill their batterers. Browne's powerful account provides a wealth of information about the patterns of violence in intimate relationships. *See generally* ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987). For a discussion of the importance of victims' narratives in the context of legislative reform, see generally Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1253-59 (1993). *See also* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV 971 (1991) (advancing a methodological critique of feminist narrative scholarship).

[86] BROWNE, *supra* note 85, at 38.

[87] *Id.* at 39.

[88] *Id.* at 56.

[89] *Id.*

[90] *Id.*

from the wall when she was quiet for too long."[91] Sexual abuse occurred "almost nightly."[92]

After years of abuse law enforcement intervenes.[93] Jim attacks Molly after finding her talking to a neighbor when he returns from work,[94] punching her repeatedly in the face, causing bruising, swelling and pain. A neighbor calls 911 and the police respond. As is typical, the police observe relatively minor injuries to Molly and place Jim under arrest for the misdemeanor crime of assault.[95]

What has Jim done to Molly over the course of their relationship that is defined as criminal by our justice system? Or, to ask the question in slightly different form, which aspects of Molly's suffering are deemed worthy of remediation?

Because law's constricted temporal lens does not see patterns of non-physical abuse, Jim's on-going scheme of domination is not illegal. Criminal statutes fail to reach battering behavior that defies capture in a moment in time; Jim is charged by the prosecutor with misdemeanor assault only.

When Jim appears before a judge or magistrate for arraignment, the judicial officer must determine whether bail is appropriate.[96] This decision

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[91] *Id.* at 89.

[92] *Id.* at 91. For a more complete discussion of sexual abuse and rape in battering relationships, see *id.* at 95-103. *See also* KELLY, *supra* note 30, at 130 (noting that "the link between violence and forced sex has seldom been discussed in studies of domestic violence").

A thorough exploration of the criminal justice system's response to marital rape and other sexual crimes perpetrated by intimates is beyond the scope of this Article. *See generally* Eskow, *supra* note 55; Hasday, *supra* note 55. However, it is important to emphasize the extent to which the batterer's need for power over his victim often manifests itself in sexually assaultive or sexually coercive acts. Regardless whether the law defines these acts viewed in isolation as criminal, in the domestic violence context they should be understood as an integral component of the battering scheme. See *infra* Part II.A for a fuller description of domestic violence as a course of conduct.

[93] Here the account departs from reality. In actuality, law enforcement intervened only after Molly killed Jim and was charged with his murder. BROWNE, *supra* note 85, at 133-34. Jim had battered Molly for six years. *Id.*

[94] In fact this did provoke one of Jim's assaults. *See id.* at 90-91.

[95] "A person is guilty of assault if he attempts to cause or purposely, knowingly or recklessly causes bodily injury to another." MODEL PENAL CODE § 211.1(a) (2002). There is of course considerable intra-jurisdictional variation in criminal law statutes. *See, e.g.*, N.Y. PENAL LAW § 120.00(1) (McKinney's 2002) (a person is guilty of misdemeanor assault when "with intent to cause physical injury to another person, he causes such injury to such person or to a third person").

[96] A primary purpose of bail is to ensure the defendant's return to court. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951).

is based largely on the seriousness of the charges facing Jim.[97] The seriousness of the offense charged dictates the maximum sentence facing the defendant, which should impact the judge's assessment of the need for bail to secure the defendant's return to court.[98] The arraigning judge knows only that Jim has assaulted Molly on this one occasion and that Molly has sustained misdemeanor level injuries, subjecting Jim to misdemeanor level penalties. In some jurisdictions, the judge may also consider Jim's potential for dangerousness in deciding whether bail should be set.[99] But unless Jim has previously been convicted of a crime against Molly, the arraignment judge may have no information about Jim's long history of abuse, including his many threats to kill. The bail determination will be made accordingly.

When the prosecutor meets with Molly to discuss the case against Jim,[100] the content of the interview is framed by the statutory definition of the crime of assault. The prosecutor assesses the strength of the case by focusing on how each element of the crime charged will be proven—and on defeating any possible defenses—should the case ultimately go to trial. What happened in the time period immediately preceding the incident is relevant to the prosecutor; what happened in the weeks, months or years preceding it is not.[101]

The prosecutor does not learn about the continuum of battering; about Jim's ways of isolating Molly;[102] about the devastating physical abuse that

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[97] For discussion of pretrial release procedures, see generally LAFAVE ET AL., *supra* note 71, § 12.1(b). "Judges are inclined to give primary consideration to the seriousness of the offense charged, most likely because it is a factor which is clearcut and easy to apply." *Id.*

[98] Cahn, *supra* note 53, at 165.

[99] *See* 18 U.S.C.A. § 3142(b) (West 2003) (stating that judicial officer should release a defendant on his personal recognizance unless the officer "determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community"). State rules governing the bail determination vary widely. LAFAVE ET AL., *supra* note 71, at § 12.1(b). *See, e.g.*, David J. Molton, *Protecting Domestic Violence Victims in Bail Determinations*, 232-2 N.Y. L.J. 4 (July 2, 2004) (discussing proposed legislation allowing judges to consider past intimidation and threats against the victim when setting bail in domestic violence cases).

[100] This initial meeting may take place at various stages in the criminal process, depending on jurisdiction and office policy. The uncooperative victim and related prosecutorial strategies are beyond the scope of this Article. *See generally* Cahn, *supra* note 53, at 165-68; Hanna, *supra* note 5.

[101] Despite the fact that criminal charges will not encompass the full spectrum of battering conduct, a domestic violence prosecutor who is well-trained, experienced and committed to effective handling of these cases will nevertheless question the victim regarding the entire relationship. See *infra* Part IV for discussion of legal structures that allow prosecutors to litigate the legal relevance of the battering relationship.

[102] For instance, Jim wouldn't allow Molly to leave the house or write to her family. BROWNE, *supra* note 85, at 56.

occurred regularly;[103] about the threats to kill Molly and her family;[104] about the on-going sexual abuse;[105] about the time Jim sheared Molly's hair off, scraping her scalp with the blades, saying "[n]o one will look at you now, will they? No one will ever want you now."[106]

In response to questions from the prosecutor about the particular incident that is the basis for the pending criminal charge, Molly will not likely volunteer a fuller account of the abuse. Molly understands that the prosecutor is interested in *this one time*. And even were she inclined to attempt to move the prosecutor outside of the charging framework, how could Molly possibly detail the inexorably linked dynamics of power, control and violence that have dominated her life for the past six years?[107]

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[103] *Id.* at 57. The following incident occurred after Jim came home early one day and "caught" Molly outside talking to a female neighbor:

> Jim flew into a rage. He told her to put the baby down. Then he began hitting her with his fists, throwing her against cabinets and appliances, knocking her to the floor, pulling her up, and hitting her again. He pulled one small cabinet completely off the wall, breaking the glasses, and threw everything in the kitchen that was movable. . . . Finally, Jim dragged Molly into the living room and demanded that she take off all her clothes. He put them in the fireplace, and then got her clothes from the closet and added those to the pile, saying she wouldn't be needing them if she was going to be a whore. He yelled and yelled at her about being outside, saying he would teach her not to do that; screaming, biting, pinching, pulling hair, kicking her in the legs and back. Molly held her breath and prayed it would be over soon. This time, she was not sure she could make it through. This time, she thought she might die.

Id. at 90.

[104] "Jim warned that [Molly's] parents' home would be the first place he would go if he came home and found her gone; he said he would see them die first and then kill her." *Id.* at 57. Jim sometimes threatened Molly "with the revolver he kept in the pick-up—holding it to her head and saying that he didn't love her, that she wasn't good enough for him." *Id.* at 58.

[105] *Id.* at 91.

> [S]exual abuse occurred almost nightly. Molly's bite marks and cuts became permanent scars. When he had been drinking, sex would go on for hours because he couldn't climax. Jim would blame Molly for that, grinding his teeth, banging her head against the headboard and choking her. He also threatened her or traced on her with a fillet knife during sex.

Id.

[106] *Id.* at 90-91.

[107] The following incident shows how power and control, fused with physical violence, sex and relentless threat, circumscribed and embedded Molly's life. Jim came home from a date at about 3 a.m.:

> He didn't say much when he walked in, but seemed angry. He went to the refrigerator to get something to eat, but then came back and knocked Molly against the wall and threw a chair at her. Still without speaking, he jerked her to her feet and slammed her backward into a partition. Molly's back broke through the plasterboard, and she came to on the floor with Jim pouring water over her. He told her to get up and fix his supper, but then changed his mind and made her sit in a chair while he lectured her instead. He was angry that she wasn't young and beautiful like the women he was dating, that she was not a virgin anymore, that she had had a child. As he talked, he kicked Molly in the legs; then he threw a knife at her, which missed. Jim picked up

To whatever extent she does describe the various facets of Jim's scheme to subordinate her, the prosecutor's responses are unlikely to inspire confidence in the criminal justice system: *that's not what he's charged with here* (meaning that her experience has no significance in the eye of law); or, *that's not a crime* (meaning that what he did to her is in fact legal).

Perhaps Molly discloses past physical violence that is criminal and the prosecutor is willing to consider additional charges. But Jim cannot be prosecuted unless Molly knows the approximate *date* of the crime and is certain that she is accurately recalling the details of one particular incident (rather than distilling multiple incidents to a prototype).[108] The patterned, on-going nature of domestic violence makes this is an often insurmountable obstacle.[109] Given the dynamics of what has been endured, it is not surprising that domestic violence victims tend to blend, generalize and summarize when narrating a history of abuse.[110]

To ask the battering victim to isolate and recount with precision each incident of physical abuse—even assuming the theoretical possibility of cohering such a thoroughly decontextualized account—is to preordain failure. A legal system requiring this conceals that which is sufficiently ubiquitous to become indistinct.

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the knife and slowly cut x's across Molly's hand, talking all the while about how ugly she had become. Then he told her to bandage it up and make supper.

Molly started to move around the kitchen, but Jim thought she was not hurrying enough. He threw her back in the chair and hit her in the head with his fist. Molly tried to get up and run, but she was too dizzy. Holding her head, Jim began hitting her face with his hand, over and over, stopping to pour water on her from a pan whenever she seemed to be passing out. Finally he let her fall, and when she landed face forward, he stomped on her back with his foot. Something snapped, and Jim heard it and quit. It was daylight, but he stayed in the kitchen until Molly managed to prepare food for him. Afterward, he wanted sex.

Id. at 92-93.

[108] See *supra* note 71 for reference to pleading specificity requirements. In determining whether to go forward with a particular charge, the prosecutor must also consider the state's burden of proving each element of the crime beyond a reasonable doubt.

[109] Ironically, relationships most characterized by on-going and relentless abuse tend to present the greatest challenges from a charging perspective. The prosecutor is unlikely to be able to charge separate incidents where, for instance, a defendant sexually abuses his victim "almost nightly." *See supra* note 105.

[110] For instance, "sometimes" when Molly bent down to pull Jim's boots off he would kick her across the room. BROWNE, *supra* note 85, at 92. Angela Browne's account continues: "Molly tried to protect herself during such attacks, but she didn't cry or scream. She would just concentrate on her breathing and wait for it to be over. Jim got angry and said she wasn't feeling enough pain; sometimes, he hit her hard, but Molly remained silent." *Id.*

From a prosecutorial perspective, this cloaking has important consequences. It affects the charges that may be brought;[111] the likelihood that an offer will be made on the case;[112] the sentence that will be recommended to the judge on a plea;[113] and, if the case goes to trial, the evidence and arguments that will be presented to judge and jury.[114] In short, the criminal law's failure to account for an ongoing pattern of violence severely constrains the prosecutor's ability to do justice in these cases.[115] Understanding the operation of these constraints is critical to a "from the ground" perspective on the breach between law and the lives of battered women.

B. TRIAL

What is the impact of the disconnect between life and law on a case that reaches the trial stage of the criminal process?[116] I contend that acquittals in domestic violence cases occur more frequently than they should, largely as a result of the law's failings.[117] More specifically,

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[111] See Cahn, *supra* note 53, at 166 for discussion of the charging decision.

[112] An "offer" is an agreement on the part of the prosecutor to allow the defendant to plead guilty to a charge or charges less serious than the top count, or most serious charge, pending against him. *See infra* note 116 (citing statistic on plea percentages).

[113] Whether a defendant was convicted by guilty plea or by jury, a judge's sentencing discretion is of course constrained by the upper and lower limits defined by the statute under which the defendant was convicted.

[114] *See infra* Part III.B (discussing trial stage of criminal proceedings).

[115] "The duty of the prosecutor is to seek justice, not merely to convict." ABA, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard No. 3-1.2(c) (1993).

[116] In our criminal justice system a relatively small (and shrinking) percentage of cases is ultimately tried. In 1998, approximately 91% of all state cases and 95% of all federal cases were the result of guilty pleas or pleas of nolo contendre. BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 401 tbl.5.8 (1999). A recent study of the federal court system by Marc Galanter for the American Bar Association suggests that in 2002, less than 5% of criminal cases went to trial. Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1. The absolute number of trials—and victims affected by their outcomes—nevertheless remains significant. Trials are important to their participants most obviously, but also for the function they serve as "cultural fables . . . relaying their own object lessons." Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 665 (1998).

[117] To the extent that this claim is empirical, its proof presents substantial methodological challenges. Criminal acquittals will not be captured in the case law and are rarely the subject of reported studies or academic commentary. *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1517-18 (1998) ("Sparse data exists on the number of domestic violence cases that arrive in the criminal justice system and what happens to them once they get there."). *But see* Virginia E.

juries[118] wrongly acquit—that is, they acquit in cases where the defendant is factually guilty of the crime charged—for reasons that derive from paradigmatic criminal law structures: jurors do not believe the victim; jurors do not see a motive for the defendant's actions; jurors are not moved by the victim's suffering.[119] To examine these assertions, it is most helpful to juxtapose what we know about jury decisionmaking with a description of evidence that generally is (and is not) presented in a domestic violence trial.

1. Victim credibility

In many ways trials are about storytelling and verdicts reflect which narrative was more persuasive to the jury.[120] "Fact finders are more likely

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Hench, *When Less is More—Can Reducing Penalties Reduce Household Violence?*, 19 U. HAW. L. REV. 37, 40 (1997) (citing state Penal Code Commission statistics reporting that in Hawaii, 92% of domestic abuse cases tried by a jury resulted in acquittals, in contrast to the approximate rate of 10% for all other criminal cases). Studies that do examine differential outcomes in domestic violence cases typically fail to distinguish between pre-trial convictions (pleas of guilty) and post-trial convictions. *See, e.g.*, RICHARD R. PETERSON, N.Y.C. CRIM. JUST. AGENCY RESEARCH DEPT., COMBATING DOMESTIC VIOLENCE IN NEW YORK CITY: A STUDY OF DV CASES IN THE CRIMINAL COURTS 7 (2003) (finding significant disparity between conviction rates for domestic violence and non-domestic violence cases), *available at* http://www.cjareports.org/reports/ressum43.pdf. This mode of analysis obviously precludes the drawing of statistically significant conclusions regarding post-trial conviction rates, much less the frequency with which factually guilty defendants are acquitted. The gap in empirical data does not, however, undermine my assertions regarding the impact of distorted narrative on juror decision-making. *See infra* Part III.B.1-3.

[118] Though "juror" and "fact finder" are used throughout this Article interchangeably, domestic violence cases may be tried by judges as well as by juries.

[119] *Cf.* Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993) for an analysis of the ways in which stories of sexual violation are discredited by fact finders. Coombs "assumes that fact finders frequently do not believe women's true stories of sexual violation." She suggests that "[t]he range of 'credible' stories is narrower than the range of true ones. It may be a useful heuristic device to think about the situations in which fact finders discredit women's claims of sexual violation by dividing them into two categories: 'Not True' and 'So What.'" *Id.* at 280. Coombs's "not true" category generally corresponds to my reference to jurors not believing the victim; "so what" aligns with what I have described as jurors being unmoved by the victim's suffering.

[120] Commentators have widely remarked on this point and its significance theoretically, rhetorically and strategically. *See, e.g.*, Coombs, *supra* note 119, at 288:

> In all litigation, a claimant must design a story to present to the factfinder. To succeed, the fact finder must believe the story and the believed story must include all the elements of the relevant legal standard. I use the term 'story' deliberately. As numerous observers have recognized, fact finders look for stories, not just discrete nuggets of fact to fit into a set of legal rules.

