

DOMESTIC VIOLENCE

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I. INTRODUCTION

Domestic violence is a problem that affects millions of people regardless of race, gender, ethnic group, socioeconomic status, sexual orientation, or age. In the United States, an estimated twenty-three percent of adult women and fourteen

percent of men have experienced an act of severe physical intimate partner violence within their lifetime.¹ The Bureau of Justice Statistics estimates that there were 847,230 incidents of violent crime perpetrated by intimate partners in 2018.²

Intimate partner violence is a pattern of behavior where one intimate partner coerces, dominates, or isolates another intimate partner to maintain power and control over the partner and the relationship.³ Compared with intimate partner violence, domestic violence includes not only violence between spouses or partners, but also includes siblings, parents, and other relatives in a domestic situation.⁴ Although domestic violence usually includes violent physical attacks, it may also include psychological, economic, and sexual abuse, as well as attempts to isolate the abused partner.⁵ The effects of domestic violence extend far beyond the relationship itself.⁶ Throughout this article, “domestic violence” will be used interchangeably with “intimate partner violence.”⁷

Although domestic violence predominately involves men victimizing women, it can take other forms: women also perpetrate violence against men, and gay and lesbian relationships can be similarly characterized by abusive patterns.⁸ In 2017, the National Coalition of Anti-Violence Programs (“NCAVP”) documented sixteen LGBT intimate partner violence homicides; however, “it is likely that these numbers only represent a portion of the actual number of intimate partner

1. PHYLLIS H. NIOLON ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING INTIMATE PARTNER VIOLENCE ACROSS THE LIFESPAN: A TECHNICAL PACKAGE OF PROGRAMS, POLICIES, AND PRACTICES 7 (2017), <https://www.cdc.gov/violenceprevention/pdf/ipv-technicalpackages.pdf>.

2. RACHEL E. MORGAN & BARBARA A. OUDEKERK, THE BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION, 2018 4 (Sept. 2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf>.

3. BEVERLY TILLERY ET AL., NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE AND INTIMATE PARTNER VIOLENCE IN 2017 36 (2018), <http://avp.org/wp-content/uploads/2019/01/NCAVP-HV-IPV-2017-report.pdf>.

4. *The Language We Use*, WOMEN AGAINST ABUSE, <https://www.womenagainstabuse.org/education-resources/the-language-we-use> (last visited Jan. 18, 2020).

5. Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN’S L.J. 457, 466 (2013).

6. *See id.* at 486–88 (“Domestic violence is also a significant contributor to job loss, divorce, poverty, and homelessness, and the U.S. Justice Department Institute has estimated that, when medical costs, indirect costs, and diminished quality of life costs are taken into account, adult [survivors] of domestic violence suffer economic costs of \$67 billion dollars per year (stated in 1993 U.S. dollars).”).

7. Throughout this article, “domestic violence” will be used interchangeably with “intimate partner violence.” *Cf.* Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman’s Syndrome in Same-Sex Domestic Violence Cases*, 24 ST. THOMAS L. REV. 544, 547 (2012) (on using the term domestic violence as it implies nothing specific about the relationship or the people in it).

8. Gendered language is used throughout this article in part because of the history and current usage in domestic violence law, especially with respect to Battered Woman Syndrome, and in part, for clarity and convenience. This is not to suggest that intimate partner violence does not occur in same-sex relationships or that a woman cannot perpetrate it against a man. *See id.*

violence related homicides of LGBTQ people.”⁹ In 2017, NCAVP programs received 2,144 reports of [LGBT] intimate partner violence.¹⁰

Part II of this article will examine domestic violence law at both the federal and state level. On the federal level, it will discuss 1) the federal Violence Against Women Act (“VAWA”) and its efforts to extend protection to immigrant women, LGBT individuals, and Native American women; 2) the Lautenberg Amendment, which prohibits people convicted of domestic violence from possessing a gun; and 3) Title IX provision, which imposes requirements on colleges in handling sexual assault and sexual harassment claims. Part II will also discuss state criminal and civil domestic violence statutes. Part III will discuss the concerns and development of domestic violence law. The gender and cultural bias against survivors still exists in court, although movements like #MeToo have increased public awareness. Survivors are facing a new threat of being harassed by GPS or phone message, which leading some legislatures to implement law against cyberstalking and nonconsensual pornography.¹¹

II. CURRENT ORGANIZATION OF DOMESTIC VIOLENCE LAW

The majority of domestic violence law is state law.¹² Most of the federal law is found in the various iterations of the Violence Against Women Act (“VAWA”).¹³ In 1994, VAWA became the first federal statute aimed directly at combating gender-related violence.¹⁴ The bulk of VAWA’s provisions created funding streams to support local resources for survivors of domestic violence, commissioned research to better understand the dynamics of domestic violence, and created ways to prevent domestic violence.¹⁵ The evolving versions of VAWA included changes to substantive law as well, including a controversial “civil rights remedy” that was struck down in *United States v. Morrison*.¹⁶

At the state level, laws relating to domestic violence are found in both the criminal and civil realms. There is no uniform codification of criminal domestic law

9. TILLERY ET AL., *supra* note 3, at 14.

10. *Id.* at 15.

11. For conciseness, this article will refer to people who inflict harm on their partners as “abusers”; there is a recent trend in the domestic violence practitioner community towards using the term “people who harm” or “people who cause harm” rather than abusers/batterers as a way to recognize that those causing harm may themselves be survivors of domestic violence. See CREATIVE INTERVENTIONS, CREATIVE INTERVENTIONS TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE 25 (2012), http://www.creative-interventions.org/wp-content/uploads/2018/04/Section-5_FINAL.pdf.

12. *United States v. Morrison*, 529 U.S. 598, 617 (2000) (“the regulation . . . of intrastate violence not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States”).

13. See generally Robin Runge, *The Evolution of a National Response to Violence Against Women*, 24 HASTINGS WOMEN’S L.J. 429 (2013) (examining the past and current versions of the Violence Against Women Act).

14. See *id.* at 429 (VAWA 1994 was “the first comprehensive legislative effort to create a national response to the epidemic of violence against women”).

15. See generally 34 U.S.C.A. §12291 (West, Westlaw through Pub. L. No. 116-91).

16. *Morrison*, 529 U.S. at 627.

(or civil domestic law) and thus, states vary significantly in their statutory organization of criminal domestic violence law.¹⁷ State criminal statutes usually mandate that assault and battery, rape and sexual assault, stalking and violations of a civil protection order (“CPO”) be domestic violence offenses when committed against family, household members or intimate partners.¹⁸ However, CPOs are underutilized by domestic violence survivors pursuing relief.¹⁹ The power of a CPO has been undercut by both state and federal decisions, such as *Castle Rock v. Gonzales*, which held that the holder of a restraining order cannot bring a due process claim against a government for its failure to actively enforce the order and protect the holder of the order from violence.²⁰ While individuals may be able to bring a due process claim against the state when the state fails to enforce the CPO, the Supreme Court held that state law does not allow the holder of a restraining order to demand specific action by the police.²¹ The Supreme Court stated that police officers always have some discretion, and therefore a benefit is not a protected entitlement if government officials “may grant or deny it in their discretion.”²² This section will focus on (A) federal laws relating to domestic violence, particularly the Violence Against Women Act and its accompanying Lautenberg Amendment, and (B) state criminal and civil domestic violence statutes.

A. FEDERAL LAWS RELATING TO DOMESTIC VIOLENCE

1. The Violence Against Women Act

The Violence Against Women Act (“VAWA”) has had three iterations since it was first passed in 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994.²³ In order to receive continued funding, VAWA has to be reauthorized by Congress. VAWA (in all its iterations) has created a number of crucial funding streams and substantive laws that support survivors and work toward preventing domestic violence.²⁴ The first version of VAWA created the

17. See *Domestic Violence/Dating Violence*, WOMENSLAW.ORG (July 9, 2019), http://www.womenslaw.org/simple.php?sitemap_id=39#3 (“Each state, territory or tribe decides for itself how to define domestic violence and how its laws will help and protect [survivors], so the laws are different from one state to another.”).

18. See e.g., FLA. STAT. ANN. § 741.28 (West, Westlaw through 2019 1st Reg. Sess. of the 26th Leg.); CAL. FAM. CODE § 6211 (West, Westlaw through Ch. 870 of 2019 Reg. Sess.).

19. Cf. Erika A. Sussman, *Civil Protection Orders as a Tool for Economic Justice*, THE ADVOC.’S Q., CTR. FOR SURVIVOR AGENCY AND JUST. 1 (2006), <https://csaj.org/document-library/POasEconJustice2006.pdf> (“Though greatly underutilized, civil protection order codes include provisions that enable survivors to pursue economic relief, including access to material resources.”).

20. *Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

21. *Id.*

22. *Id.* at 756.

23. *History of the Violence Against Women Act*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-vawa> (last visited Jan. 18, 2020).

24. CAMPAIGN FOR FUNDING TO END DOMESTIC AND SEXUAL VIOLENCE, FY 2013 APPROPRIATIONS BRIEFING BOOK (2012), http://www.ncdsv.org/images/NNEDV_CampaignFundingEndDSV_FY13Briefing_Book_3-2012.pdf.

Office on Violence Against Women within the Department of Justice to implement VAWA and facilitate the creation of programs and policies to end domestic violence.²⁵ It also allowed survivors of domestic violence “to be heard regarding the danger posed by the defendant” during a pretrial release proceeding.²⁶ The most controversial provision of VAWA 1994 was the creation of a civil rights remedy which, “enabled a [survivor] of gender-motivated violence to bring a civil cause of action against the perpetrator.”²⁷ To show that the violence was gender-motivated, the plaintiff had to prove that the violence was committed “because of gender or on the basis of gender . . . due, at least in part to an animus based on a survivor’s gender.”²⁸ In *United States v. Morrison*, the petitioners claimed that this provision was sustainable under Congress’s commerce power as a regulation of activity that substantially affects interstate commerce.²⁹ The Supreme Court disagreed, stating that Congress had exceeded the scope of its Commerce Clause authority.³⁰ Following the analysis outlined in *United States v. Lopez*,³¹ the Court ruled that gender-motivated violence is, itself, not an economic activity and could not be regulated by Congress under the Commerce Clause because it had only an “attenuated” effect on interstate commerce.³² VAWA 2000 revised the rules governing notification to abusers for survivors who leave the jurisdiction that issued the protective order. Although an abuser must be notified that they have a protective order against them for it to be valid, under VAWA 2000 the survivor can register the protective order in the new jurisdiction to satisfy the notification requirement.³³

Each version of VAWA has concentrated on improving both prevention of and response to domestic violence amongst communities that have traditionally been

25. OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUSTICE, ABOUT THE OFFICE ON VIOLENCE AGAINST WOMEN, (2016), <https://www.justice.gov/file/29836/download>.

26. 18 U.S.C.A. § 2263 (West, Westlaw through Pub. L. No. 116-91); see Suraji R. Wagage, *When the Consequences Are Life and Death: Pretrial Detention for Domestic Violence Offenders*, 7 DREXEL L. REV. 195, 221, 223 (2014) (“Hence, when the [survivor] begins to attempt to reassert control by leaving the abuser, she or he is at an increased risk of violence. Many studies confirm ‘increased rates of violence, particularly lethal violence upon perceived, attempted, or actual separation of women from their abusive partners.’ A woman’s attempt to leave the relationship is the most common precursor to intimate partner homicide. The temporal element is crucial, with the danger of assault most acute immediately after separation and diminishing over time . . . Pretrial detention of domestic violence offenders could serve as a potent intervention that protects [survivors] during the period of separation from an abusive partner when such protection is most needed.”).

27. See Runge, *supra* note 13, at 437.

28. *Id.*

29. *United States v. Morrison*, 529 U.S. 598, 607 (2000).

30. *Id.* at 619.

31. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (deciding Congress can regulate three areas under the Commerce Clause: channels of commerce, regulating and protecting the instrumentalities of interstate commerce, and the regulation of intrastate activity if that activity has a substantial effect on interstate commerce).

32. See *Morrison*, 529 U.S. at 615–18 (“[T]he Constitution requires a distinction between what is truly national and what is truly local.”).

33. See 18 U.S.C.A. § 2265(d)(1) (West, Westlaw through Pub. L. No. 116-91).

underserved: immigrant women, LGBTQ individuals,³⁴ and Native Americans.³⁵ For example, VAWA 2000 included the Battered Immigrant Women Protection Act (“BIWPA”).³⁶ The provision was significant as it created U-visas (visas for survivors of certain abuse or criminal activity); section 107 of VAWA also created T-visas for survivors of trafficking.³⁷ The U-visa system was created to encourage unauthorized immigrants to cooperate with law enforcement without the fear of deportation.³⁸ A U-visa would allow a survivor to “live and work in the United States and may result in the dismissal of any case in immigration court filed against the immigrant.”³⁹ The requirements for receiving a U-visa are:

(1) the petitioner suffered substantial mental or physical abuse as a result of a qualifying crime; (2) the petitioner has knowledge and information concerning the crime; (3) the petitioner has been helpful, currently is helpful, or is likely to be helpful in the future to the investigation or prosecution of the crime; and (4) the crime occurred in the United States, or a federal court has jurisdiction to prosecute.⁴⁰

U-visas are normally granted for up to four years, but U-visa holders may apply to get legal permanent residence after three years.⁴¹ If a survivor has a U-visa, his or her immediate family can also receive the benefits of a U-visa.⁴²

34. See Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81, 121 (2003); *Domestic (Intimate Partner) Violence Fast Facts*, CNN (May 23, 2019, 6:59 PM), <http://www.cnn.com/2013/12/06/us/domestic-intimate-partner-violence-fast-facts/index.html>.

35. LEGAL MOMENTUM, *supra* note 23.

36. *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AM. IMMIGR. COUNCIL 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/violence_against_women_act_provides_protections_for_noncitizen_women_and_victims_of_crime.pdf [hereinafter *Protections for Immigrant Women*].

37. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 701, 1501-1513, 114 Stat. 1464, 1518-37 (codified in scattered sections of 8, 18, 20, 22, 27, 28, 42 and 44 U.S.C. (2000)). See generally Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN’S L.J. 137 (2002) for a comprehensive discussion of the BIWPA. Sections 1509-11 of the BIWPA also allows Cuban, Central American, and Haitian battered immigrants to take refuge through the Cuban Adjustment Act, the Nicaraguan Adjustment and Central American Relief Act, and the Haitian Refugee Fairness Act of 1998.

38. Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 925 (2015).

39. *Protections for Immigrant Women*, *supra* note 36, at 2.

40. Andrea L. Dennis & Carol E. Jordan, *Encouraging Victims: Responding to a Recent Study of Battered Women Who Commit Crimes*, 15 NEV. L.J. 1, 37 (2014).

41. Kagan, *supra* note 38, at 925.

42. *Id.*

In 2005, Congress again reauthorized and expanded VAWA in order to provide assistance to a survivor's immediate family.⁴³ For example, Title VIII, which is an immigration provision included in VAWA 2005, attempted to address issues that were still outstanding with respect to battered and trafficked immigrants.⁴⁴ It waived the requirement that U and T-visa entrants must demonstrate "extreme hardship" in order to be accompanied by family members.⁴⁵ A survivor of trafficking under this Title is also relieved of the requirement to assist in a trafficking investigation if she has suffered severe trauma, either psychological or physiological.⁴⁶ VAWA 2013 continues to extend protections for immigrant women, who are particularly at risk for domestic violence.⁴⁷ The Act expands the scope of the U-visa by adding stalking to the list of crimes that a survivor can receive a U-visa for.⁴⁸

VAWA expired in September 2018 and received a temporary extension until February 2019. In April 2019, the House passed The Violence Against Women Reauthorization Act of 2019 (H.R. 1585), which would renew VAWA for an additional five years.⁴⁹ Reauthorization has come to a standstill because of difficulties agreeing on additional amendments.⁵⁰ The Senate is predicted to vote down this new legislation because of their disagreements over the additional provisions. Despite the lapse in authorization, VAWA programs will receive \$559 million this year, which is the highest amount of funding they have ever received.⁵¹

The most debated addition to VAWA 2019 involves "extending the longstanding prohibition against gun possession for perpetrators of domestic violence, to include dating violence and stalking."⁵² The National Rifle Association has attempted to block reauthorization because of this extension.⁵³

Other proposed additions to VAWA 2019 include improving college campus program grants to develop prevention education, increasing access to housing

43. Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (codified as amended in scattered sections of 18 and 42 U.S.C. (2005)) [hereinafter VAWA2005].

44. NAT'L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN, VIOLENCE AGAINST WOMEN ACT 2005 TITLE VIII — IMMIGRANT ISSUES: VIOLENCE AGAINST WOMEN ACT 2005 (2005), <http://www.ncdsv.org/images/TitleVIIIImmigrantIssuesVAWA2005.pdf>.

45. *Id.*

46. *Id.* § 801(a)(3).

47. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

48. 8 U.S.C.A. § 1101 (West, Westlaw through Pub. L. No. 115-90).

49. *Violence Against Women Act Reauthorization Threatened*, ABA (May 16, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may2019/vawa_update/.

