

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 955,930 incidents of violent crime perpetrated by intimate partners in 2022.²

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

1. Phyllis H. Niolon, Megan Kearns, Jenny Dills, Kirsten Rambo, Shalon Irving, Theresa L. Armstead, & Leah Gilbert, *Preventing Intimate Partner Violence Across the Lifespan: A Technical Package of Programs, Policies, and Practices*, CTRS. FOR DISEASE CONTROL & PREVENTION, 7 (2017), <https://perma.cc/SDP7-ZNCP>.

2. Alexandra Thompson & Susannah N. Tapp, *Criminal Victimization, 2022*, THE BUREAU OF JUS. STATISTICS, U.S. DEP’T OF JUST., 2022, 3 (Sept. 2023), <https://perma.cc/X5FH-FY3M>.

3. Beverly Tillery, Audacia Ray, Eliel Cruz, & Emily Waters, *Lesbian, Gay, Bisexual, Transgender, Queer and HIB-Affected Hate and Intimate Partner Violence in 2017*, NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, 36 (2018), <https://perma.cc/3TEV-KVJC>.

4. *The Language We Use*, WOMEN AGAINST ABUSE, <https://perma.cc/Z25G-93FX>.

5. *What is Domestic Violence?*, OFFICE OF VIOLENCE ON WOMEN, U.S. DEP’T OF JUST., <https://perma.cc/5RTL-SB3R>.

6. *See id.* at 490–91 (“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. *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) (explaining the term domestic violence as implying nothing specific about the relationship or the people in it).

8. Gendered language is used throughout this Article in part because of its 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.*

9. Tillery, Ray, Cruz, & Waters, *supra* note 3, at 14.

10. *Id.* at 15.

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 both concerns with and development of domestic violence law. This includes discussion of gender and cultural biases that survivors still face in court as of 2023, despite movements like #MeToo increasing public awareness of domestic and intimate partner violence. Part III concludes with a discussion of threats that survivors face in a digital age, including harassment by GPS and phone messages, developments which are leading some legislatures to implement laws 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 constructed funding streams to support local resources for survivors of domestic violence, generated ways to prevent domestic violence, and commissioned research to better understand the dynamics of domestic violence.¹⁵ Subsequent versions of VAWA incorporated 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, there are both criminal and civil laws relating to domestic violence. There is no uniform codification of criminal domestic violence law (or civil domestic violence law), thus states vary significantly in their statutory

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 *Toolkit: A Practical Guide to Stop Interpersonal Violence*, CREATIVE INTERVENTIONS, 74 (2012), <https://perma.cc/Y743-A7AF>.

12. *United States v. Morrison*, 529 U.S. 598, 618 (2000) (holding that “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. 433 (2013) (examining the past and current versions of VAWA).

14. See *id.* at 433 (noting that 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. 118-41).

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

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”) are 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 *Town of 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 if the state law creates a system to do so, 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 considered 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 has had four iterations since it was passed in 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994, each authorization of which allows VAWA to continue to receive funding.²³ VAWA (in all its iterations) has created a number of crucial funding streams and substantive laws that support survivors and work towards preventing domestic violence.²⁴ The first version of VAWA created the Office on Violence Against Women within the Department of Justice to implement the legislation and

17. See *Domestic Violence/Dating Violence*, WOMENSLAW.ORG (July 9, 2019), <https://perma.cc/H5Y2-QKHL> (“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 2023 Special B and C Sess. and the 2023 First Reg. Sess.); Cal. Fam. Code § 6211 (West, Westlaw through Ch. 1 of 2024 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://perma.cc/PNV6-NRP4> (“Though greatly underutilized, civil protection order codes include provisions that enable survivors to pursue economic relief, including access to material resources.”).

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

21. *Id.* at 756, 760, 768.

22. *Id.*

23. See *The 2022 Violence Against Women Act (VAWA) Reauthorization*, CONG. RSCH. SERV. (May 22, 2023), <https://perma.cc/AMR8-63W7>.

24. *Violence Against Women Act (VAWA) and Related Programs Appropriations for Fiscal Years 18, 19, 20, and 21*, NAT’L NETWORK TO END DOMESTIC VIOLENCE (July 2020), <https://perma.cc/DBM8-DRAN>.

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 concentrated on improving both prevention of and response to domestic violence amongst traditionally underserved communities:

25. *About the Office on Violence Against Women*, OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUST. (2016), <https://perma.cc/5QL4-5ULT>.

26. See Suraji R. Wagage, *When the Consequences Are Life and Death: Pretrial Detention for Domestic Violence Offenders*, 7 DREXEL L. REV. 195, 220, 234 (2015) (“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 618–19.

31. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (deciding that 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 617–18 (noting that “the 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 P.L. 118-41).

immigrant women, LGBTQIA+ 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 human trafficking.³⁷ The U-visa system was created to encourage unauthorized immigrants to cooperate with law enforcement without the fear of deportation.³⁸ An 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 noncitizen.”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; however, 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

In 2005, Congress again reauthorized and expanded the VAWA in order to provide assistance to a survivor’s immediate family.⁴³ For example, Title VIII,

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, 122 (2003); *Domestic (Intimate Partner) Violence Fast Facts*, CNN (May 24, 2023, 4:58 PM), <https://perma.cc/9MP9-UPZW>.

35. CONG. RSCH. SERV., *supra* note 23, at 9–10.

36. *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, Am. Immigr. Council (2019), <https://perma.cc/TV3P-QKJ7> [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, *Recent Development: Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN’S L.J. 137 (2002) (providing a comprehensive discussion of the BIWPA). Sections 1509–11 of the BIWPA also allow 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.*

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].

which is an immigration provision included in the 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 The 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 was temporarily extended 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 Despite the lapse in authorization, VAWA programs received \$559 million in 2019.⁵⁰ VAWA was not officially reauthorized until March 2022.⁵¹ In the three years between, VAWA was not officially authorized, but many of the programs remained funded.⁵¹

The Violence Against Women Act Reauthorization Act of 2022 (“VAWA 2022”) approved many of the pre-existing programs, along with new additions.⁵² VAWA 2022 included funding to improve college campus program grants to develop prevention education, increase access to housing protections for survivors, and restore Native American women’s ability to fully respond to and report sexual violence on their lands.⁵³ VAWA 2022 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.”⁵⁴

Additional programs include programs aimed at addressing the backlog of sexual assault kits and the supply of Sexual Assault Forensic Exams.⁵⁵ In addition,

44. Nat’l Task Force To End Sexual & Domestic Violence Against Women, Violence Against Women Act 2005 Title VIII — Protection of Battered and Trafficked Immigrants (2005), <https://perma.cc/L2EF-G35H>.

45. *Id.*

46. *Id.*

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

48. Violence Against Women Reauthorization Act of 2013 § 801.

49. *Violence Against Women Act Reauthorization Threatened*, ABA (May 16, 2019), <https://perma.cc/4L54-UYJE>.

50. Arianna Skibell, ‘It’s a real loss for survivors.’ Domestic violence law stalled in U.S. Senate, WIS. EXAMINER (Jan. 24, 2020), <https://perma.cc/Y9XS-8WBC>.

51. Annie Karnie, *House Passes Bill to Bolster Protections for Women Facing Violence*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/us/politics/house-passes-violence-against-women-act.html>.

52. Skibell, *supra* note 50.

53. H. COMM. ON THE JUDICIARY, 116TH CONG., The Violence Against Women Reauthorization Act of 2019 (2019), <https://perma.cc/9BWF-RJSQ>.