Id. (citations omitted); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 559 (1991) (discussing the ways in which stories may figure prominently at trial: litigants tell stories to jurors; jurors make sense of the evidence presented by fitting it into a story pattern; and jurors reach a verdict by arriving at a

to believe stories that are coherent, internally consistent, plausible"[121] and that accord with experience and cultural expectations.[122] Empirical research into the psychology of credibility assessment has confirmed the validity of this model of cognition.[123] Emphasizing the close nexus between narrative coherence and perceived credibility, the United States Supreme Court has proclaimed that "the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story."[124]

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collective story); Stephen Lubet, *The Trial as a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77 (1990) ("Courts hold trials to allow the parties to persuade the judge or jury by recounting their versions of the historical facts. Another name for this process is storytelling."); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 128 (1992) (Lawyers "mobilize ordinary storytelling practices that are present outside legal settings, in which credibility, coherence, and plausibility are all judged against a background of common knowledge, itself shot through with unthinking assumptions."). For other interesting understandings of the trial as storytelling process, see Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy and Power*, 8 WM. & MARY J. WOMEN & L. 1 (2001); Leslie Feiner, *The Whole Truth: Restoring Reality to Children's Narrative in Long-Term Incest Cases*, 87 J. CRIM. L. & CRIMINOLOGY 1385 (1997); Myrna S. Raeder, *The Double Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 (1996).

[121] Coombs, *supra* note 119, at 288-89.

[122] *See* Scheppele, *supra* note 120, at 161 ("[T]ruth-finding is a socially situated practice. We all have a set of interpretive conventions, practices of truth-finding, that tell us when a particular story seems more credible than another and when one witness appears to be telling the truth and another seems to be lying.").

[123] *See, e.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); *see also* Lempert, *supra* note 120 (summarizing psychological research on individual juror decision making and its significance for lawyers).

In one social psychological experiment, college students were randomly divided into two groups. Students in one group were told to relate a true episode, and students in the other told to concoct one. A majority of the audience evaluated the truth of the story based on story structure. *See* LANCE W. BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 66-90 (1981). "The more coherent the story, which is to say the less ambiguous the story connections, the more likely the story was to be judged true, regardless of its actual truth." Lempert, *supra* note 120, at 562. Lempert, evaluating the import of the psychological literature, concludes: "A trier presented with a jumble of facts is, in other words, less likely to find for the party presenting those facts than a trier who receives the same factual information presented not as a jumble but as a coherent story." *Id.*

[124] Old Chief v. United States, 519 U.S. 172, 190 (1997). The Court, per Justice Souter, held that the prosecution may be required to accept a defendant's offer to stipulate to the fact that he was previously convicted of a felony. According to the Court, the introduction of evidence about the nature of Johnny Lynn Old Chief's prior offense in a prosecution under the "felon in possession" statute would raise the risk of unfairly prejudicing the jury. Since the evidence was offered solely to prove the element of prior conviction and the defendant offered to stipulate to this element, the trial court abused its discretion in allowing the

In *Old Chief v. United States*, the Court in dictum reaffirms the general proposition that the prosecution is entitled to prove its case using evidence of its choosing. The opinion evokes (unintentionally) the functioning of jurors in domestic violence trials:

> A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way. . . . People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.[125]

In domestic violence trials, the governing criminal statutes *themselves dictate* that the flow of evidence will be interrupted; that the natural sequence of narrative evidence will be broken; and that vital links will apparently be missing. Given that legal structures significantly distort what would otherwise be the battered woman's "true" (i.e., extra-legal) narrative, we would anticipate that the stories victims are constrained to tell in court would hardly be persuasive to juries.[126]

That the practice of battering finds no descriptive outlet in law may be fatal to the narrative coherence of the victim's account at trial. Law forces the victim to testify in a manner that does not sound credible, for it is not her reality.[127] Ripped from context, her account resembles something other

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prosecution to admit the full record of the prior judgment for conviction of assault causing serious bodily injury.

[125] *Id.* at 189.

[126] In this regard, Kim Lane Scheppele's analysis of the factfinder's credibility assessment is helpful:

> The attribution of truth by judges and juries depends on properties of the stories witnesses tell. Of course, this attribution goes on against a backdrop of cultural expectations about what sorts of stories are credible in the first place, and those expectations are dependent on visions of normality and aberration, drawn from experience and from widely available stock representations. But judges and juries decide whether a witness is telling the truth by evaluating *how the story is constructed* rather than by working out whether the story has a 'real' referent. Some of the properties that matter in deciding whether stories are believable include internal consistency [and] narrative coherence. . . . Narratives often become their own best evidence.

Scheppele, *supra* note 120, at 162 (citing BENNETT & FELDMAN, *supra* note 123, at ix).

[127] A domestic violence case I tried with a colleague, in which the jury acquitted the defendant of all counts charged, effectively illustrates this dynamic. The victim, Lourdes, had been battered by her husband throughout the many years of their marriage. He isolated her, used her undocumented immigration status for control, humiliated her, threatened to kill her, and physically and sexually abused her on an on-going basis. For reasons discussed, *supra* Part II.C, the defendant was charged only with the physical abuse that resulted in his arrest and the one other incident of physical violence that Lourdes could remember with

than truth. By failing to criminalize what is quintessentially battering, the law guts the victim's story. As we have seen, an incoherent story is an unpersuasive story. And unpersuaded jurors are (as they should be) acquitting defendants.

2. Defendant motive

Motive[128] serves a unique function in a criminal trial. Since it is not a statutory element, proof of motive is not required.[129] Yet evidence of motive is always relevant[130] and, from a juror perspective, critical to making

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sufficient precision. Apart from these two apparently (from the jury's perspective) isolated incidents, she was not allowed to testify about any of the ways in which the defendant exercised power and control over her. Lourdes' testimony was of course stilted, her account virtually incomprehensible. Without context, the story simply did not cohere. One of the jurors who I spoke with after the acquittal said, in words to this effect, "something about her story just didn't seem right; she was strange." And, in the courtroom, she did seem strange. In this case, a battered woman whose story was mangled by legal structures became incredible.

[128] "Motive" has been defined as:

> Cause or reason that moves the will and induces action. . . . In common usage "intent" and "motive" are not infrequently regarded as one and the same thing. In law there is a distinction between them. "Motive" is said to be the moving course, the impulse, the desire that induces the criminal action on the part of the accused; it is distinguished from "intent" which is the purpose or design with which the act is done, the purpose to make the means adopted effective.

BLACK'S LAW DICTIONARY 1014 (6th ed. 1990) (citing State v. Willis, 632 S.W.2d 63, 65 (Mo. Ct. App. 1982)).

A batterer's desire or impulse to control his victim would seem to satisfy this definition. However, to the extent that the concept of motive might imply, however incorrectly, a *conscious* articulation that is not necessarily characteristic of the scheme to exert power over a domestic violence victim, I use the word advisedly in this context. *See generally* WAYNE R. LAFAVE., CRIMINAL LAW § 3.6, at 241-42 (3rd ed. 2000) (noting disagreement about the meaning of the word "motive" and how it differs from "intention," "a matter which has caused the theorists considerable difficulty for years"); Martin Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present,* 1993 UTAH L. REV. 635 (1993). For further discussion of the difficulty of proving consciousness of motive in domestic violence cases, see *infra* note 331 and accompanying text.

[129] A major categorical exception is for bias crimes. *See* Gardner, *supra* note 128, at 717-24.

[130] LAFAVE, *supra* note 128, § 3.6, at 246:

> [T]he fact that the defendant had some motive, good or bad, for committing the crime is one of the circumstances which, together with other circumstances, may lead the factfinder to conclude that he did in fact commit the crime; whereas lack of any discernible motive is a circumstance pointing in the direction of his innocence.

Id.

sense of the victim's story.[131] As one leading teacher of trial advocacy suggests, "[p]eople do things for a reason. Jurors want to know not only what they did—the conduct—but also why they did it—the motivation."[132]

Jurors in domestic violence cases are typically not presented with the evidence they need to understand the defendant's motive. Law has decontextualized episodic physical violence from the battering relationship, depriving jurors of critical information. Abstracted incidents are uprooted from their place of meaning: a man beats his wife after he finds her outside the house talking to the woman next door[133]—why? In the absence of a motive that can be causally linked to the alleged conduct, a factfinder might well entertain a doubt—and reasonably so—about whether the conduct *in fact* occurred. A jury cannot make sense of what motivates the defendant's actions[134] without understanding that which the law masks.

This veiling of patterns of control obscures much that is relevant to the question of "motive"—the strand weaving together seemingly disparate mechanisms of power. Law shrouds an elaborate system of subordination, constructed and maintained to dominate. Batterers make rules that their

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[131] For an interesting illustration of the importance of motive evidence to a criminal prosecution, see John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 214 (2000). Mitchell's hypothetical closing argument (which he uses to make an advocacy point) demonstrates the strategic value to the defense of unproven motive:

> But of course we do not presume Mr. [Defendant] guilty, we presume him innocent. If there was no reason for him to do something—like deliberately hit a police officer—than there is a reasonable doubt that he did, a reason to believe it might have been an accident. And this doubt does not disappear just because the prosecution says, "Oh, people do stupid things." She wants to make these reasonable doubts disappear by making up explanations and excuses. You can always do that if you presume someone guilty, and shift the burden of proof. But those reasonable doubts stay unless there is *evidence*. . . . But the prosecution has no such evidence, so all she will give you in rebuttal is explanation and excuses. And do not be fooled. I am not saying that the prosecutor must prove motive, she does not. *What I am saying is that if my client had no reason to deliberately strike the officer, then there is reasonable doubt that he did.*

Id. (emphasis added).

[132] THOMAS A. MAUET, TRIAL TECHNIQUES 26 (5th ed. 2000). While the importance of motive evidence is generally understood by reference to the cognitive framework that we have been discussing, it is also interesting to note that jurors may expect prosecutors to prove motive beyond a reasonable doubt despite instructions to the contrary. Phoebe C. Ellsworth, *Juror Comprehension and Public Policy*, 6 PSYCHOL. PUB. POL. & L. 788, 808 (2000) (citing study by Reifman and Ellsworth that found only 30% of jurors who served on criminal cases correctly understood that the prosecution does not have the burden of proving motive beyond a reasonable doubt).

[133] *See supra* note 103.

[134] Jurors may also feel a need to make sense of the victim's actions (despite the fact that the victim is not on trial) in order to convict the defendant. *See infra* notes 350-52 and accompanying text.

victims must follow.[135] They force their victims to internalize these rules[136] and punish rule infractions.[137] A batterer reinforces his victim's connection to him through fear,[138] emotional abuse and social isolation.[139]

A jury presented with evidence of isolated physical violence cannot begin to reconstruct this complex pattern of control. Left with the "why" question unanswered, a jury discredits the victim's account. What she's saying makes little sense, despite the fact—indeed because of it—that her testimony is simply conforming to legal structures that deform her story.

Because the batterer's desire for power finds no expression in law,[140] the jury in a domestic violence case is denied the evidence that would

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[135] Fischer et al., *supra* note 6, at 2126-27:

> Battered women have frequently reported that abusers are extremely controlling of the everyday activities of the family. This domination can be all encompassing: as one of the batterers from Angela Browne's study was fond of stating, "you're going to dance to my music . . . be the kind of wife I want you to be."

Id. (quoting BROWNE, *supra* note 85, at 60).

[136] *Id.* at 2129:

> As time goes by in a battering relationship . . . specific rules and their attached consequences give way to a general climate of increasingly subtle control, where the batterer needs to do less and less to structure his family's behavior. Caught up in the day to day fight for survival, the victims may not even be aware of this censorship process.

Id.

[137] *Id.* at 2131:

> The rules that battered women try desperately to follow become established in a pattern of domination and control by the enforcement mechanism used by the batterer. Batterers may either simply respond with abuse when a rule is broken, or they may make it clear that the abuse is punishment for violations.

Id.

[138] *Id.* at 2131-32:

> At the core of these types of systematic control and domination is the fear that battered women have about future violence. This fear can be a result of past beatings or threats of physical or sexual abuse. The fear may also be triggered by any verbal or nonverbal symbol associated with the onset of an abusive incident. In some cases, threats of harm against the victim's extended family or against her children may be as effective in controlling her behavior as physical violence itself.

Id.

[139] *Id.* at 2132:

> Control is also maintained, and fear is intensified, through the extensive use of humiliation, ridicule, criticism, and other forms of emotional abuse; financial abuse; and social isolation. It is undoubtedly easier to control someone if they think less of themselves. It is difficult for victims to leave their abusers when they do not have access to money. Similarly, limiting victims' interactions with other people enhances the batterers' domination over the family by both cutting off potential sources of support and by making the boundary between the family culture of battering and the outside world more defined.

Id.

enable it to cobble together a motive for the conduct charged. An account of the full panoply of abuse—if allowed—would manifest a "systematic pattern of control and domination."[141] Only then would the jury be in a position to frame a meaningful account of the defendant's scheme.

3. Juror apathy

A vote to convict a defendant of a crime is an expression of certainty beyond a reasonable doubt.[142] As one veteran prosecutor in the New York County District Attorney's office often remarks, prosecutors "cannot win the jurors' minds unless they win their hearts."[143] Jurors presented with evidence of domestic violence out of context will naturally care less about the victim and what she has endured.[144] This, in turn, makes jurors more likely to entertain doubts about whether the defendant's guilt has been proven to the requisite standard of certainty.[145]

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[140] Contrast this to the law's receptivity to paradigmatic motives for paradigmatic crimes of violence—for instance, anger, jealousy and financial gain.

[141] Fischer et al., *supra* note 6, at 2126-32.

[142] This concept is elusive and seemingly impossible to define with precision. One prominent treatise on federal pattern jury instructions explains reasonable doubt as follows:

> The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must . . . be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

Leonard B. Sand et al., Modern Federal Jury Instructions, Instr. 4-2, at 4-8 (2002).

[143] Interview with Peter Casolaro, Assistant District Attorney, New York County District Attorney's Office, in New York, N.Y. Put differently, "jurors want to feel good about their decisions, and they can't unless they learn enough about the key people to get a feel for them and reach a verdict that is consistent with their feelings about those people." MAUET, *supra* note 132, at 26.

[144] Mary Coombs has made a similar observation in the context of jury evaluations of women's stories of sexual violation, terming the category of discredited claims: "So What." Coombs, *supra* note 119, at 280-81.

[145] I do not mean to suggest that we want jurors to convict because they empathize with the victim but, rather, that empathy is a *sine qua non* for conviction in domestic violence cases. Nor do I assert that jurors in domestic violence return verdicts of not guilty to express conscious disapproval with the law or its application to domestic violence. The concept of "proof beyond a reasonable doubt" is sufficiently malleable that talk of jury nullification is not necessary or particularly helpful in this context. *See generally* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966); M. Kristine Creagan, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101 (1993); Philip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1989).

The law's decontextualization of battering thus has profound implications for jury functioning. As the *Old Chief* Court recognized,

> [w]hen a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.[146]

In domestic violence cases, jurors obligated to sit in judgment are presented with a narrative warped by law. The verdicts that they reach may reflect this failing.

IV. PRESSURE ON THE BREACH

We have been considering the disconnect between battering as it is practiced and battering as it is criminalized. This analytic framework allows us to see particular legal rules, formal and informal, as having developed in response to the gap between socially lived reality[147] and criminal law. This Part explores areas of law that have been shaped at certain "pressure points" by the incoming, incompatible realities of domestic violence: evidentiary rulings on the admission of "prior bad acts"; expert testimony on battering and its effects; and the application of anti-stalking statutes to the prosecution of batterers. These pressure points are testament to the powerful force brought to bear on legal structures by unaccounted for experiences. Yet law's adjustments have, to this point, been marginal: at times doctrinally incoherent; in places theoretically untenable; in other places practically unworkable; always providing less than a remedy for the true harm of domestic violence.

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[146] The fuller observation offered by the Court in *Old Chief* is as follows:

> Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.

Old Chief v. United States, 519 U.S. 172, 187-88 (1997).

[147] *See* MacKinnon, *supra* note 26.

A. LITIGATING DOMESTIC VIOLENCE "HISTORY"

The law's antipathy to what is conceptualized as character evidence is deeply rooted.[148] The prohibition on propensity evidence[149] and its rationale have been articulated in this way:

> [T]he government may not prove one or more past criminal acts in an effort to support the inference that the accused has a bad or criminal disposition. . . . Permitting this generally forbidden line of proof would be inconsistent with the general principle that, basically, disallows character evidence when offered for circumstantial use against the accused. . . . In short, the forbidden line of proof invokes with full force the considerations of distraction, confusion of the issues, time consumption and, especially, prejudice.[150]

Evidence of a criminal defendant's prior bad acts, it is feared, could lead jurors to convict in the absence of proof beyond a reasonable doubt, or to engage in prohibited "propensity reasoning"—that is, to assume that if the defendant is the *type* of person who has engaged in particular conduct in the past, he is more likely to have done so on the occasion in question.[151] The rule governing the admissibility of prior acts frequently results in

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[148] "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977).

[149] "Propensity evidence" generally refers to acts (normally prior acts) introduced as proof of character to show action in conformity with this trait on the occasion of the litigated dispute. The prohibition on propensity evidence is codified by Federal Rule of Evidence 404 and its state law analogues.