50. *Id.*

51. *Id.*

52. *Id.*

53. Emily Rueb & Niraj Chokshi, *The Violence Against Women Act Is Turing 25. Here's How it Has Ignited Debate*, N.Y. TIMES (April 4, 2019), <https://www.nytimes.com/2019/04/04/us/violence-against-women-act-reauthorization.html>.

protections for survivors, and restoring Native American women's ability to fully respond and report to sexual violence on their lands.⁵⁴ VAWA 2019 also added language in order to address the #MeToo movement, which specifies that "at least 80 percent of funds go to states for community-based, culturally specific prevention activities regarding sexual harassment."⁵⁵

Under Former Attorney General Sessions' control, the Department of Justice cut grants for "sanctuary cities," i.e., states or municipalities that refuse to comply with federal law enforcement at the expense of immigrants;⁵⁶ removed sexual discrimination protections for transgender employees;⁵⁷ and filed a brief asserting that Title VII does not protect gay people.⁵⁸

a. Immigrant Women. The Trump administration's stricter immigration laws have caused unauthorized immigrant women experiencing intimate partner violence to choose between seeking protection and risking deportation or enduring continued abuse.⁵⁹ This crackdown on immigration may decrease the effectiveness of VAWA's U-visa provision. Reporting of domestic violence by immigrant populations has already decreased. In March 2017, about a year after the Trump administration implemented new immigration laws, Los Angeles police department noted a ten percent decrease in domestic violence reports and a twenty-five percent decrease in rape reports in Latino occupied areas.⁶⁰ The Houston police department also noticed a forty-three percent decrease in reported rapes in Latino occupied areas.⁶¹ In addition, "[a] recent survey of over 700 advocates and legal service providers found that sixty-two percent have observed an increase in immigration-related questions from survivors of violence. About three-fourths of those surveyed said immigrants have expressed concern about contacting police and appearing in court."⁶²

54. HOUSE COMM. ON THE JUDICIARY, 116TH CONG., FACT SHEET: THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2019 (2019), available at <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/VAWA%20fact%20sheet%203.7.19%20final.pdf>.

55. *Id.*

56. *Implementation of Exec. Order No. 13768, "Enhancing Public Safety in the Interior of the United States,"* OFFICE OF ATTY GEN., DEP'T OF JUST. (May 22, 2017), <https://www.justice.gov/opa/press-release/file/968146/download>.

57. *See Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, OFFICE OF THE ATT'Y GEN., DEP'T OF JUSTICE (Oct. 4, 2017), <https://www.documentcloud.org/documents/4067437-Sessions-memo-reversing-gender-identity-civil.html> (explaining "Title VII does not prohibit discrimination based on gender identity per se . . . Title VII expressly prohibits discrimination 'because of . . . sex' and several other protected traits, but it does not refer to gender identity. 'Sex' is ordinarily defined to mean biologically male or female.").

58. *See Readier et al., Brief for the United States as Amicus Curiae*, DEP'T OF JUSTICE (July 2017), <https://assets.documentcloud.org/documents/3901849/Justice-Dept-Brief-Against-on-Gay-Rights.pdf>.

59. Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, GUARDIAN (Mar. 23, 2017, 6:30 PM), <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation>.

60. Maya Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*, TIME (May 30, 2017), <http://time.com/4798422/domestic-violence-deportation-immigration/>.

61. *Id.*

62. *Id.*

In general, the creation of the U-visa has been central to efforts to prevent undocumented immigrant women from underreporting domestic violence offenses.⁶³ By granting these survivors temporary legal status, the U-visa was meant to encourage reporting of domestic violence and cooperation with local enforcement while removing the fear of deportation.⁶⁴ Taking steps to provide assistance to immigrant women is significant as “refugee and immigrant women are experiencing domestic violence at rates between thirty percent and fifty percent.”⁶⁵ There are also a variety of challenges that are unique to immigrant abuse-survivors: language barriers, uncertain legal status, fear of deportation, concern over the custody of children, and a lack of cultural awareness in the services they seek out.⁶⁶ A 2013 study found that two-thirds of unauthorized Latino immigrants were less likely to report a crime against them to law enforcement.⁶⁷ Abusers, consequently, can use survivors’ immigration status to control or manipulate the survivors.⁶⁸ For example, clients of AYUDA, an organization that “advocate[s] for low-income immigrants through direct legal, social [,] and language services,”⁶⁹ said their abuser would threaten to take their children away or threaten to report them to the authorities.⁷⁰ Survivors also may feel they cannot live independently of their abusers because they may not find a job due to their immigration status.⁷¹

Many immigration attorneys are concerned that the U-visa application process—which requires undocumented immigrants to provide their fingerprints, address, and photo—may put undocumented immigrants on Immigration Custom Enforcement’s (“ICE”) radar and increase the immigrant’s risk of deportation.⁷²

63. Min Ji Ku, *Violence Against Women Act and Its Impact on Immigrant Women*, CRIMINAL LAW BRIEF (Mar. 8, 2013), <http://wclcrimallawbrief.blogspot.com/2013/03/violence-against-women-act-and-its.html>.

64. See Lindsey J. Gill, *Secure Communities: Burdening Local Law Enforcement and Undermining the U-Visa*, 54 WM. & MARY L. REV. 2055, 2070-75 (2013) (arguing that while Congress created program “Secure Communities” to promote public safety, it has actually had adverse effects on the reporting of crime and is detrimental to the efforts of VAWA); see also Elizabeth M. Rieser-Murphy & Kathryn D. DeMarco, Note, *The Unintended Consequences of Alabama’s Immigration Law on Domestic Violence Victims*, 66 U. MIAMI L. REV. 1059, 1061 (2012) (arguing that the passage of anti-immigration bills like Alabama’s H.B. 56 has had harmful effects on domestic violence survivors).

65. *Refugee and Immigrant Community*, WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, <https://www.wcsap.org/advocacy/culturally-specific/immigrant-refugee> (last updated Oct. 26, 2016) (citing Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367 (2002)).

66. Rieser-Murphy & DeMarco, *supra* note 64, at 1060–61.

67. Andrew Roddin, *Certified: How the U Visa Petition Process Prevents Fraud and Promotes Safe Communities*, 12 GEO. J.L. & PUB. POL’Y 805, 809 (2014).

68. Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 HAMLINE L. REV. 149, 158 (2011).

69. *About Us*, AYUDA, <http://ayuda.com/about-ayuda/mission/> (last visited Oct. 3, 2019).

70. Olivares, *supra* note 68, at 158–59.

71. *Id.* at 159.

72. Nora Caplan-Bricker, “*I Wish I’d Never Called the Police*,” SLATE (Mar. 19, 2017), http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html.

These fears by both advocates and immigrants are valid considering news that ICE agents detained an undocumented transgender woman in court after she had just received a protective order against her abusive partner.⁷³

b. LGBT Individuals. A key addition to VAWA 2013 was the LGBT-inclusive language added in, which had been missing from earlier iterations.⁷⁴ VAWA 2019 goes even further to expand protections for transgender people.⁷⁵ Particularly, the Act proposes a provision that would require the Bureau of Prisons “to consider safety and protection of transgender prisoners when giving housing assignments.”⁷⁶ Republicans are attempting to eliminate some of the gender identity language in the new Act.⁷⁷ While there are a number of similarities to the violence that occurs within heterosexual relationships,⁷⁸ LGBT survivors of domestic violence face unique challenges to accessing aid.⁷⁹ These individuals may be less likely to report instances of abuse because of a perception that the police are unfriendly to the gay community and that societal homophobia will prevent them from getting a fair hearing.⁸⁰ Moreover, some LGBT individuals are turned away from shelters that are tailored to heterosexual females and often do not have space for transgender individuals.⁸¹ Several Republican Representatives have pushed to prohibit service providers from allowing transgender women into women’s shelters altogether.⁸² These social and institutional barriers aggravate power dynamics that favor the abuser in same-sex relationships. The fact that some shelters do not accept men or trans-women forces these survivors to stay with their abusers, especially since some survivors, because of their sexual orientation, are rejected by their family.⁸³

73. Kate Segal, *Immigration Orders Undermine Violence Against Women Act Protections*, THE HILL (Mar. 13, 2017, 4:30 PM), <https://thehill.com/blogs/pundits-blog/immigration/323756-new-immigration-orders-a-double-threat-for-immigrant-women>.

74. Many scholars have discussed why previous iterations of VAWA did not explicitly mention LGBT survivors. See, e.g., Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81, 121–22 (2003).

75. Emily Cochrane, *House Expands Domestic Violence Gun Controls in Rebuke to N.R.A.*, N.Y. TIMES (Apr. 4, 2019) <https://www.nytimes.com/2019/04/04/us/politics/nra-violence-against-women-act.html?module=inline>.

76. *Id.*

77. Emily Cochrane, *Transgender and Gun Rights are Sticking Points for Violence Against Women Act*, N.Y. TIMES (March 13, 2019) <https://www.nytimes.com/2019/03/13/us/politics/violence-against-women-act-transgender-guns.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

78. Pertnoy, *supra* note 7, at 552–53.

79. *Id.* at 558–59.

80. See *id.* at 561–63.

81. See Christina Samons, Note, *Same-Sex Domestic Violence: The Need for Affirmative Legal Protections at all Levels of Government*, 22 S. CAL. REV. L. & SOC. JUST. 417, 421–22 (2013).

82. Cochrane, *supra* note 75.

83. Samons, *supra* note 81, at 421–23.

Nearly all states, whether through gender specific or gender neutral language, allow LGBT domestic abuse survivors to apply for a civil protection order,⁸⁴ however, there are a few notable exceptions: South Carolina,⁸⁵ Virginia,⁸⁶ North Carolina,⁸⁷ and Louisiana.⁸⁸ On the federal level, VAWA 2013 specifically addressed LGBT individuals by including anti-discriminatory language that ensures all survivors of domestic violence access to services and programs, regardless of their sexual orientation or gender identity.⁸⁹ VAWA 2019 will continue these protections for LGBT individuals.⁹⁰ It also allows states to use federal funding to improve responses to domestic violence among the LGBT community.⁹¹ The explicit inclusion of homosexual and trans individuals under the criminal and civil provisions of VAWA 2013, “finally recognize[d] and acknowledge[d] the need for specific, legislatively mandated protections for same-sex domestic violence victims.”⁹²

c. Native Americans. VAWA 2000, VAWA 2013, and the pending reauthorization of VAWA 2019, also address concerns of Native American domestic violence victims. VAWA 2000 mandated that each state and Native American territory grant full faith and credit to the criminal sanctions imposed by any other state or Native American territory.⁹³ Native American women are at an increased risk for domestic violence and sexual assault.⁹⁴ More than

84. See AM. BAR ASSOC., *What Rights Do I Have as an LGBT Victim of Domestic Violence?* 4 (last visited Oct. 3, 2019) https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/publications/ABA_LGBT-rights_Final.authcheckdam.pdf.

85. *Id.* (“South Carolina limits the application of civil protection orders to individuals related by blood, marriage, or male and female cohabitants.”) (referencing South Carolina H.B. 3022, <https://legiscan.com/SC/text/H3022/2015>).

86. *Id.* at 5 (“In 2006, the Office of the Attorney General of Virginia issued an opinion that, while discussing related matters, assumed that a court could consider same-sex couples to be ‘cohabiting’ for purposes of the family abuse definition.”) (referencing VA. CODE ANN. 16.1-228 (2015)).

87. *Id.* (“North Carolina does not allow for same-sex ‘dating partners’ to be covered; however, [domestic abuse survivors] with a ‘same-sex’ abusive partner can obtain relief as a ‘current or former household member.’”) (referencing NCGS § 50B-1(b) (2015)).

88. *Id.* (“[O]nly adults of the opposite sex who are living together may be seen as intimate partners. LGBT [survivors] may still be able to obtain relief pursuant to Louisiana’s dating violence statute.”) (referencing 34 LA. REV. ANN. §§ 46:2134; 46:2151 (2012)).

89. 42 U.S.C.A. § 12291 (West, Westlaw current through Pub. L. No. 116-108).

90. HOUSE COMM. ON THE JUDICIARY, *supra* note 54.

91. See Katie Miller, *LGBT People Will Receive First-Ever Domestic Violence Protections Under VAWA*, THINKPROGRESS.ORG (Feb. 28, 2013), <https://thinkprogress.org/lgbt-people-will-receive-first-ever-domestic-violence-protections-under-vaawa-f3ebfe1d946a/>.

92. Samons, *supra* note 81, at 430.

93. 18 U.S.C.A. § 2265 (West, Westlaw current through Pub. L. No. 116-108); see generally Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 (2001) (exploring the jurisdiction of state and tribal governments in implementing the full faith and credit provisions of VAWA 1994 and VAWA 2000).

94. Native American women experience higher overall rates of physical violence than non-Native women. See Ed Hermes, *Law & Order Tribal Edition: How the Tribal Law and Order Act Has Failed to*

forty-seven percent of Native American and Alaska Native women will be subjected to domestic violence in their lifetimes.⁹⁵ Violence against Native American women tends to be at the hands of non-Native men because Native American women are often married to non-Native men (approximately seventy-six percent of the people living on tribal lands are non-Native).⁹⁶ Previously, tribal courts could not prosecute a defendant who was not Native American, even when the crime was committed on tribal land.⁹⁷ VAWA 2013 amended this situation to permit tribes to exercise “special domestic violence criminal jurisdiction” (“SDVCJ”) over certain defendants who commit certain crimes on Native American territory.⁹⁸ Moreover, VAWA 2013 allows tribal courts to enforce civil protection orders against non-Native Americans living within their territory, irrespective of the jurisdiction where the civil protection order was granted.⁹⁹

The VAWA 2019 proposal better addresses the unique challenges Native American survivors of domestic violence survivors experience. Notably, the VAWA 2019 proposal provides funding for states to establish task forces charged with identifying abusers who killed their victims and may have evaded criminal prosecution due to the complexities of criminal jurisdiction on Native land.¹⁰⁰ Thus far, seven states—Wyoming, New Mexico, Montana, Minnesota, Arizona, California, and Nebraska—have established such task forces, which offer a promising solution for locating missing persons through amber alert systems, and acquiring additional support from the states’ Division of Criminal Justice to prosecute murder.¹⁰¹ Nonetheless, housing, job training and other preventative measures are largely absent from the provisions concerning Native women.¹⁰²

Increase Tribal Court Sentencing Authority, 45 ARIZ. ST. L.J. 675, 678 (2013) (noting that Congress has found an epidemic of violence against Native women).

95. DIV. OF VIOLENCE PREVENTION, NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, *The National Intimate Partner and Sexual Violence Survey 2010-2012 State Report* (Apr. 2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> (explaining that 47.5 % of American Indian/Alaskan Native women will be a target of sexual violence, physical violence or stalking by an intimate partner in their lifetime).

96. *See Ending Violence Against Native Women*, INDIAN L. RESOURCE CTR., <https://indianlaw.org/issue/ending-violence-against-native-women> (last visited Feb. 1, 2020).

97. On the issue of criminal jurisdiction and the limitations of tribal sovereignty, *see, e.g.*, Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 669–98 (2013) (giving an overview of the “legal landscape of criminal jurisdiction”).

98. 25 U.S.C.A. § 1304 (West, Westlaw through Pub. L. No. 116-108).

99. 18 U.S.C.A. § 2265 (West, Westlaw through Pub. L. No. 116-108).

100. Melodie Edwards, *7 States Step Up Efforts to Fight Violence Against Indigenous Women*, NPR (July 23, 2019), <https://www.npr.org/2019/07/23/743659569/7-states-step-up-efforts-to-fight-violence-against-indigenous-women>.

101. *Id.*

102. *See Violence Against Women Reauthorization Act of 2019*, §§ 901–905 H.R. 1585, 116th Cong., (2019-2020).

Additionally, the VAWA 2019 proposal acknowledges the distinctive jurisdictional problems Native women, and particularly Native women living in Alaska, experience.¹⁰³ In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court narrowed which territories could be considered “Indian country” in Alaska.¹⁰⁴ Since this decision, it has been exceedingly difficult for Alaska Native tribes to prosecute non-Native abusers because of limited jurisdiction. The VAWA 2019 proposal creates a pilot project, which would recognize previously unacknowledged jurisdiction for five Alaska Native tribes to prosecute offenders who have committed their crimes within “Indian country.”¹⁰⁵ The VAWA 2019 proposal seeks to make prosecution of violent offenders easier for Native communities by allocating funding and resources towards supporting and expanding tribal jurisdiction.

d. Ongoing Criticisms. Despite VAWA 2013’s expansion of protections for immigrants, the LGBTQ community, and Native Americans, there are several criticisms of the legislation. One criticism is the mandatory arrest policies have caused domestic violence to be even more underreported than before the enactment of VAWA 2013 because survivors might fear their partners will be automatically arrested and put in jail.¹⁰⁶ Some academics and domestic violence advocates believe that survivors need options other than automatic arrests and prosecutions of their abusers because there are survivors who want the abuse to stop without having their partners taken away from them.¹⁰⁷ Since VAWA only responds to domestic violence concerns after the abuse has already happened, there is a concern that the policies do nothing to address the causes of domestic violence.¹⁰⁸ Donna Coker, a former abused-women’s-shelter worker and current law professor, advocates for some of the funding given to enforcement of VAWA policies to be given to prevention and job training programs.¹⁰⁹ Additionally, Coker found that in 2012, about one-fifth of the total federal funding authorized through VAWA for law enforcement action went to transitional housing. Housing is by far the most common unmet need for survivors.¹¹⁰

103. *Id.* at § 901(a)(15) (noting the complex jurisdiction of “Indian country” in Alaska).