54. *Id.*

55. *Id.* at 10.

there are new programs aimed at cybercrime and the distribution of intimate photos, along with trauma-informed approaches.⁵⁶ Lastly, VAWA 2022 increased the Tribal criminal jurisdiction and included Native Hawaiians for VAWA grant eligibility.⁵⁷

a. Immigrant Women. The Trump administration's stricter immigration laws caused unauthorized immigrant women experiencing intimate partner violence to choose between seeking protection and risking deportation or enduring continued abuse.⁵⁸ Reporting of domestic violence by immigrant populations decreased as a result of these changes. In March 2017, about a year after the Trump administration implemented new immigration laws, the Los Angeles police department noted a ten percent decrease in domestic violence reports and a twenty-five percent decrease in rape reports in Latinx occupied areas.⁵⁹ The Houston police department also noticed a forty-three percent decrease in reported rapes in Latinx occupied areas.⁶⁰ In addition, "[a] recent survey of over 700 advocates and legal service providers found that 62% 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."⁶¹

In general, the creation of the U-visa has been central to efforts to prevent undocumented immigrant women from underreporting domestic violence offenses.⁶² By granting these survivors temporary legal status, the U-visa is meant to encourage reporting of domestic violence and cooperation with local enforcement while removing the fear of deportation.⁶³ Taking steps to provide assistance to immigrant women is significant, as between thirty percent to fifty percent of refugee and immigrant women experience domestic violence.⁶⁴ 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

56. *Id.* at 10–11.

57. *Id.* at 9.

58. Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, THE GUARDIAN (Mar. 23, 2017, 6:30 PM), <https://perma.cc/K3BH-GTPW>.

59. Maya Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*, TIME (May 30, 2017, 4:11 PM), <https://perma.cc/2S43-7QBN>.

60. *Id.*

61. *Id.*

62. Min Ji Ku, *Violence Against Women Act and Its Impact on Immigrant Women*, CRIMINAL LAW PRACTITIONER (Mar. 8, 2013, 7:00 AM), <https://perma.cc/E6ZB-D5BR>.

63. See Lindsey J. Gill, *Secure Communities: Burdening Local Law Enforcement and Undermining the U-Visa*, 54 WM. & MARY L. REV. 2055, 2065 (2013) ("Recognizing that immigrants were particularly vulnerable to violent-crime victimization, Congress asserted that all victims should be able to report crimes and participate fully in the investigation and prosecution of those crimes without fear of deportation."); 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, 1069–71 (2012) (discussing how VAWA aims to protect women through the U-visa).

64. 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).

children, and a lack of cultural awareness in the services they seek out.⁶⁵ A 2013 study found that two-thirds of unauthorized Latinx immigrants were “less likely” to report a crime against them to law enforcement.⁶⁶ Abusers, consequently, can use survivors’ immigration status to control or manipulate them.⁶⁷ For example, clients of Ayuda, an organization that “provides legal, social, and language services to help low-income immigrants,”⁶⁸ said their abusers would threaten to take their children away or threaten to report them to the authorities.⁶⁹ Survivors also may feel they cannot live independently of their abusers because they may be unable to find a job due to their immigration status.⁷⁰

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 their risk of deportation.⁷¹ 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.⁷²

However, procedural issues have delayed many immigrants from moving forward in the U-visa application process, as a backlog of applications increased the wait time from 11 months in 2015 to at least five years.⁷³ The Biden Administration addressed this backlog issue from the previous Administration by speeding up the temporary work permit process in order to move forward in the process for those waiting on U-visa applications.⁷⁴

b. LGBTQIA+ Individuals. A key addition to VAWA 2013 was the LGBTQIA+ inclusive language added in, which had been missing from earlier iterations.⁷⁵

65. Rieser-Murphy & DeMarco, *supra* note 63, at 1060–61.

66. 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).

67. 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).

68. AYUDA, <https://perma.cc/MH24-2BFD>.

69. Olivares, *supra* note 67, at 158–59.

70. *Id.* at 159.

71. Nora Caplan-Bricker, “I Wish I’d Never Called the Police,” SLATE (Mar. 19, 2017, 8:12 PM), <https://perma.cc/K7VJ-BH2A>.

72. Kate Segal, *Immigration Orders Undermine Violence Against Women Act Protections*, THE HILL (Mar. 13, 2017, 4:30 PM), <https://perma.cc/6LB3-AJUS>.

73. Eileen Sullivan, *Biden extends temporary work permissions for some undocumented immigrants who are victims of crime*, N.Y. TIMES (June 14, 2021), <https://perma.cc/74V4-ZSJL>.

74. *Id.*; Press Release, Dep’t of Homeland Sec., Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners (June 14, 2021), <https://perma.cc/RC9T-9SGK>.

75. Many scholars have discussed why previous iterations of VAWA did not explicitly mention LGBTQIA+ 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).

While there are a number of similarities to the violence that occurs within heterosexual relationships,⁷⁶ LGBTQIA+ survivors of domestic violence face unique challenges to accessing aid.⁷⁷ These individuals may be less likely to report instances of abuse because of a perception that the police are unfriendly to the LGBTQIA+ community and that societal homophobia will prevent them from getting a fair hearing.⁷⁸ Moreover, some LGBTQIA+ individuals are turned away from shelters that are tailored to heterosexual females and often do not have space for transgender individuals.⁷⁹ Several Republican Representatives have pushed to prohibit service providers from allowing transgender women into women's shelters altogether.⁸⁰ 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.⁸¹

Nearly all states, whether through gender specific or gender neutral language, allow LGBTQIA+ domestic abuse survivors to apply for a civil protection order.⁸² However, there are a few notable exceptions: South Carolina⁸³ and North Carolina.⁸⁴ On the federal level, VAWA 2013 specifically addressed LGBTQIA+ 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.⁸⁵ VAWA 2022 continued these protections for LGBTQ individuals.⁸⁶ It also allows states to use federal funding to improve responses to domestic violence among the LGBTQIA+ community.⁸⁷ 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."⁸⁸

c. Native Americans. VAWA 2000, VAWA 2013, and VAWA 2022 also address concerns of Native American domestic violence victims. VAWA 2000

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

77. *Id.* at 558–59.

78. *See id.* at 561–63.

79. *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).

80. Emily Cochrane, *House Expands Domestic Violence Gun Controls in Rebuke to N.R.A.*, N.Y. TIMES (Apr. 4 2019), <https://perma.cc/PKA8-PDPB>.

81. Samons, *supra* note 79, at 421–23.

82. *Can I get a Restraining Order Against my Same-Sex Partner?*, WomensLaw.org, <https://perma.cc/9K7L-T26E>.

83. *Id.*

84. *Id.*

85. 34 U.S.C.A § 12291 (West, Westlaw current through Pub. L. No. 118-119).

86. H. COMM. ON THE JUDICIARY, 116TH CONG., *supra* note 53.

87. *See* Katie Miller, *LGBT People Will Receive First-Ever Domestic Violence Protections Under VAWA*, ThinkProgress.org (Feb. 28, 2013), <https://perma.cc/J5KL-7SJJ>.

88. Samons, *supra* note 79, at 430.

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.⁸⁹ Native American women are at an increased risk for domestic violence and sexual assault.⁹⁰ More than forty-seven percent of Native American and Alaska Native women will be subjected to domestic violence in their lifetimes.⁹¹ 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).⁹² Previously, tribal courts could not prosecute a defendant who was not Native American, even when the crime was committed on tribal land.⁹³ 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.⁹⁴ 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.⁹⁵

The VAWA 2022 reauthorization better addresses the unique challenges Native American survivors of domestic violence experience. Notably, the VAWA 2022 reauthorization 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.⁹⁶ Thus far, seven states—Wyoming, New Mexico, Montana, Minnesota, Arizona, California, Nebraska, Wisconsin, and Utah—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

89. 18 U.S.C.A. § 2265 (West, Westlaw current through Pub. L. No. 118-119); *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).

90. Native American women experience higher overall rates of physical violence than non-Native women. *See* U.S. Dept. of Just., *Five Things About Violence Against American Indian and Alaska Native Men and Women* (May 2023), <https://perma.cc/N6G8-FVRA> (noting that Congress has found an epidemic of violence against Native women).

91. 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://perma.cc/ATY8-8JAZ> (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).

92. *See Ending Violence Against Native Women*, Indian L. Resource Ctr., <https://perma.cc/P3DA-8R3D>.

93. 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”).

94. 25 U.S.C.A. § 1304 (West, Westlaw through Pub. L. No. 118-119).

95. 18 U.S.C.A. § 2265 (West, Westlaw through Pub. L. No. 118-119).

96. Melodie Edwards, *7 States Step Up Efforts to Fight Violence Against Indigenous Women*, NPR (July 23, 2019), <https://perma.cc/9TRJ-T4FQ>.