[150] GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.12, at 161 (3d ed. 1996) (internal citation omitted). The commentary notes that "past criminal acts" include acts not resulting in a criminal conviction as well as "immoral acts." This category is variously referred to as "bad acts," "uncharged acts" or "other acts" evidence. *See also* Myrna Raeder, *The Admissibility of Prior Acts of Domestic Violence:* Simpson *and Beyond*, 69 S. CAL. L. REV. 1463, 1488-89 (1996). Myrna Raeder explains the doctrinal justification for excluding propensity evidence in this way:

> [O]ur criminal justice system is based on the proposition that individuals are tried only for the crime charged—not for who they are. . . . We forbid the jury to reason that if a person has committed previous assaults, he is the type of person who would assault the victim on this occasion, even though such propensity-based reasoning is clearly logical. As a policy matter we have decided that the relevance of such information does not outweigh its prejudice because jurors may be inflamed by the bad acts and ignore the otherwise weak evidence concerning the current charges to punish the defendant for his previous wrongs. Moreover, the evidence also puts an unfair burden on the defendant to defend against matters usually having nothing to do with the case being prosecuted.

Id.

[151] The rule also embodies that notion that a criminal defendant facing trial is entitled to a clean slate. People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) ("In a very real sense a defendant starts his life afresh when he stands before a jury . . . .").

exclusion of probative evidence[152] and leaves in its wake a doctrine that is confused and often contradictory. Although tension that inheres in application of this evidentiary rule is by no means limited to domestic violence prosecutions,[153] in this context the resulting illogic is unique.

Given the abundance of scholarly commentary on the rules related to character evidence,[154] our inquiry may be narrowly defined. We are interested in law's struggle to reconcile its hostility to propensity evidence with the reality of domestic violence. How has evidentiary doctrine configured itself to account for the patterned nature of battering? As expected, there is both movement and resistance on the part of legal structures subjected to the force of lived experience. Each (movement/resistance) reveals the defects of structures left intact, the remaining doctrinal patchwork a testament to the power of incompatible truths.

In service of a criminal law that transactionalizes violence, the rules of evidence mute stories of battering. Because domestic violence is criminalized as a discrete act or acts, the pattern itself—and all conduct manifesting it that is not specifically charged—lies outside the domain of the prosecution. Pieces of a whole fragmented by substantive criminal statutes become further unmoored from their context by evidentiary doctrine. According to Federal Rule of Evidence 404(b) and its state law analogues, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

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[152] However, prior acts evidence may be admitted provided that the proponent's theory of relevance does not engage the prohibited "propensity" reasoning. *See supra* note 149.

[153] Thomas J. Leach, *"Propensity" Evidence and FRE 404: A Proposed Amended Rule With an Accompanying "Plain English" Jury Instruction*, 68 TENN. L. REV. 825, 827 (2001):

> [A]mbivalence about the Rule and the skewed decisional reasoning it produces are a reflection of an inherent tension within the Rule itself—tension between an acknowledgment of the factual probativeness of other-acts evidence and a fear of its dangers in the hands of the jury. Moreover, this tension, both in the Rule and in the courts' administration of it, leads to a dangerously disrespected version of justice that should encourage us to look hard at a change in the Rule.

Id. For general critiques of Rule 404, see Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547 (1998); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717 (1998); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

[154] "The number of law review articles on uncharged misconduct is staggering." EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:04 (rev. ed. 1999). For other perspectives on the workings of the rule, see Edward J. Imwinkelreid, *The Dispute Over the Doctrine of Chances*, 7 CRIM. JUST. 16 (Fall 1992); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998). For an insightful discussion of the operation of the rule in the domestic violence context, *see* Raeder, *supra* note 150.

therewith."[155] Since all conduct that is not charged becomes, by definition, "other crimes, wrongs or acts," its admissibility is framed as a question of "character" or "propensity."

In domestic violence cases, 404(b) litigation is the terrain on which the battle over context is enacted.[156] The prosecution's motion to introduce prior acts evidence at trial is, in effect, an assertion that the conduct charged cannot be fully understood in isolation.[157] A 404(b) motion implicitly (or explicitly) argues that for the trier of fact to function—to evaluate victim credibility, comprehend motive and attach meaning to the behavior alleged[158]—a more complete story than that contemplated by the criminal law must be told. The defense, citing fundamental criminal[159] and evidentiary paradigms[160] that negate context, equates prior bad acts with unfair prejudice[161] or character assassination.[162] The decision of the trial judge is discretionary and largely unconstrained.[163]

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[155] FED. R. EVID. 404(b). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." *Id.*

[156] Again, the general exclusion of prior acts for their propensity value does not preclude the admission of these same acts for another purpose. Rule 404(b) provides a non-exhaustive list of non-propensity uses of bad act evidence. *Id.* We will see that some courts and legislatures have created what is expressly or functionally a domestic violence exception to this rule. *See infra* notes 181-187, 190 and accompanying text.

[157] *See* Raeder, *supra* note 150, at 1488.

[158] *See supra* Part III.B.

[159] *See supra* notes 60-67 and accompanying text.

[160] *See supra* notes 148-52 and accompanying text.

[161] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." FED. R. EVID. 403. "Unfair prejudice" is defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (Advisory Committee's note).

[162] *See* FED. R. EVID. 404(b).

[163] *See* Raeder, *supra* note 150, at 1494. Raeder observes:

> Judicial philosophy varies dramatically concerning the true value of [prior acts] evidence. Whether it is considered character assassination or extremely probative depends in large measure on the judge's understanding of domestic violence. If judges do not comprehend the dynamics of battering relationships, including common themes such as cyclical violence, control and abusive personality, it is much easier to view prior acts as isolated and extremely prejudicial. This ignorance reinforces misogynistic beliefs about women which fixate on their provocation, rather than the male's intentional pattern of behavior. As a result, a judge may exclude such evidence entirely, severely limit the number of past acts, require them to be physically abusive in nature or only permit acts which were close in time to the event.

Id.

Practical considerations of crowded case dockets and fear of appellate reversal may also incentivize the trial court exclusion of prior acts evidence. I thank Assistant District Attorney Laurence Busching, Bureau Chief of the New York County Family Violence and Child Abuse Bureau, for clearly articulating this insight.

The extent to which judges are allowing prior acts evidence in domestic violence prosecutions is unknown. Case law inevitably distorts our sense of what is happening at trials, failing to capture denials of prosecutor's 404(b) motions.[164] What we do learn from appellate opinions is how judges are justifying the admission of prior acts evidence in battering cases.[165] We will see that partial accommodation of legal structures to domestic violence "history" evidence[166] reveals the fundamental dissonance between the transaction-based/disposition-averse law and the practice of battering.

While the applicable legal framework varies jurisdictionally,[167] a few general observations can be made. Prior acts of domestic violence,[168] when admitted, are typically allowed to rebut a particular defense[169]—most often, suicide or accident[170] and self-defense.[171] Within this context, trial courts

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[164] Note the invisibility of this exclusion of context. "It is virtually impossible to track the decisions which favor the defendant because such rulings are generally not appealable by the prosecution." Raeder, *supra* note 150, at 1494. Only on rare occasions does a written decision result from a prosecutor's interlocutory appeal of a pretrial order excluding prior acts evidence. *But see, e.g.*, State v. Pyle, 963 P.2d 721 (Or. Ct. App. 1998) (affirming trial court's exclusion of evidence). In my prosecutorial experience the admission of prior acts evidence in domestic violence trials was exceptional.

[165] As doctrine frames (but rarely dictates) these rulings it is simultaneously shaped by them.

[166] *See infra* notes 194-95 and accompanying text (critiquing characterization of domestic violence history evidence as such).

[167] *Compare* Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73 (1995) (discussing New York common law governing the admissibility of domestic violence history evidence) *with* Sarah J. Lee, *The Search For Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221, 231 (1998) (focusing on Hawaii's application of the state's rule 404(b)), *and* Debra Raye Hayes Ogden, *Prosecuting Domestic Violence Crimes: Effectively Using Rule 404(b) to Hold Batters Accountable for Repeated Abuse*, 34 GONZ. L. REV. 361, 368-74 (1998-99) (commenting on Washington's 404(b) jurisprudence and summarizing law of other select states).

[168] We are concerned here with judicio-legislative treatment of prior acts of battering against *the victim in the case on trial.* Admission of evidence of previous abusive relationships lies outside the scope of this discussion. *See, e.g.*, Wetta v. State, 456 S.E.2d 696, 699 (Ga. Ct. App. 1995); *see also infra* note 190.

[169] Within this framework, the prior acts are not independently admissible in the prosecutor's direct case. Instead, their admission is contingent on an assertion of a particular defense. *See* Raeder, *supra* note 150, at 1470 (noting that "even with the most sympathetic judge, none of this [404(b)] evidence is likely to be admissible in the government's case-in-chief"). Unfortunately, the appellate case law often fails to differentiate between rebuttal and case-in-chief use of prior acts evidence.

[170] *See, e.g.*, People v. Illgen, 583 N.E.2d 515, 519-22 (Ill. 1991) (evidence of the defendant's prior unprovoked assaults on his wife admissible to negate the claim that injury was accidental or inadvertent).

understand the previous abuse to be evidence of motive,[172] intent,[173] and plan or design.[174] These rationales for admitting prior acts evidence accord

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[171] *See, e.g.*, Lee v. State, 405 S.E.2d 33, 34 (Ga. 1991) (evidence showing that defendant had physically abused his wife for years, and had threatened her with weapons prior to her murder admissible to rebut claim of self defense); People v. Hawker, 626 N.Y.S.2d 524, 525 (N.Y. App. Div. 1995) (evidence of defendant's prior assault of his wife admissible to rebut claim of self-defense); State v. Hendricks, 787 A.2d 1270, 1276 (Vt. 2001) (prior domestic assault evidence admissible to rebut defendant's self-defense claim).

[172] *See, e.g.*, State v. Powell, 893 P.2d 615, 624-25 (Wash. 1995) (evidence of defendant's previous assaults against his wife, including a prior attempt to strangle her, properly admitted to show motive for murder). In *Powell*, the court defined motive as "'the moving course, the impulse, the desire that induces criminal action on part of the accused.'" *Id.* (quoting BLACK'S LAW DICTIONARY 1014 (6th rev. ed. 1990)). Often, however, courts equate motive in domestic violence cases with generalized hostility. Consider *People v. Deeney*, 193 Cal. Rptr. 608 (Cal. Ct. App. 4th Dist. 1983), where a California appeals court reversed the defendant's conviction for involuntary manslaughter. The *Deeney* court held that the trial judge had erred in admitting evidence of defendant's prior abuse of the victim (his wife) to prove motive. *Id.* at 610. In reasoning stunningly devoid of insight into the battering dynamic, the court explained:

> [The previous abuse does not] reveal any motive to kill June. These prior events do show Deeney mistreated June and frequently argued with her. They may even suggest Deeney disliked his wife. However, because these events did not involve any physical attacks even remotely capable of causing death, they do not demonstrate Deeney disliked June so intensely that he wished her dead.

Id. at 612; *see also* Raeder, *supra* note 150, at 1495. Raeder criticizes the judicial rationale for admitting prior acts as proof of motive. Courts allowing this evidence tend to view previous battering as evidence of hostility and conceptualize hostility as the motive for the violence. This is problematic given that "control is not synonymous with hostility." *Id.*

[173] *See, e.g.*, Commonwealth v. Andrade, 661 N.E.2d 1308, 1312 (Mass. 1996) (noting that ample evidence of threats and acts of spousal abuse rendered other erroneously admitted evidence cumulative on the issue of defendant's intent to kill); State v. Murillo, 509 S.E.2d 752, 764 (N.C. 1998) (upholding trial court's admission of other acts evidence to show lack of accident and to support a finding of intent).

[174] When offered to prove a common scheme or plan or identity, courts generally require a substantial degree of similarity between the prior acts and the crime charged. JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 190(3) (5th ed. 1999). *Cf.* Grider v. State, 69 S.W.3d 681, 687 (Tex. Ct. App. 2002) (stating that "[i]t is not enough for proponents to argue that the evidence establishes a common scheme or plan; proponents must demonstrate that such common scheme logically makes an elemental fact more or less probable"). *Compare* People v. Linkenauger, 38 Cal. Rptr. 2d 868, 874 (Cal. Ct. App. 1995) (quoting People v. Miller, 790 P.2d. 1289, 1306 (Cal. 1990) (prior history evidence supports inference that defendant committed the charged offense, as "inference of identity . . . need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together"), *and Illgen*, 583 N.E.2d at 524 ("[T]he differences between the shooting incident [charged] and the prior incidents of abuse are not so great as to eliminate the probative value of the prior abuse evidence."), *with* Robertson v. State, 829 S.2d 901, 909 (Fla. 2002):

> The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other

with the traditional 404(b) framework.[175] Where a victim recants her allegations at trial, courts have also allowed prior acts evidence to prove why she might be unwilling to testify against the defendant.[176] Appellate courts affirming trial courts' exercise of discretion tend to emphasize that the admitted evidence is relevant for a purpose "other than to show the defendant's propensity to commit the crime charged."[177]

Traditional doctrinal justifications for the admission of "history" evidence—to prove motive, intent, and the defendant's scheme or plan—inevitably constrict its significance.[178] The evidence is admitted[179] *solely* for the purpose of establishing motive, intent, scheme, or whichever non-propensity basis the judge prefers—and the jury is instructed not to consider it for any other purpose.[180]

> offenses. In this case, the crime with which [the defendant] was charged was the completed offense of murder against his girlfriend utilizing a handgun. The prior offense, assuming it occurred, involved a threat of violence against [the defendant's] former wife, involving an assault rifle. Neither the crimes, the weapons, nor the victims are similar.

Id. (internal citation omitted). *See* Edward J. Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 MO. L. REV. 1, 15 (1985).

[175] *See* Raeder, *supra* note 150, at 1493.

[176] *See, e.g.*, State v. Clark, 926 P.2d 194, 206-07 (Haw. 1996) (allowing prior acts as evidence to show the relationship between the defendant and the victim where the abusive nature of the relationship may form the basis for the victim's retraction of her allegations); State v. Harris, 560 N.W.2d 672, 677 (Minn. 1997) (testimony regarding previous abuse admissible where it "demonstrate[s] the degree of control exercised by [the defendant] over [the victim] and provide[s] an explanation for her willingness to perjure herself on his behalf at [a prior] trial"); State v. Thompson, 520 N.W.2d 468, 471 (Minn. Ct. App. 1994) (affirming the trial court's admission of prior acts evidence for its relevance to the victim's recanting of her allegations at trial).

[177] *See, e.g.*, *Illgen*, 583 N.E.2d at 520. A limiting instruction informs the jury of the permissible use for the admitted evidence and emphasizes that the prior acts are not to be considered as proof of the defendant's propensity to commit domestic violence. *See infra* note 185 (describing appropriate jury instruction).

[178] As we have seen, incidents of domestic violence cannot be understood in isolation. *See supra* Part II.A.

[179] It is worth underscoring that even where prior acts of domestic violence would seem to fit neatly into the traditional non-propensity framework, a judge may nevertheless exclude the evidence. See *supra* note 161 (citing Fed. R. Evid. 403).

[180] The doctrinal justification for admission dictates how the jury is instructed on the permissible uses of the evidence. *See* Linsky, *supra* note 167, at 89:

> If the prosecutor is permitted to introduce domestic violence history evidence on the direct case, the trial judge must instruct the jury as to the limited purposes for which the jury must consider this evidence. The judge must also advise the jury that they must not consider such evidence as probative of a criminal propensity or general bad character of the defendant.

Id.

In contrast, some courts have explicitly recognized the importance of context to domestic violence prosecutions and have allowed prior bad acts to be admitted for their bearing on the relationship as a whole.[181] This approach, while departing from the template of traditional non-propensity uses,[182] reflects rather a more candid appraisal of the probative value of the evidence in this context.[183] It thus represents an alternative to the conceptual muddle that results when the paradigmatic propensity framework is applied to battering cases.

The opinion of the Vermont Supreme Court in *State v. Sanders*,[184] explicitly avowing the probative worth of context, illustrates this approach. At issue was the trial judge's admission of two prior acts of violence in a prosecution of the defendant for threatening his girlfriend with a knife. The State argued that the evidence was relevant to the issue of the defendant's intent to threaten (an element of the crime) and the victim's fear of the defendant. The trial court admitted the evidence on the issue of intent.[185]

Interestingly, in upholding the admission of prior acts evidence, the court explicitly connects domestic violence "history" to the practice of battering:

> Here, we need not decide whether the prior bad acts may be admissible solely to show fear or intent because the evidence was relevant also to portray the history surrounding the abusive relationship, providing the needed context for the behavior in issue. The purpose of establishing the defendant's history of abuse of the victim, is not to show his general character for such but to provide the jury with an understanding of the defendant's actions on the date in question. . . . Allegations of a single act of domestic violence, taken out of its situational context, are likely to seem 'incongruous and incredible' to a jury. Without knowing the history of the

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[181] *See, e.g.*, State v. Drach, 1 P.3d 864 (Kan. 2000); State v. Hedger, 811 P.2d 1170, 1174 (Kan. 1991) (Kansas courts have repeatedly "held that evidence of a discordant marital relationship is admissible, independent of the [state's 404(b) analogue] to show the on-going relationship between the parties."); State v. Elvin, 481 N.W.2d 571, 575 (Minn. Ct. App. 1992) ("[E]vidence of previous domestic violence is admissible to illuminate the relationship between defendant and victim."); People v. Shorey, 568 N.Y.S.2d 436, 437 (N.Y. App. Div. 1991) (stating that in addition to its bearing on motive and intent, prior acts evidence also admissible "as background material in order for the jury to understand the nature of" the abusive relationship); State v. Sanders, 716 A.2d 11 (Vt. 1998). A few states have made legislative changes to this effect. *See infra* note 190 and accompanying text.