104. See *Reauthorization of VAWA House Bill 1585 Introduced*, ALASKA NATIVE WOMEN’S RESOURCE CTR. (Mar. 12, 2019), <https://www.aknwr.org/reauthorization-of-vawa-house-bill-1585-introduced> (quoting *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 520 (1998) (holding that an Alaskan tribe lacked the jurisdictional power to tax nonmembers of the tribe)).

105. See *id.*

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

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

2. The Lautenberg Amendment

The prevalence of domestic violence often involves the use of firearms, an issue Congress attempted to address by passing the Lautenberg Amendment to the 1996 Gun Control Act. It is estimated that at least fifty-two women are shot to death by their intimate partners every month in the United States.¹¹¹ In 2011, nearly two-thirds of women killed with firearms were killed by their intimate partners.¹¹² The Firearms Owners' Protection Act prohibits people who have been convicted of a crime of domestic violence and/or who are the subject of a civil protection order from owning a gun.¹¹³ The Lautenberg Amendment to the 1996 Gun Control Act extended this prohibition to non-felons.¹¹⁴ The Amendment prohibits any person from owning or possessing a firearm if they have been convicted of a misdemeanor crime of domestic violence or under a court order to refrain from harassing, stalking, or otherwise threatening an intimate partner.¹¹⁵ The Lautenberg Amendment, however, provides no public interest exemptions for police, military officers, or government officials.¹¹⁶ Members of law enforcement have brought many cases challenging this Amendment because of the possibility that a police officer could lose their job if they are unable to carry a gun.¹¹⁷

While the Lautenberg Amendment has been challenged a number of times on the basis of the Second Amendment right to bear arms,¹¹⁸ the Fifth Amendment right to due process,¹¹⁹ and the Fourteenth Amendment right to equal protection

111. *Guns and Violence Against Women*, EVERYTOWN FOR GUN SAFETY (Apr. 1, 2016), https://everytownresearch.org/reports/guns-violence-women-americas-uniquely-lethal-domestic-violence-problem/#foot_note_6 (citing Federal Bureau of Investigation, Uniform Crime Reporting Program: Supplementary Homicide Reports (SHR), 2013-2017).

112. *See Domestic Violence & Firearms Policy Summary*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (May 17, 2012), <http://smartgunlaws.org/domestic-violence-firearms-policy-summary/> (reporting that abused women are five times more likely to be killed by their abuser if the abuser owns a firearm, and domestic violence assaults involving a firearm are twelve times more likely to result in death than those involving other weapons or bodily force).

113. 18 U.S.C.A. § 922(g)(8)(B) (West, Westlaw current through Pub. L. No. 116-108).

114. *Id.* § 922(g)(8-9) (known as the Lautenberg Amendment after its sponsor, the late Frank Lautenberg); *see generally* Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 827 (2000); James Bovard, *Disarming Those Who Need Guns Most*, WALL ST. J., Dec. 23, 1996, at A12 (discussing the passage of the amendment and the lack of law enforcement exemptions).

115. *Id.* § 922(g)(9).

116. *Id.* § 925(a)(1). (listing the statutory exemptions, of which law enforcement, military, and government officials are not included).

117. *See, e.g.*, *Gillespie v. City of Indianapolis*, 13 F. Supp. 2d 811, 814-15 (S.D. Ind. 1998); *see also* Jay Buckey, *Firearms for Felons? A Proposal to Prohibit Felons from Possessing Firearms in Vermont*, 35 VT. L. REV. 957, 970 (2013) (discussing the Law Enforcement Amendment's negative consequences on the family and reporting rates).

118. *See, e.g.*, *United States v. Spruill*, 61 F. Supp. 2d 587, 591 (W.D. Tex. 1999); *United States v. Henson*, 55 F. Supp. 2d 528, 528 (S.D. W.Va. 1999); *Gillespie*, 13 F. Supp. 2d at 822.

119. *See, e.g.*, *United States v. Beavers*, 206 F.3d 706, 709 (6th Cir. 2000); *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999).

violations,¹²⁰ courts have rejected these challenges and have declared the amendment constitutional.¹²¹ The primary challenge to the Lautenberg Amendment came in *Gillespie v. City of Indianapolis*.¹²² Gillespie, a police officer, was convicted of a misdemeanor crime of domestic violence against his ex-wife.¹²³ Under the Lautenberg Amendment, Gillespie was no longer able to carry his gun and therefore could not continue in his capacity as a police officer.¹²⁴ The U.S. District Court for the Southern District of Indiana rejected all of Gillespie's constitutional challenges to the Lautenberg Amendment, including a Tenth Amendment challenge that the amendment invaded state sovereignty,¹²⁵ equal protection claims under the Fifth Amendment,¹²⁶ and a Second Amendment challenge based on his right to bear arms.¹²⁷

Reviewing the amendment's constitutionality, the Court applied a rational basis analysis rather than the compelling government interest or strict scrutiny standard advocated for by Gillespie.¹²⁸ The Court rejected Gillespie's argument for a stricter standard, expressing its view that "the right to bear arms is not a fundamental right for equal protection purposes."¹²⁹ In response to Gillespie's argument that the amendment should be scrutinized under a compelling governmental interest standard,¹³⁰ the Court held that "the right to bear arms . . . is not a fundamental right for equal protection purposes."¹³¹ Furthermore, even if the right to bear arms was a fundamental right in terms of an equal protection analysis, the governmental interest in keeping firearms from domestic violence offenders was

120. See, e.g., Ashley G. Pressler, *Guns and Intimate Violence: A Constitutional Analysis of the Lautenberg Amendment*, 13 ST. JOHN'S J. LEGAL COMMENT 705, 718 n.81 (1999) (evaluating the Amendment's constitutionality).

121. The decision in *Fraternal Order of Police I* was a brief and fleeting success for critics of the Lautenberg Amendment. *Fraternal Order of Police v. United States*, 152 F.3d 998, 1000 (D.C. Cir. 1998), *rev'd*, 173 F.3d 898 (D.C. Cir. 1999) [hereinafter *Fraternal Order of Police I*] (holding that the amendment violated the Constitution's Equal Protection Clause). Upon a petition for rehearing by the United States, the Court reversed its prior decision. *Fraternal Order of Police v. United States*, 173 F.3d 898, 903–04 (D.C. Cir. 1999) [hereinafter *Fraternal Order of Police II*] (finding that, while existing laws keep felony behavior in close check, its attitude towards misdemeanants is much more lax, creating the dangerous loopholes that the Lautenberg Amendment was designed to close).

122. See *Gillespie*, 13 F. Supp. 2d at 811.

123. *Id.* at 814.

124. *Id.* at 814–15.

125. *Id.* at 819–20 (holding that the Amendment does not supplant state law, but rather creates a new federal law that imposes a firearm disability based on that federal law's definition of domestic violence, and states are free to "define and punish domestic violence crimes as they wish").

126. *Id.* at 823–25 (holding that Gillespie had no fundamental right to his employment, and a law aimed at "preventing domestic violence misdemeanants from possessing a firearm is reasonably related to the legitimate government purposes of keeping firearms out of the hands of potentially dangerous or irresponsible persons and protecting [survivors] of domestic violence," and cannot be traced to a discriminatory purpose).

127. See *id.* at 823, 827.

128. *Id.* at 823 (citing *United States v. Lewis*, 445 U.S. 55 (1980)).

129. *Id.*

130. *Id.* at 814.

131. *Id.* at 823.

a compelling interest,¹³² and the Lautenberg Amendment was sufficiently narrowly tailored.¹³³ The amendment survived and has influenced similar state legislation in the past several years.¹³⁴

The Supreme Court has taken steps to safeguard the protections provided to survivors of domestic violence by the Lautenberg Amendment. In June of 2016, the Court issued its ruling in *Voisine v. United States*, which overturned the Ninth Circuit's decision in *United States v. Nobriga*.¹³⁵ In *Nobriga*, the Ninth Circuit held that crimes involving the *reckless* use of force are not misdemeanor crimes of violence for the purpose of fulfilling the Lautenberg Amendment's domestic violence element.¹³⁶ *Nobriga* did not bar perpetrators of reckless acts of violence against an intimate partner from possessing firearms.¹³⁷ The Supreme Court addressed the issue of the Lautenberg Amendment's application to reckless assaults ten years later in *Voisine*. In *Voisine*, two male plaintiffs, who were arrested for possessing firearms after committing reckless assaults against their female domestic partners, brought suit.¹³⁸ The Supreme Court ruled against the plaintiffs, holding that perpetrators of reckless assaults are barred from owning firearms under the Lautenberg Amendment.¹³⁹ The Court stated:

Statutory text and background alike lead us to conclude that a reckless domestic assault qualifies as a 'misdemeanor crime of domestic violence' under [the Lautenberg Amendment]. Congress defined that phrase to include crimes that necessarily involve the 'use . . . of physical force.' Reckless assaults, no less than the knowing or intentional ones . . . satisfy that definition.¹⁴⁰

In holding that reckless assaults qualified as crimes of domestic violence, the Court closed a dangerous gun control loophole. Despite this effort, many loopholes still exist that leave survivors of domestic violence vulnerable to the possibility that their abuser will obtain access to a firearm. Misdemeanor crimes of domestic violence on the federal level, and within many state statutes, are considered to exist only for an act of violence between two people who were married, living together or similarly situated to spouses.¹⁴¹ This creates what is often referred to as the "boyfriend loophole." Because boyfriends or stalkers who act violently towards their partners do not resemble spouses under the meaning of

132. *Id.* at 827.

133. *See id.*

134. *See* Buckey, *supra* note 117 (discussing a proposed Vermont gun law that contains language almost identical to the Lautenberg Amendment).

135. *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016) (citations omitted).

136. *United States v. Nobriga*, 474 F.3d 561, 564 (9th Cir. 2006).

137. *See id.*

138. *Voisine*, 136 S. Ct. at 2274.

139. *See id.* at 2278.

140. *Id.*

141. *See Guns and Violence Against Women*, EVERYTOWN FOR GUN SAFETY, *supra* note 111, at 9.

“misdemeanor crimes of domestic violence,” they are able to possess firearms following a conviction.¹⁴²

Despite pushback from the N.R.A., VAWA 2019 proposes closing the boyfriend loophole, precluding unmarried domestic violence offenders from owning a gun.¹⁴³ Furthermore, the pending legislation would prevent individuals convicted of the misdemeanor of stalking, which in the majority of states is a misdemeanor for first-time offenders,¹⁴⁴ from possessing a gun.¹⁴⁵ This is an important development because seventy-six percent of women murdered by their partners had been stalked within a year before death.¹⁴⁶ Additionally, Congress introduced the “Gun Violence Prevention Act of 2019,” which would prohibit individuals who are convicted of violent misdemeanors from possessing firearms.¹⁴⁷ Since women are just as likely to be shot by their abusive dating partners as they are by their spouses,¹⁴⁸ the closure of the boyfriend loophole, and other expansions of gun control regulations in the pending legislation,¹⁴⁹ are critical measures. According to a recent CDC study, across all racial and ethnic lines, over half of all female homicides are caused by either a current or previous intimate partner.¹⁵⁰

3. Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally-funded educational institutions and programs. Despite underreporting,¹⁵¹ statistics reveal college students experience high rates of sexual assault and sexual harassment,¹⁵² both of which are forms of sex discrimination covered by Title IX. Compared to other age groups, women between the ages of 18 and 24 are at the highest risk of intimate partner violence.¹⁵³ In 2011,

142. *Id.*

143. Sheryl Gay Stolberg, *Why the N.R.A. Opposes New Domestic Abuse Legislation* (Apr. 1, 2019), N.Y. TIMES, <https://www.nytimes.com/2019/04/01/us/politics/nra-domestic-violence-congress.html>.

144. Yasmine Issa, Note, “A Profoundly Masculine Act”: *Mass Shootings, Violence Against Women, and the Amendment that Could Forge a Path Forward*, 107 CAL. L. REV. 673, 693–694 (2019).

145. Violence Against Women Reauthorization Act of 2019, § 802 H.R. 1585, 116th Congress, (2019-2020).

146. Issa, *supra* note 144, at 695, (citing Judith M. McFarlane, Stalking and Intimate Partner Femicide, 3 HOMICIDE STUDIES 300, 308 (Nov. 1999)).

147. Gun Violence Prevention Act of 2019, H.R. 1745, 116th Cong. (2019).

148. *See id.*

149. Violence Against Women Reauthorization Act of 2019, § 802, H.R. 1585, 116th Congress, (2019-2020) (amending 18 U.S.C.A. § 922 (g)(a)).

150. EMIKO PETROSKY ET AL., CDC, RACIAL AND ETHNIC DIFFERENCES IN HOMICIDES OF ADULT WOMEN AND THE ROLE OF INTIMATE PARTNER VIOLENCE (Jul. 21, 2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w#suggestedcitation.

151. *College-Age Victims of Sexual Violence Often Do Not Report to Law Enforcement*, Campus Sexual Violence: Statistics, RAINN (Oct. 5, 2019), <https://www.rainn.org/statistics/campus-sexual-violence>.

152. *Know Your Rights: Sexual Harassment and Sexual Assault under Title IX*, AAUW, (Oct. 5, 2019), <https://www.aauw.org/what-we-do/legal-resources/know-your-rights-on-campus/campus-sexual-assault/>.

153. Juliette Grimmer et al., *The Challenge of Title IX Responses to Campus Relationship and Intimate Partner Violence* 4-6, ATIXA, (Oct 5, 2019), <https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2015/02/12193857/Challenge-of-TIX-with-Author-Photos.pdf>.

the Department of Education's Office for Civil Rights (OCR) issued guidance that included sexual harassment as a threat to a student's ability to pursue opportunities in education.¹⁵⁴ In September 2017, Secretary of Education Betsy DeVos rescinded the Obama administration's Title IX guidelines.¹⁵⁵ DeVos accused the federal government of using "intimidation and coercion" to ask schools to comply with directives that came from the 2011 and 2014 "Dear Colleague" letters.¹⁵⁶ The "Dear Colleague" letters contained guidance on universities' obligations to prevent and respond to sexual assault under Title IX, and included requirements that universities complete expedient investigations of accusations, lower the standard of evidence needed to hold an accused student responsible by using civil rights evidentiary standards as opposed to criminal evidentiary standards, prevent harassment of survivors on campus, and stop making survivors sign nondisclosure agreements.¹⁵⁷ In November 2018, the Department of Education released its proposed Title IX regulations,¹⁵⁸ which curb schools' ability to address allegations of sexual misconduct.

The 2018 proposed rules narrow the definition of sexual harassment covered by Title IX. The 2011 "Dear Colleague" letter defined sexual harassment as any "unwelcome conduct of a sexual nature," including "verbal conduct" such as "making sexual comments, jokes, or gestures," "spreading sexual rumors," and "creating e-mails or Web sites of a sexual nature."¹⁵⁹ The 2018 proposed rules define sexual harassment under Title IX as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's educational program or activity."¹⁶⁰ Additionally, the 2014 "Dear Colleague" letter emphasized that Title IX requires schools to "process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity."¹⁶¹ In contrast, the new rules would make schools responsible for sexual misconduct only when "the harasser is under the school's disciplinary authority" and the conduct

154. Off. for Civ. Rts., U.S. Dep't of Educ., *Dear Colleague Letter* (April 4, 2011).

155. Katie Reilly, *Betsy DeVos Moves to End Obama's Guidelines for Campus Sexual Assault Investigations*, TIME (Sept 7, 2017), <https://time.com/4931796/betsy-devos-title-ix-sexual-assault/>.

156. *Id.*

157. Christina Cauterucci, *What Will Happen to Title IX Under Trump?*, SLATE (Feb. 2, 2017, 5:02 PM), <https://slate.com/human-interest/2017/02/trump-could-undo-obamas-title-ix-protections-for-rape-victims-and-trans-students.html>.

158. R. Shep Melnick, *The Department of Education's Proposed Sexual Harassment Rules: Looking Beyond the Rhetoric*, BROOKINGS (Jan. 24, 2019), <https://brookings.edu/blog/brown-center-chalkboard/2019/01/24/the-department-of-educations-proposed-sexual-harassment-rules-looking-beyond-the-rhetoric/>.

159. *Id.*

160. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 83 Fed. Reg. 61462 (proposed November 29, 2018) (to be codified at 34 C.F.R. 106) [hereinafter *2018 Proposed Rules*].

161. Off. for Civ. Rts., U.S. Dep't of Educ., *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

occurs “within its education program or activity.”¹⁶² A major concern is that the new rules would relieve schools of responsibility to respond to sexual misconduct that occurs in places like fraternity houses that are independent of the school and located off-campus.¹⁶³

The new rules would also make schools responsible for failing to address harassment only when the school had “actual knowledge” the harassment occurred¹⁶⁴ and the school responded in a manner that was “deliberately indifferent.”¹⁶⁵ “Actual knowledge” is defined as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.”¹⁶⁶ The “actual knowledge” standard has raised concerns that schools will not be held accountable for failing to address sexual assault and harassment even when students have disclosed violations to certain school employees. In its comment on the proposed rules, the American Civil Liberties Union (ACLU) pointed out that “many students disclose sexual harassment and assault to employees who do not have the authority to institute corrective measures, both because students seek help from the adults they know and trust the most, and because students may not be informed about which employees have authority to address the conduct.”¹⁶⁷

Another controversial aspect of the new rules is the live-hearing requirement, under which colleges will be required to hold a live hearing before holding someone responsible for sexual misconduct. The rules also allow someone accused of sexual assault to cross-examine their accuser at the live hearing.¹⁶⁸ Under the proposal, the cross-examination can only be done by a third party, which raises concerns that live hearings would disproportionately favor wealthier students who can afford to hire an attorney to perform cross-examination.¹⁶⁹

162. *2018 Proposed Rules*, *supra* note 160.