Criminal Justice to prosecute murder.⁹⁷ Nonetheless, housing, job training, and other preventative measures are largely absent from the provisions concerning Native women.⁹⁸

Additionally, the VAWA 2022 reauthorization acknowledges the distinctive jurisdictional problems Native women, and particularly Native women living in Alaska, experience.⁹⁹ In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court narrowed which territories could be considered “Indian country” in Alaska.¹⁰⁰ Since this decision, it has been exceedingly difficult for Alaska Native tribes to prosecute non-Native abusers because of limited jurisdiction. The VAWA 2022 reauthorization 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.”¹⁰¹ The VAWA 2022 reauthorization seeks to make prosecution of violent offenders easier for Native communities by allocating funding and resources towards supporting and expanding tribal jurisdiction.

The reauthorization of VAWA in 2022 built on the 2013 VAWA SDVCJ jurisdiction provision by amending SDVCJ to include “Special Tribal Criminal Jurisdiction” (“STCJ”) over a list of covered crimes.¹⁰² This new list expands the list included under 2013 VAWA, and includes “assault of Tribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, and stalking.”¹⁰³ VAWA 2022 also includes provisions recognizing and affirming “Alaska Tribes’ inherent authority to exercise criminal and civil jurisdiction over all Indians present in their Villages and their courts’ full civil jurisdiction to issue and enforce protection orders in matters arising within the Village or otherwise within their authority” — an important expansion of Tribal sovereignty.¹⁰⁴

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 that the mandatory arrest policies have caused domestic violence to go even more underreported than before the enactment of VAWA 2013 because survivors might fear their partners will be

97. *Id.*; Devon Haynie, *How States Are Addressing Violence Against Indigenous Women*, U.S. NEWS (Nov. 1, 2021, 1:06 PM), <https://perma.cc/XD4E-5QTK>.

98. See *FACT SHEET: Biden-Harris Administration Celebrates the Twenty-Ninth Anniversary of the Violence Against Women Act*, THE WHITE HOUSE (Sep. 13, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/13/fact-sheet-biden-harris-administration-celebrates-the-twenty-ninth-anniversary-of-the-violence-against-women-act/>.

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

100. See THE WHITE HOUSE *supra*, note 98; *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).

101. See *id.*

102. See *2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, U.S. DEP’T OF JUST., <https://perma.cc/GSQ6-6LA5>.

103. *Id.*

104. *Id.*

automatically arrested and put in jail.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ 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 instead be given to prevention and job training programs.¹⁰⁸ 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.¹⁰⁹

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 on average 70 women are shot to death by their intimate partners every month in the United States.¹¹⁰ Over two-thirds of women killed by their intimate partners are killed by guns.¹¹¹ 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.¹¹² The Lautenberg Amendment to the 1996 Gun Control Act extended this prohibition to non-felons.¹¹³ 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.¹¹⁴ The Lautenberg Amendment, however, provides no public interest exemptions for police, military

105. Kate Pickert, *What's Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), <https://perma.cc/VSP5-AK23>.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Guns and Violence Against Women*, EVERYTOWN FOR GUN SAFETY (Mar. 10, 2023), <https://perma.cc/JD9W-AE7Q> (citing Centers for Disease Control and Prevention, National Violent Death Reporting System (NVDRS) 2019).

111. *See Domestic Violence & Firearms*, Giffords L. Ctr. to Prevent Gun Violence, <https://perma.cc/3X2X-3TFJ> (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).

112. 18 U.S.C. § 922(g)(8)(B)–(9) (West, Westlaw current through Pub. L. No. 118–19).

113. *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).

114. 18 U.S.C. § 922(g)(8–9).

officers, or government officials.¹¹⁵ 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.¹¹⁶

While the Lautenberg Amendment has been challenged a number of times on the basis of the Fifth Amendment right to due process¹¹⁷ and the Fourteenth Amendment right to equal protection violations,¹¹⁸ courts have rejected these challenges and have declared the amendment constitutional.¹¹⁹ The primary challenge to the Lautenberg Amendment came in *Gillespie v. City of Indianapolis*.¹²⁰ Gillespie, a police officer, was convicted of a misdemeanor crime of domestic violence against his ex-wife.¹²¹ 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.¹²² 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,¹²³ equal protection claims under the Fifth Amendment,¹²⁴ and a Second Amendment challenge based on his right to bear arms.¹²⁵

115. 18 U.S.C. § 925(a)(1) (listing the statutory exemptions, which does not include law enforcement, military, and government officials).

116. See, e.g., *Gillespie v. City of Indianapolis*, 13 F. Supp. 2d 811, 814–15 (S.D. Ind. 1998); see also Jay Buckley, *Firearms for Felons? A Proposal to Prohibit Felons from Possessing Firearms in Vermont*, 35 Vt. L. Rev. 957, 970 (2011) (discussing the Law Enforcement Amendment's negative consequences on the family and reporting rates).

117. See, e.g., *United States v. Beavers*, 206 F.3d 706, 709–10 (6th Cir. 2000); *United States v. Bostic*, 168 F.3d 718, 722–23 (4th Cir. 1999).

118. See Jessica A. Golden, Note, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementation Flaws*, 29 FORDHAM URB. L.J. 427, 453 (2001).

119. 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).

120. See *Gillespie*, 13 F. Supp. 2d at 814.

121. *Id.*

122. *Id.* at 814–15.

123. *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”).

124. *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).

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

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.¹²⁶ 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."¹²⁷ In response to Gillespie's argument that the amendment should be scrutinized under a compelling governmental interest standard,¹²⁸ the Court held that "the right to bear arms . . . is not a fundamental right for equal protection purposes."¹²⁹ 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 a compelling interest,¹³⁰ and the Lautenberg Amendment was sufficiently narrowly tailored.¹³¹ The amendment survived and has influenced similar state legislation in the past several years.¹³² However, the Lautenberg Amendment's passage raises unique commerce clause issues, and the amendment is possibly unconstitutional.¹³³

The Supreme Court has previously taken steps to safeguard the protections provided to survivors of domestic violence by the Lautenberg Amendment, though it is unclear whether this will remain true as we await their decision in *United States v. Rahimi*. In November 2023, the U.S. Supreme Court heard *United States v. Rahimi*, a case that will determine whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.¹³⁴ In 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 Ten years later, the Supreme Court addressed the issue of the Lautenberg Amendment's application to reckless assaults in *Voisine*. In *Voisine*, two male plaintiffs, who were arrested for possessing firearms after committing reckless assaults against their

126. *Gillespie*, 13 F. Supp. 2d at 823 (citing *United States v. Lewis*, 445 U.S. 55 (1980)).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 827.

131. *See id.*

132. *See* Buckey, *supra* note 116 (discussing a proposed Vermont gun law that contains language almost identical to the Lautenberg Amendment).

133. *See* Golden, *supra* note 118, at 430.

134. *United States v. Rahimi*, 2022 WL 2070392 (C.A.5 (Tex.), 2022); *see also* Rachel Reed, *Do People Subject to Restraining Orders Retain Second Amendment Rights to Own Guns?*, Harvard Law Today (Oct. 31, 2023), <https://perma.cc/FFZ2-SAUL>.

135. *Voisine v. United States*, 579 U.S. 686, 691 (2016) (citations omitted).

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

137. *See id.*

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, several loopholes still exist, leaving survivors of domestic violence vulnerable to the possibility that their abuser will obtain access to a firearm. Although the Bipartisan Safer Communities Act of 2022 (BSCA) expanded the prohibition preventing convicted domestic abusers from buying or owning firearms to include those who abused current or former dating partners, “[t]he law left out dating partners under domestic violence restraining orders, who continue to remain federally eligible to access firearms.”¹⁴¹ Furthermore, the BSCA does not prohibit people convicted of misdemeanor stalking crimes from owning a gun.¹⁴²

This is a critical loophole, as one study revealed seventy-six percent of women murdered by their partners had been stalked within a year before death.¹⁴³ To address this issue, Congress introduced the “Strengthening Protections for Domestic Violence and Stalking Survivors Act of 2023,” which would prohibit individuals who are convicted of the misdemeanor crime of stalking from possessing firearms.¹⁴⁴ The Act also aims to protect survivors of dating relationships with domestic violence restraining orders by proposing to redefine “intimate partner” to include someone with whom there is or was a dating relationship.¹⁴⁵ The complete closure of the boyfriend loophole and other expansions of gun control regulations in the pending legislation are critical measures.¹⁴⁶ According to a

138. See *Voisine*, 579 U.S. at 689-690.

139. See *id.* at 699.

140. *Id.* at 692.