[182] Again, Rule 404(b) is not exhaustive.

[183] Some states have amended their evidentiary codes to make prior acts evidence presumptively admissible for non-propensity purposes in domestic violence cases. *See, e.g.*, COLO. REV. STAT. § 18-6-801.5 (2002); MINN. STAT. ANN. § 634.20 (West 2002).

[184] 716 A.2d at 13.

[185] Presumably the jury was instructed that it was only to consider the evidence of prior abuse for its bearing on the defendant's intent to threaten the victim, and not as proof of any criminal (or battering) disposition. *See supra* note 177.

> relationship between the defendant and the victim, jurors may not believe the victim was actually abused . . . . The prior occasions tend to prove that defendant meant to threaten and intimidate his friend when he raised the knife and said "someone is gonna die." Therefore, the evidence was admissible.[186]

The court's basic point—that "the purpose of establishing the defendant's history of abuse of the victim, is not to show his general character for such but to provide the jury with an understanding of the defendant's actions on the date in question"—could be characterized as a general description of the relevance of prior acts evidence in domestic violence cases. That is to say, the court's proposition is true as a categorical matter. Even in cases where the previous conduct is admissible for a non-propensity purpose specifically allowed by the evidentiary code, it more importantly will "provide the jury with an understanding of the defendant's actions on the date in question."[187]

Why, then, the widespread judicial reluctance to embrace the probative value of prior acts evidence for all its richness? This ambivalence is grounded in law's antipathy to propensity reasoning.[188] The concern might be articulated in this way: relying on the past conduct of a defendant—even a defendant who, over the course of a relationship, controls his victim using all manner of tactics—to assess the defendant's behavior on a particular occasion puts us in the realm of "disposition." And this, the argument goes, cannot be squared with our criminal evidentiary law.[189]

In response to this perceived incompatibility between the propensity framework and truth seeking in battering prosecutions, a few states have amended their evidentiary codes to expressly allow for the propensity use of

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[186] *Sanders*, 716 A.2d at 13. The court goes on to note that previous incidents of abuse are also relevant to the victim's recantation at trial, recognizing that the prior history of violence "gives the jury an understanding of why the victim is less than candid in her testimony and allows them to more accurately decide which of the victim's statements more reliably reflect reality." *Id.*

[187] *Id. Consider* Stallworth v. State, 797 So. 2d 905, 909 (Miss. 2001) (stating that the trial court held that evidence of past abuse "might easily show motive, opportunity, intent, preparation, plan . . . about all of the 404(b) exceptions to allow it in").

[188] *See infra* discussion at notes 148-51 and accompanying text; *cf.* Raeder, *supra* note 150, at 1503 (stating that "the mistrust of domestic violence evidence is a relic of a past in which domestic femicides were viewed in isolation and no theory linked the prior acts to the murder other than generalized bad character").

[189] For one formulation of this argument, see Christopher M. Joseph, Comment, *Other Misconduct Evidence: Rethinking Kansas Statutes Annotated Section 60-455*, 49 U. KAN. L. REV. 145, 187 (2000) (asserting that admission of prior acts to show "relationship, course of conduct, or to corroborate testimony" is "often relevant only to show the defendant's criminal disposition," thereby undermining the rationale for excluding propensity evidence).

prior acts in domestic violence cases.[190] In these jurisdictions, jurors are instructed that they may consider the evidence as it bears on the defendant's disposition to commit offenses involving domestic violence.[191] If the jury finds that the defendant has this disposition it may, but is not required to, infer that he was likely to commit and did commit the crime of which he is accused.[192]

Resort to the propensity use of prior acts evidence may be understood as an effort to legislate around law's failure to account fully for the probative value of uncharged acts of domestic violence. This approach, however, goes beyond what is needed while leaving intact flawed structural paradigms. Allowing propensity-based reasoning in domestic violence cases does not compensate for criminal justice system defects.[193] Indeed, conceptualizing bad acts as probative of a "disposition" to commit domestic violence reflects a misunderstanding of the tension inherent in applying the traditional propensity paradigm to the practice of battering. Domestic violence "history" is probative of what happened on the occasion charged because battering is characterized by patterns of behavior that are ongoing

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[190] *See, e.g.*, ALASKA R. REV. RULE 404(b)(4) (West 2003) (stating that in prosecution for a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person is admissible); CAL. EVID. CODE § 1109 (West 2003-04) (allowing generally evidence of defendant's "commission of other domestic violence" in prosecution for offense involving domestic violence, subject to balancing of probative value against prejudicial effect). Both statutes have survived constitutional challenge. *See* Fuzzard v. State, 13 P.3d 1163 (Alaska Ct. App. 2000); People v. Jennings, 97 Cal. Rptr. 2d 727, 734-36 (Cal. Ct. App. 2000); People v. Johnson, 91 Cal. Rptr. 2d 596, 598-601 (Cal. Ct. App. 2000); People v. Brown, 92 Cal. Rtpr. 2d 433, 437-39 (Cal. Ct. App. 2000); People v. Hoover, 92 Cal. Rptr. 2d 208, 212-14 (Cal. Ct. App. 2000). Both of these rules allow for the admission of acts of domestic violence against a victim other than the person allegedly harmed in the case on trial. The battering statute I propose, which criminalizes a course of conduct directed at the victim, would not alter the traditional 404(b) analysis of acts of domestic violence against unrelated persons. *See infra* text of statute and discussion at Part VI.A.

[191] *See* CA. CALJIC No. 2.50.02 (2004); People v. Wu, 2003 WL 125019 (Cal. Ct. App. Jan. 16, 2003).

[192] *See* CA. CALJIC No. 2.50.02.; *Wu*, 2003 WL 125019.

[193] *See infra* note 295 and accompanying text (emphasizing that amending the rules of evidence to require presumptive admission of prior acts in domestic violence case leaves intact a regime which condones battering); *infra* Part V (discussing implications of failure to condemn battering). From a criminal defense perspective, reform of the substantive criminal law should be preferable to the enactment of evidentiary rules that arguably tend to lower the prosecutor's burden of proof. *See supra* notes 148-151 and accompanying text.

and unseverable.[194] Talk of a battering disposition or propensity to batter would be meaningless if battering were defined accurately.[195]

In short, applying the evidentiary framework governing prior misconduct to battering prosecutions is bound to result in incoherence because domestic violence "history" is not in fact history; it is, rather, an integral part of the batterer's continuing effort to control his victim. Despite criminal law's insistence to the contrary, the pattern of domestic violence cannot be vivisected. Doctrinal adjustments to the law governing prior acts evidence reflect an imperfect effort to accommodate this reality.

B. EXPERT TESTIMONY ON BATTERING[196]

The prosecutorial use of experts to explain battering and its effects is becoming increasingly common.[197] Expert testimony has been admitted to

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[194] A variation on this argument is advanced by Myrna Raeder. Raeder, *supra* note 150, at 1491-92. Advocating for the admission of prior acts evidence in domestic femicide prosecutions, Raeder asserts:

> [I]f character only prohibits general propensity, most domestic violence evidence is not banned because it is situational—a repeated response in a specific relationship. The narrowness of the conduct takes it out of general propensity reasoning which focuses on the defendant as a bad person. Thus, the repetitive nature of the response is informative about the conduct on the occasion in questions, thereby permitting domestic violence history to be introduced.

Id.

[195] *Cf. id.* at 1499:

> While the dynamics of control are undoubtedly rooted in the defendant's personality, the prior acts of domestic violence do not depend on character for their relevance. Instead, they provide the current motivation for the murder. The otherwise, unintelligible code imbedded in the seemingly random acts of abuse can be deciphered by recognizing that when the defendant's efforts fail to control the victim and he ends the relationship, the final act is murder because the abuser fails to release control.

Id.

[196] A substantial body of scholarship documents the development of this type of testimony and explored its relationship to the doctrine of self-defense in the context of women who kill their batterers in self-defense. *See, e.g.*, SCHNEIDER, *supra* note 3, at 123-47; Mahoney, *supra* note 3, at 34-44; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213 (1992). The growing use of expert testimony in prosecutions of batterers has provoked less academic interest. *But see* Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593 (1999); Raeder, *supra* note 120, at 802-13; Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553 (1991).

[197] Mangum, *supra* note 196, at 610. Mangum reports that as recently as the early 1990s, courts paid little attention to the use of this type of testimony, and very few addressed its admissibility. By 1999, twenty-seven states had admitted or discussed favorably the

explain the victim's prior inconsistent statements or recantation at trial, and to rehabilitate the victim's testimony once her credibility has been attacked.[198] More broadly, jurors often find it difficult to fathom a victim's actions during the course of the relationship, leading to the discrediting of her account.[199] An expert witness may elucidate seemingly incomprehensible behaviors which are, in fact, quite typical and understandable.[200]

Law receives its most holistic accounts of battering when experts are permitted to testify to its effects.[201] The admission of expert testimony concerning battered women's experiences[202] widens the legal lens, bringing

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prosecutorial use of expert testimony on battering and its effects. For a description of the evidentiary framework for admitting this type of testimony, see *id.* at 613.

[198] *Id.*

[199] *See supra* Part III.B.1.

[200] Jurors "may expect victims and batterers to fit certain stereotypes and may have certain expectations regarding a battered woman's behavior in a battering situation . . . [e]xpert testimony identifying the dynamics of domestic violence and patterns of behavior in battering relationships is relevant" and "particularly important for evaluating [the victim's] credibility." Mangum, *supra* note 196, at 615. More broadly, Myrna Raeder asserts that "jurors need background evidence about the dynamics of domestic violence in order to make rational decisions about the significance of evidence presented at trial." Raeder, *supra* note 120, at 790. Raeder criticizes battered woman syndrome evidence as unnecessarily "shoehorning" victims into a pathology that inaccurately describes the experiences of many women. She urges the adoption of evidentiary policies that would allow juries to be educated about the nature of battering without resort to syndrome evidence. Professor Raeder's concerns would, I believe, be accommodated by the admission of expert testimony on the effects of battering. *See infra* note 202. Raeder argues that "domestic violence testimony imparts important background information in cases where abuse is significant in explaining that a crime really happened, why it happened, or identifying who committed it." Raeder, *supra* note 120, at 816.

[201] As Martha Mahoney observes, it is "[ironic that] the most complete description of women's suffering from domestic violence has entered our case law and legal literature at the point where violence against women finally harms men—when battered women kill in self-defense." Mahoney, *supra* note 12, at 35.

[202] Outside the courtroom, a consensus is developing that expert testimony on what has been described as "battered woman syndrome" should be conceived more broadly as testimony on battering and its effects, or as testimony concerning battered women's experiences. This change is more than semantic. *See* NAT'L INST. OF JUST., U.S. DEP'T OF JUST., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS (May 1996), *available at* http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/; Dutton, *supra* note 6. The DOJ/NIJ study cites earlier reports that conclude that "the term 'battered woman syndrome' is no longer useful or appropriate":

> While recognizing its historical role in the introduction of expert testimony in this area, the authors of these reports contend that the term does not reflect the breadth of empirical knowledge now available concerning battering and its effects. Each notes that the phrase "battered woman syndrome" implies that a single effect or set of effects characterizes the responses of all battered women, a position unsupported by the research findings or clinical experience. They also raise

context into view. By infusing criminal prosecutions with more complete stories of battering, expert testimony challenges law's insistence that context lacks meaning.[203]

Expert testimony on the effects of battering is relevant, of course, only in cases where there is evidence of a battering relationship.[204] Now-admissible testimony about the contours and dynamics of the relationship forces jurors to grapple with the space between criminalized incidents of physical violence. Challenging the structural imperative that charged crimes be viewed in isolation, this testimony gives the lie to law's suggestion that this space lacks meaning.

People v. Ellis,[205] a New York Court of Appeals decision, reveals how true stories of battering can permeate transaction-based legal walls. In *Ellis*, the prosecution sought to introduce expert testimony regarding what was conceptualized as battered woman syndrome in order to help the jury "understand the behavioral patterns of abused women and how the abuse affects their conduct before, during and after the commission of a crime."[206] The defense objected on relevance grounds, arguing that the prosecution had not laid a proper foundation for the introduction of the evidence.[207] In

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> concerns that the word 'syndrome' may be misleading, by carrying connotations of pathology or disease or that it may create a false perception that the battered woman "suffers from" a mental defect. All preferred to refer to evidence or expert testimony "on battering and its effects" and urged the adoption of this terminology as the standard phrase of reference.

NAT'L INST. OF JUST., *supra*.

[203] Expert testimony was designed to overcome stereotypes about battered women by providing the fact-finder with information regarding context. Perversely, battered woman syndrome evidence has contributed to a focus on victimization and a view of the battered woman as pathological. Mahoney, *supra* note 12, at 42.

[204] This foundational requirement necessarily expands the permissible scope of factual testimony at trial. As one court noted, addressing the admissibility of what was then-described as battered woman syndrome (BWS) testimony:

> Of course, BWS expert testimony would only be admissible if it is relevant, based on a proper evidentiary foundation. . . . "[T]he party seeking to introduce battered woman syndrome evidence must lay an appropriate foundation substantiating that the conduct and behavior of the witness is consistent with the generally recognized symptoms of the battered woman syndrome, and that the witness has behaved in such a manner that the jury would be aided by expert testimony which provides a possible explanation for the behavior."

People v. Ellis, 650 N.Y.S.2d 503, 507 (N.Y. Sup. Ct. 1996) (quoting State v. Stringer, 897 P.2d 1063, 1070 (Mont. 1995)).

[205] *Id.* at 503.

[206] *Id.* at 506. The victim, who was married to the defendant throughout the battering, recanted her allegations of abuse at trial and refused to testify after having testified before the Grand Jury. The defendant was ultimately convicted of two counts of felony assault and one count each of intimidating a witness and menacing.

[207] The defense argument as summarized by the court is as follows:

ruling that the expert would be permitted to testify, the trial court found that the prosecution had presented evidence sufficient to provide a foundation for the expert's testimony.

According to the trial court opinion, evidence relevant to the foundation issue included the following: "discipline and physical abuse in the past"; the defendant's criticism of the victim's housekeeping; the victim's failure to shield herself from blows by keeping her hands in her lap while being beaten; the defendant's efforts to "get the complainant to return to him"; and the victim's self-blaming for causing the incidents.[208] In short, the relationship as a whole was deemed relevant to the question of whether the victim's conduct might be better understood with help from an expert on the dynamics of battering.[209]

The use of this type of expert testimony to prosecute perpetrators of domestic violence may be aptly characterized both as significant and as limited. Predicated on a recognition that the battering relationship itself may give meaning to otherwise unfathomable acts and omissions, expert testimony on battering represents a partial neutralization of law's atomizing force. At the same time, the admission of expert testimony is bounded by formal evidentiary rules[210] and, even more tightly, by the trial court's notion of relevance.

Conceptions of the relevance of expert testimony to domestic violence prosecutions differ dramatically. For instance, Myrna Raeder has suggested: "Jurors need background evidence about the dynamics of domestic violence in order to make rational decisions about the significance of evidence presented at trial."[211]

> [T]he People have not laid a proper foundation for the introduction of this evidence because the complainant has never been determined to be a battered woman by an expert nor is there evidence before the jury that she suffers from this condition. Further, the defendant argues that the complainant's recantation is self-explanatory and that the jury was given the reason for the recantation by the complainant, when she described her initial accusation as false and based on the vengeance for her husband's infidelity.

Id. at 507-08.

[208] Id. at 508.

[209] Note the court's focus on the *victim*'s conduct and credibility. While admission of expert testimony on battering properly contextualizes domestic violence (at least in part), it should be emphasized that the concomitant fixation on the victim's behavior is highly problematic. *See* Mahoney, *supra* note 12; Schneider, *supra* note 68.

[210] *See supra* note 197 (citing Mangum's discussion of applicable evidentiary framework).

[211] Raeder, *supra* note 120, at 790.