163. Jeannie Suk Gersen, *Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault*, *NEW YORKER* (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault>.

164. Under the Obama-era guidance, schools are responsible for failing to address harassment when a school “knows or reasonably should know” about the offense. Off. for Civ. Rts., U.S. Dep’t of Educ., *Dear Colleague Letter* (April 4, 2011).

165. Under the proposed rules, a school is “deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” *2018 Proposed Rules*, *supra* note 160, at 18.

166. *Id.*

167. ACLU, *Comments in Response to Proposed Rule, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”* (Jan 30, 2019), https://www.aclu.org/sites/default/files/field_document/2019_1_30_title_ix_comments_final.pdf.

168. *See* Melnick, *supra* note 158.

169. *See* Adam Harris, *Betsy DeVos’s Sexual-Assault Rules Would Let the Accused Cross-Examine Accusers*, *ATLANTIC* (Nov. 17, 2018), <https://www.theatlantic.com/education/archive/2018/11/betsy-devos-campus-sexual-assault/576100/>.

The Administrative Procedure Act's notice-and-comment rulemaking process requires 60-day public comment period before the Department of Education can finalize the rules. The comment period ended January 28, 2018, and the Department is still reviewing the comments.

B. STATE LAW RELATING TO DOMESTIC VIOLENCE

1. Criminal Law of Domestic Violence

States have taken the steps necessary to codify domestic violence offenses into criminal law, resulting in statutory frameworks that achieve justice for many survivors while missing the mark for others. While states vary in their methods of prosecuting domestic abusers and protecting survivors, there is a consistent discussion of relationship power dynamics within the criminal law of domestic violence. Lawmakers, courts, and experts often grapple with the psychological theories that contemplate the effect of domestic violence on survivors, many of which are frequently invoked in criminal domestic violence proceedings yet heavily criticized. Criminal domestic violence law also struggles to protect LGBT domestic abuse survivors whose relationship power dynamics are often lost on juries more familiar with the power dynamics of heterosexual relationships. In the midst of these developments, states have implemented extensive criminal statutes meant to protect domestic abuse survivors while enabling law enforcement to take into custody, build cases against, and ultimately prosecute domestic abusers.

a. Statutory Organization of Domestic Violence Crimes. Many states have codified certain crimes as “domestic violence offenses” when they are perpetrated against family, household members, or intimate partners.¹⁷⁰ The most common of such crimes are assault and battery, sexual assault and rape, stalking, and violation of a protection order. All fifty states and the District of Columbia have criminalized stalking; most states designate the violation of a civil protection order as a misdemeanor.¹⁷¹ Some states, however, treat the violation as a felony if the

170. For a comprehensive resource on all state domestic violence legislation, see National Network to End Domestic Violence, Know the Laws: State Law Overview, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/general> (use the drop-down menu on the left to access resources on the laws of all 50 states) (last visited Oct. 5, 2019).

171. ALA. CODE § 13A-6-90 (West, Westlaw through Act 2019-540); ALASKA STAT. ANN. § 11.56.740(b) (West, Westlaw through 2019 1st Reg. Sess. & 1st Spec. Sess. of the 31st Leg.); ARIZ. REV. STAT. ANN. § 13-2923 (West, Westlaw through the 1st Reg. Sess. of the 54th Leg. (2019)); ARK. CODE ANN. § 9-15-207(b) (West, Westlaw through 2019 Reg. Sess. of the 92d Ark. Gen. Assemb.); CAL. PENAL CODE § 646.9 (West, Westlaw through 2019 Reg. Sess.); COLO. REV. STAT. ANN. § 18-6-803.5(2)(a) (West, Westlaw through 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-181d (West, Westlaw through 2019 Jan. Reg. Sess. & 2019 July Spec. Sess.); DEL. CODE ANN. TIT. 10, § 1046(i) (West, Westlaw through 150th Gen. Assemb. (2019-2020)); D.C. CODE § 16-1005(g) (West, Westlaw through Sept. 11, 2019); FLA. STAT. ANN. § 741.31 (West, Westlaw through 2019 1st Reg. Sess. of the 26th Leg.); GA. CODE ANN. § 16-5-90 (West, Westlaw through 2019 Sess. of the Gen. Assemb.); HAW. REV. STAT. § 586-11 (West, Westlaw through 2019 Reg. Sess.); IDAHO CODE ANN. § 39-6312(1) (West, Westlaw through 2019 1st Reg. Sess. of the 65th Idaho Leg.); 725 ILL. COMP. STAT. ANN. 5/112A-23

abuser has previously violated a protection order.¹⁷² A majority of jurisdictions also provide for contempt charges to be brought against an individual who violates a protection order.¹⁷³

(West, Westlaw through P.A. 101-66); IND. CODE ANN. § 35-46-1-15.1(a) (West, Westlaw through 2019 1st Reg. Sess. of the 121st Gen. Assemb.); IOWA CODE ANN. § 708.11 (West, Westlaw through 2019 Reg. Sess.); KAN. STAT. ANN. § 21-5427 (West, Westlaw through 2019 Reg. Sess.); KY. REV. STAT. ANN. § 403.763(2) (West, Westlaw through 2019 Reg. Sess.); LA. REV. STAT. ANN. § 79(A)(1)(a) (West, Westlaw through 2019 Reg. Sess.); ME. REV. STAT. ANN. tit. 19-A, § 4011 (West, Westlaw through 2019 1st Reg. Sess. & 1st Spec. Sess. of the 129th Leg.); MD. CODE ANN., FAM. LAW § 4-509(a) (West, Westlaw through 2019 Reg. Sess. of the Gen. Assemb.); MASS GEN. LAW ANN. ST. 265 § 43 (West, Westlaw through 2019 1st Ann. Sess.); MICH. COMP. LAW ANN. ST. § 750.411h (West, Westlaw through P.A.2019 of the 2019 Reg. Sess.); MINN. STAT. ANN. § 609.749 (West, Westlaw through 2019 Reg. & 1st Spec. Sess.); MISS. CODE ANN. § 93-21-21 (West, Westlaw through 2019 Reg. Sess.); MO. ANN. STAT. § 455.085(7) (West, Westlaw through 2019 1st Reg. & 1st Ex. Sess. of the 100th Gen. Assemb.); MONT. CODE ANN. § 45-5-626 (West, Westlaw through 2019 Sess.); NEB. REV. STAT. ANN. § 42-924(4) (West, Westlaw through 1st Reg. Sess. of the 106th Leg. (2019)); NEV. REV. STAT. ANN. § 33.100 (West, Westlaw through 80th Reg. Sess.); N.H. REV. STAT. ANN. § 173-B:9(III) (West, Westlaw through Ch. 320 of the 2019 Reg. Sess.); N.J. STAT. ANN. § 2C:12-10 (West, Westlaw through L.2019, c. 246 & J.R. No. 20); N.M. STAT. ANN. § 40-13-6(F) (West, Westlaw through 1st Reg. Sess. of the 54th Leg.); N.Y. FAM. CT. ACT § 846-a (West, through L. 2019, Ch. 316); N.C. GEN. STAT. ANN. § 50B-4.1(a) (West, Westlaw through 2019 Reg. Sess.); N.D. CENT. CODE ANN. § 14-07.1-06 (West, Westlaw through Jan. 1 2020, from the 66th Gen. Assemb.); OHIO REV. CODE ANN. § 2919.27 (B)(2) (West, Westlaw through files 1 to 15 of the 133rd Gen. Assemb. (2019-2020)); OR. REV. STAT. ANN. § 163.732 (West, Westlaw through 2018 Reg. Sess. & Spec. Sess. of the 79th Leg. Assemb.); 18 PA. STAT. AND CONS. § 2709.1 (West, Westlaw through 2019 Reg. Sess. Act 72); R.I. GEN. LAW ANN. § 15-15-3(n)(1) (West, Westlaw through Ch. 310 of the 2019 Reg. Sess.); S.C. CODE ANN. § 16-3-1700(H) (West, Westlaw through 2019 Sess.); S.D. CODIFIED LAWS § 25-10-13 (West, Westlaw through 2019 Sess.); TENN. CODE ANN. § 39-17-315 (West, Westlaw through 2019 1st Reg. Sess. of the 111th Gen. Assemb.); TEX. FAM. CODE ANN. § 85.026 (West, Westlaw through 2019 Reg. Sess. of the 86th Leg.); UTAH CODE ANN. § 76-5-106.5 (West, Westlaw through 2019 Gen. Sess.); VT. STAT. ANN. TIT. § 1063 (West, Westlaw through Reg. Sess. of the 2019-2020 Gen. Assemb.); VA. CODE ANN. § 16.1-253 (West, Westlaw through 2019 Reg. Sess.); WASH. REV. CODE ANN. § 26.50.110(1) (West, Westlaw through 2019 Reg. Sess.); W. VA. CODE ANN. § 48-27-903(a) (West, Westlaw through 2019 Reg. Sess. & 1st Ex. Sess.); WIS. STAT. ANN. § 813.12(8)(a) (West, Westlaw through 2019 Act 5, published May 4, 2019); WYO. STAT. ANN. § 6-4-404(a) (West, Westlaw through 2019 Gen. Sess.).

172. *See, e.g.* MO. ANN. STAT. § 455.085(7) (West, Westlaw through 2019 1st Reg. Sess. & 1st Ex. Sess. of the 100th Gen. Assemb.) (a violation of a protection order is a Class E felony if the abuser has previously plead guilty or been found guilty of violating a protection order within five years of the present violation); NEB. REV. STAT. ANN. § 42-924(4) (West, Westlaw through 1st Reg. Sess. of the 106th Leg. (2019)) (“any person convicted of violating such order who has a prior conviction for violating a protection order shall be guilty of a Class IV felony”); N.D. CENT. CODE ANN. § 14-07.1-06 (West, Westlaw through Jan. 1, 2020, from the 66th Leg. Assemb.) (the first violation of a civil protection order is a Class A misdemeanor and any subsequent violation of any protection order is a class C felony); OHIO REV. CODE ANN. § 2919.27(B)(3) (West, Westlaw through Files 1 to 14 of the 133d Gen. Assemb. (2019-2020)) (violating a protection order is a felony if the offender previously has been convicted of or pleaded guilty to a violation of a protection order).

173. ALA. CODE § 30-5A-6 (West, Westlaw through Act 2019-540); ARIZ. REV. STAT. ANN. § 13-3602 (West, Westlaw through 1st Reg. Sess. of the 54th Leg.); DEL. CODE ANN. tit. 11, § 1271 (West, Westlaw through ch. 218 of the 150th Gen. Assemb. (2019-2020)); D.C. CODE ANN. § 16-1005(f) (West, Westlaw through Sept. 11, 2019); FLA. STAT. ANN. § 741.30(9)(a) (West, Westlaw through 2019 1st Reg. Sess. of the 26th Leg.); GA. CODE ANN. § 19-13-6 (West, Westlaw through 2019 Sess. of the Gen. Assemb.); HAW. REV. STAT. ANN. § 710-1077 (West, Westlaw through Act 286 of the 2019 Reg. Sess.); 725 ILL. COMP. STAT. ANN. 5/112A-23(b) (West, Westlaw through P.A. 101-66); KAN. CODE ANN. § 60-3110 (West, Westlaw through 2019 Reg. Sess.); KY. REV. STAT. ANN. § 403.763 (West, Westlaw

b. Battered Woman Syndrome. Battered Woman Syndrome (“BWS”) is a psychological theory that was originally developed to explain the behavior of certain women who have been abused by their husbands, partners, or lovers¹⁷⁴ (including potentially violent behavior).¹⁷⁵ It is not a separate affirmative defense but meant to explain “why”—why she did not leave, why she did not seek help, why she resorted to violence, why she thought she was in danger, why she recanted, why she went back—all the “whys” that mystify the factfinder in cases of domestic violence.¹⁷⁶ As the defense of BWS has become more widely applied, so too has criticism regarding its use. A major critique is that the terminology of BWS is exclusive of many survivors of domestic violence, as its main focus is on female victims only. Further, many critics have argued that BWS labels women as helpless and submissive and ignores the emotional complexities that arise in relationships in which domestic violence occurs. In response to these critiques, new theories have emerged, including the “Survivors Theory,” which focuses on the victims as survivors, rather than passive actors.¹⁷⁷

Dr. Lenore Walker, a psychology professor at Nova Southwestern University College of Psychology, argues abusive relationships trap women in a three-stage

through 2019 Reg. Sess.); MD. CODE ANN., FAM. LAW § 4-508 (Westlaw through 2019 Reg. Sess. of the Gen. Assemb.); MICH. COMP. LAW ANN. § 600.2950 (West, Westlaw through P.A.2019, No. 51 of the 2019 Reg. Sess., 100th Leg.); MISS. CODE ANN. §93-21-21 (West, Westlaw through 2019 Reg. Sess.); N.H. REV. STAT. ANN. § 173-B:9 (West, Westlaw through Ch. 320 of the 2019 Reg. Sess.); N.J. STAT. ANN. § 2C:29-9 (West, Westlaw through L.2019, c. 246 & J.R. No. 20); N.M. STAT. ANN. § 40-13-5 (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); N.Y. PENAL LAW § 215.51 (West, Westlaw through L.2019, Ch. 316); N.C. GEN. STAT. § 50B-4.1 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. & Ex. Sess., including through 2019-163, of the Gen. Assemb.); N.D. CENT. CODE § 14-07.1-06 (West, Westlaw through Jan. 1, 2020, from the 66th Gen. Assemb.); OHIO REV. CODE ANN. § 3113.31 (West, Westlaw through Files 1 to 14 of the 133d Gen. Assemb.); 23 PA. STAT. AND CONS. STAT. ANN. § 6114 (West, Westlaw through 2019 Reg. Sess. Act 72); R.I. GEN. LAWS § 15-15-3 (m)(l) (West, Westlaw through Ch. 310 of the 2019 Reg. Sess.); TENN. CODE ANN. § 36-3-610 (West, Westlaw through 2019 1st Reg. Sess. of the 111th Gen. Assemb.); TEX. FAM. CODE ANN. § 85.026 (West, Westlaw through 2019 Reg. Sess. of the 86th Leg.); VT. STAT. ANN. TIT. 15, § 1108(e) (West, Westlaw through Reg. Sess. of the 2019-2020 Gen. Assemb.); WASH. REV. CODE ANN. § 10.14.120 (West, Westlaw through 2019 Reg. Sess.).

174. The concept of “Battered Women Syndrome” was first coined by Dr. Lenore E. Walker. See LENORE E. WALKER, *THE BATTERED WOMAN* XV (Harper 1980). Originally, her work focused on the idea of “learned helplessness” as the defining characteristic of a battered woman. In the 1990s, Walker revised her idea of BWS as being a subset of Post-Traumatic Stress Disorder. Then, in the 2000s, Walker added three additional criteria to the identification of BWS that do not exist for other forms of PTSD. Mary Dutton, *Update of the “Battered Woman Syndrome” Critique*, NAT’L ONLINE RES. CTR. FOR VIOLENCE AGAINST WOMEN (2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf.

175. Pertnoy, *supra* note 7, at 563–64 (“BWS sheds light on certain behavior of the battered woman, such as attempts to leave or cope with the abuse and its damage . . . the result can be violent, and lead to homicide.”).

176. See, e.g., *People v. Evans*, 631 N.E.2d 281, 288 (Ill. App. Ct. 1994) (“The law must finally step up to the times and itself comprehend the reality of domestic violence cases which involve victims of battered woman’s syndrome. If the law does not keep up with the times in this area, a system whose *raison d’être* is justice will mete out injustice under the guise of unenlightened rationalizations.”).

177. See Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When she fights back*, 20 YALE J.L. & FEMINISM 84 (2008).

“cycle of violence” that often prevents women from seeking help.¹⁷⁸ The first stage is the “tension-building” phase, wherein a woman experiences minor physical violence and verbal attacks from her abuser. The abused woman tends to minimize the importance of these incidents and blame herself for the abuse.¹⁷⁹ This stage can last for years while the woman attempts to placate her abuser and act in ways that she believes will avoid physical violence.¹⁸⁰ The second stage is the battering stage. As the minor incidents become more frequent, the tension increases until the woman can no longer appease her abuser;¹⁸¹ Walker refers to this as the “acute battering incident.”¹⁸² At this point, the violence becomes so severe that the woman fears major physical injury or death.¹⁸³ Walker suggests it is the more obvious “lack of control and its major destructiveness” that distinguishes this incident from those that occur in the first stage.¹⁸⁴ The third stage, the “honeymoon phase,” begins almost immediately following the battering incident and is characterized by the abuser’s lack of violence and exhibition of what Walker calls “contrite loving behavior.”¹⁸⁵ During this phase, the abuser is charming and apologetic as he begs for the woman’s forgiveness.¹⁸⁶ The abuser believes that he will never hurt the woman again and tries to take some action, such as giving up alcohol, to demonstrate that his intentions are sincere.¹⁸⁷

Walker argues that such repeated cycles of violence cause a woman to develop “learned helplessness.”¹⁸⁸ According to Walker, the woman believes that she lacks control over her abusive situation and feels it is impossible to escape, even when escape is in fact a possibility.¹⁸⁹ The woman becomes increasingly passive, and her motivation and will to leave the relationship diminish.¹⁹⁰ Because she cannot leave the relationship, the woman suffers more abuse and remains trapped

178. See WALKER, *supra* note 174, at 55.

179. *Id.* at 56–59.