141. See *Guns and Violence Against Women*, *supra* note 110, at 10-11.

142. *Id.* at 11.

143. *Id.* (citing Judith M. McFarlane, Jacquelyn C. Cambell, Susan Wilt, Carolyn J. Sachs, Yvonne Ulrich, & Xiao Xu, *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUD.: AN INTERDISC. & INT'L J. 300, 308 (Nov. 1999)).

144. Strengthening Protections for Domestic Violence and Stalking Survivors Act of 2023, S. 321, 118th Cong. (2023).

145. See *id.*

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

CDC study, over half of all female homicides are caused by either a current or previous intimate partner, across all racial and ethnic lines.¹⁴⁷

3. Title IX

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination on the basis of sex in federally-funded educational institutions and programs.¹⁴⁸ Despite underreporting,¹⁴⁹ statistics reveal college students experience high rates of sexual assault and sexual harassment, 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.¹⁵⁰ Women of color undergraduate students have disproportionately low rates of accessing resources for survivors of sexual assault, and some studies indicate that they may also experience violence at an even higher rate.¹⁵¹ Furthermore, transgender and gender non-conforming students disproportionately experience sexual assault.¹⁵²

In 2011, 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.¹⁵³ In September 2017, Secretary of Education Betsy DeVos rescinded the Obama administration’s Title IX guidelines.¹⁵⁴ 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.¹⁵⁵ The “Dear Colleague” letters contained guidance on universities’ obligations to prevent and respond to sexual assault under Title IX and imposed requirements that universities complete expedient investigations of accusations, lower the standard of evidence needed to hold an accused student responsible, prevent harassment of survivors on campus, and stop making survivors

147. Emiko Petrosky, Janet M. Blair, Carter J. Betz, Katherine A. Fowler, Shane P.D. Jack, & Bridget H. Lyons, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence*, CDC (July 21, 2017), <https://perma.cc/BU3F-4JTA>.

148. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681–1688.

149. *See Campus Sexual Violence: Statistics*, RAINN <https://perma.cc/FYT6-DG2L>.

150. Juliette Grimmer, W. Scott Lewis, Sandra K. Schuster, Brett A. Sokolow, Daniel C. Swinton, & Brian Van Brunt, *The Challenge of Title IX Responses to Campus Relationship and Intimate Partner Violence*, ATIXA, 1, 5 <https://perma.cc/B3D9-YTUW>.

151. *See Harris, Jessica C., Women of Color Undergraduate Students’ Experiences with Campus Sexual Assault: An Intersectional Analysis*, The Review of Higher Education, Vol. 44, No. 1, Fall 2020, at 3–7.

152. *Campus Sexual Violence: Statistics*, RAINN, <https://perma.cc/FYT6-DG2L>.

153. *Dear Colleague Letter: Sexual Violence*, U.S. DEP’T OF EDUC. 1 (Apr. 4, 2011), <https://perma.cc/L377-83PX>.

154. Katie Reilly, *Betsy DeVos Moves to End Obama’s Guidelines for Campus Sexual Assault Investigations*, TIME (Sept. 7, 2017, 5:33 PM), <https://perma.cc/K3T9-QHUR>.

155. *Id.*

sign nondisclosure agreements.¹⁵⁶ In May 2020, the Department of Education released its Title IX regulations,¹⁵⁷ which curbed schools' ability to address allegations of sexual misconduct. Because the Biden administration has yet to finalize its Title IX regulations, the 2020 regulations remain in effect.¹⁵⁸

The 2020 regulations narrowed 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 By contrast, the 2020 rules defined sexual harassment under Title IX as conduct on the basis of sex that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education."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, under the 2020 regulations, schools are responsible for sexual misconduct only if "a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."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 2020 regulations 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

156. Christina Cauterucci, *What Will Happen to Title IX Under Trump?*, SLATE (Feb. 2, 2017, 5:02 PM), <https://perma.cc/D2L5-4X5T>.

157. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 at 30036 (May 19, 2020), <https://perma.cc/HBV4-GWA5> [hereinafter 2020 Regulations].

158. Knott, Katherine, *Students Press Biden Administration to Finalize New Title IX Rules*, INSIDE HIGHER ED. (Sept. 12, 2023), <https://perma.cc/4VU2-6X6P>.

159. Dear Colleague Letter, *supra* note 153.

160. *Id.* at 30033.

161. *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T OF EDUC. 1, 29 (Apr. 29, 2014), <https://perma.cc/4MUL-NW6B>.

162. See 2020 Regulations *supra* note 157, at 30087. However, the 2020 regulations note that "nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction by occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States." *Id.* at 30038.

163. Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://perma.cc/2C3Z-8MQK>.

164. See 2020 regulations, *supra* note 157, at 30030. Under the Obama-era guidance, schools are responsible for failing to address harassment when a school "knows or reasonably should know" about the offense. See Dear Colleague Letter, *supra* note 153, at 4.

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 raises 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 2020 regulations is its live-hearing requirement, under which colleges are required to conduct a live hearing before holding someone responsible for sexual misconduct.¹⁶⁸ The rules also allow someone accused of sexual assault to cross-examine their accuser at the live hearing.¹⁶⁹ 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.¹⁷⁰

President Biden’s Department of Education took its first substantive action regarding Title IX on May 20, 2021, when its Office for Civil Rights informed the public of a virtual public hearing it would host across one week in June 2021.¹⁷¹ The hearing was attended by more than 280 students, educators, and public advocates, who addressed a range of issues falling under Title IX, including sexual harassment and sexual violence.¹⁷² President Biden’s Department of Education thereafter released its proposed regulations on July 12, 2022, in large-part rescinding the 2018 rules on the grounds that they “[did] not best fulfill the requirement of Title IX ... that schools and institutions that receive Federal

165. Under the proposed rules, a school acts with “deliberate indifference only when it responds to sexual harassment in a manner that is “clearly unreasonable in light of the known circumstances.” 2020 Regulations, *supra* note 157, at 30091.

166. *Id.* at 30033.

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://perma.cc/59HM-GYCE>.

168. 2020 Regulations, *supra* note 157, at 30053–54.

169. Suzanne Eckes, R. Shep Melnick, & Kimberly J. Robinson, *Reactions to the Biden administration’s proposed Title IX changes from education law scholars*, BROOKINGS (June 30, 2022), <https://perma.cc/7NT7-E6K5>.

170. Adam Harris, *Betsy DeVos’s Sexual-Assault Rules Would Let the Accused Cross-Examine Accusers*, THE ATLANTIC (Nov. 17, 2018), <https://perma.cc/9KGS-DXEG>.

171. *Announcement of Public Hearing: Title IX of the Education Amendments of 1972*, U.S. DEP’T OF EDUC. (May 20, 2021), <https://perma.cc/HGX5-3J2E>.

172. *June 2021 Title IX Public Hearing*, U.S. DEP’T OF EDUC. (June 1, 2023), <https://perma.cc/95YD-CXT3>.

financial assistance eliminate discrimination on the basis of sex in their education programs or activities.”¹⁷³ For example, the proposed regulations expanded the definition of sex-based discrimination to “address all complaints of sex discrimination,”¹⁷⁴ including sexual harassment, sexual violence, or discrimination based on sexual orientation and gender identity.”¹⁷⁵ Furthermore, contrary to the 2018 regulations’ limited geographic scope, the 2022 regulations specify that a “recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to that hostile environment occurred outside the recipient’s education or activity or outside the United States.”¹⁷⁶ The 2020 regulations additionally depart from the 2018 regulations by “enabl[ing] recipients to tailor procedures to be effective at addressing sex- discrimination in their educational environment by providing an option to conduct live hearings with cross-examination,” but not requiring it.¹⁷⁷

The Administrative Procedure Act’s notice-and-comment rulemaking process requires a 60-day public comment period before the Department of Education can finalize the rules.¹⁷⁸ The comment period concluded on September 12, 2022, culminating in more than 240,000 public comments – almost twice the amount received during the Department’s last rulemaking on Title IX.¹⁷⁹ Nonetheless, the Department of Education has yet to promulgate its final regulations, a necessary step in replacing the Trump-era regulations that are still in effect. In February 2024, the Department of Education sent its updates to the Office of Management and Budget for its long-awaited final review.¹⁸⁰

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.¹⁸¹ Lawmakers, courts, and experts often

173. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390 (July 12, 2022), (codified as 34 C.F.R. 106), <https://perma.cc/7WT2-6DKQ>.