Contrast this understanding of the importance of contextualizing battering to the function of expert testimony articulated by the Michigan Supreme Court in *People v. Christel*:

> In this case, the expert testimony was arguably relevant and helpful in understanding complainant's actions in tolerating physical abuse over a period of years. Moreover, it may have been relevant in explaining why complainant did not report similar incidents earlier. On the other hand, its relevance did not reach the level found in other battered women cases that have considered this issue. Complainant did not remain in the relationship until the date of the assault and try to hide or deny the abuse, did not delay reporting this incident, and did not later retract the claim of abuse. Instead, complainant testified that the relationship ended one month before the assault, explained that she immediately reported the sexual assault, and has consistently maintained that the abuse occurred. Although the testimony was arguably relevant and helpful, on these facts, we are persuaded that a more direct connection and factual premise is necessary, and, hence, we deem the trial court's decision to admit the testimony to be error.[212]

The court's conclusion that the trial judge erred in allowing expert testimony[213] follows from its judgment that the complaining witness did not act in a manner requiring explanation.[214] From the opinion we learn these facts about the relationship between the complainant and the defendant:[215]

> For several years before this incident, defendant and complainant shared an on-again, off-again romantic relationship. . . . [In December 1989] heated arguments and physical abuse compelled complainant to ask defendant to move out. Complainant testified that this ended their relationship, whereas defendant claimed that the relationship continued nonetheless until the date of this alleged assault.[216]

> At trial, complainant testified that their relationship began well, but later progressed into both verbal and physical abuse. Defendant apparently became extremely jealous of complainant; he accused her of dating other men and became angered at any intimation that she was looking at other men in person, on television, or in pictures.

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[212] People v. Christel, 537 N.W.2d 194, 196-97 (Mich. 1995).

[213] The court found "the error harmless in light of the limited nature of the [expert] testimony and the other physical and testimonial evidence of abuse." *Id.* at 197.

[214] *Id.*; *see also* State v. Borrelli, 629 A.2d 1105, 1115 n.15 (Conn. 1993) (stating that "expert testimony on the subject of battered woman's syndrome is not relevant unless there is some evidentiary foundation that a party or witness to the case is a battered woman, and that party or witness has behaved in such a manner that the jury would be aided by expert testimony providing an explanation for the behavior") (citation omitted).

[215] Evidence of the uncharged acts of abuse was admitted at trial pursuant to a 404(b) motion. The trial court allowed the evidence in order to "place the charged activity in context so that the jury could better appreciate the competing claims of force and consent." *Christel*, 537 N.W.2d at 199 n.12 (quoting People v. Christel, No. 140721, slip op. at 1 (Mich. Ct. App. Dec. 9, 1993)). Christel was not held criminally responsible for any of these incidents. *Id.* at 204.

[216] *Id.* at 197; *see infra* text accompanying notes 238-40.

> This jealousy often turned to rage and beatings, followed by compelled sexual intercourse. Complainant described this behavior as being a "game" for defendant.[217]

The defendant was charged with breaking into complainant's apartment and raping her on January 23, 1990.[218] At trial, "complainant was portrayed as a liar, a perjurer, [and] a self-mutilator."[219]

The *Christel* court generally recognizes the admissibility of expert testimony on battered woman syndrome but qualifies its holding, emphasizing "that the admissibility of syndrome evidence is limited to a description of the uniqueness of a specific behavior brought out at trial."[220] Here this requisite "uniqueness of a specific behavior" was apparently missing. The court's rationale for its finding of error is labyrinthine:

> In the instant case, while there may have been some basis for the testimony, we find the necessary factual underpinnings for admission of expert testimony lacking. Certainly there may have been a question why complainant tolerated prolonged abuse without reporting it to authorities or friends. However, defendant never denied that some [of the prior] abuse occurred. Furthermore, complainant testified that the relationship ended one month before the [charged] assault and did not attempt to hide or deny the instant sexual assault. Moreover, complainant did not relay reporting this incident, but, instead, immediately sought medical attention with accompanying discussions with police. . . . Complainant also never recanted that the assault occurred. . . . [W]e reject the prosecution's contention that the battered woman syndrome was relevant in this case.[221]

Despite its references to seemingly "objective" or universal notions of relevance, the law as applied reflects a particular perspective on foundational facts. If expert testimony on battering is deemed relevant only when *the victim* behaves in a proscribed manner, domestic violence out of context remains the legal rule.[222] Expert testimony and its potential to push outward on law's narrowly circumscribed boundary of relevance is thus constricted.

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[217] *Christel*, 537 N.W.2d at 197.

[218] At the time, complainant was six months pregnant and suffered premature labor contractions as a result of the rape. She was bruised, scratched, bloodied and swollen vaginally when she arrived at the hospital to be treated for the contractions. Hospital personnel (as opposed to the complainant) notified the police. *Id.* at 197-98. Although it is not uncommon in domestic violence cases for the victim not to report an incident to the police, or to do so after some delay, a complaining witness's "failure to report" often raises credibility issues for the trier of fact.

[219] *Id.* at 198; Christel was convicted of the sexual assault and acquitted of breaking and entering. *Id.* at 197.

[220] *Id.* at 201 (quoting People v. Beckley, 456 N.W.2d 391, 406 (Mich. 1990)).

[221] *Id.* at 204.

[222] This is true regardless of the definition of how the victim must behave to warrant the introduction of expert testimony. *See, e.g.*, text accompanying *supra* note 212.

Nonetheless, that certain circumstances trigger law's acceptance of a fuller account of battering challenges the system's default to the contrary.

C. PROSECUTING STALKING

Anti-stalking legislation[223] criminalizes a continuing course of conduct,[224] codifying a recognition that seemingly isolated events must be viewed in context in order for their meaning to be discerned. Defining a pattern of behavior as criminal, the law accounts for the reality of stalking.

Application of laws against stalking to the domestic violence context[225] reveals the profound importance of framing crime as other than

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[223] For a comprehensive report on federal, state, and model anti-stalking legislation (including sentencing provisions), see VIOLENCE AGAINST WOMEN GRANTS OFF., U.S. DEP'T OF JUST., STALKING AND DOMESTIC VIOLENCE 1 (1998), *available at* http://www.ojp.usdoj.gov/vawo/grants/stalk98/; *see also* Jennifer L. Bradfield, Note, *Anti-Stalking Laws: Do they Adequately Protect Stalking Victims?*, 21 HARV. WOMEN'S L.J. 229 (1998) (critiquing the effectiveness of the anti-stalking laws); Laurie Salame, Note, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67 (1993) (discussing the development of anti-stalking legislation and constitutional issues it potentially raises).

[224] *See* Salame, *supra* note 223, at 73-74. "A representative definition of 'course of conduct'" [contained in stalking laws] is a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." *Id.*

[225] Though well-publicized celebrity stalking cases were often the impetus for passage of anti-stalking laws, the tight connection between domestic violence and stalking has been recognized by lawmakers. *See, e.g.*, Michael V. Saxl, *The Struggle to Make Stalking a Crime: A Legislative Road Map of How to Develop Effective Stalking Legislation in Maine*, 23 SETON HALL LEGIS. J. 57 (1998). Saxl, then House Majority Whip of the Maine House of Representatives, proposed the anti-stalking legislation that ultimately became law in Maine. Saxl explains the importance of this law for battered women:

> Although Maine is among the most crime-free states in the nation, domestic violence represents the largest percentage of all felonies committed in Maine. Domestic abuse professionals in Maine have identified stalking as a critical component of domestic violence in Maine. Indeed, stalking occurs in eighty percent of domestic violence cases in Maine.

Id. at 62 (citations omitted). Further evincing an awareness that domestic violence and stalking are linked is the congressional requirement, codified as part of the Violence Against Women Act (VAWA), that the Attorney General submit an annual report providing "information concerning the incidence of stalking and domestic violence, and evaluating the effectiveness of antistalking efforts and legislation." STALKING AND DOMESTIC VIOLENCE, *supra* note 223.

Feminist scholars and advocates for battered women have also explored the nexus between stalking and battering. *See* SCHNEIDER, *supra* note 3, at 65 ("The broader description of battering relationships is premised on an understanding of coercive behavior and of power and control—including a continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation—rather than 'number of hits.'") (citation omitted).

transactional in nature.[226] Inquiry into how anti-stalking laws have been used to prosecute batterers encompasses consideration of the ways in which these laws have generally *not* been used.[227] This, in turn, says a good deal about how socially drawn lines become legally significant.[228] We are ultimately interested in what this story reveals about the criminal law's response to battering.

Stalking behavior as it tends to be understood in the domestic violence context is normally triggered by some type of separation—or an expressed desire to separate—on the part of the victim.[229] Mahoney calls this "separation assault" and notes that "it often takes place over time":[230]

> Separation assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship.[231]

The concept of separation assault is closely, though not perfectly, aligned with social understandings of stalking. The nexus between domestic violence and stalking—tight[232] and often lethal[233]—makes stalking statutes

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[226] *See infra* Part V (discussing implications of law's failure to account for women's experiences); *cf.* Mahoney, *supra* note 12, at 60 (offering that "[t]o bring women's experience into law and make it more comprehensible to women ourselves, we need litigation strategies aimed at exposing the power and control at the heart of battering").

[227] *See infra* text accompanying notes 229-40.

[228] *See infra* text accompanying notes 236-37.

[229] *See* Salame, *supra* note 223, at 85 ("Unwilling to relinquish control of their former lovers, batterers become stalkers, pursuing their victims after the victims leave the abusive relationship."). The term "post-separation woman abuse" explicitly focuses on separation as a critical conceptual moment. *See* Mahoney, *supra* note 3, at 64-65 (critiquing the term for its failure to capture the cases where violence occurs in response to the expressed decision to separate, as opposed to actual separation). Mahoney's articulation of separation assault "recast[s] the entire discussion of separation in terms of the batterer's violent attempts at control." *Id.* at 64.

[230] Mahoney, *supra* note 3, at 65-66.

[231] *Id.*

[232] *See id.* at 64 (stating that "at least half of women who leave their abusers are followed and harassed or further attacked by them"); STALKING AND DOMESTIC VIOLENCE, *supra* note 223, at 14 (citing National Violence Against Women Survey finding that eighty-one percent of women stalked by a current or former intimate partner were also physically assaulted by the same partner); Saxl, *supra* note 225, at 62 (stating that "stalking occurs in eighty percent of domestic violence cases in Maine") (footnote omitted); Salame, *supra* note 223, at 83 (stating that "[i]t is difficult to separate stalking from domestic violence").

[233] *See* Salame, *supra* note 223, at 86. "The most dangerous time for victims of domestic violence occurs when victims leave or attempt to leave the abusive relationship. In many cases, the *batterer-turned-stalker* ultimately finds and murders the victim." *Id.* (emphasis added). Stalking is one factor on the list of "lethality indicators" that suggest a batterer is

an important component of law enforcement efforts to protect victims and hold batterers responsible for their behaviors.[234]

But when does the "batterer" turn "stalker"?[235] We will see that the clear applicability of stalking laws to the paradigmatic fact pattern—abuser "unable to relinquish control"[236] pursues victim attempting to extricate herself from the relationship—results in the reification of what comes to be known as stalking's onset. That is, defining separation as the necessary condition for stalking imbues separation with unwarranted meaning.[237]

The practice of battering is not transformed by "separation."[238] Rather, the desire to exert power and control continues to dominate the relationship.[239] In a bizarre twist, what the law validates in the stalking context—that isolated incidents must be understood as pieces of a pattern of control—it denies in the pre-separation domestic violence context. The

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particularly likely to kill his victim. *See* Janet A. Johnson et al., *Death by Intimacy: Risk Factors for Domestic Violence,* 20 PACE L. REV. 263, 283 (2000).

[234] We do not know how often batterers are charged with, and convicted of, stalking. The National Violence Against Women Survey, cited in STALKING AND DOMESTIC VIOLENCE, *supra* note 223, at 18, does not disaggregate intimate stalking cases from acquaintance/stranger stalking cases in its discussion of the frequency of stalking prosecutions. I am aware of no systematic study of stalking prosecutions in a domestic violence context, though such prosecutions are well represented in the appellate case law. *See, e.g.*, Bowell v. State, No. A—6293, 1999 Alas. App. LEXIS 110 (Oct. 6, 1999); Commonwealth v. Davis, 737 A. 2d 792 (Pa. 1999); State v. Rapey, No. 97-0279-CR, 1998 WL 86283 (Wis. Ct. App. Mar. 3, 1998). Unsurprisingly, each of these defendants engaged in an on-going course of abusive conduct that preceded the behavior characterized (and charged) as stalking.

[235] Salame, *supra* note 223, at 86.

[236] *Id.* at 85.

[237] Even were this definition correct as a conceptual matter, separation resists identification as a moment in time. *See* Mahoney, *supra* note 12, at 65:

> When the decision, rather than actual separation, triggers the attack, the circumstances of the violence may not reveal the assault on separation: the couples may still have been living together, and the attack may have taken place inside their mutual home—yet the attack may have been a direct response to her assertion of the will to separate or her first physical moves *toward* separation.

Id.

[238] I mean to suggest that in the domestic violence context, what we call battering and what we call stalking are of a piece. Mahoney makes a similar point when she asserts that defining separation assault is one way to "expose the struggle for control" in women's experience of battering. Mahoney, *supra* note 12, at 65. Separation assault lies on the "continuum of control" and helps to "illuminate the issue of violence as part of the issue of power." *Id.* at 5, 69.

[239] There surely is *a relationship* between a "stalking" batterer and his victim.

batterer's quest for power is considered only when the "relationship" is deemed to be "over."[240]

This rather simplistic doctrinal regime superimposes itself on realities far more complex. For instance, the case of *State v. Whitesell*[241] reveals this dissonance. The opinion begins:

> The relevant facts of this case span over an 8-year period. Julie met Whitesell in 1989, became pregnant, and married him in 1990. Whitesell and Julie rarely lived together as the relationship was abusive from the start. When Julie and Whitesell did live together, Julie would often flee with her children to her sister's house when Whitesell became violent.[242]

Already we see the conceptual impossibility of identifying a moment of separation. Indeed the court's recitation of facts includes various physical departures and returns on the part of both Julie and Jon.[243]

Over the course of their marriage, the following incidents took place.[244] Jon threw Julie into a closet and refused to let her out.[245] He laid out all their knives in a pattern on the kitchen table.[246] He pulled Julie from the driver's seat and began driving dangerously fast until Julie managed to jump out of the car and run away at a stop light.[247] He threatened her, telling her that she hadn't "seen anything yet" and that he "could come and find her if he needed to."[248] He threw water on her while she was sleeping and told her that he was taking their daughter. When Julie tried to stop Jon from driving away, he pounded her head against the steering wheel, shoved her to the ground, and pulled her hair out.[249] He disabled the air conditioner and removed parts from Julie's car.[250]

After Julie obtained a protective order, Jon tried breaking into her home.[251] He told Julie that marriage was "till death do us part."[252] He

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[240] Accordingly, in many abusive relationships there is no apparent separation sufficient to trigger application of this stalking paradigm.

[241] 13 P.3d 887 (Kan. 2000).

[242] *Id.* at 896.

[243] For instance, Jon moved back into the house with Julie when she was diagnosed with cancer. *Id.*

[244] Note the transaction-based nature of this narrative, gleaned, as it is, from the appellate summary of facts. *See supra* text accompanying notes 37-39.

[245] *Whitesell*, 13 P.3d at 896.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *See infra* note 270 (indicating that Whitesell was convicted of battery based on this incident).

[250] *Whitesell*, 13 P.3d at 896.

[251] *Id.*

pushed her, locked her in the bathroom with him, threw her into the corner and "pressed his pelvis into her," like he was going to rape her. He instead threw her in the hall with such force that her foot went through the wall.[253]

Once he threw a television set.[254] When Julie tried to leave the home, Jon slapped and kicked her, forcing her to escape to the bathroom with the children. He kicked in the door to the bathroom.[255] He went to Julie's father's house screaming for his gun.[256] He broke into the garage.[257] He called the district attorney and said that he had a gun and would kill Julie.[258] He followed her, drove by her house, and sent her a note referencing the O.J. Simpson trial (which was taking place at the time).[259] He left suicide notes inside of her locked car and sent a birthday card that read, "I will not quit."[260]

Julie filed for divorce[261] and obtained a protective order. Jon drove by her house by car and by bicycle, over and over again.[262] He parked nearby with his lights off and binoculars in the car.[263] Once he drove by while Julie's new boyfriend was mowing the lawn, called her a slut and told her to "watch her back."[264] He watched the house from a field near the yard.[265] He sent her a copy of the Kansas adultery statute and a bible with a handwritten inscription saying that he would not quit.[266] He followed Julie's boyfriend to work and confronted him about "screwing his wife."[267] Jon was subsequently arrested and charged with stalking.[268]

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[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.* at 897.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] This was the second time Julie filed for divorce. The first time she dismissed the divorce action after discovering that she was pregnant with Jon's baby.

[262] *Whitesell*, 13 P.3d at 897-98.