180. See generally Joan M. Schroeder, Note, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553 (1991).

181. See WALKER, *supra* note 174, at 59–65.

182. *Id.*

183. *Id.*

184. *Id.* at 59.

185. *Id.* at 65–70; Rebecca D. Comia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA WOMEN’S L. J. 99, 103 (1997).

186. WALKER, *supra* note 174, at 65.

187. *Id.* at 65–66.

188. Comia, *supra* note 185, at 103; see also WALKER, *supra* note 174, at 42–54. The concept of “learned helplessness,” first introduced by psychologist Martin Seligman, is a psychological state marked by lack of control and an inability to escape a dangerous situation. *Id.* at 45–47. Seligman’s theory of learned helplessness was based largely on his studies of dogs, and some recent literature has discredited Walker’s early formulations of learned helplessness as inaccurate when applied to battered women. See, e.g., David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 74–79 (1997); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 77–84 (1994).

189. WALKER, *supra* note 174, at 47–48.

190. See Comia, *supra* note 185, at 103.

in the cycle of violence.¹⁹¹

An alternative theory of explaining the behavior of victims of violence, known as the “Survivor theory,” emerged after Walker’s theory.¹⁹² This theory advocates for a more encompassing terminology of “survivor of domestic abuse” rather than “battered woman.” This theory explains why victims remain in violent relationships without labeling them as passive, helpless non-actors.¹⁹³ Instead, the theory focuses on the victim as a survivor, who remains in the relationship to protect themselves and their children.¹⁹⁴ It is premised on the idea that the survivor may not think outside help is an option.¹⁹⁵ This is an alternative theory to Walker’s, but is not as accepted in the legal system.¹⁹⁶

i. Criticism of BWS Testimony. Although the use of expert testimony about BWS by both defendants and prosecutors has gained acceptance in the legal community, the practice has been heavily criticized.¹⁹⁷ Opponents focus primarily on the negative stereotypes that are reinforced when BWS evidence is offered to explain abused women’s behavior, as well as the potential for damaging legal consequences.¹⁹⁸ According to its critics, BWS implies either a mental disorder or an inability to reason.¹⁹⁹ The “ideal” battered woman “appears to be one who is helpless, passive, and has no history of violent or confrontational behavior.”²⁰⁰ Because of this assumption, someone who legitimately suffers from BWS may not be able to use this syndrome in their defense if they actively defend themselves against their domestic abuser.²⁰¹ In *State v. Anaya*, for example, the defendant was charged with murdering her boyfriend. An expert witness testified that “battered wives typically stay with their men out of economic dependency and that they ‘most frequently . . . react with passivity’ to the violence of their mates.”²⁰² The

191. See Schroeder, *supra* note 180, at 559.

192. See Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When she fights back*, 20 YALE J.L. & FEMINISM 84 (2008).

193. *Id.*

194. *Id.*

195. *Id.* at 85.

196. *Id.*

197. Dutton, *supra* note 174.

198. *Id.*

199. Jill E. Adams, *Unlocking Liberty: Is California’s Habeas Law the Key to Freeing Unjustly Imprisoned Battered Women?*, 19 BERKELEY WOMEN’S L. J. 217, 224 (2004). Some critics began using the phrase “battering and its effects” in order to avoid pathologizing women who experience abuse. See *id.* at 224–25; Kathy Luttrell Garcia, *Battered Women and Battered Children: Admissibility of Evidence of Battering and Its Effects to Determine the Mens Rea of a Battered Woman Facing Criminal Charges for Failing to Protect a Child from Abuse*, 24 J. JUV. L. 101, 123 (2004).

200. See Cheryl A. Terrance et al., *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 944 (2012); see also Symposium, *Promoting Global Equality for Women Through the Law*, 34 WOMEN’S RTS. L. REP. 105, 120 (2013) (discussing the catch-22 position this image of the “ideal battered woman” puts the real victim in if she decides to fight back).

201. See Terrance et al., *supra* note 200, at 944.

202. *State v. Anaya*, 456 A.2d 1255, 1266 (Me. 1983).

prosecution rebutted the defense's claim of BWS by using the testimony of the survivor's sister that the victim was unemployed and the defendant had stabbed the victim in a prior incident.²⁰³ This testimony sufficiently superseded the testimony of numerous witnesses used to establish the BWS defense for the jury to find the defendant, a survivor of intimate partner violence, guilty of murdering her boyfriend.²⁰⁴

A second criticism asserts that expert testimony about BWS gives juries the impression of a woman who is "disordered and pathological"—especially when the expert describes BWS as a subcategory of PTSD.²⁰⁵ Once the survivor of domestic violence is pathologized in such a manner, it becomes harder for juries to see the control and power the abuser had over her, thus, creating challenges for claims of self-defense.²⁰⁶ Pathologizing women with BWS may also cause women to lose custody of their children.²⁰⁷

Additionally, critics of BWS object to grouping all survivors of domestic violence together as "battered women" because it assumes all experiences of abuse are the same²⁰⁸ and ignores male and transgender survivors of violence. When the accused individual appears in court, they are unable to match the stereotype and, therefore, fail in their claim of self-defense.²⁰⁹ This "ideal" battered woman does not reflect the diverse experiences of female (heterosexual) survivors of domestic violence and, furthermore, fails to encompass the LGBT community and heterosexual men entirely.²¹⁰

ii. Legal Consequences of BWS for Male and LGBT Survivors. Domestic violence and its emotional and physical consequences are also prevalent among male, lesbian, and transgender persons in addition to females in heterosexual relationships.²¹¹ In fact, some scholars have noted that the percentage of abusive relationships in these communities may be higher than those in heterosexual relationships because of the stigma and negative stereotypes that already plague these communities.²¹² Male survivors may struggle with sharing experiences with intimate partner violence because the traditional support systems used by female survivors may be less accepting of male survivors in either homosexual or heterosexual relationships.²¹³

203. *Id.* at 1265.

204. *Id.*

205. See Terrance et al., *supra* note 200, at 942–43.

206. *Id.*

207. *Id.* (arguing that the label of BWS can cause juries to see the survivors of domestic violence as "mentally unfit" and therefore "unfit" to raise her children); see also Symposium, *supra* note 200.

208. See Terrance et al., *supra* note 200, at 942–43.

209. *Id.* at 944 (discussing the "stereotypical battered woman").

210. See discussion *infra* Section titled "Legal Consequences of BWS for Male and LGBT Survivors."

211. Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 328–30 (1999).

212. *Id.* at 337.

213. BRENDA L. RUSSELL, BATTERED WOMAN SYNDROME AS A LEGAL DEFENSE: HISTORY, EFFECTIVENESS AND IMPLICATIONS 67 (McFarland 2010).

Recent court decisions have made considerable gains in opening up services for male and LGBT survivors of domestic violence.²¹⁴ Legislation in all fifty states specifically defines the group of people covered by BWS and domestic violence provisions,²¹⁵ and several states have codified the term Battered Spouse Syndrome (“BSS”) to encompass relationships other than married, heterosexual couples.²¹⁶

Male and LGBT individuals have not utilized the BWS defense as easily as females in heterosexual relationships. Juries are often unable to visualize a power imbalance that makes the survivor of violence vulnerable to abuse.²¹⁷ In the case of heterosexual male survivors, both society and the legal justice system find it difficult to view the man as the weaker party in the relationship.²¹⁸ Although the power dynamics and physical size discrepancies can be just as unequal in homosexual relationships as in heterosexual relationships, and there are legitimate instances of men being abused by their female partners,²¹⁹ many jurors automatically view the situation as one of mutual battering.²²⁰

In 1988, Annette Green killed her same-sex partner, Yvonne Julio, following years of escalating abuse.²²¹ Green used the BWS defense, despite the prosecutor’s objection that the defense was inappropriate.²²² Jurors found Green guilty and rejected the BWS argument even though all believed that the relationship was abusive.²²³ One juror reported that during trial, the prosecution relied heavily on Green’s admission that she had previously threatened Julio with a gun.²²⁴ The District Court of Appeals of Florida overturned Green’s conviction due to technical errors;²²⁵ however, her case demonstrates that juries tend to be less accepting

214. See *Woods v. Horton*, 84 Cal. Rptr. 3d 332 (Ct. App. 2008) (holding that California regulations that keep males from partaking in publicly-funded domestic violence services violate males’ equal protection right under the Constitution).

215. Nancy Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U.L. REV. 335, 344–46 (1995).

216. FLA. R. CRIM. P. 3.201 (West, Westlaw through Sept. 2017); MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (West, Westlaw through 2017 Reg. Sess. of the Gen. Assemb.); MO. ANN. STAT. § 563.033 (West, Westlaw through 2017 1st Reg. Sess. & Ex. Sess. of the 99th Gen. Assemb.); S.C. CODE ANN. § 17-23-170 (West, Westlaw through 2017 Sess.). Not all states have codified a broader BSS definition, but state courts have increasingly allowed the admission of broader BSS testimony. See, e.g., *State v. Stewart*, 719 S.E.2d 876, 883 (2011); *Bonner v. State*, 740 So. 2d 439, 440 (1998); *People v. Wilson*, 487 N.W.2d 822 (1992).

217. Knauer, *supra* note 211, at 333–34.

218. Alexander Detschelt, *Recognizing Domestic Violence Directed Towards Men*, 12(2) KAN. J. L. & PUB. POL’Y 249, 252–56 (2002-2003).

219. See, e.g., Gina Serpe & Ashley Fultz, *A Very Brady Death Threat?!, E!* ONLINE (Dec. 15, 2009 3:22 PM), <http://www.eonline.com/news/158137/a-very-brady-death-threat>.

220. Knauer, *supra* note 211, at 333–34.

221. Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence*, *Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 574 (1990).

222. *Id.* at 574–75.

223. See Pertnoy, *supra* note 7, at 565–66.

224. Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman Syndrome Expert Testimony for Gay Men and Lesbians who Kill Abusive Partners*, 58 BROOK. L. REV. 1379, 1381 (1993).

225. *Green v. State*, 575 So. 2d 796, 797 (Fla. Dist. Ct. App. 1991).

of BWS as a defense in same-sex relationships, even in the face of overwhelming evidence of domestic abuse.

Courts also allow BWS testimony in civil cases.²²⁶ For example, courts have admitted expert testimony regarding BWS in child custody cases.²²⁷ In *Knock v. Knock*, the Supreme Court of Connecticut admitted expert testimony in order to determine the best interests of the child in a child custody dispute.²²⁸ The court found the BWS evidence relevant to the case because of the potential detrimental effects of battering to the victim and any children raised by a parent who batters the other parent.²²⁹

c. Law Enforcement and Protection Policies. State legislatures have enacted various enforcement policies to protect survivors of domestic violence including warrantless arrests, mandatory arrests, mandatory or “no-drop” prosecutions, mandatory no-contact orders, and mandatory reporting of domestic violence by health care professionals.

i. *Warrantless Arrests.* Currently, all fifty states and the District of Columbia permit warrantless arrests in cases of domestic violence when the arresting officer has probable cause to believe that the abuser has violated a restraining order or committed a criminal act against an intimate partner.²³⁰ A number of states have statutes that give police discretion to make warrantless arrests.²³¹ Some state statutes prefer warrantless arrests over other courses of action,²³² and many even mandate warrantless arrest.²³³

226. Heather Tonsing, Note, *Battered Woman Syndrome as a Tort Cause of Action*, 12 J.L. & HEALTH 407, 408 (1997-1998) (citing Lenore E.A. Walker, *Understanding Battered Woman Syndrome: Victims and Violence*, TRIAL (Feb. 1, 1995)), <http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1230&context=jlh> (BWS testimony has proved helpful in family courts considering child custody and property disputes; in civil litigation to prove liability and damages; and in coercive contract disputes and will contests).

227. See, e.g., *Knock v. Knock*, 621 A.2d 267, 272 (Conn. 1993).

228. *Id.* at 273.

229. *Id.*

230. See Hannah Brenner, *Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 316–17 (2013).

231. See, e.g., ALA. CODE §15-10-3(a) (West, Westlaw through Act 2018-69); DEL. CODE ANN. tit. 11, § 1904(b)(1) (West, Westlaw through 81 Laws 2017); GA. CODE ANN. § 17-4-20(a) (West, Westlaw through 2017 Spec. Sess.); HAW. REV. STAT. ANN. § 709-906(2) (West, Westlaw through 2017 1st Spec. Sess.); 725 ILL. COMP. STAT. ANN. 5/107-2 (West, Westlaw through P.A. 100-578 of the 2018 Reg. Sess.); KY. REV. STAT. ANN. § 431.005(2) (West, Westlaw through 2017 Reg. Sess.); MD. CODE ANN., CRIM. PROC. § 2-204 (West, Westlaw through Chs. 1 to 4 from the 2018 Reg. Sess. of the Gen. Assemb.); MINN. STAT. ANN. § 629.341(1) (West, Westlaw through 2017 Reg. & 1st Spec. Sess.); NEB. REV. STAT. ANN. § 29-404.02(3) (West, Westlaw through 1st Reg. Sess. of the 105th Leg.); N.H. REV. STAT. ANN. § 173-B:9(1)(a) (West, Westlaw through 2017 Reg. Sess.); 18 PA. STAT. & CONS. STAT. ANN. § 2711(a) (West, Westlaw through 2017 Reg. Sess.).

232. See, e.g., ARK. CODE ANN. § 16-81-113(a)(1)(B) (West, Westlaw through 2017 Reg. Sess.); FLA. STAT. ANN. § 741.29(4)(b) (West, Westlaw through 2017 1st Reg. Sess.); MASS. GEN. LAWS ANN. Ch. 209A, § 6(7) (West, Westlaw through 2017 1st Ann. Sess.); TENN. CODE ANN. § 36-3-619(a) (West, Westlaw through 2017 1st Reg. Sess.).

233. See, e.g., CAL. PENAL CODE § 836(c)(1) (West, Westlaw through Ch. 2 of 2018 Reg. Sess.); COLO. REV. STAT. ANN. § 18-6-803.6(1) (West, Westlaw through 2017 1st Reg. Sess.); D.C. CODE § 16-

ii. Mandatory Arrests. Many states and the District of Columbia have enacted laws mandating arrest in domestic violence cases,²³⁴ including the violation of civil protection orders.²³⁵ Mandatory arrest laws reflect states' decreasing tolerance for domestic violence by requiring officers to make an arrest when probable cause exists.²³⁶ Proponents argue that mandatory arrest laws send a message to the abuser (and the community) that his or her behavior is criminal and unacceptable.²³⁷ These laws increase the rate at which abusers are arrested and eliminate the potential for racism on the part of law enforcement because "every abuser will be treated similarly."²³⁸

Detractors argue that this elimination of discretion can have harmful effects on the very survivors of abuse whom the law should protect. The elimination of the discretion of the officer is also the elimination of the discretion of the survivor. The survivor has no participation in the decision to arrest—undercutting their agency and reinforcing the idea of them as a victim.²³⁹ Furthermore, critics argue

1031(a) (West, Westlaw through Jan. 30, 2018); IOWA CODE ANN. § 236.12(3) (West, Westlaw through 2017 Reg. Sess.); ME. REV. STAT. ANN. tit. 19-A, § 4012(6)(D) (West, Westlaw through 2017 Reg. Sess.); MISS. CODE ANN. 99-3-7(3)(a) (West, Westlaw through 2017 Reg. Sess.); NEV. REV. STAT. ANN. § 171.137(1) (West, Westlaw through 79th Reg. Sess.); N.J. STAT. ANN. § 2C:25-21(a)(3) (West, Westlaw through L. 2017, c. 245 & J.R. No. 19); N.Y. CRIM. PROC. LAW § 140.10(4) (West, Westlaw through L.2018); UTAH CODE ANN. § 77-36-2.2(2)(a) (West, Westlaw through 2017 1st Spec. Sess.); VA. CODE ANN. § 19.2-81.3(B) (West, Westlaw through 2017 Reg. Sess.); WASH. REV. CODE ANN. § 10.31.100(2) (West, Westlaw through 2017 Act 135); WIS. STAT. ANN. § 968.075(2)(a) (West, Westlaw through 2017 Act 3d Spec. Sess.).