174. *Id.* at 41408.

175. *Id.* at 41392.

176. *Id.* at 41402. Illuminating this principle, the proposed regulations provide the example of a teacher’s sexual harassment of a student “likely” constituting sexual harassment even if the harassment occurs off-campus, off-school grounds, or outside a school-sponsored activity, as it is still “under the school’s disciplinary authority.” *Id.*

177. *Id.* at 41397.

178. *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comments*, U.S. DEP’T OF EDUC. (June 23, 2022), <https://perma.cc/L88Z-9K9F>.

179. *A Timely Update on Title IX Ruling*, U.S. DEP’T OF EDUC. (May 26, 2023), <https://perma.cc/V94G-6AA2>.

180. Knott, Katherine, *Education Department Moves New Title IX Rule Forward*, INSIDE HIGHER ED. (Feb. 6, 2024), <https://perma.cc/2LWQ-SYLQ>.

181. 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://perma.cc/5674-55BX> (use the drop-down menu on the left to access resources on the laws of all 50 states).

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, and yet remain heavily criticized.¹⁸² Criminal domestic violence law also struggles to protect LGBTQIA+ domestic abuse survivors whose relationship power dynamics are often lost on juries more familiar with the power dynamics of heterosexual relationships.¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶ Some states, however, treat the violation as a felony if the

182. See generally C.I. Eckhardt, & A.A. Massa, *Psychological theories of intimate partner violence*, in HANDBOOK OF INTERPERSONAL VIOLENCE AND ABUSE ACROSS THE LIFESPAN, 2375–97 (Oct. 13, 2021).

183. Krisana M. Hodges, Note, *Trouble in Paradise: Barriers to Addressing Domestic Violence in Lesbian Relationships*, 9 TULANE L. REV. OF LAW & SEXUALITY 311, 326–27 (1999) (discussing how judges and jurors struggle to conceptualize a woman as a perpetrator of domestic violence, often disbelieving the experiences of survivors of domestic violence in lesbian relationships).

184. For a comprehensive resource on all state domestic violence legislation, see *Know the Laws: State Law Overview*, *supra* note 181.

185. *Id.*

186. ALA. CODE § 13A-6-90 (West, Westlaw through Act 2024-35 of 2024 Reg. Sess.); ALASKA STAT.CODE .§ 18.65.850 (West, Westlaw through 2024 Reg. Sess.); ARIZ. REV. STAT. ANN. § 13-2923 (West, Westlaw through the 2d Reg. Sess. of the 56th Leg. (2024)); ARK. CODE ANN § 9-15-207(b) (West, Westlaw through 2023 Reg. Sess. of the 94th Ark. Gen. Assemb.); CAL. PENAL CODE § 646.9 (West, Westlaw through 2024 Reg. Sess.); COLO. REV. STAT. ANN § 18-6-803.5(2)(a) (West, Westlaw through 2024 Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-181d (West, Westlaw through 2023 Reg. Sess. & 2023 Sept. Spec. Sess.); DEL. CODE ANN. TIT.10, § 1046(i) (West, Westlaw through 152d Gen. Assemb. (2023–2024)); D.C. CODE § 16-1005(g) (West, Westlaw through Jan. 5, 2024); FLA. STAT. ANN. § 741.31 (West, Westlaw through 2024 1st Reg. Sess.); GA. CODE ANN. § 16-5-90 (West, Westlaw through 2023 Sess. of the Gen. Assemb.); HAW. REV. STAT. § 586-11 (West, Westlaw through 2024 Reg. Sess.); IDAHO CODE ANN § 39-6312(1) (West, Westlaw through 2024 2nd Reg. Sess. of the 67th Idaho Leg.); ILL. COMP. STAT. ANN. 725 § 5/112A-23 (West, Westlaw through P.A. 103-583 of the 2023 Reg. Sess.); IND. CODE ANN § 31-15-5-1 (West, Westlaw through 2023 1st Reg. Sess. of the 123rd Gen. Assemb.); IOWA CODE ANN. § 708.11 (West, Westlaw through 2024 Reg. Sess.); KAN. STAT. ANN. § 60-3107 (West, Westlaw through 2024 Reg. Sess.); KY. REV. STAT. ANN § 403.763(2) (West, Westlaw through 2024 Reg. Sess.); LA. REV. STAT. ANN. § 14:79(A)(1)(a) (West, Westlaw through 2023 Reg. Sess.); ME. REV. STAT. TIT. 19-A, § 4113 (West, Westlaw through 2023 Reg. Sess.); MD. CODE. ANN., FAM. LAW § 4-509(a) (West, Westlaw through 2023 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. CH.209A, § 7 (West, Westlaw through 2023 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 600.2950a (West, Westlaw through P.A. 2024, No. 23 of the 2024 Reg. Sess. of the 102d Leg.); MINN. STAT. ANN. § 609.749 (West, Westlaw through 2024 Reg. Sess.); MISS. CODE ANN. § 93-21-21 (West, Westlaw through 2024 Reg. Sess.); MO. ANN. STAT. § 455.085(7) (West, Westlaw through 2023 1st Reg. Sess. of the 102d Gen. Assemb.); MONT. CODE ANN. § 45-5-626 (West, Westlaw through 2023 Sess.); NEB. REV. STAT. ANN. § 42-924(4) (West, Westlaw through 2d Reg. Sess. of the 108th Leg. (2024)); NEV. REV.

abuser has previously violated a protection order.¹⁸⁷ A majority of jurisdictions also provide for contempt charges to be brought against an individual who violates a protection order.¹⁸⁸

STAT. ANN. § 33.100 (West, Westlaw through 82d Reg. and 35th Spec. Sess.); N.H. REV. STAT. ANN. § 173-B:9(III) (West, Westlaw through Ch. 6 of the 2024 Reg. Sess.); N.J. STAT. ANN. § 2C:12-10 (West, Westlaw through L.2023, c. 228 & J.R. No. 15); N.M. STAT. ANN. § 40-13-6(F) (West, Westlaw through 2d Reg. Sess. of the 56th Leg. (2023)); 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 2024 Reg. Sess.); N.D. CENT. CODE ANN. § 14-07.1-06 (West, Westlaw through 2023 Reg. and Spec. Sess.); OHIO REV. CODE ANN. § 2919.27 (B)(2) (West, Westlaw through File 20 of the 135th Gen. Assemb. (2023-2024)); OR. REV. STAT. ANN. § 163.732 (West, Westlaw through 2023 Reg. Sess. & Spec. Sess. of the 82d Leg. Assemb.); PA. STAT. AND CONS. STAT. ANN. 23 § 6108 (West, Westlaw through 2023 Reg. Sess. Act 33); R.I. GEN. LAWS ANN. § 15-15-3 (West, Westlaw through 2023 Reg. Sess.); S.C. CODE ANN. § 16-3-1700(H) (West, Westlaw through 2024 Sess.); S.D. CODIFIED LAWS § 22-19A-2 (West, Westlaw through 2023 Reg. Sess. and Sup. Ct. Rule 23-17); TENN. CODE ANN. § 39-17-315 (West, Westlaw through 2024 Reg. Sess. of the 113th Gen. Assemb.); TEX. FAM. CODE ANN. § 85.026 (West, Westlaw through 2023 Reg. Sess. of the 88th Leg.); UTAH CODE ANN. § 76-5-106.5 (West, Westlaw through 2023 2d Spec. Sess.); VT. STAT. ANN. TIT. 12, § 5133 (West, Westlaw through 2023–2024 Adj. Sess. Vt. Gen. Assemb.); VA. CODE ANN. § 16.1-253 (West, Westlaw through 2023 Reg. and Spec. Sess.); WASH. REV. CODE ANN. § 7.105.450 (West, Westlaw through 2023 Reg. and 1st Spec. Sess.); W. VA. CODE ANN. § 48-27-903(a) (West, Westlaw through 2024 Reg. Sess.); WIS. STAT. ANN. § 813.12(8)(a) (West, Westlaw through 2023 Act 101, published March 5, 2024); WYO. STAT. ANN. § 6-4-404(a) (West, Westlaw through 2024 Budget. Sess.).