[263] *Id.* at 898.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] Jon was convicted of stalking. *See infra* note 289 (summarizing Kansas stalking statute). After judgment was vacated on jurisdictional grounds, he was again convicted and sentenced to five years of probation. The Kansas Supreme Court affirmed the conviction, denying the defendant's constitutional challenge to the stalking statute, but vacated sentence because the trial judge had failed to make a record justifying the upward departure from the

The story of the relationship between Jon and Julie raises this question: when does the battering end and the stalking begin? We would expect that the law would locate the moment of "separation"—here, the filing of the second, final divorce action[269]—and define as stalking all conduct that followed it. And indeed Julie's second "decision to seek a divorce" triggered the invocation of criminal law.[270] The battering that she endured up until this point was in no way redressed.[271]

The story of Patricia Brady, also a victim of domestic violence, illustrates many of these same contradictions.[272] Ronald Ledesma, a San Jose police officer,[273] became intimately involved with Patricia in the early 1980's, and the two moved in together in 1991. Their relationship was "always tumultuous and beset with instances of domestic violence,"[274] and Patricia was repeatedly assaulted and raped over the years.[275]

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presumptive two-year probationary sentence. This issue was mooted by a procedural motion made in the interim by the State. The motion did not change the duration of probation but limited its appealability. State v. Whitesell, 33 P.3d 865 (Kan. 2001).

[269] Finality is defined here in relation to the criminal prosecution—that is, Jon was arrested and charged with stalking while this second divorce action was still pending.

[270] With one exception, Jon Whitesell's battering—seven years of it—was wholly untouched by the criminal law until the legally anointed moment of separation. The exception is that Jon was apparently convicted of one count of domestic battery years earlier for an attack that required the intervention of "several firemen who had responded to a nearby emergency." *Whitesell*, 13 P.3d at 896.

[271] We know very little about the "pre-separation" relationship between Jon and Julie. What we do know results from the trial court's discretionary ruling to allow the prosecutor to present this evidence. *See supra* notes 155-66 and accompanying text (discussing importance of FED. R. EVID. 404(b) litigation in domestic violence cases). The Kansas Supreme Court affirmed the use of this evidence to prove Jon's intent to stalk Julie and his motive for doing so. The court also noted its relevance to the issue of Julie's fear of Jon during the four-month period in which he stalked her. It is fair to say that what Jon did to Julie before the two were deemed to have separated is legally significant only to the extent that it bears on what came after. *See infra* note 295 and accompanying text.

[272] People v. Ledesma, No. H021604, 2002 LEXIS 360 (Cal. Ct. App. Apr. 22, 2002). The facts revealed by an appellate decision are wholly circumscribed by the legal structures that we have been discussing. That the pattern of power and control can barely be glimpsed through the recited "facts" proves the limits of law, not the absence of context. *See supra* text accompanying note 13 (commenting on the meaning of the space between transactional incidents).

[273] We can assume that Ronald had ready access to guns and that Patricia was well aware of this fact.

[274] *Ledesma*, 2002 LEXIS 360, at *2. We learn nothing specific about the violence that was perpetrated during this period of time.

[275] We know this because the prosecutor moved to admit these acts of "uncharged domestic violence" under California's applicable evidentiary statute. Unlike the rule in most jurisdictions, California's code makes prior acts of domestic violence presumptively relevant and admissible subject to a balancing of its probative value against the risk of undue

On September 14, 1997, Ronald attacked Patricia as they were leaving a football game. While the car was moving, he grabbed her hair and pulled her down on him. As she was screaming in pain, Ronald began pulling on her ear, eventually tearing it from her scalp.

The court explains:

> By the summer of 1998, Brady was trying to end her relationship with defendant, but he refused to accept that it might be over. He warned Brady that if she ever got together with another man, he would kill her. "No other man is ever going to have you," he exhorted. Notwithstanding these warnings, Brady told defendant on September 14 that she was breaking off the relationship. Defendant again refused to concede the relationship was over.[276]

According to the opinion, "their relationship lasted until September 14, 1998, when Patricia told defendant she did not want to see him anymore."[277] From this date until February 1999, Ronald "repeatedly sent Brady notes and flowers, he drove by her house, and he called her five or six times a day at work, and another five or six times a day at home, sometimes late at night, which interrupted her sleep."[278] At one point, Patricia changed her locks and home phone number, but Ronald continued to call her at work. He told her, "we're getting back together we are going to see each other, period."[279]

On February 21, 1999, Ronald came to Patricia's condominium at around 11:00 p.m. After seeing him in the parking lot, she heard his footsteps coming up the stairs, and knew he was trying to come inside when the knob turned. The deadbolt kept him out. When the police responded to Patricia's 911 call, Ronald was gone.[280] Patricia and her daughter left the condominium for the night. Around 3:30, Ronald was found on Patricia's balcony by the security guard, who called the police. Ronald had entered by removing the sliding door from its tracks, thrown Patricia's clothes around the bedroom, and left a note on her front door.[281] Ronald was

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prejudice. *See supra* note 190. It is interesting to note that three of the acts in question were in all likelihood recalled with the necessary specificity because they occurred on holidays—Easter, Good Friday and Christmas—although Patricia was confused about the year that some of these attacks took place. *See supra* note 108 and accompanying text (discussing difficulty presented by pleading requirements).

[276] *Ledesma*, 2002 LEXIS 360 at **5-6.

[277] *Id.* at *5.

[278] *Id.* at *6.

[279] *Id.* at *7.

[280] Patricia was understandably "reluctant" to tell police Ronald's name. When she did, police advised her to leave the condominium with her daughter for the night. *Id.*

[281] The note read: "Pat, I guess Ernie was right; Sunday night and you're with your new boyfriend; here's two a.m. you're not home; P.S. a little gift, Ron . . . I hope you're not 'shacked up.'" *Id.* at *9.

arrested after telling police that Patricia had invited him over and that she was "probably out with some new boyfriend."

Ronald was charged with one count of stalking.[282] Given the significance of separation, we might wonder when (in the eye of law) Ronald began stalking Patricia. At what point in time does the course of conduct begin? And does the law take account of, or does it deny, the full spectrum of violence and control in the relationship before the defined moment of separation?

As anticipated, law disregards the continuing course of conduct that dominated Patricia's life before the relationship is deemed to have "ended." The stalking "began" on September 14, 1998, when Patricia "told [Ronald] that she was breaking off the relationship."[283] The criminal conduct included the notes, flowers, letters, phone calls, drive-bys, and break-in. This the jury came to understand as a pattern of behavior intricately bound up in Ronald's desire to control Patricia.[284] Each note was considered in context; no act was isolated from the others.

Compare this to law's treatment of all that came before. Ronald was held accountable for one assault, and no others. He was not charged with raping Patricia or with threatening to kill her. The other (physical) acts of domestic violence that the prosecutor was permitted to introduce—those that Patricia was able to attach dates to—were admitted solely to prove the crimes that were, in fact, charged.[285] To the extent that "opinion evidence" about the nature of the relationship was allowed, it was admitted for its relevance to the stalking charge.[286] All that comes before September 14,

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[282] Ronald Ledesma was also convicted of one count of assault for the incident of September 15, 1997. *Id.* at *3.

[283] *Id.* at *5. Ledesma was convicted of stalking for conduct occurring from September 14, 1998, through February 22, 1999. This was confirmed by a prosecutor in the Santa Clara County District Attorney's office. Telephone Interview with Rolanda Pierre-Dixon, Assistant District Attorney, Santa Clara District Attorney's Office (Dec. 19, 2003).

[284] Viewing the (post-separation) relationship in context, the appellate court characterizes the defendant's stalking behavior as "months and months of harassment, leaving Brady physically and emotionally exhausted and fearful for her life." *Id.* at *19.

[285] Again, California is unusual in allowing prior acts of domestic violence to be admitted to prove a "disposition" to commit domestic violence. *See supra* note 190 and accompanying text.

[286] The trial court allowed: testimony by Patricia's daughter that defendant was "dominating, controlling, and manipulative" and that Patricia would become "quiet" when Ronald "shouted to her to 'shut up'"; testimony by a friend that Patricia became "quiet, guarded with what she'd say—I would call it shy" around Ledesma; and testimony by Patricia's employer that she viewed Ronald as "controlling" of Patricia's activities. *Ledesma*, 2002 LEXIS 360, at *23. On appeal the defendant argued that this testimony constituted inadmissible opinion evidence. The appellate court affirmed its admission,

when Patricia "separates" from Ronald, is significant only insofar as it bears on the single incident of assault charged and the stalking that begins where the relationship apparently ends.

Under California's anti-stalking law it is a crime to willfully, maliciously, and repeatedly follow or harass another person and to make a "credible threat" with the intent to place the victim in reasonable fear of his or her safety.[287] The statute seemingly makes Ronald guilty of stalking *from the time he began battering Patricia.* The legislative definition of stalking is certainly not the most apt description of battering.[288] But as applied to battering relationships, the statute fails to distinguish between pre- and post-separation conduct.[289] Anti-stalking legislation *could*, then,

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noting that opinions are admissible where they are "less a matter of judgment and more a matter of observation." *Id.* at **23-24.

[287] In pertinent part the law reads as follows:

> (a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . . .
>
> (e) For the purposes of this section, "harasses" means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.
>
> (f) For the purposes of this section, "course of conduct" means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."
>
> (g) For the purposes of this section, "credible threat" means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of "credible threat."

CAL. PENAL CODE § 646.9 (West 2003).

[288] There are fundamental differences in the meaning of stalking behavior when a batterer is the perpetrator (in contrast to when he is a stranger or an acquaintance). While anti-stalking laws may be broad enough on their face to apply to battering, there is necessarily a contortion that results when a law is applied to remedy uncontemplated harms. Most notably, legal conceptions of stalking are not defined by the perpetrator's continuing struggle for power. Contrast stalking laws to the proposed domestic violence statute at *infra* Part VI.A.

[289] The same can be said of the statute used to prosecute Jon Whitesell. It reads in pertinent part as follows:

be used to prosecute a course of conduct that comprises the entirety of the battering relationship.[290]

This application of stalking statutes was not designed by legislatures or courts.[291] It does not comport with social understandings of stalking,[292] nor does it truly capture the harm of battering.[293] But the statutory definition of stalking may allow for a fuller account of battering than does any other criminal statute currently on the books.

Criminalization of a course of conduct demands a contextualized view of acts understood to be of a piece. In particular, anti-stalking legislation embodies a legal recognition of crime that is neither coterminous with a discrete incident nor the sum of isolated constituent parts. In this manner statutes defining the crime of stalking partly bridge the distance between life and law's construction of it.

D. LIMITATIONS OF LAW'S MEDIATIONS

Even where law has failed to account for a widely shared experiential reality it does not remain untouched by it. Instead, legal structures adjust in

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(a) Stalking is an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety . . . .

(d) For the purposes of this section: (1) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. Constitutionally protected activity is not included within the meaning of "course of conduct."

(2) "Harassment" means a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose.

(3) "Credible threat" means a verbal or written threat, including that which is communicated via electronic means, or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety.

KAN. STAT. ANN. § 21-3438 (2002).

[290] I have found no indication that this prosecutorial practice is widespread. New York County is one jurisdiction applying stalking laws in this manner. Telephone Interview with Laurence E. Busching, Bureau Chief, Family Violence and Child Abuse Bureau, New York County District Attorney's Office (Dec. 17, 2003).

[291] *See supra* notes 223-24 and accompanying text.

[292] *See supra* text accompanying notes 229-32.

[293] To the extent that the statute's technical fit conflicts with social understandings, judges and juries may be unreceptive to prosecutions that stretch the perceived limits of what constitutes stalking. *See supra* Part IV.D (noting absence of control in stalking definition).

response to incompatible stories of suffering. Yet as long as criminal law paradigms live safely, these narratives are inevitably perverted, the injuries they describe unremedied. While law may appear to expand, its movement is constrained by unchallenged premises.

So there is play at the margins. For its bearing on the particular incident charged, domestic violence history may be admitted—but it may not be,[294] and its probative value either way is doctrinally limited: even if prior acts are admitted pursuant to 404(b) or a reformed state analogue, the conduct that is "prior" remains condoned by law. [295] Experts on battering may be permitted to testify and effectively "open the door" to evidence of relationship context—but admissibility is contingent on the testimony conforming to a victim-focused template. Stalking laws grant legal status to the continuing course of conduct and tacitly acknowledge the significance of relationship—but separation is arbitrarily designated by sociolegal culture as the moment at which context comes to matter, and statutory language fails to describe the centrality of control to the criminal enterprise.

In short, this play at the margins has left intact law's fatal misunderstanding of domestic violence, preordaining criminal justice system failure. Under the current regime, battering conduct is situated on the legal side of the law; tinkering fails to engage this reality. Until domestic violence is truly criminalized, doctrinal and legislative reforms will fall short.

V. CONSEQUENCES OF THE BREACH

Law's failure to criminalize the true nature of battering is an injustice that begets a multitude of wrongs. We now turn to the implications of law's failure to define, and thus condemn, battering. What consequences flow from the legal rupture of experience?[296]

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[294] *See supra note* 179 (noting wide judicial discretion in this realm).

[295] It bears emphasizing that amending the rules of evidence to require presumptive admission of prior acts in domestic violence cases fails to engage the substantive criminal law, leaving in place a regime which condones battering as it is practiced. *See infra* Part V.

[296] For the sake of the remaining discussion, let us assume that our current system could—with reform at the margins—function in domestic violence cases to convict defendants who are guilty of the crimes charged. Accepting this supposition focuses our inquiry on the inadequacies of existing statutes under which batterers may be prosecuted and convicted.

A. PUNISHMENT

Law's denial of the full panoply of injuries inflicted on and suffered by battered women necessarily results in systemic malfunctioning. The legitimacy of our criminal justice system rests on the proposition that punishment on behalf of the state can be justified. To the extent that criminal sanctions are imposed, we should reasonably expect that some articulable function is served.[297] Whether this function is retributive or utilitarian in nature—or a dynamic, mutating amalgamation[298]—it is presumably advanced only to the extent that the system has correctly identified the societal harm resulting from the criminal conduct. [299]

This observation does not rest on any particular punishment theory, nor does it require that we grapple with the deep philosophical questions inevitably raised by the very existence of criminal laws. Rather, I start from the premise that the imposition of punishment can be justified and assume logically that the functioning of the system is contingent on its proper recognition of harm. If this is true, the failure of criminal law to capture the experience of battering severely undermines its legitimacy in this realm.

In the domestic violence context, the severity of available criminal law sanctions does not reflect the scope of the harm perpetrated.[300] In this respect, law's inability to define battering wholly subverts the ideal of proportionality.[301] Battering conduct obscured by criminal law paradigms goes unpunished. This means that moral blame is not ascribed,[302] future

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[297] A vast literature attempts to justify the imposition of criminal punishment. *See, e.g.*, KENT GREENAWALT, 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1136, 1340-41 (Sanford H. Kadish, ed. 1983) (entry for "punishment"); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

[298] "The idea that a single normative theory does or should determine the shape of all criminal doctrines is exceedingly implausible." Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotions in Criminal Law*, 96 COLUM. L. REV. 269, 350 (1996).

[299] Criminal law is directed at conduct only to the extent that it causes harm. *See* LAFAVE, *supra* note 71, § 3.1. Put differently, "[a]cts of harming . . . are the direct objects of the criminal law." JOEL FEINBERG, HARM TO OTHERS 31 (1994).

[300] *See supra* notes 27-28 and accompanying text.

[301] *See generally* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL LAW SANCTION 139-45 (1968).

[302] *See* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1443 (2001):

> [M]oral authority gives the criminal law persuasive power to label as morally condemnable conduct that was not previously seen as such. That is, a criminal law with moral credibility can facilitate the internalization of norms that counsel against prohibited conduct. It is this internalization of norms by individuals and their family and acquaintances that has the greatest

battering is not deterred,[303] and we cannot even hope for rehabilitation.[304] In short, battering lives—as do batterers and their victims—outside the reaches of criminal law.

B. VICTIMS

Battered women experience law's failure on the individual level and as members of a collective. When battering behavior goes unpunished victims rightly perceive that whatever promise of justice the system offers has been broken.[305] Batterers are not meaningfully condemned,[306] the full spectrum of control is not deterred,[307] and victims are uniquely situated to suffer for these failings.

A prosecutor who has handled domestic violence cases has in all likelihood heard: but *this* (the crime formally charged) is not the worst that he did to me, usually followed by a painful story of what is. She calls for understanding at the very least and, beyond, for remediation, a fuller measure of justice. The prosecutor explains: only *this* is what the law says is criminal, only *this* can be spoken of in court, only for *this* may he be held accountable, and so on.

A battered woman, upon confronting legal structures impermeable to her stories, learns that the criminal law does not go to the places of her suffering. This knowledge is constructive, shaping her understanding of

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effect in controlling conduct. Finally, a criminal law with moral authority can influence conduct by helping to shape community norms.

Id.

[303] *See id.*

[304] It is helpful to assume momentarily the perspective of the batterer charged under the existing criminal law framework. Presumably he assesses the wrongfulness of his conduct, at least in part, in relation to the formal charges that are brought against him. (If not, we should be skeptical of the promise of deterrence, retribution, and rehabilitation.) This batterer will learn very little about the wrong of battering from the legal system's formal charge and the proof it allows. Unless we are willing to exempt the criminal defendant from law's prescriptive power, this is unacceptable.

[305] The posited existence of a belief in the promise of justice may reflect an unduly optimistic vision of the relationship between battered women and the law. The alternative is suggested by Catharine MacKinnon, who writes:

> [m]ostly women feel that the law is not about them, has no idea who they are or what they face or how they think or feel, has nothing to say to them and can do nothing for them. When the law and their life collide, it is their life that gets the worst of it.