234. *See id.*

235. States listed are those that require arrest when a protective order has been violated. Other states merely permit arrest for such a violation. *See* CAL. PENAL CODE § 836(c)(l) (West, Westlaw through 2017 Reg. Sess.); KY. REV. STAT. ANN. § 403.763 (West, Westlaw through 2017 Reg. Sess.); MD. CODE ANN., FAM. LAW § 4-509(c) (West, Westlaw through 2017 Reg. Sess. of the Gen. Assemb.); N.J. STAT. ANN. § 2C:25-21(a)(3) (West, Westlaw through L. 2017, c. 245 & J.R. No. 19); S.D. CODIFIED LAWS § 23A-3-2.1 (West, Westlaw through 2017 Reg. & Spec. Sess.); TENN. CODE ANN. § 36-3-611(a)(2) (West, Westlaw through 2017 1st Reg. Sess. of the 110th Gen. Assemb.); TEX. CRIM. PROC. CODE ANN. Art. § 14.03(b) (West, Westlaw through 2017 Reg. & 1st Sess. of the 85th Leg.); UTAH CODE ANN. § 78B-7-113(2)(f) (West, Westlaw through 2017 1st Spec. Sess.); WASH. REV. CODE ANN. § 10.31.100(2) (West, Westlaw through 2017 3d Spec. Sess.).

236. *See, e.g.,* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 278–79 (2005).

237. *See* Brenner, *supra* note 230, at 316–17.

238. *See* Thomas L. Hafemeister, *If All You Have Is A Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 979 (2011). *But see* Emerson Beishline, *An Examination of the Effects of Institutional Racism and Systematic Prejudice on Intimate Partner Violence in Minority Communities*, 4 WM. MITCHELL L. RAZA J. 2, 23-24 (2013) (examining the disparate impact mandatory arrest policies have on immigrant women and women of color).

239. *See* MARY HAVILAND ET AL., THE FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1995: EXAMINING THE EFFECTS OF MANDATORY ARREST IN NEW YORK CITY (2001), available at https://www.researchgate.net/profile/Valli_Rajah/publication/314857235_The_Family_Protection_and_Domestic_Violence_Intervention_Act_of_1995_Examining_the_Effects_of_Mandatory_Arrest_in_New_York_City_A_REPORT_BY_THE_FAMILY_VIOLENCE_PROJECT_OF_THE_URBAN_JUSTICE_CENTER_AUTH/links/58c69a28aca272e36dde68cc/The-Family-Protection-and-Domestic-Violence-Intervention-Act-of-1995-Examining-the-Effects-of-Mandatory-Arrest-in-New-York-City-A-REPORT-BY-THE-FAMILY-VIOLENCE-PROJECT-OF-THE-URBAN-JUSTICE-CENTER-AUTH.pdf.

that these laws often result in dual arrests, where the officers arrest the survivor along with the abuser.²⁴⁰ To combat the unanticipated consequence of these dual arrests, some states have adopted laws that require officers to arrest only the primary physical aggressor in domestic violence disputes.²⁴¹ Some of these statutes list factors to aid police officers in determining which party was the primary physical aggressor.²⁴² This is a problem for same-sex couples because police might mistakenly arrest the victim rather than the perpetrator.²⁴³

Some commentators suggest a policy of presumptive arrest as an alternative to mandatory arrest.²⁴⁴ In a presumptive arrest jurisdiction, police officers are, as with mandatory arrests, generally required to make an arrest when there is probable cause that domestic violence occurred.²⁴⁵ However, even though there is a strong presumption in favor of arrest, officers are granted a small degree of discretion not to make an arrest if the “victim expressly states that an arrest is not desired and the officer determines that the victim is safe.”²⁴⁶ A system of presumptive arrest preserves many of the benefits of a mandatory arrest policy while allowing officers the discretion to tailor their responses to each specific situation they encounter and the wishes of the survivor.²⁴⁷ Critics of presumptive arrest argue that “granting any discretion to police officers will result in that discretion

240. See Beishline, *supra* note 238, at 22–23.

241. MO. ANN. STAT. § 455.085(3) (West, Westlaw through 2017 1st Reg. Sess.); NEV. REV. STAT. § 171.137(2) (West, Westlaw through 79th Leg. Sess.); R.I. GEN. LAWS § 12-29-3(C)(2) (West, Westlaw through 2017 Reg. Sess., Ch. 285); S.D. CODIFIED LAWS § 25-10-35 (West, Westlaw through Ch. 480 of the Jan. 2017 Sess.); WASH. REV. CODE ANN. § 10.31.100(2)(C) (West, Westlaw through 2017 3d Spec. Sess.); WIS. STAT. ANN. § 968.075 (West, Westlaw through 2017, Act 136).

242. MO. ANN. STAT. § 455.085(3) (West, Westlaw through 2017 1st Reg. Sess.) (“When an officer makes an arrest he is not required to arrest two parties involved in an assault when both parties claim to have been assaulted. The arresting officer shall attempt to identify and shall arrest the party he believes is the primary physical aggressor. The term ‘primary physical aggressor’ is defined as the most significant, rather than the first, aggressor. The law enforcement officer shall consider any or all of the following in determining the primary physical aggressor: (1) The intent of the law to protect victims of domestic violence from continuing abuse; (2) The comparative extent of injuries inflicted or serious threats creating fear of physical injury; (3) The history of domestic violence between the persons involved.”); NEV. REV. STAT. § 171.137(2) (West, Westlaw through 79th Reg. Sess.) In determining whether a person is a primary physical aggressor for the purposes of this subsection, the peace officer shall consider: (a) prior domestic violence involving either person; (b) the relative severity of the injuries inflicted upon the persons involved; (c) the potential for future injury; (d) whether one of the alleged batteries was committed in self-defense; and (e) any other factor that may help the peace officer decide which person was the primary physical aggressor. S.D. CODIFIED LAWS §25-10-35 (West, Westlaw through 2018 Reg. Sess.) (“The officer shall arrest the person whom the officer believes to be the predominant physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (1) the intent to protect victims of domestic abuse under this chapter; (2) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (3) the history of domestic abuse between the persons involved.”).

243. See Beishline, *supra* note 238, at 22–23 (noting that lesbians are often victims of dual arrests).

244. See Hafemeister, *supra* note 238, at 982.

245. *Id.*

246. *Id.*

247. *Id.*

being exercised too liberally, and that domestic violence will be taken less seriously by law enforcement in general.”²⁴⁸

iii. No-Drop Prosecutions. To increase offender accountability and curb prosecutorial discretion in dismissing domestic violence cases, some jurisdictions have adopted aggressive “no-drop” prosecution policies.²⁴⁹ Under such policies, prosecutors are not permitted to drop charges of abuse at the survivor’s request; rather, they must pursue charges and either proceed without the survivor’s testimony or seek their cooperation.²⁵⁰ In seventy percent of domestic violence cases, domestic abuse survivors request that charges be dropped.²⁵¹ Prosecutors will often not permit the survivor to drop the charge, but some prosecutors will dismiss the case if the defendant seeks counseling and there are no reports of abuse against the defendant.²⁵²

There are two models of mandatory prosecution: “soft” and “hard.”²⁵³ In jurisdictions employing “soft” no-drop policies, the prosecutor initiates criminal proceedings, and there are no penalties for survivors who refuse to cooperate after charges are filed.²⁵⁴ These non-coercive no-drop policies, however, are not completely deferential to the domestic abuse survivor.²⁵⁵ Although the survivor retains control over his or her own participation in the prosecution, the prosecutor ultimately decides how the prosecution will proceed.²⁵⁶ However, in “hard” no-drop jurisdictions, prosecutors must try cases regardless of the wishes of the survivor, and the survivor may be penalized for not cooperating with the prosecution.²⁵⁷

Proponents argue that these mandatory no-drop policies force prosecutors to take domestic violence cases seriously, make the survivor and any children safer, and remove the incentive for the abuser to try to intimidate the survivor into dropping charges or not testifying.²⁵⁸ Detractors point out that pursuing charges over the objections of the survivor disregards the survivor’s autonomy and ignores the safety and financial reasons that underlie the survivor’s desire to not prosecute.²⁵⁹

248. Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 186 (2003).

249. See Hafemeister, *supra* note 238, at 982 (“These laws were crafted in response to prosecutors’ discretionary power and tendency to not pursue domestic-violence cases and judges’ propensity to minimize and dismiss them.”).

250. See, e.g. FLA. STAT. ANN. § 741.2901 (West, Westlaw through 2017 1st Reg. Sess., Ch. 232); UTAH CODE ANN. § 77-36-2.7 (West, Westlaw through 2017 1st Spec. Sess.).

251. Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 389 (2001).

252. *Id.* at 390.

253. See Hafemeister, *supra* note 238, at 983.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 983–84.

259. *Id.*

iv. **Mandatory No-Contact Orders.** A no-contact order is a criminal protective order that prohibits a defendant from having contact with the survivor.²⁶⁰ These orders are often used as conditions of pre-trial release or of sentencing in domestic violence cases.²⁶¹ Judges normally have discretion to evaluate the complaining witness' specific situation and to determine whether a no-contact order is appropriate.²⁶² Recently, a few states have mandated the issuance of an initial criminal no-contact order in all domestic violence cases.²⁶³ In *People v. Brockelman*, the Colorado Court of Appeals held that it was constitutional for the legislature to classify a violation of a mandatory criminal restraining order as a crime more serious than a violation of a civil restraining order, finding that it did not violate the equal protection rights of the defendant.²⁶⁴

Policy supporters stress that many relationships with a history of domestic violence are likely to involve continuing violence in the future.²⁶⁵ Furthermore, supporters believe that mandatory no-contact orders keep the survivors safer than they would be without such orders.²⁶⁶ Critics note that such orders only carry the force the offender places on it, and the psychological benefit to the survivor is undermined when the order is issued against the survivor's wishes.

v. **Mandatory Reporting by Health Care Professionals.** While it is common for states to require health care professionals to report injuries that result from criminal acts in general,²⁶⁷ in recent years several states have enacted legislation requiring medical professionals to file a report when they suspect that a patient's

260. See Robert F. Friedman, *Protecting Victims from Themselves, but Not Necessarily from Abusers: Issuing A No-Contact Order over the Objection of the Victim-Spouse*, 19 WM. & MARY BILL RTS. J. 235, 246 (2010) ("Criminal courts have long been vested with the power to issue no-contact orders during an ongoing criminal proceeding.").

261. *Id.*

262. See, e.g., FLA. STAT. ANN. § 741.2901(3) (West, Westlaw through 2017 1st Reg. Sess., Ch. 232) (a judge may consider the defendant's history, including prior arrests for domestic violence, prior arrests unrelated to domestic violence, and prior protection orders filed against the defendant).

263. See, e.g., S.D. CODIFIED LAWS §25-10-23 (West, Westlaw through 2017 Reg. Sess.); UTAH CODE ANN. § 77-36-2.5 (West, Westlaw through 2017 1st Spec. Sess.) (cited in Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1858 n. 61 (2002)).

264. *People v. Brockelman*, 862 P.2d 1040, 1042 (Colo. Ct. App. 1993).

265. See, e.g., R.I. GEN. LAWS § 12-29-4(a)(1) (West, Westlaw through 2017 Reg. Sess., Ch. 285) ("Because of the likelihood of repeated violence directed at those who have been victims of domestic violence in the past, when a person is charged with or arrested for a crime involving domestic violence . . . [t]he court or bail commissioner authorizing release shall issue a no-contact order prohibiting the person charged or arrested from having contact with the victim.").

266. See Friedman, *supra* note 260, at 247-48.

267. See, e.g., N.H. REV. STAT. ANN. § 631:6(1) (West, Westlaw through 2017 Reg. Sess., Ch. 276) ("[A] person is guilty of a misdemeanor if, having knowingly treated or assisted another for a gunshot wound or for any other injury he believes to have been caused by a criminal act, he fails immediately to notify a law enforcement official of all the information he possesses concerning the injury.").

injuries are the result of domestic violence.²⁶⁸ In 1994, for example, California updated and expanded its sixty-year-old reporting law.²⁶⁹ The amended law increased the penalties for failures to report, broadened the range of health care practitioners obligated to report suspected domestic violence, and contained an immunity provision protecting those who report as authorized.²⁷⁰ Advocates of mandatory reporting by medical professionals maintain that these statutes serve two broad purposes: protecting the safety of the survivor²⁷¹ and aiding law enforcement in prosecuting violent criminals.²⁷² They believe that mandatory reporting by medical professionals helps identify domestic abusers, a class of criminals who are difficult to detect and frequently escape prosecution, and aids prosecution by creating a medical record of injuries that can later be used as evidence against the abuser.²⁷³

Opponents of these statutes argue that violent abusers, knowing that medical professionals are obligated to report domestic violence-related injuries, may prevent survivors from obtaining medical care.²⁷⁴ Another concern is that disregarding the survivor's wishes about whether to involve law enforcement will only victimize her further by weakening her self-esteem and eliminating her sense of control over her situation.²⁷⁵

In addition to these safety and health concerns, critics of these laws highlight the ethical implications of breaching doctor-patient confidentiality.²⁷⁶ Because of these concerns, the American Medical Association officially opposes mandatory reporting laws.²⁷⁷ The majority of medical professionals do not screen a patient to determine if that patient is a survivor of domestic violence.²⁷⁸ In some situations,

268. See COLO. REV. STAT. ANN. § 12-36-135 (West, Westlaw through Reg. Sess. of the Gen. Assemb.); CAL. PENAL CODE § 11160 (West, Westlaw through 2018 Reg. Sess.); KY. REV. STAT. ANN. § 209.030(2) (West, Westlaw through 2017 Reg. Sess.); R.I. GEN. LAWS ANN. § 12-29-9 (West, Westlaw through Ch. 480 of the Jan. 2017 Sess.); see also Mia McFarlane, *Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INT. L.J. 1, 33 (1998-1999).

269. See Donna R. Mooney & Michael Rodriguez, M.D., *California Healthcare Workers and Mandatory Reporting of Intimate Violence*, 7 HASTINGS WOMEN'S L.J. 85, 88-92 (1996).

270. *Id.* at 90-91.

271. See Karen P. West et al., *The Mandatory Reporting of Adult Victims of Violence: Perspectives From the Field*, 90 KY. L.J. 1071, 1079 (2001-2002).

272. See McFarlane, *supra* note 268.

273. *Id.*

274. *Id.* at 23-24.

275. See Deborah L. Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J. L. & GENDER 11, 20 (2007).

276. See McFarlane, *supra* note 268, at 29-30 (explaining that medical ethics prohibit physicians from disclosing the abuse of competent adult domestic abuse survivors without the consent of the survivor).

277. See *id.* at 21-22 (quoting the AMA's position, "The American Medical Association opposes the adoption of mandatory reporting laws for physicians treating competent adult [survivors] of domestic violence if the required reports identify [survivors]. Such laws violate basic tenets of medical ethics and are of unproven value.").

278. Karen Oehme et al., *Unheard Voices of Domestic Violence Victims: A Call to Remedy Physician Neglect*, 15 GEO. J. GENDER & L. 613, 637 (2014).

where the patient has disclosed abuse, medical professionals have not taken additional steps to protect the survivor.²⁷⁹ Medical professionals usually do not follow up with a survivor who is in an abusive relationship.²⁸⁰ Survivors of domestic violence mentioned that for the medical professionals that do screen, they do not do so effectively to determine if the survivor has been subject to domestic violence and is in need of protection.²⁸¹ For medical professionals who do not want to report that a patient has been a target of domestic violence, one possible compromise would be to require medical professionals to fully document domestic violence-related injuries in the survivor's medical records but not be compelled to disclose this information to law enforcement.²⁸² Then, if the survivor later decides to pursue legal action, these records are available for evidentiary purposes.²⁸³

2. Civil Law of Domestic Violence

This subsection will address civil protection orders, tort actions, domestic violence resources, and child custody.

a. Civil Protection Orders. All fifty states and the District of Columbia permit domestic violence survivors to petition the court for a civil protection order (“CPO”).²⁸⁴ Protection orders generally come in two forms: temporary protection orders (granted *ex parte*) and civil protection orders (granted after an evidentiary hearing).²⁸⁵ A CPO is a binding court order that can provide various forms of relief, including prohibiting a person who has threatened, emotionally abused, or injured an intimate partner, family member, or roommate from having further contact with that individual or from visiting specific locations such as the survivor's school or workplace.²⁸⁶ Mutual protection orders prohibit both parties from

279. *Id.* at 636.

280. *Id.* at 638.

281. *Id.*

282. McFarlane, *supra* note 268, at 29, 31.

283. *Id.* at 35.

284. See A.B.A. COMM'N ON DOMESTIC & SEXUAL VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOs) BY STATE, (2014), available at https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf.

285. See Jaime Kay Dahlstedt, *Notification and Risk Management for Victims of Domestic Violence*, 28 WIS. J.L. GENDER & SOC'Y 1, 7 (2013).