187. *See, e.g.* MO. ANN. STAT. § 455.085(7) (West, Westlaw through 2023 1st Reg. Sess. of the 102d 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 2d Reg. Sess. of the 108th Leg. (2024)) (“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 2023 Reg. and Spec. Sess.) (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 File 20 of the 135th Gen. Assemb. (2023-2024)) (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).

188. ALA. CODE § 30-5A-6 (West, Westlaw through Act 2024-35 of the 2024 Reg. Sess.); ARIZ. REV. STAT. ANN. § 13-3602 (West, Westlaw through 2d Reg. Sess. of the 56th Leg.); DEL. CODE ANN. TIT. 11, § 1271 (West, Westlaw through ch. 254 of the 152d Gen. Assemb. (2023-2024)); D.C. CODE ANN. § 16-1005(f) (West, Westlaw through Jan. 5, 2024); FLA. STAT. ANN. § 741.30(9)(a) (West, Westlaw through 2024 1st Reg. Sess.); GA. CODE ANN. § 19-13-6 (West, Westlaw through 2023 Reg. Sess. of the Ga. Gen. Assemb.); HAW. REV. STAT. ANN. § 710-1077 (West, Westlaw through Act 1 of the 2024 Reg. Sess.); 725 ILL. COMP. STAT. ANN. 5/112A-23(b) (West, Westlaw through P.A. 101-66); KAN. STAT. ANN. § 59-2217a (West, Westlaw through 2024 Reg. Sess.); KY. REV. STAT. ANN. § 403.763 (West, Westlaw through 2024 Reg. Sess.); MD. CODE ANN. FAM. LAW § 4-508 (Westlaw through 2023 Reg. Sess. of the Gen. Assemb.); MICH. COMP. LAWS ANN. § 600.2950a (West, Westlaw through P.A. 2024, No. 23 2024 Reg. Sess. of the 102d Leg.); MISS. CODE ANN. § 93-21-21 (West, Westlaw through 2024 Extraordinary Sess.); N.H. REV. STAT. ANN. § 173-B:9 (West, Westlaw through Ch. 6 of the 2024 Reg. Sess.); N.J. STAT. ANN. § 2C:29-9 (West, Westlaw through L.2023, c. 228 & J.R. No. 15); N.M. STAT. ANN. § 40-13-5 (West, Westlaw through 2d Reg. Sess. of the 56th Leg. (2023)); N.Y. PENAL LAW § 215.51 (West, Westlaw through L.2024); N.C. GEN. STAT. § 50B-4.1 (West, Westlaw through 2023 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE § 14-07.1-06 (West, Westlaw through 2023 Reg. and Spec. Sess.); OHIO REV. CODE ANN. § 3113.31 (West, Westlaw through Files 20 of the 135th Gen. Assemb. (2023-2024)); PA. STAT. AND CONS. STAT. ANN. 23 § 6114 (West, Westlaw through 2023 Reg. Sess. Act 33); R.I. GEN. LAWS § 15-15-3(m)(l) (West, Westlaw through Ch. 6 of the 2024 Reg. Sess.); TENN. CODE ANN. § 36-3-610 (West, Westlaw through 2024 Reg. Sess. of the 113th Gen. Assemb.); TEX. FAM. CODE ANN. § 85.026 (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 lovers¹⁸⁹ (including potentially violent behavior).¹⁹⁰ It is not a separate affirmative defense, but is 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.¹⁹¹ As the defense of BWS has become more widely applied, so too has criticism regarding its use. One major critique is that the terminology of ‘Battered Woman Syndrome’ excludes many other survivors of domestic violence, as its main focus is on women as 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 “Survivor Theory,” which focuses on the victims as survivors, rather than passive actors.¹⁹²

Dr. Lenore Walker, a retired psychology professor at Nova Southwestern University College of Psychology, argues that abusive relationships trap women in a three-stage “cycle of violence” that often prevents women from seeking help.¹⁹³ While Dr. Walker exclusively uses the term “women” to refer to the survivor entrapped in this cycle, its theory is applicable to all survivors of domestic violence. The first stage is the “tension-building” phase, wherein an individual experiences minor physical violence and verbal attacks from their abuser. The abused person tends to minimize the importance of these incidents and blame themselves for the abuse.¹⁹⁴ This stage can last for years while the individual

through 2023 Reg. Sess. of the 88th Leg.); VT. STAT. ANN. TIT.15, § 1108(e) (West, Westlaw through Reg. Sess. of the 2023–2024 Gen. Assemb.); WASH. REV. CODE ANN. § 7.105.450 (West, Westlaw through 2023 Reg. and 1st Spec. Sess.).

189. 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 Ann Dutton, *Update of the “Battered Woman Syndrome” Critique*, NAT’L ONLINE RES. CTR. FOR VIOLENCE AGAINST WOMEN (2009), <https://perma.cc/VZ8S-SD4C>.

190. 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.”).

191. 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.”).

192. See Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 84–85 (2008).

193. See Walker, *supra* note 189, at 55.

194. *Id.* at 56–59.

attempts to placate their abuser and act in ways that they believe will avoid violence.¹⁹⁵ The second stage is the battering stage. As the minor incidents become more frequent, the tension increases until the individual can no longer appease their abuser;¹⁹⁶ Walker refers to this as the “acute battering incident.”¹⁹⁷ At this point, the violence becomes so severe that the individual may fear major physical injury or death.¹⁹⁸ 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.¹⁹⁹ 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.”²⁰⁰ During this phase, the abuser is charming and apologetic as he begs for the individual’s forgiveness.²⁰¹ The abuser believes that he will never hurt the individual again and tries to take some action, such as giving up alcohol, to demonstrate that his intentions are sincere.²⁰²

Walker argues that such repeated cycles of violence cause an individual to develop “learned helplessness.”²⁰³ According to Walker, the individual believes that they lack control over her abusive situation and feels it is impossible to escape, even when escape is in fact a possibility.²⁰⁴ The individual becomes increasingly passive, and their motivation and will to leave the relationship diminish.²⁰⁵ Because they cannot leave the relationship, the individual suffers more abuse and remains trapped in the cycle of violence.²⁰⁶

An alternative theory of explaining the behavior of victims of violence, known as the “Survivor theory,” emerged after Walker’s theory.²⁰⁷ 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 rela-

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

196. See Walker, *supra* note 189, at 59–65.

197. *Id.*

198. *Id.*

199. *Id.* at 59.

200. *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).

201. Walker, *supra* note 189, at 65.

202. *Id.* at 65–66.

203. Comia, *supra* note 200; see also Walker, *supra* note 189, 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).

204. Walker, *supra* note 189, at 47–48.

205. See Comia, *supra* note 200.

206. See Schroeder, *supra* note 195, at 559.

207. See Goodmark, *supra* note 192, at 84.

tionships without labeling them as passive, helpless non-actors.²⁰⁸ Instead, the theory focuses on the victim as a survivor, who remains in the relationship to protect themselves and their children.²⁰⁹ It is premised on the idea that the survivor may not think outside help is an option.²¹⁰ This is an alternative theory to Walker's, but is not as accepted in the legal system.²¹¹

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.²¹² 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.²¹³ According to its critics, BWS implies either a mental disorder or an inability to reason.²¹⁴ The "ideal" battered woman "appears to be one who is helpless, passive, and has no history of violent or confrontational behavior."²¹⁵ 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.²¹⁶ 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."²¹⁷ The 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.²¹⁸ 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.²¹⁹

208. *Id.*

209. *Id.*

210. *Id.* at 85.