Catherine A. MacKinnon, *Reflections on Law in the Everyday Life of Women*, *in* LAW IN EVERYDAY LIFE 110 (A. Sarat & T.R. Kearns, eds., 1995).

[306] *See supra* note 302 and accompanying text.

[307] *See supra* text accompanying note 303.

what she has endured, of her place in society, of the function of law.[308] As Reva Siegel has written, "the language of law mediates our understanding of social relationships"[309] and "structures fundamental aspects of our social experience."[310]

Criminal law's failure also has implications for battered women as group members.[311] What if domestic violence victims could be constituted by law in a manner that validated, rather than negated, their experiences? Imagine that legal structures are reformed to account for the reality of battering and observe what changes follow.[312] Criminalizing the actual practice of domestic violence is potentially transformative for the battered woman making sense of her suffering. Systems—social and legal—reconfigure themselves around this newly codified understanding of battering.[313] In this manner, "[t]he framing of narrative . . . carries

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[308] MacKinnon, *supra* note 305, at 112.

> The deepest rules of women's lives are written between the lines, and elsewhere. Yet the actions and inactions of law construct and constrict women's lives, its consequences no less powerful for being offstage. Focusing on the areas the law abdicates, its gaps and silences and absences, one finds that women's everyday life has real rules, but they are not the formal ones. . . . The rules of everyday life, in this sense, are that law which is not one, the law for women where there is no law.

Id.

[309] Reva B. Siegel, *In the Eyes of the Law: Reflections on the Authority of Legal Discourse, in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 225, 227 (Peter Brooks & Paul Gewirtz, eds., 1996).

[310] *Id.* at 226.

[311] Equal protection norms are embedded in this discussion. *See* G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of Deshaney*, 29 COLUM. HUM. RTS. L. REV. 641 (1998); Dorothy Q. Thomas & Michele E. Beasley, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1130-34 (1995).

[312] "[L]aw can be a means of defining and redefining selfhood, of perceiving and reconceiving experience. . . . Law reform can express new collective identities and needs and manifest a sensitivity to those needs." SCHNEIDER, *supra* note 3, at 8.

[313] The synergy that characterizes transformation on individual and systemic dimensions has been described as follows: "We live within particular cultures that reflect both legal structures and legal interpretation. Women's lives, culture, and law are in a state of continuing interaction." *Id.* at 45. Exploring this same dynamic, Martha Mahoney suggests that the

> interrelationship between women's lives, culture and law . . . is not linear (moving from women's lives to law, or from law to life) but interactive: cultural assumptions about domestic violence affect substantive law and methods of litigation in ways that in turn affect society's perceptions of women; both law and societal perceptions affect women's understanding of our own lives, relationships and options; our lives are part of the culture that affects legal interpretation and within which further legal moves are made.

profoundly political implications. Put differently, the terms of narrative are prizes in a pitched conflict among groups attempting to describe their social reality, constitute their social identity, and vindicate their social existence."[314]

This notion of vindicating social existence suggests that to grasp the full extent of criminal law's failings we must broaden our focus beyond the victim. How does the criminal justice system response to battering give meaning to larger communal understandings of violence in intimate relationships?

C. SOCIETY[315]

What the law defines as domestic violence (and what the law denies is domestic violence) is generative of extra-legal meaning.[316] Simply put, the practice of battering is understood socially in relation to how it is and is not criminalized. Legislative constructions of domestic violence seep into the pores of society in a manner "more pervasive and less perceptible"[317] than is readily apparent. This is of particular concern given the expansive practice of battering that goes untouched by criminal law.[318]

Mahoney, *supra* note 12, at 2.

[314] JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 81 (2000). *See also* Toni Morrison, *Nobel Lecture—Nobel Prize in Literature* (Dec. 7, 1993), *available at* http://www.nobel.se/literature/laureates/1993/morrison-lecture.html (stating that "narrative is radical, creating us at the very moment it is being created").

[315] For the sake of discussion, I assume the existence of a mutating, bi-directionally permeable border between law and society. *See* Siegel, *supra* note 45, at 2181 ("momentarily reify[ing] the distinction between 'law' and 'society'" for purposes of argument).

[316] "Law is made, and operates, in many sites and in many different ways; it does not exist outside culture but is reflected in popular consciousness, where it takes on a wide range of cultural forms and produces cultural meanings." SCHNEIDER, *supra* note 3, at 8.

[317] Siegel, *supra* note 309, at 226.

[318] For a powerful account of the social significance of legally defining women's injuries, see Catherine A. MacKinnon, *Sexual Harassment: Its First Decade in Court (1986), in* 3 GENDER AND AMERICAN LAW: THE IMPACT OF THE LAW ON THE LIVES OF WOMEN—THE EMPLOYMENT CONTEXT 53 (Karen J. Maschke ed., 1997). MacKinnon writes:

> The existence of a law against sexual harassment has affected both the context of meaning within which social life is lived and the concrete delivery of rights through the legal system . . . . If there is no right place to go to say, this hurt me, then a woman is simply the one who can be treated this way, and no harm, as they say, is done. In point of fact, I would prefer not to have to spend all this energy getting the law to recognize wrongs to women as wrong. But it seems to be necessary to legitimize our injuries as injuries in order to delegitimize our victimization by them, without which it is difficult to move in more positive ways. The legal claim for sexual harassment made the events of sexual harassment illegitimate socially as well as legally for the first time. Let me know if you figure out a better way to do that.

Failure to outlaw the pattern of violence and power that is experienced by battered women distorts communal understandings of the abuse that is inflicted in intimate relationships. We do not see battering for what it truly is. We do not see ourselves as victims or perpetrators of it. We cannot grapple honestly with its root causes or our own societal complicity in its perpetuation. Circumscribed by a collective narrowness of understanding, any social condemnation of domestic violence is, at best, misdirected to a practice that exists only in the landscape of law. Worse, what the law quietly calls legal becomes, or remains, socially legitimate.

Whether or not one has directly experienced battering, living in a society that does not truly condemn it has consequences. For, after all, "[a]wareness of what the law says is just or unjust, justified or unjustified, influences all interactions between people, ultimately shaping their identities as well as their goals."[319]

VI. CRIMINALIZING DOMESTIC VIOLENCE

A. BATTERING STATUTE

Domestic violence should be criminalized to capture its nature and its harm. Bringing law into alignment with social reality requires a statutory definition of battering that encompasses a course of conduct characterized by power and control.[320] Unless we are willing to concede that battering lies beyond the reach of the law, domestic violence must be reconceptualized.

The application of existing legal structures to domestic violence represents tremendous progress in the development of criminal law. And yet, for the reasons we have been discussing, new structures are needed to account for truths antithetical to existing criminal law paradigms. A course of conduct crime of battering represents the next stage in the evolution of law's growing responsiveness to harms suffered by women.

A battering statute might read as follows:

> A person is guilty of battering when:
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> He or she intentionally engages in a course of conduct directed at a family or household member; and

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Id. at 103-04.

[319] Catherine Albiston et al., *Feminism in Relation*, 17 WIS. WOMEN'S L.J. 1, 3 (2002).

[320] See Mahoney, *supra* note 12, at 60 ("To bring women's experience into law . . . we need litigation strategies aimed at exposing the power and control at the heart of battering.").

He 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

At least two acts comprising the course of conduct constitute a crime in this jurisdiction.

Definitions

"Family or household member," means spouses, former spouses, adults related by consanguinity or affinity, an adult with whom the actor is or has been in a continuing relationship of a sexual or otherwise intimate nature, and adults who have a child in common regardless of whether they have been married or have resided together at any time.

"Course of conduct" means a pattern of conduct comprised of a series of acts over a period of time, however short, evidencing a continuity of purpose.

"Crime" means a misdemeanor or a felony.

Note how criminalizing domestic violence as a course of conduct refocuses the lens through which evidence is filtered.[321] Context is now relevant, as is relationship. Physical manifestations of power are no longer understood as the sole incidents of battering. What were seemingly disconnected events become woven together by the thread of control. Battering is described accurately by the legislative language which purports to criminalize it.

This proposed statutory framework finds precedent in the substantive criminal law, which has at times incorporated the proposition that the legality of acts must at times be assessed in the context of a pattern of conduct.[322] For instance, state statutes[323] defining harassment,[324]

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[321] This statutory definition would constitute the lowest degree of battering. A reasonable penal classification scheme would use this statutory language as a basis for enhancing the degree of the crime in relation to the presence of certain aggravating factors enumerated by statute. Such aggravating factors might include the use of a weapon, infliction of physical injury or serious physical injury, the commission of a predicate act that is defined as felonious, and a prior conviction for battering.

[322] *Cf.* Pub. L. No. 54 of August 15, 1989, 8 P.R. LAWS ANN. §§ 601-64 (1996). The Puerto Rico Domestic Abuse Prevention and Intervention Act, commonly known as Act 54, recognizes "intimate violence as a manifold experience which is not limited to physical acts, but also manifests itself through verbal, psychological, sexual and economic actions." Esther Vicente, *Beyond Law Reform: The Experience in Puerto Rico with Implementation of the Domestic Violence Act*, 68 REV. JUR. U.P.R. 553, 576 (1999); *see also* Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law and the United States Violence Against Women Act of 1994: The Limitations of Legislative Responses*, 5 COLUM. J. GENDER & L. 78, 83-105 (1995). Act 54 broadly criminalizes domestic violence to include within its ambit psychological abuse, which it defines as a "constant pattern of conduct" causing grave emotional harm. See Vicente, *supra*, at 585-89 for a discussion of psychological abuse provisions of Act 54. Although Act 54 conceives of battering as a course of conduct, its particular approach to criminalizing domestic violence does differ in

menacing,[325] and course of sexual conduct against a child,[326] in addition to the anti-stalking legislation already discussed,[327] all depart from the transaction-based norm[328] and criminalize a course of conduct. Federal criminal law has similarly codified the model of crime premised on an ongoing pattern of conduct.[329] From a doctrinal perspective there is nothing

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significant respects from the legislative model I am advocating. *See infra* notes 355-59 and accompanying text (discussing problem of line drawing).

[323] I use New York law here to demonstrate the general proposition that course of conduct statutes exist in our legisprudence.

[324] A person is guilty of harassment in the second degree when, "with intent to harass, annoy or alarm another person . . . he or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." N.Y. PENAL LAW § 240.26(3) (West 2004).

[325] A person is guilty of menacing in the second degree when "he or she repeatedly follows a person or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place another person in reasonable fear or physical injury, serious physical injury or death." N.Y. PENAL LAW § 120.14(2) (West 2004).

[326] A person is guilty of course of sexual conduct against a child in the second degree when, "over a period of time not less than three months duration, he or she engages in two or more acts of sexual conduct with a child less than eleven years old." N.Y. PENAL LAW §130.80(1)(a) (West 2004).

[327] *See supra* Part IV.C.

[328] *See supra* notes 62-67 and accompanying text.

[329] For instance, in the federal system, the Racketeer Influenced and Corrupt Organizations Act (RICO) makes it illegal to "conduct or participate . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c) (2002). As Gerald Lynch explains,

> [t]he very words of the statute reveal an intent to prohibit not any particular, time-bound action, but a course of conduct extending over a potentially lengthy period of time. Although the predicate acts of racketeering are conventional crimes, defined in terms of specific conduct, the actual RICO violation is not identifiable by the physical contours of a particular action or effect. Rather, the defining characteristic of the "pattern of racketeering" is the relationship of certain conduct to other conduct and to the "enterprise," which itself is an abstract construct of certain interpersonal relationships.

Lynch, *supra* note 63, at 938. Lynch comprehensively discusses ways in which the enterprise corruption statute challenges the conventional transaction-based model of crime. *Id.* at 937-46. After exploring the various critiques of criminal RICO prosecutions, he concludes that "to the extent that RICO is not fully consistent with our traditional notions of what constitutes a crime, such inconsistency does not automatically discredit the statute, but rather constitutes reasons to reexamine those notions." Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 664 (1987). Given that the analogy between battering and enterprise corruption is of limited heuristic value, further analysis of the complexities and criticisms of RICO is beyond the scope of this discussion. *See also* 18 U.S.C. § 1341 (2002) (stating that mail fraud requires continuing course of conduct defined as "scheme to defraud").

revolutionary about criminalizing domestic violence in the manner I am advocating.

What is, of course, unique to this legislation is that the defendant must know or reasonably should know that his conduct is likely to result in substantial power and control over the victim. Defining this element is a particularly thorny aspect of the legislative piece. "Recognizing the batterer's attempt at domination as the key to battering relationships allows a focus on his motivations rather than the psychology of the victim."[330] Yet prosecutors would understandably balk at a requirement that intentional mens rea be proven with respect to the exercise of power and control. The difficulty of convincing jurors beyond a reasonable doubt that a batterer *consciously* intended to dominate his victim may be practically insurmountable.[331]

Another option would be to define the element in relation to the victim: the statute could require proof that the victim was *in fact* dominated and controlled as a result of the defendant's scheme. But this is problematic from an evidentiary perspective, as it suggests (or at least does not preclude) that the victim must be completely subordinated for the defendant to be convicted. It is also troubling phenomenologically, since a focus on the victim's domination will tend to obscure evidence of agency.[332]

In the statute I am proposing, prosecutors would be required to prove that the defendant engaged in a pattern of conduct *likely to result in substantial power or control over the victim.* Defining the element in this manner emphasizes the natural consequences of the abuser's pattern of

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[330] Mahoney, *supra* note 12, at 57.

[331] Most jurisdictions define this state of mind as follows: a person acts "intentionally" with respect to a result or to conduct when his conscious objective is to cause such result or to engage in such conduct. *See, e.g.*, N.Y. PENAL LAW § 15.05(1) (West 2004); CONN. CRIM. JURY INSTRUCTIONS § 2.47. In the battering context, proving beyond a reasonable doubt that the defendant engaged in a course of conduct *consciously* aimed at controlling his victim would be extremely difficult. Here the distinction between motive—which may be subconscious—and intent—which legally may not be subconscious—is significant. The proposed statutory definition avoids the need for the prosecutor to prove intentional *mens rea* with respect to the power and control element.

[332] One can imagine the litigation strategies on the part of both prosecution and defense that would develop under a statutory framework that made proof of actual subordination an element of the crime. Even in the absence of this element, it is "difficult . . . to present a complex account of women as both oppressed and struggling." Mahoney, *supra* note 3, at 61. By defining accurately the practice of domestic violence, the battering statute enables this more complex account to be told. *See id.* at 73 ("[T]reat[ing] battering as a pattern of power and control [is] essential to show both agency and oppression in the lives of women, making women's experiences and life choices comprehensible.").

activity[333] while avoiding a singular inquiry into the victim's powerlessness. The practice of battering is truly rendered by the prosecution's satisfaction of its burden of proof.

Outside law,[334] the meaning of domestic violence is transformed by a redefined crime of battering. What once was socially invisible can be called by its name, and conduct that was condoned may now be condemned. This next move, then, is critical.

B. POTENTIAL CRITIQUES

Fundamental criminal law paradigms are in tension with the remediation of battering.[335] To the extent that improving the criminal justice response to domestic violence requires the reshaping of traditional structures, these reforms will inevitably be viewed as threatening convention.[336] With this in mind, we might predict that specific features of the proposed statutory approach will be challenged: the move away from an incident-centered crime model;[337] avoidance of particularity requirements;[338] alleged circumvention of statutes of limitations;[339] the potential for duplicitious verdicts,[340] double jeopardy and collateral

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[333] Testimony by the victim about the actual impact of the defendant's conduct would of course be relevant to this element.

[334] *See supra* note 315.

[335] *See supra* Part II.C.

[336] *Cf.* Schulhofer, *supra* note 44, at 2151. Stephen Schulhofer writes:

> The feminist challenge is to adapt male-oriented criminal laws and practices to the concerns of a group of victims and offenders who are normally left out of the picture. This turns out to be difficult, and not just because of a lack of empathy for the needs of women. Factoring female victims and offenders into the criminal law equation is hard because of many conflicting concerns and commitments that most Americans share.

Id.

[337] *See supra* notes 63-65 and accompanying text.

[338] *See supra* note 71.

[339] The statute of limitations does not begin to run until a continuing crime is complete. *See generally* LAFAVE ET AL., *supra* note 71, § 18.5. "Certain crimes are properly characterized as continuing offenses, and as to them the time begins to run only when the course of conduct or defendant's complicity therein terminates." *Id.*

[340] "[D]ue process has long been held to impose a requisite degree of specificity, so that no person is punished 'save upon proof of some illegal conduct.'" *Id.* at 1157 (quoting Schad v. Arizona, 501 U.S. 624, 633 (1991)). Jurors need not agree unanimously that particular facts have been proven; they must simply be unanimous in deciding that each element of the crime has been proven. With respect to the proposed battering statute, if each juror is persuaded beyond a reasonable doubt that both the charged predicate acts *and* the alleged course of conduct have been proven, conviction is proper—regardless of whether the jury is unanimously agreed on which particular acts comprising the course of conduct have been proven. *Id.* at 1156-58. The jury must be properly instructed on the elements of a

estoppel;[341] and what might be characterized as insufficient notice or undue vagueness.[342]

A response to these content-neutral objections may be simply stated: a carefully drafted statute protects against violations of the rights of criminal defendants. To the extent that the legislation departs from established criminal law norms, it does so with ample precedent and exceedingly powerful justification. The remainder of this Part will focus on challenges raised by the very existence of a battering statute, as opposed to those presented by its operational constructs.