286. See Hafemeister, *supra* note 238, at 987–88 (“Protective orders . . . may require the subject of the order to refrain from specific actions, such as harming the [domestic abuse survivor] or coming within a specified distance of the [survivor's] residence. The order may also require the subject to take certain affirmative steps, such as relinquishing firearms, providing child support, or entering a treatment program.”); see also Dahlstedt, *supra* note 285, at 8 (“The common protection order contains three safety provisions: (1) a no abuse, threaten, or harass provision, essentially ordering respondents not to engage in behavior that is independently illegal; (2) a no contact provision that prevents the respondent from contacting the petitioner; and (3) a stay away provision that precludes the respondent from coming within a certain distance of the petitioner or specific locations she commonly frequents, such as her home or workplace. In essence, this provision creates ‘exclusionary zones,’ both fixed and moving.”).

contacting each other.²⁸⁷ However, some jurisdictions have adopted CPOs that prohibit an individual from committing future abuse, but still permit ongoing contact between the parties.²⁸⁸ This type of CPO has been designed to protect survivors, but at the same time permit those who are unwilling to leave their relationships to continue to have contact with their partner.²⁸⁹ This type of CPO is only granted in a limited number of jurisdictions.²⁹⁰

While all fifty states and the District of Columbia allow for the issuance of CPOs, each state has its own legislation providing criteria for who may petition for a CPO, what a CPO may cover, and how long it will remain in effect.²⁹¹ Some states allow the domestic violence survivor to file for a CPO when they fall into one of the required relationships (current spouse, former spouse, cohabitants, dating partner, intrafamily, child or member of the same family).²⁹² Other states remain silent on whether the law permits “dating partners” to obtain a CPO, which includes partners of the same sex.²⁹³ There are also differences among states with respect to what the CPO covers when the domestic violence survivor is granted one. In the majority of jurisdictions, a CPO may allow for child custody, spousal support, and restitution.²⁹⁴ There are other jurisdictions where a CPO does not allow for spousal support or restitution but does allow for compensation with respect to counseling treatments.²⁹⁵ While many jurisdictions have statutorily set a standard duration of one year for CPOs, others give the ordering judge discretion to set its duration from six months to ten years, and some even allow for a permanent order.²⁹⁶

287. See Hafemeister, *supra* note 238, at 990 (discussing the criticism of mutual protection orders as a “quick fix” that are issued even when there is isn’t evidence of mutual violence); see also Murphy v. Okeke, 951 A.2d 783 790 (D.C. 2008) (holding that where there is insufficient evidence of mutual violence, allowing mutual protection orders shifts the responsibility for the abuse onto the survivor and fails to hold the abuser accountable).

288. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?* 29 CARDOZO L. REV. 1487, 1490 (2008).

289. *Id.*

290. *Id.*

291. See A.B.A. COMM’N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 284.

292. California, the District of Columbia, and Louisiana all have the same standards as to who may file for a CPO. See CAL. FAM. CODE §§ 6211, 6301(a) (West, Westlaw through Ch. 3 of 2020 Reg. Sess.); D.C. CODE § 16-1005(c) (West, Westlaw through Mar. 11, 2020); LA. REV. STAT. § 46:2133D (West, Westlaw through 2019 Reg. Sess.); *Get a Protection Order*, SUPERIOR CT. OF THE D.C. DOMESTIC VIOLENCE UNIT, <https://www.dccourts.gov/services/domestic-violence-matters/get-a-protection-order#> (last visited Jan 11, 2020).

293. N.Y. FAM. CT. ACT § 812(1)(e) (This legislation does not specify whether same sex partners are included in the definition of “intimate relationship,” but does not exclude same sex partners either.); R.I. GEN. LAWS § 8-8.1-1(1) (This legislation does not specify whether same sex partners are included in the definition of “intimate relationship,” but does not exclude same sex partners either); see also *Resources & Services: Order Of Protection*, N.Y. FAMILY CT., <https://www1.nyc.gov/site/nypd/services/victim-services/resources-services-orders-protection.page> (last visited Jan 11, 2020).

294. See A.B.A. COMM’N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 284.

295. See *id.*

296. *Id.*

Some states also allow petitioners to retain exclusive care, possession, or control of any pets belonging to or under the care of the petitioner or minor children residing in the residence or household of either party without showing any additional justification when filing for a CPO.²⁹⁷ Other states, however, require that petitioners show good cause in order to retain exclusive care, possession, or control of animals or minor children that were residing with the petitioner.²⁹⁸

Domestic violence advocates continue to view CPOs favorably because they provide survivors with immediate relief by prohibiting abusive conduct.²⁹⁹ However, there can be frequent violations of protection orders with no arrests.³⁰⁰ The potential powerlessness of a protection order was seen in *Castle Rock v. Gonzales*.³⁰¹ In *Gonzales*, the Court held that the holder of a restraining order cannot bring a due process claim against a government for its failure to actively enforce the order and protect the holder of the order from violence.³⁰² The effect was that an survivor who had obtained a court-issued protection order would not have legal recourse against police officers who refused to enforce her protection order.³⁰³ This ruling “undercuts the strength and value of protective orders, as it allows police officers to enforce the orders—or not—at their own discretion.”³⁰⁴

b. Tort Actions. Traditionally, common law rules barred tort actions by survivors of domestic violence against their abusive spouses because spouses were protected by the doctrine of spousal immunity.³⁰⁵ Now that forty-eight states³⁰⁶

297. Animal Welfare Inst, *Representing Domestic Violence Survivors With Pets in the District of Columbia, Maryland, and Virginia* 4 (2014), <https://awionline.org/sites/default/files/uploads/documents/AWI-CA-PPO-Manual-11192014.pdf>.

298. *Id.*

299. *What is A Protection Order and How Can It Help You?* WOMENS LAW <https://www.womenslaw.org/laws/videos/pt-1-what-protection-order-and-how-can-it-help-you> (last visited Oct. 7, 2019).

300. See Hafemeister, *supra* note 238, at 989 (“One study reported that sixty percent of protective orders are violated, yet only eighteen percent of the violators of these orders were jailed.”).

301. *Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

302. *See id.* at 768.

303. *See id.*

304. *See Hafemeister, supra* note 238, at 991.

305. *See John M. Burman, Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 223 (2003) (discussing the historical development of the doctrine of spousal immunity).

306. *See, e.g.,* MONT. CODE ANN. § 40-2-109 (West, Westlaw through 2019 Reg. Sess., 66th Leg.); R.I. GEN. LAWS ANN. § 15-4-17 (West, Westlaw through ch. 2 of the 2020 Sess.). Only Georgia and Louisiana still maintain the doctrine of spousal immunity. *See New v. Hubbard*, 426 S.E.2d 379, 379–80 (Ga. Ct. App. 1992) (reaffirming GA. CODE ANN. § 19-3-8 (West, Westlaw through 2019 Sess. of the Gen. Assemb.), which states that “[i]nterspousal tort immunity . . . shall continue to exist”); *Smith v. S. Farm Bureau Cas. Ins. Co.*, 174 So. 2d 122, 124 (La. 1965) (“This immunity exists, commendably, to maintain domestic tranquility and promote the stability of the family unit.”); LA. REV. STAT. ANN. § 9:291 (West, Westlaw through the 2018 3d Ex. Sess.) (“[S]pouses may not sue each other except for causes of action pertaining to contracts or arising out of the provisions of Book III, Title VI of the Civil Code; for restitution of separate property; for divorce or declaration of nullity of the marriage; and for causes of action pertaining to spousal support or the support or custody of a child while the spouses are living separate and apart.”).

have abolished spousal immunity,³⁰⁷ battered spouses can assert tort claims including assault, battery, intentional infliction of emotional distress, and a number of newly developed “domestic torts.”³⁰⁸

“Domestic torts” are non-traditional tort actions that a domestic violence survivor can assert such as intentional interference with custody,³⁰⁹ parental kidnapping,³¹⁰ defamation,³¹¹ and tortious infliction of a sexually transmitted disease.³¹² In addition to domestic torts, several states have also established tort actions designed to recognize and ameliorate the particular obstacles faced by domestic violence survivors in bringing a claim. For example, in *Jewitt v. Jewitt*, the Washington Superior Court for Spokane County recognized domestic violence as a tort in and of itself and outlined the following elements: (1) a pattern of volitional acts, (2) reasonably calculated to place the survivor in fear, (3) which spans a period of time, (4) and proximately and directly caused, (5) an injury or a state of dependency that rendered the survivor incapable of maintaining action against the abuser.³¹³

Similarly, in *Cusseaux v. Pickett*, the Superior Court of New Jersey for Bergen County recognized battered woman’s syndrome as a valid cause of action and characterized this action as a continuing tort, rather than requiring that each incident be considered a separate cause of action.³¹⁴ Despite the term “battered woman’s syndrome,” the court noted that this cause of action was

307. See generally Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 324-25 (1997) (providing an overview of domestic torts).

308. *Id.* at 339.

309. See, e.g., *State v. Sciortino*, 724 So. 2d 258, 261 (La. Ct. App. 1998) (clarifying statute defined intentional interference with custody as “the intentional taking, enticing, or decoying away of a minor child by a parent not having a right of custody, with the intent to detain or conceal such child from a parent having a right of custody pursuant to a court order”). But see *Gleiss v. Newman*, 415 N.W.2d 845, 847 (Wis. 1987) (holding non-custodial parents do not have a tort action for intentional interference with visitation rights).

310. See, e.g., *Rayford v. Rayford*, 456 So. 2d 833, 835 (Ala. Civ. App. 1984) (compensating mother for expenses incurred in recovering her children when their father did not return them after visitation).

311. See, e.g., *Ziegler v. Zeigler*, 28 F. Supp. 2d 601, 617-18, 620 (E.D. Wash. 1998) (holding defamation claim valid when wife alleged that husband made false statements about her mental health to her employer, co-workers, and friends).

312. See, e.g., *Kohl v. Kohl*, 149 So. 3d 127, 130 (Fla. App. 4 Dist. 2014) (holding that a claim for negligent transmission of a sexually transmitted infection may be stated under common law principles); *Doe v. Johnson*, 817 F. Supp. 1382, 1391 (W.D. Mich. 1993) (holding tortious infliction of a sexually transmitted disease claim valid when female sex partner and child brought suit against male sex partner for wrongful transmission of HIV because defendant knew he was infected and put plaintiffs at risk); *Meany v. Meany*, 639 So. 2d 229, 235 (La. 1994) (upholding a claim based on negligent infliction of venereal diseases brought by former wife because husband knew or should have known he was infected); *Coleman v. Coleman*, 566 So. 2d 482, 485 (Ala. 1990) (holding woman’s claim of negligent or wanton transmission of venereal disease against former husband barred from suit because of release clause signed during divorce proceedings).

313. *Jewitt v. Jewitt*, No. 93-2-01846-5 (Wash. Super. Ct., Spokane County Apr. 21, 1994) (described in Mercedes Fort, *A New Tort: Domestic Violence Gets the Status it Deserves in Jewitt v. Jewitt*, No. 93-2-01846-5 (Wash. Super. Ct. Spokane County Apr. 21, 1993), 21 S. ILL U. L.J. 355, 376-77 (1997)).

314. See *Cusseaux v. Pickett*, 652 A.2d 789, 793-95 (N.J. Super. Ct. Law Div. 1994).

available to individuals of either gender, engaged in heterosexual or homosexual relationships.³¹⁵

The California legislature has codified the tort of domestic violence.³¹⁶ This action requires the plaintiff to show that a domestic relationship existed between them and the defendant and that injuries inflicted were the result of abuse.³¹⁷ If such a showing is made, the defendant can be held liable for general, special, and punitive damages, and the court may award any other relief it deems proper, such as costs and attorney's fees.³¹⁸ Additionally, section 340.15 of the California Civil Procedure Code provides a separate statute of limitations for filing tort actions for domestic violence, which extends the deadline for the commencement of an action to three years from the last act of domestic violence or three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act of domestic violence.³¹⁹

c. Domestic Violence Resources and Child Custody. Survivors of domestic violence often stay with their abusers due to the limited resources for survivors seeking assistance and the consequences of accepting outside help from domestic violence services.³²⁰ Many survivors stay rather than face the possibility of financial despair when they realize they cannot support themselves or their children without the abuser's resources because of the lack of a sufficient governmental financial safety net.³²¹ Survivors fleeing their abusers also fear the threat of being separated from their children upon seeking refuge from domestic violence.³²² When a separation or divorce stems from domestic violence, the parent's role in the violence is often considered when determining the custody of minor children.³²³ A majority of states limit the child custody and visitation rights of a perpetrator of domestic violence.³²⁴ Additionally, some states also limit the rights of

315. See *id.* at 794 n.7.

316. See CAL. CIV. CODE § 1708.6 (West, Westlaw through Ch. 524 of 2019 Reg. Sess.).

317. See *id.*; see also CAL. PENAL CODE § 13700 (West, Westlaw through Ch. 524 of 2019 Reg. Sess.).

318. See CAL. CIV. CODE § 1708.6(b)-(c) (West, Westlaw through Ch. 524 of 2019 Reg. Sess.).

319. See CAL. CIV. PROC. CODE § 340.15 (West, Westlaw through Ch. 524 of 2019 Reg. Sess.).

320. See generally Sarah Buel, *Fifty Obstacles to Leaving, AKA, Why Abuse Victims Stay*, 28 COLO. LAW. 19, 20 (1999).

321. *Id.*

322. *Id.* at 20.

323. See, e.g., ALA. CODE § 30-3-131 (West, Westlaw through Act 2019-540) (in custody cases, a determination of domestic violence creates a rebuttable presumption that it is "detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of domestic or family violence"); see also Wright, *Torture at Home*, *supra* note 5, at 508.

324. See Megan Shipley, *Reviled Mothers: Custody Modification Cases Involving Domestic Violence*, 86 IND. L.J. 1587, 1588 (2011) ("Almost all states now have statutes that require or allow judges to consider domestic violence in making custody decisions. Even with these statutes in place, however, [survivors] of domestic violence often face considerable difficulties in getting courts to take domestic violence seriously in custody disputes.").

the survivor.³²⁵ Several states—including California, Illinois, Nebraska, and New York—have used the child abuse and neglect system to remove children from the custody of a domestic violence survivor if the survivor “failed to protect” the child from witnessing incidents of domestic violence.³²⁶ Additionally, some courts remove custody from a parent who alleges abuse by the other parent, claiming it is an attempt to alienate the children from their other parent.³²⁷

While survivors of domestic violence are often directed to emergency shelters, many shelters do not have the capacity to serve the needs of survivors in the communities they serve.³²⁸ The strain on resources is compounded by limited funding and an increased demand for shelter, and has led to overcrowding in many shelters,³²⁹ including, for example, the House of Ruth in Washington, D.C.³³⁰ In 2014, nearly 1,000 battered women called the House of Ruth seeking assistance and shelter, but the shelter only had capacity for 200 women.³³¹ This problem is not unique to the urban environment of Washington, D.C., and in a study conducted of ninety-one percent of domestic violence services in the United States during a twenty-four hour period in 2018, 9,183 requests for aid—including emergency housing and legal representation—were not provided because of a shortage of resources.³³² The space available for male and transgender survivors

325. See *id.* (discussing the situation where a mother who has physical custody of the children is being abused by a new boyfriend).

326. See, e.g., *In re Jon N.*, 224 Cal. Rptr. 319, 322 (Ct. App. 1986) (removing child from the custody of his parents “after protracted marital difficulties resulting in physical violence between the child’s parents which threatened the child’s security” and holding that the domestic abuse by the father against the mother “must inevitably have affected the child even though [the child] has not yet been physically injured”); *In re C.D.C.*, 455 N.W.2d 801, 807 (Neb. 1990) (“The mother could be a good parent if she would disassociate herself from the father . . . [however] the mother’s inability to provide her child with an environment devoid of abusive behavior constitutes a willful failure to maintain a safe . . . environment . . . Children have the right to grow up in a wholesome and healthful atmosphere, free of fear of abuse or injury.”) (citations omitted); *In re Lonell J.*, 673 N.Y.S.2d 116, 116–17 (N.Y. App. Div. 1998) (establishing neglect where “the father habitually abused the mother” and “the mother complained to [a social worker] that the father was hitting her and forcing her to have intercourse with him. However, [the mother] refused to follow [the social worker’s] advice that she go with the children to a battered women’s shelter.”); see also Dana Harrington Conner, *To Protect or Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 878, 890 (2006).

327. See generally JOAN MEIER, ET AL., CHILD CUSTODY OUTCOMES IN CASES INVOLVING PARENTAL ALIENATION AND ABUSE ALLEGATIONS 3–4 (2019), available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2712&context=faculty_publications.

328. See NAT’L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE COUNTS 2018: A 24-HOUR CENSUS OF DOMESTIC VIOLENCE SHELTERS AND SERVICES 8 (2018) [hereinafter DOMESTIC VIOLENCE COUNTS 2018], available at https://nnev.org/wp-content/uploads/2019/10/Library_census_2018_full_report_high-res.pdf.

329. See NAT’L NETWORK TO END DOMESTIC VIOLENCE, FUNDING CHALLENGES FOR DOMESTIC VIOLENCE PROGRAMS: THE IMPACT ON VICTIMS 1 (2019), available at https://nnev.org/wp-content/uploads/2019/07/Library_Public_Policy_FundingChallenges.pdf.

330. See *Access and Admissions to Shelter*, HOUSE OF RUTH, <https://hruth.org/get-help/shelter-options/access-to-shelter/> (last visited Jan. 18, 2020).