211. *Id.*

212. Dutton, *supra* note 189.

213. *Id.*

214. 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).

215. *See* Cheryl A. Terrance, Karyn M. Plumm & Katlin J. Rhyner, *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).

216. *See* Terrance, Plumm, & Rhyner, *supra* note 215, at 944.

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

218. *Id.* at 1265.

219. *Id.* at 1256, 1265.

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.²²⁰ 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 them, thus, creating challenges for claims of self-defense.²²¹ Pathologizing individuals with BWS may also cause them to lose custody of their children.²²²

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 same²²³ 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.²²⁴ This “ideal” battered woman does not reflect the diverse experiences of female (heterosexual) survivors of domestic violence and, furthermore, fails to encompass the LGBTQIA+ community and heterosexual men entirely.²²⁵

ii. Legal Consequences of BWS for Male and LGBTQIA+ Survivors. Domestic violence and its emotional and physical consequences are also prevalent among male, lesbian, and transgender persons in addition to women in heterosexual relationships.²²⁶ 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.²²⁷ Male survivors may especially 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.²²⁸

Over the past twenty years, considerable gains have been made in opening up services for male and LGBTQIA+ survivors of domestic violence.²²⁹ Legislation in all fifty states specifically defines the group of people covered by BWS and

220. See Terrance, Plumm, & Rhyner, *supra* note 215, at 942–43.

221. *Id.*

222. *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 215.

223. See Terrance, Plumm, & Rhyner, *supra* note 215, at 944.

224. *Id.* (discussing the “stereotypical battered woman”).

225. See discussion *infra* Section titled “Legal Consequences of BWS for Male and LGBTQIA+ Survivors.”

226. 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).

227. *Id.* at 337.

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

229. See *Woods v. Horton*, 84 Cal. Rptr. 3d 332 (Cal. 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).

domestic violence provisions,²³⁰ and several states have codified the term Battered Spouse Syndrome (“BSS”) to include relationships beyond married, heterosexual couples.²³¹

Male and LGBTQIA+ individuals have more difficulties in applying the BWS defense than do women in heterosexual relationships. Juries are often unable to visualize a power imbalance that makes the survivor of violence vulnerable to abuse.²³² 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.²³³ 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,²³⁴ jurors may automatically view the situation as one of mutual battering.²³⁵

In 1988, Annette Green killed her same-sex partner, Ivonne Julio, following years of escalating abuse.²³⁶ Green used the BWS defense, despite the prosecutor’s objection that the defense was inappropriate.²³⁷ Jurors found Green guilty and rejected the BWS argument, even though all believed that the relationship was abusive.²³⁸ One juror reported that during the trial, the prosecution relied heavily on Green’s admission that she had previously threatened Julio with a gun.²³⁹ Although the District Court of Appeals of Florida vacated Green’s conviction due to technical errors,²⁴⁰ her case demonstrates that juries tend to be less accepting of BWS as a defense in same-sex relationships, even in the face of overwhelming evidence of domestic abuse.

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

231. FLA. STAT. ANN. § 3.201 (West, Westlaw through Nov. 2023); MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (West, Westlaw through 2023 Reg. Sess. of the Gen. Assemb.); MO. ANN. STAT. § 563.033 (West, Westlaw through 2023 1st Reg. Sess. of the 102d Gen. Assemb.); S.C. CODE ANN. § 17-23-170 (Westlaw through 2024 Act No. 120). Although not all states have codified a broader BSS definition, state courts have increasingly allowed the admission of broader BSS testimony. *See, e.g.*, State v. Stewart, 719 S. E.2d 876, 885 (W. Va. 2011); Bonner v. State, 740 So. 2d 439, 440 (Ala. Crim. App. 1998); People v. Wilson, 487 N.W.2d 822 (Mich. Ct. App. 1992).

232. Knauer, *supra* note 226, at 333.

233. Alexander Detschelt, *Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation*, 12 KAN. J. L. & PUB. POL’Y J 249, 252–56 (2002).

234. *See, e.g.*, Gina Serpe & Ashley Fultz, *A Very Brady Death Threat?!*, ENEWS (Dec. 15, 2009 6:22 PM), <https://perma.cc/VQ5X-UCW2>.

235. *See, e.g.*, Knauer, *supra* note 226, at 334.

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

237. *Id.* at 575.

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

239. 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).

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

Courts also allow BWS testimony in civil cases.²⁴¹ For example, courts have admitted expert testimony regarding BWS in child custody cases.²⁴² 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.²⁴³ 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.²⁴⁴

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.* 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.²⁴⁵ Numerous states have statutes that give police discretion to make warrantless arrests.²⁴⁶ Some state statutes prefer warrantless arrests over other courses of action,²⁴⁷ and many even mandate warrantless arrests.²⁴⁸

241. Heather Tonsing, Note, *Battered Women Syndrome as a Tort Cause of Action*, 12 J.L. & HEALTH 407, 408 (1997).

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

243. *Id.* at 273.

244. *Id.*

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

246. *See, e.g.*, ALA. CODE §15-10-3(a) (Westlaw through 2023 1st Spec., Reg., and 2nd Spec. Sess.); DEL. CODE ANN. tit. 11, § 1904(b)(1) (West, Westlaw through ch. 240 of the 152d Gen. Assemb. (2023-2024)); GA. CODE ANN. § 17-4-20(a) (West, Westlaw through 2023 Reg. Sess. of the Ga. Gen. Assemb.); HAW. REV. STAT. ANN. § 709-906(2) (West, Westlaw through 2023 Reg. Sess.); 725 ILL. COMP. STAT. ANN. 5/107-2 (West, Westlaw through P.A.103-583 of the 2023 Reg. Sess.); KY. REV. STAT. ANN. § 431.005(2) (West, Westlaw through 2023 Reg. Sess.); MD. CODE ANN., CRIM. PROC. § 2-204 (West, Westlaw through 2023 Reg. Sess. of the Gen. Assemb.); MINN. STAT. ANN. § 629.341(1) (West, Westlaw through 2023 Reg. Sess.); NEB. REV. STAT. ANN. § 29-404.02 (West, Westlaw through 1st Reg. Sess. of the 108th Leg.); N.H. REV. STAT. ANN. § 173-B:9(1)(a) (Westlaw through 2023 Reg. Sess.); 18 PA. STAT. AND CONS. STAT. ANN. § 2711(a) (West, Westlaw through 2023 Reg. Sess. Act 23).

247. *See, e.g.*, ARK. CODE ANN. § 16-81-113(a)(1)(B) (West, Westlaw through 2023 Reg. Sess.); FLA. STAT. ANN. § 741.29(4)(b) (West, Westlaw through 2023 Spec. B and C Sess. and the 2023 first Reg. Sess.); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West, Westlaw through Ch. 25 of 2023 1st Ann. Sess.); TENN. CODE ANN. § 36-3-619(a) (West, Westlaw through 2023 Reg. Sess.).

248. *See, e.g.*, CAL. PENAL CODE § 836(c)(1) (West, Westlaw through Ch. 1 of 2023-24 1st Extraordinary Sess.); COLO. REV. STAT. ANN. § 18-6-803.6(1) (West, Westlaw through 1st Extraordinary Sess. of the 74th Gen. Assemb.); D.C. CODE ANN. § 16-1031(a) (West, Westlaw through Nov. 28, 2023); IOWA CODE ANN. § 236.12(3) (West, Westlaw through 2023 Reg. Sess.); MISS. CODE ANN. 99-3-7(3)(a) (West, Westlaw through July 1, 2023); NEV. REV. STAT. ANN. § 171.137(1) (West, Westlaw through 82nd Reg. Sess.); N.J. STAT. ANN. § 2C:25-21(a)(3) (West, Westlaw through L. 2023, c. 150 & J.R. No. 12); N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney, Westlaw through L. 2023); UTAH CODE ANN. § 77-36-2.2(2)(a) (West, Westlaw through 2023 2d Spec. Sess.); VA. CODE ANN. § 19.2-81.3(B) (West, Westlaw through 2023 Reg. Sess.); WASH. REV. CODE ANN. § 10.31.100(2) (West,

ii. **Mandatory Arrests.** Many states and the District of Columbia have enacted laws mandating arrest in domestic violence cases,²⁴⁹ including for the violation of civil protection orders.²⁵⁰ Mandatory arrest laws reflect states' decreasing tolerance for domestic violence by requiring officers to make an arrest when probable cause exists.²⁵¹ Proponents argue that mandatory arrest laws send a message to the abuser (and the community) that his or her behavior is criminal and unacceptable.²⁵² 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."²⁵³

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.²⁵⁴ Furthermore, critics argue that these laws often result in dual arrests, where the officers arrest the survivor along with the abuser.²⁵⁵ 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.²⁵⁶ Some of these statutes list factors to aid police officers in determining which party was the primary

Westlaw through 2023 Reg. and First Spec. Sess.); WIS. STAT. ANN. § 968.075(2)(a) (West, Westlaw through 2023 Act 39).