1. Formal Equality

If the criminal law is to remedy a harm suffered uniquely by women, gender difference inevitably becomes salient.[343] Its discomfiting appearance tends to provoke default to the trope of formal equality, which insists that domestic violence be approached no differently from any other crime. Those who invoke the ideal of formal equality may believe that "unequal treatment" is unfair as a purely normative matter, or that "unequal treatment" will have practical consequences that are undesirable.[344]

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course of conduct charge in order to ensure against a multi-theory verdict. *See* Richardson v. United States, 526 U.S. 813 (1999); United States v. White, 116 F.3d 903 (D.C. Cir. 1997) (upholding jury instructions in RICO prosecution).

[341] *See* Ashe v. Swenson, 397 U.S. 436 (1970) (holding that the Fifth Amendment guarantee against double jeopardy encompasses principle of collateral estoppel). *See generally* LAFAVE ET. AL, *supra* note 71, at 839-50.

[342] A statute criminalizing battering must be drawn with sufficient precision to avoid constitutional challenge. For a discussion of the vagueness issues raised by anti-stalking legislation, see Salame, *supra* note 223, at 94-95. Stalking statutes pass the Supreme Court's test for vagueness even though they "do not describe every possible 'course of conduct' or act which constitutes stalking." *Id.* at 95 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)); *see* Carol E. Jordan et al., *Stalking: Cultural, Clinical and Legal Considerations*, 38 BRANDEIS L.J. 513, 563-76 (2000) ("Since their passage in the early 1990s, courts have upheld the great majority of stalking statutes against constitutional challenges. Most commonly, defendants have asserted that the stalking statutes fail as being void for vagueness, or that they are overly broad, in violation of the First Amendment."). For discussion of similar constitutional issues in the RICO context, see David W. Gartenstein & Joseph F. Warganz, Note, *RICO's Pattern Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489 (1990).

[343] Gender is salient despite the facial neutrality of a statute criminalizing battering. This is because the social practice of battering (onto which law is mapped) is deeply gendered. *See supra* note 5 (in overwhelming majority of cases women are the victims and men the perpetrators of domestic violence).

[344] *See Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1505, 1527 (1993):

> [D]omestic violence should not be treated as a special crime. Any special treatment or policy "adjustments" other than the increased allocation of resources and vigorous prosecution will

But we have seen that law's conception of domestic violence as *like* other violence is fundamentally flawed.[345] The rhetorical and philosophical appeal of formal equality should not obscure this reality[346] and certainly cannot alter it.

2. Pragmatic

Related to the practical workings of the legislation are considerations of how the elements of a battering statute might be satisfied at trial.[347] The pragmatist contemplates proof issues likely to arise when the law is applied to realities of abusive relationships.

While victim-blaming is always a potential problem in domestic violence trials, the introduction of evidence of a relationship replete with on-going, patterned abuse may have a paradoxical effect. Evidence of context or relationship, while essential to the crime and its proof, may nevertheless create unwarranted barriers to conviction. The introduction of a fuller narrative to describe the battering course of conduct may defy jury

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> have stigmatizing effects for the victims, hamper energetic enforcement efforts, and serve to perpetuate myths and societal tolerance for woman battering. Formally equal treatment . . . will facilitate the recognition of woman battering as an equally undesirable crime as other assaults and batteries. . . . Woman battering should be treated like any other violent crime.

Id.

[345] *See supra* Part II. Writing broadly about criminal law's treatment of gender difference, Stephen Schulhofer has made these general observations:

> [A]lthough we want women to be treated the same as men, sometimes equality cannot be achieved by treating two groups of people the same way. We need to take differences into account. Yet drawing categorical distinctions between men and women undermines our ideals. This is the familiar debate concerning sameness versus difference . . . [which] plays out with some unexpected twists in criminal justice.

Schulhofer, *supra* note 44, at 2151-52; *see also* SCHNEIDER, *supra* note 3, at 134 (discussing feminist challenges to models of formal equality "as based on a male standard and not accommodating women's experiences and perspectives").

[346] *See* Dorothy E. Roberts, *Foreword: The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1, 3 (1994):

> Feminists examining criminal law should be concerned with uncovering the ways that the criminal law contributes to women's deprivation by continuing to reflect and protect patriarchal interests. . . . It is essential, however, to acknowledge the power differences between men and women and then work to eliminate them. As Fran Olsen puts it, it is pointless "to pretend that men and women are similarly situated."

Id. (quoting Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 412 (1984)).

[347] All prosecutorial decision making is ultimately framed by the question of what charges can be proven beyond a reasonable doubt. "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9(a) (3d ed. 1993).

comprehension,[348] creating a need for expert testimony to explain the dynamics of domestic violence.[349]

Another way of articulating this concern is to observe that, in a prosecution under the proposed battering statute, jurors may fail to engage with the full implications of the batterer's exercise of power and control. If so, their deliberations will tend to stall around the leaving question. This stall may manifest itself as a challenge to the victim's credibility or morph into an unarticulated sense that by "choosing to stay," she forfeited her right to law's protection.[350]

We should watch for the *sub rosa* operation of the depressingly perennial inquiry: "why she didn't leave."[351] As Martha Mahoney has written:

> The question "why didn't you leave" implies that exit is always the appropriate response to violence, and tends to hide all the things women actually do to cope with violence and to resist the batterers' quest for control. This "shopworn question" implicitly asserts both that leaving is possible and that it will bring safety. In truth, either staying or leaving are often dangerous acts for women. When a woman tries to stop battering without leaving, or stays because she fears retaliation, she may find that failure to exit is used against her socially and legally."[352]

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[348] This is ironic yet understandable given that social understandings of the practice of battering are at best incomplete. As Martha Mahoney writes:

> Domestic violence is beyond the layman's ken (even though we know it is fairly common) because some jurors will interpret their *own* experience through cultural perceptions that distort understanding and make it difficult for all of us to talk about the subject, and because cultural stereotypes will shape the vision of battered women held by jurors who have *no* personal experience of such violence as well.

Mahoney, *supra* note 12, at 42.

[349] *See supra* Part IV.B.

[350] Jurors may blame the victim for domestic violence even when there is no evidence that she "stayed" in a relationship characterized by on-going abuse. Where evidence of on-going abuse is admitted, however, there may be a somewhat greater likelihood that, in the absence of juror understanding, the evidence will have the unintended consequence of triggering a blaming response.

[351] Mahoney, *supra* note 12, at 61:

> The "shopworn question" persists in the cases, legal scholarship, and social science literature. It reveals several assumptions about separation: that the right solution is separation, that it is the woman's responsibility to achieve separation, and that she could have separated. The question "why didn't she leave" is actually an objectifying statement that asserts that the woman did not leave. Asking this question often makes actual separations disappear.

Id. (internal citations omitted).

[352] Mahoney, *supra* note 3, at 76.

It is possible that the force of a complete account of the battering will propel the jurors past this inquiry.[353] But until the meaning of "staying" in a violent relationship has been socially redefined, expert testimony on the nature of battering will serve an important—and in some cases critical—function in domestic violence trials.[354]

In some cases prosecutors may rely on experts to help prove the crime of battering; this does not, of course, render the statute objectionable. Decisions about whether to charge the course-of-conduct or to rely on traditional criminal laws to prosecute a batterer—as well as what evidence to seek to introduce—will ultimately lie with the prosecutor. Over time, the need for juror education about the dynamics of domestic violence should diminish as social understandings of battering grow. A battering statute is an integral part of this sociolegal transformation.

3. Anti-Criminalization

Criminalizing battering starkly presents the problem of line drawing.[355] The spectre of law creeping into new places (relationships) will—expressly or obliquely—animate opposition to the proposed legislation. One argument is this: once we move away from a crime model that is incident-based and focused on physical injury, we blur distinctions between batterers (i.e., criminals) and men who are simply controlling (i.e., not criminals). This legal entanglement in the messy imbroglio of intimacy is dangerous and ultimately doomed.[356]

This critique is, in effect, a challenge to placement of the line demarcating illegal conduct.[357] Here the contention is that a course of

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[353] By this I mean that some victims may be able to articulate their reasons for "staying" in a manner that satisfies the jurors.

[354] *See supra* Part IV.B.

[355] As Deborah Denno has remarked, "[t]here are many line-drawing dilemmas throughout the criminal law." Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 274 (2002). The line-drawing critique is distinct from (though related to) so-called "slippery slope" arguments, since it concerns itself with the *placement* of the border between lawful and unlawful conduct, as opposed to the potential for border movement.

[356] A related objection concedes the wrongfulness of battering conduct in the abstract and focuses on the difficulty of identifying it in any given relationship. In this regard, consider the reasoning of People v. Brown, 632 P.2d 1025 (Colo. 1981), upholding the marital rape exemption based in part on the following consideration: "[T]he marital exception averts difficult emotional issues and problems of proof inherent in this sensitive area. Otherwise, juries would be expected to fathom the intimate sexual feelings, frustrations, habits, and understandings unique to particular marital relationships." *Id.* at 1027 (internal citations omitted).

[357] *See supra* note 355.

conduct statute encompasses behavior that—although not admirable—should not be condemned by law. Note that this argument is historically iterated.[358] It is also intricately connected to ideals of family and gender relations in ways that may be counterintuitive:

> Acknowledging battering as part of a continuum forces us . . . to confront our fantasies of the family as a haven. If battering is perceived not simply as physical abuse but as an issue of power and control, it threatens our traditional notions of the family even more profoundly. It is far easier to distance ourselves when the issue is physical abuse rather than personal domination, which may feel uncomfortably close to home.[359]

Recognizing that the line-drawing critique is evocative of privacy-based rationales for legal non-intervention does not, of course, definitively resolve the question of precisely how criminal law should define battering. We might, for instance, wonder about relationships in which power is wielded and control exercised without resort to physical violence. Should these patterns of behavior be criminalized?[360]

Though unremediated suffering by women has a history that should make us leery of partial justice,[361] concerns about too radically expanding criminal law boundaries should not be dismissed.[362] We would ideally close the gap between law's conception of domestic violence and the social practice of battering in a manner that does not depart dramatically from established norms.[363]

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[358] *See generally* Siegel, *supra* note 45.

[359] SCHNEIDER, *supra* note 3, at 66. A similar insight has been framed more broadly by Victoria Nourse, who has written that "feminism contests powerful social norms about intimate relationships, which makes reform intensely controversial in very personal ways. People resist feminism because it seems to place them in positions in which they may have to question their most intimate relationships, their identity, and their daily lives." Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 977 (2000).

[360] *See supra* note 322 (describing Puerto Rico's domestic violence statute criminalizing psychological abuse).

[361] *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321-22 (1989) ("The kinds of injuries and harms historically left to private individuals to absorb and resist through private means is no accident. The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live."); Schulhofer, *supra* note 44 (stating that "criminal law is, from top to bottom, preoccupied with male concerns and male perspectives"); *supra* Part II.B (discussing criminalization of domestic violence in historical context).

[362] *See supra* Part VI.B.3 (discussing anti-criminalization critique).

[363] Implicit in this discussion is the notion that illegality and immorality are conceptually distinct categories. *See* LAFAVE, *supra* note 71, at 11 ("[I]mmorality and criminality, though related, are not synonymous.").

The proposed legislation is framed around conduct already defined as illegal,[364] but brings within its ambit the pattern of power and control that is the essence of the crime of battering. A course of conduct battering statute built around predicate acts already criminalized thus represents law's natural evolution.

A further challenge to the battering statute comes from those wary of reliance on a flawed criminal justice system.[365] Feminists and critical race scholars have observed in the context of domestic violence prosecution (and more generally) that the system is racist,[366] classist,[367] and sexist.[368] Despite the emergence of what has been described as a "discourse emphasizing crime control," there is still "considerable debate within the battered women's movement and among legal advocates, particularly among communities of color, who do not see the state as benevolent."[369] A policy of aggressive criminal justice intervention in violent relationships uniquely impacts women "sandwiched by their heightened vulnerability to battering,

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[364] A battering statute might be further restricted in scope by limiting the qualifying predicate acts to crimes of violence specifically referenced by the statute.

[365] *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 690-700 (1995); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).

[366] *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 329-47 (3d. ed. 1992); Butler, *supra* note 365, at 690-700 (racial critiques of criminal justice system); Siegel, *supra* note 45, at 2134-41 (historical account of race and class bias in domestic violence prosecution). Proponents of criminalization must confront the fact that young black males born in the United States in the early 1990s faced an estimated lifetime risk of incarceration of 28.5%, compared to an estimated 4.4% risk among white males of a similar age. BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., PRISON AND JAIL INMATES AT MIDYEAR 2000 (March 2001). On how this intersection of race and the criminal justice system impacts the lives of domestic violence victims of color, see Crenshaw, *supra* note 8, at 1253-58.

[367] *See, e.g.*, Siegel, *supra* note 45, at 2134.

[368] *See generally* Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817 (2000); Coker, *supra* note 365. "[C]rime control policies result in greater state control of women, particularly poor women." Coker, *supra* note 365, at 805; *see also* SCHNEIDER, *supra* note 3, at 182-84 (discussing changing feminist conceptions of role of state in combating domestic violence); Hanna, *supra* note 5 (dissecting tension between victim autonomy and aggressive prosecution of battering).

[369] SCHNEIDER, *supra* note 3, at 184. Angela Davis has urged:

> We need an analysis that furthers neither the conservative project of sequestering millions of men of color in accordance with the contemporary dictates of globalized capital and its prison industrial complex, nor the equally conservative project of abandoning poor women of color to a continuum of violence that extends from the sweatshops through the prisons, to shelters, and into bedrooms at home.

Coker, *supra* note 365, at 807-08 (quoting Angela Davis, Keynote Address to Color of Violence Conference).

on the one hand, and their heightened vulnerability to intrusive state control, on the other."[370]

Without denying the power of these critiques, a few related observations may be made. Domestic violence will not be eradicated by criminal law alone. Criminalizing battering as a course of conduct is a critical component of what must necessarily be a multi-faceted enterprise.[371] But the impossibility of the system providing a total fix does not warrant its rejection.[372]

Before abandoning the criminal law we should think carefully about life in its void. Even those skeptical of criminalization would, I suspect, acknowledge this: unless we are prepared to consign battered women to a place beyond the reach of criminal justice, a law that truly condemns domestic violence is better than one that does not.

VII. CONCLUSION

Given that domestic violence was once legally condoned, the development of a criminal justice system response to battering may be viewed as a story of progress. Without minimizing that progress, this Article has demonstrated that criminal law's evolution in this area is not complete. The laws that exist to remedy paradigmatic stranger violence, no matter how rigorously they are enforced, cannot remedy domestic violence.

Law's failure to redress the ongoing, patterned nature of battering and non-physical manifestations of the abuser's effort to dominate his victim

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[370] Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1011 (2000). Coker argues that "poor women and particularly poor women of color should be the focus for evaluating anti-domestic violence law and policies." Coker, *supra* note 365, at 811; *see also id.* at 858-59:

> Poor women are subject to a dual vulnerability: the private coercion and violence of abusive men and the public coercion and violence of the state. When battered women's advocates negotiate with the state, the challenge is to develop strategies that ensure a positive state response, while limiting the risk that these interventions will result in increased state control *of women*.

Id.

[371] *See* Coker, *Crime Control*, *supra* note 365, at 859 ("We must begin to articulate that economic justice for women and children is part of domestic violence prevention."). We would predict a symbiotic relationship between criminal law reform and other efforts, legal and non-legal, to end the practice of battering. *Cf.* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 301 (1985) ("[D]o nothing arguments ignore the symbolic value of the law—that the law can lead as well as follow. By taking unequivocal action against battering, the legal system can eventually make inroads against the social forces that condone abuse.").

[372] *Cf.* Waits, *supra* note 371, at 298-302 (discussing need for legal intervention and rejecting argument that law is "ill-equipped to deal with complex social and psychological problems like battering and should thus avoid them").

means that domestic violence has been criminalized in a manner that negates the essence of battering. As a consequence, battering as it practiced and experienced in the world lies outside the criminal law. Denial that battering is fundamentally different from violence against non-intimates is fatal to the effective functioning of the criminal justice system in this realm.

Under current statutory definitions of domestic violence, deep and pervasive suffering by battered women is not redressed and the infliction of such suffering is not condemned. The failure of criminal law to recognize and remedy harms to women is not new, nor is it inevitable. Configuring legal structures to recognize and criminalize the violent exercise of power and control in intimate relationships represents the next phase of law's evolving response to the practice of battering.