331. See *id.*

332. DOMESTIC VIOLENCE COUNTS 2018, *supra* note 328, at 1.

is even more scarce because the shelters that are currently available typically cater to female survivors.³³³

III. CONCERNS AND TRENDS IN DOMESTIC VIOLENCE LAW

A. EDUCATION AND ADVANCEMENT

“In the twenty-first century, domestic violence continues to be one of the most misunderstood crimes.”³³⁴ A lack of education and understanding about the nature of domestic violence contributes to the truth of this statement. There are a staggering number of domestic violence cases that come through domestic violence courts, and “the fastest way to get through them is to do the same thing in everyone.”³³⁵ This creates the problem of “path dependency” where judges rely on previous decisions to maintain the status quo and perpetuate a “check the box” attitude towards domestic violence cases.³³⁶ When the entire process is routine, judges do not and cannot consider alternatives that may offer survivors more protection.³³⁷

Institutional attitudes have progressed,³³⁸ but there is evidence that judges “commonly trivialize or excuse domestic violence, despite the enactment of statutes granting rights to battered women.”³³⁹ This has been seen as a reflection of gender bias and cultural attitudes towards women.³⁴⁰ Furthermore, without exposure or training, it can be difficult to understand the oft-asked question: “why didn’t she just leave?”³⁴¹ Familiarity with domestic violence cases and education is required to comprehend just how women are tied to their abusers—physically, financially, and emotionally.³⁴² A survivor may stay in an abusive relationship because she loves her partner, fears retaliation against her or her children, is

333. See Lynn Rosenthal, *Ensuring LGBT Victims of Domestic Violence Can Access Critically Needed Services and Protections*, OBAMA WHITE HOUSE BLOG (May 15, 2012, 11:06 AM), <https://obamawhitehouse.archives.gov/blog/2012/05/15/ensuring-lgbt-victims-domestic-violence-can-access-critically-needed-services-and-pr>; NAT’L RES. CTR. ON DOMESTIC VIOLENCE, LGBT COMMUNITIES & DOMESTIC VIOLENCE: INFORMATION AND RESOURCES 2 (2007), available at <https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566cc17ec647adfee2f5227/1449967998925/2007-NRCDV-Report-on-LGBTQ-DV-STATISTICS2.pdf>.

334. Wright, *Torture at Home*, *supra* note 5, at 464; see also Terrance et al., *supra* note 200, at 952 (“Despite the prevalence of domestic violence, there is substantial evidence that the public continues to endorse a number of myths and misconceptions concerning [domestic abuse survivors].”).

335. Dahlstedt, *supra* note 285, at 32.

336. *Id.* at 34.

337. *Id.* (arguing for the use of GPS monitoring when a CPO is issued).

338. See *Donaldson v. City of Seattle*, 831 P.2d 1098, 1105 (Wash. Ct. App. 1992) (“[A] common police response to domestic violence calls was to treat the matter as a family quarrel, try to mediate the situation and walk the abuser around so he could ‘cool off.’”).

339. Symposium, *supra* note 200, at 119.

340. *Id.*

341. See Dahlstedt, *supra* note 285, at 33 (arguing that judges need to be familiar with the complexity of domestic violence because of the unique issues it presents).

342. Kathryn Gillespie Wellman, *Taking the Next Step in the Legal Response to Domestic Violence: The Need to Reexamine Specialized Domestic Violence Courts from A Victim Perspective*, 24 COLUM. J. GENDER & L. 444,446 (2013).

financially dependent upon her abuser, lacks access to community aid resources, has been isolated by her abuser from family and friends, feels ashamed to seek help, is pressured by her cultural or religious community to stay, or does not want to uproot her children.³⁴³ One particularly strong deterrent to leaving a relationship is Martha Mahoney's concept of "separation assault."³⁴⁴ This concept describes how abusers "intensify their violence to prevent women from leaving, retaliate against them for leaving, or forcibly end the separation."³⁴⁵

In 2017, the #MeToo movement went viral on social media, allowing many survivors of sexual abuse to break silence on the stories they may have carried for many years.³⁴⁶ It followed the earlier #WhyIStayed movement, which was specific to the stories of survivors of domestic violence and intimate partner abuse.³⁴⁷ The outpouring of stories has raised societal consciousness of the extent of abuse, helping combat some of the "credibility discounts" that have prevented survivors from being believed—and therefore assisted—by the justice and social service systems.³⁴⁸ While survivors still face credibility discounting, many more are being believed, showing that progress is possible.³⁴⁹

B. DOMESTIC VIOLENCE IN THE DIGITAL AGE

Surveillance of an abuser's target is not new to domestic violence; however, "technology is now the tool to perpetuate that surveillance."³⁵⁰ Cyberstalking refers to the use of technologies such as cell phones, GPS, and the Internet to, for example, send threatening emails, trace another person's computer, or post threatening or harassing messages on social media.³⁵¹ "Cyberstalking is now a standard part of domestic abuse in the U.S."³⁵² Technology makes it easier for abusers to harass their targets, which hinders the targets' ability to escape their abusers.³⁵³ Abusers use cell phones to stalk and harass their targets.³⁵⁴ For example, an

343. See, e.g., *Domestic Violence: Reasons Why Battered Victims Stay with the Batterers*, LOS ANGELES POLICE DEP'T., http://www.lapdonline.org/get_informed/content_basic_view/8877 (last visited Jan 18, 2020).

344. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 119 (Aspen L. & Bus., 3d ed. 2013).

345. *Id.*

346. See Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399, 401 (2019).

347. *Id.* at 415–16.

348. *Id.* at 402.

349. *Id.* at 458.

350. Aarti Shahani, *Smartphones Are Used to Stalk, Control Domestic Abuse Victims*, NAT'L PUB. RADIO (Sept. 15, 2014, 4:22 PM), <http://www.npr.org/sections/alltechconsidered/2014/09/15/346149979/smartphones-are-used-to-stalk-control-domestic-abuse-victims>.

351. Aily Shimizu, *Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116, 117 (2013).

352. Shahani, *supra* note 350, at 1.

353. *Id.*

354. Erica Olsen, *Domestic Violence and Stalking in a Digital Age: Information for Community Corrections Agencies & Professionals*, AM. PROB. & PAROLE ASS'N J. 84, 85 (2012), <https://nnedv.org/mdocs-posts/domestic-violence-stalking-in-a-digital-age-information-for-community-corrections-agencies-professionals/>.

abuser can track a target's cell phone activity and even trace the target's location through the cell phone's GPS. Also, an abuser can block certain numbers on a target's phone.³⁵⁵ An abuser can also harass their target anonymously by falsifying phone numbers, purchasing prepaid phone cards, and using Voice over Internet Protocol ("VoIP"), which allows the abuser to call their target without displaying a caller ID.³⁵⁶ "Spoofing" disguises the identity and origin of a call.³⁵⁷ When a person uses spoofing, a fake number appears on the receiver's phone caller ID and also appears in the telephone company's records.³⁵⁸ This makes tracing the call extremely difficult for targets, law enforcement, and prosecutors and allows abusers to violate orders of protection fairly easily.³⁵⁹

In addition to cell phones, abusers use GPS to track the locations of their targets.³⁶⁰ National Public Radio surveyed more than seventy shelters and found that eighty-five percent of them were working directly with survivors whose abusers tracked them using GPS.³⁶¹ Some GPS packages are so advanced that they allow the abusers to control their targets' vehicles by locking the doors or even disabling the car completely.³⁶² The abusers can control the GPS devices at home through a simple click on the computer.³⁶³ Computer monitoring software also enables abusers to track their targets' computer activity, activate webcams, and take pictures of the targets and their rooms.³⁶⁴ Along with "programs that are installed for the sole purpose of monitoring location, social location apps such as FourSquare, Facebook, Sonar, or Grindr, allow users to share their location with either a group of friends or for the purpose of meeting new friends."³⁶⁵ Even if the target does not use the applications personally, these applications pose additional dangers because the abuser often monitors the applications of family members or friends of the target, especially when the abuser is unable to monitor the target through the target's personal applications.³⁶⁶ All of this can be done without the target's awareness.³⁶⁷

Even though abusers are usually the ones taking advantage of technology, Robin McGraw has developed *Aspire News*, an application for survivors of

355. *Id.*

356. *Id.*

357. Gabriella Sneringer, *Contact that Can Kill: Orders of Protection, Call ID Spoofing and Domestic Violence*, 90 CHI.-KENT L. REV. 1157, 1169 (2015).

358. *Id.*

359. *Id.* at 1159.

360. *See* Shahani, *supra* note 350, at 3.

361. *Id.*

362. *See* Olsen, *supra* note 354, at 86.

363. *Id.*

364. *Id.*

365. Kaofeng Lee & Erica Olsen, *Cell Phone Location, Privacy, and Intimate Partner Violence*, DOMESTIC VIOLENCE REP. 1, 3 (Aug./Sept. 2013), https://www.acesdv.org/wp-content/uploads/2014/06/NNEDV_CellPhoneLocationPrivacy_DVRarticle_2013.pdf.

366. *Id.*

367. *Id.* at 2.

domestic violence to be able to take advantage of technology.³⁶⁸ The application presents summaries of top stories in world, sports, and entertainment news, but it also has a feature in the “Help Section” of the app that includes resources for survivors of domestic violence.³⁶⁹ The application is disguised well, and it looks like a normal app that any person would use.³⁷⁰ As long as survivors have their location settings turned on, the “Help Section” finds shelters located nearby.³⁷¹ By pressing the “go” button, survivors can also create an audio or video recording of everything that is happening and transmit it to authorities and chosen contacts when they are in distress.³⁷² There are also links for survivors to educate themselves about domestic violence.³⁷³ Aspire News is not intended to be a replacement for calling 911 but can provide some additional help and resources for domestic violence survivors, especially when they are in the same location as their abuser.³⁷⁴

Police should understand the various technologies that can be used by domestic abusers in order to ensure the supervision of offenders and provide safety for survivors.³⁷⁵ In many states, domestic violence survivors cannot alter a shared family plan when the abuser or other party is the primary account holder despite the fact that “for many [survivors] of domestic violence, a wireless telephone is their lifeline to the community resources, life-saving services, and support network they need to leave their abuser and abusive environment.”³⁷⁶ However, some states are taking action to change these laws. For example, California Assembly Bill 1407, enacted in 2016, authorized a court to direct a wireless telephone service provider to transfer billing rights and responsibility to the requesting party in domestic violence cases.³⁷⁷

Advocates with the National Network to End Domestic Violence (“NNEDV”) are also taking steps to raise awareness around how technology impacts the lives of domestic violence survivors.³⁷⁸ NNEDV’s Safety Net Project works with communities, agencies, and technology companies to address the impact technology has on a survivor’s safety and privacy, educates survivors on the way to strategically use technology to keep themselves safe, trains law enforcement on

368. *Aspire News App*, WHEN GEORGIA SMILED: THE ROBIN MCGRAW REVELATION AND DR. PHIL FOUND., <https://www.whengeorgiasmiled.org/aspire-news-app/> (last visited Oct. 9, 2019).

369. See Kim LaCapria, *‘Aspire News’ App Allows Furtive Reporting of Abusive Relationships*, SNOPE (June 29, 2015), <https://www.snopes.com/2015/06/29/aspire-news-app/>.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. See Olsen, *supra* note 354, at 87.

376. 2015 Cal. Legis. Serv. 415 (West); see also Press Release, John Casey, Speaker Atkins’ Bill Protecting Victims of Domestic Violence Passes Committee (Apr. 28, 2015) (on file with author).

377. 2015 Cal. Legis. Serv. 415 (West).

378. See *Safety Net Project*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/content/technology-safety/> (last visited Jan. 16, 2020).

offenders' technological tactics, and advocates on behalf of domestic violence survivors.³⁷⁹

Federal and state laws need to adjust to address technological advancement and how it impacts domestic violence.³⁸⁰ All states have anti-stalking statutes, and Congress passed an anti-stalking statute in 1996, but many of these original statutes required the stalker to be visually or physically proximate to the survivor.³⁸¹ Since 1996, Congress and some states have modified their stalking statutes to reflect the use of technology in stalking cases.³⁸² For instance, Florida's stalking statute includes a definition of cyberstalking so that the language of the statute covers stalking through technological means, such as cell phones, GPS, and computers.³⁸³ Likewise, California's stalking statute describes "electronic communication devices" such as telephones, cellular phones, computers, video recorders, fax machines, or pagers.³⁸⁴ Cyberstalking laws typically address only stalking through the Internet.³⁸⁵ States are encouraged to follow the Model Stalking Code when reviewing and modifying their existing stalking laws.³⁸⁶ The 2007 revision of the Model Stalking Code covers many technological advances but is broader in coverage than most cyberstalking statutes.³⁸⁷

Along with cyberstalking, another form of emotional abuse has become more prevalent over the past few years.³⁸⁸ Nonconsensual pornography ("NCP"), colloquially known as "revenge porn," (a misnomer because "that term suggests that a scorned partner has shared an ex-partner's intimate images as a way to 'get back' at the ex-partner" where the true motivation is often power)³⁸⁹ is defined as the distribution of sexually graphic images or videos of individuals without their consent or knowledge.³⁹⁰ Similar to physical forms of domestic violence, the abusers

379. *Id.*

380. See Justine A. Dunlap, *Intimate Terrorism and Technology: There's an App for That*, 7 U. MASS. L. REV. 10, 24 (2012).

381. *Id.*

382. See FLA. STAT. § 784.048 (West, Westlaw through 2019 1st Reg. Sess. of 26th Leg.) (expanding the definition of cyberstalking).

383. *Id.*

384. See CAL. PENAL CODE § 646.9 (West, Westlaw through Ch. 870 of 2019 Reg. Sess.).

385. See NAT'L CTR. FOR VICTIMS OF CRIME, THE MODEL STALKING CODE REVISED: RESPONDING TO THE NEW REALITIES OF STALKING 16 (2007), available at <https://victimsofcrime.org/docs/default-source/src/model-stalking-code.pdf?sfvrsn=12>.

386. *Id.* at 23.

387. *Id.* at 15.

388. Haley Goldberg, *Revenge Porn: When Domestic Violence Goes Viral*, SELF (Mar. 21, 2017), <https://www.self.com/story/revenge-porn-domestic-violence>. For the purposes of this article, we categorize revenge porn as a form of domestic violence.

389. *What is Nonconsensual Image Sharing?*, WOMENSLAW.ORG, <https://www.womenslaw.org/about-abuse/abuse-using-technology/technology-tool-abuse/abuse-involving-texts-photos-and-videos-6> (last visited Jan. 16 2020).

390. See, e.g., *When Abusers Threaten Revenge Porn*, DOMESTIC SHELTERS.ORG (Sept. 30, 2016), <https://www.domesticshelters.org/domestic-violence-articles-information/when-abusers-threaten-revenge-porn#>. (framing domestic violence as abuse that includes psychological and emotional acts as well as physical acts. Nonconsensual pornography, which is quickly becoming one of the most common forms of control and intimidation of partners, is therefore a form of domestic violence.)

engaging in NCP are often significant others and trusted individuals who use personal images to harass past or current partners. As of 2017, one in eight social media users have been targets of NCP, with 15.8% of women and 9.3% of men reporting having been targeted.³⁹¹

NCP laws are still relatively new and are continuing to develop.³⁹² Federal legislation has been proposed but has not yet been enacted.³⁹³ Forty-six states, the District of Columbia, and Guam have adopted revenge porn laws,³⁹⁴ and Vermont's Supreme Court recently upheld its NCP statute in the face of constitutional challenge.³⁹⁵ In most states, in order to be found guilty of NCP, the distributor must send pictures or videos that are considered sexual in nature, such as "showing the [target's] intimate body parts or engaging in a sexual act."³⁹⁶ To be clear, in most jurisdictions, a perpetrator does not need to seek revenge on anyone, rather, the distributor must intend to distribute the sexually explicit video or photograph with the intent to "annoy or harass the [target] without their consent."³⁹⁷

IV. CONCLUSION

Domestic violence impacts everyone, and "while intimate partner violence . . . was once seen as an exclusively private family matter, it is increasingly being seen as an integral aspect of a larger system of social domination against women, the poor, people of color, sexual minorities, and immigrants."³⁹⁸ The American legal system has made tremendous strides in realizing the complexities of domestic violence and changing the once-exclusive narrative surrounding it to account for traditionally underrepresented survivors of violence.³⁹⁹ Federal and state laws have become more adept at addressing the needs of domestic violence survivors, but modern domestic violence laws still leave LGBT individuals and persons who do not conform to the image of an "ideal battered woman" unprotected. While Title IX held colleges more accountable for campus sexual assault and sexual harassment claims, the Trump Administration has pushed back. On the other hand, the trend toward mandatory protective measures against perpetrators of abuse aims to protect survivors and hold offenders accountable, but these policies

391. *Nonconsensual Pornography: A Common Offense*, CYBER CIV. RTS. INITIATIVE, <https://www.cybercivilrights.org/2017-research-infographic/> (last visited Jan. 16, 2020).

392. Goldberg, *supra* note 388, at para. 30.

393. See *Vermont v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (citing the Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016); Servicemember Intimate Privacy Protection Act, H.R. 1588, 115th Cong. (2017)).

394. *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIV. RTS. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Jan. 16, 2020).

395. See *VanBuren*, 214 A.3d at 794.

396. *State Revenge Porn Laws*, FINDLAW, <http://criminal.findlaw.com/criminal-charges/revenge-porn-laws-by-state.html> (last visited Jan. 16, 2020).

397. *Id.*

398. Beishline, *supra* note 238, at 1.

399. See, e.g., Dahlstedt, *supra* note 285, at 35 (discussing resolutions passed in Cincinnati and Baltimore "declaring that freedom from domestic violence is a fundamental human right").

undermine survivors' autonomy, credibility, and safety. Laws will continue to evolve. As a result of the evolution, policies that include presumptive arrest and non-coercive no-drop policies, rising public awareness of domestic violence, GPS tracking of protection orders, and a greater number of resources for survivors seeking help will likely be more effective at protecting and empowering survivors. Stricter laws that empower survivors will fortify public safety and ensure American society no longer tolerates domestic violence.