249. See Brenner, *supra* note 245, at 316–17.

250. *Id.* Other states merely permit arrest for such a violation, however. See KY. REV. STAT. ANN. § 403.763 (West, Westlaw through 2023 Reg. Sess.); MD. CODE ANN., FAM. LAW § 4-509(f) (West, Westlaw through 2023 Reg. Sess. of the Gen. Assemb.); S.D. CODIFIED LAWS § 23A-3-2.1 (Westlaw through 2023 Reg. Sess.); TENN. CODE ANN. § 36-3-611(a)(2) (West, Westlaw through 2023 Reg. Sess. of the 113th Gen. Assemb.); TEX. CRIM. PROC. CODE ANN. art. § 14.03(b) (West, Westlaw through 2023 Reg. 2d & 3rd Sess. of the 88th Leg.); UTAH CODE ANN. § 78B-7-113(2)(f) (West, Westlaw through 2023 2d Spec. Sess.); WASH. REV. CODE ANN § 10.31.100(2) (West, Westlaw through 2023 Reg. and 1st Spec. Sess.).

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

252. See Brenner, *supra* note 245, at 317.

253. 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).

254. See Mary Haviland, Valli Rajah, & Victoria Frye, *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City* (2001), <https://perma.cc/KN6T-B6SM>.

255. See Beishline, *supra* note 253, at 23.

256. MO. ANN. STAT. § 455.085(3) (West, Westlaw through 2023 1st Reg. Sess.); NEV. REV. STAT. § 171.137(2) (West, Westlaw through 82d Reg. Sess.); R.I. GEN. LAWS § 12-29-3(C)(2) (West, Westlaw through 2023 Reg. Sess., Ch. 398); S.D. CODIFIED LAWS § 25-10-35 (West, Westlaw through 2023 Reg. Sess.); WASH. REV. CODE ANN. § 10.31.100(2)(C) (West, Westlaw through 2023 1st Spec. Sess.); WIS. STAT. ANN. § 968.075 (West, Westlaw through 2023, Act 72).

physical aggressor.²⁵⁷ This is a problem for same-sex couples because police might mistakenly arrest the victim rather than the perpetrator.²⁵⁸

Some commentators suggest a policy of presumptive arrest as an alternative to mandatory arrest.²⁵⁹ 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.²⁶⁰ 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.”²⁶¹ 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.²⁶² Critics of presumptive arrest argue that “granting any discretion to police officers will result in that discretion being exercised too liberally, and that domestic violence will be taken less seriously by law enforcement in general.”²⁶³

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.²⁶⁴ Under such policies, prosecutors are not permitted to drop charges of abuse at the survivor’s request;

257. MO. ANN. STAT. § 455.085(3) (West, Westlaw through 2023 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 82d 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 2023 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.”).

258. See Beishline, *supra* note 253, at 23 (noting that lesbians are often victims of dual arrests).

259. See Hafemeister, *supra* note 253, at 982.

260. *Id.*

261. *Id.*

262. *Id.*

263. 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).

264. See Hafemeister, *supra* note 253, 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.”).

rather, they must pursue charges and either proceed without the survivor's testimony or seek their cooperation.²⁶⁵ In seventy percent of domestic violence cases, domestic abuse survivors request that charges be dropped.²⁶⁶ 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.²⁶⁷

There are two models of mandatory prosecution: "soft" and "hard."²⁶⁸ 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.²⁶⁹ These non-coercive no-drop policies, however, are not completely deferential to the domestic abuse survivor.²⁷⁰ Although the survivor retains control over his or her own participation in the prosecution, the prosecutor ultimately decides how the prosecution will proceed.²⁷¹ 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.²⁷²

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.²⁷³ 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.²⁷⁴

iv. **Mandatory No-Contact Orders.** A no-contact order is a criminal protective order that prohibits a defendant from having contact with the survivor.²⁷⁵ These orders are often used as conditions of pretrial release or of sentencing in domestic violence cases.²⁷⁶ Judges normally have discretion to evaluate the complaining witness' specific situation and to determine whether a no-contact order

265. See, e.g. FLA. STAT. ANN. § 741.2901 (West, Westlaw through 2023 1st Reg. Sess.); UTAH CODE ANN. § 77-36-2.7 (West, Westlaw through 2023 2d Spec. Sess.).

266. 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).

267. *Id.* at 389–90.

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

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 983–84.

274. See *id.* at 984–85.

275. 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.").

276. *Id.*

is appropriate.²⁷⁷ A few states have mandated the issuance of an initial criminal no-contact order in all domestic violence cases.²⁷⁸ 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.²⁷⁹

Policy supporters stress that many relationships with a history of domestic violence are likely to involve continuing violence in the future.²⁸⁰ Furthermore, supporters believe that mandatory no-contact orders keep the survivors safer than they would be without such orders.²⁸¹ 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,²⁸² several states have enacted legislation requiring medical professionals to file a report when they suspect that a patient's injuries are the result of domestic violence.²⁸³ In 1994, for example, California updated and expanded its sixty-year-old reporting law.²⁸⁴ 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.²⁸⁵ Advocates of mandatory

277. See, e.g., FLA. STAT. ANN. § 741.2901(3) (West, Westlaw through 2023 1st Reg. Sess., Ch. 232) (noting that 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).

278. See, e.g., S.D. CODIFIED LAWS § 25-10-23 (West, Westlaw through 2023 Reg. Sess.); UTAH CODE ANN. § 78b-7-802 (West, Westlaw through 2023 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)).

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

280. See, e.g., R.I. GEN. LAWS § 12-29-4(a)(1) (West, Westlaw through 2023 Reg. Sess., Ch. 398) ("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.").

281. See Friedman, *supra* note 275, at 247-48.

282. See, e.g., N.H. REV. STAT. ANN. § 631:6(1) (West, Westlaw through 2023 Reg. Sess., Ch. 243) ("[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.").

283. See COLO. REV. STAT. ANN. § 12-36-135 (West, Westlaw through Reg. Sess. of the Gen. Assemb.); CAL. PENAL CODE § 11160 (West, Westlaw through 2023 Reg. Sess.); KY. REV. STAT. ANN. § 209.030(2) (West, Westlaw through 2023 Reg. Sess.); R.I. GEN. LAWS ANN. § 12-29-9 (West, Westlaw through Ch. 398 of the Jan. 2023 Sess.); see also Mia M. McFarlane, *Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INT. L.J. 1, 33 (1998).

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

285. *Id.* at 90-91.

reporting by medical professionals maintain that these statutes serve two broad purposes: protecting the safety of the survivor²⁸⁶ and aiding law enforcement in prosecuting violent criminals.²⁸⁷ 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.²⁸⁸

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.²⁸⁹ 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.²⁹⁰

In addition to these safety and health concerns, critics of these laws highlight the ethical implications of breaching doctor-patient confidentiality.²⁹¹ Because of these concerns, the American Medical Association officially opposes mandatory reporting laws.²⁹² The majority of medical professionals do not screen a patient to determine if that patient is a survivor of domestic violence.²⁹³ In some situations, where the patient has disclosed abuse, medical professionals have not taken additional steps to protect the survivor.²⁹⁴ Medical professionals usually do not follow up with a survivor who is in an abusive relationship.²⁹⁵ 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.²⁹⁶ 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

286. See Karen P. West, Linda Bledsoe, Joni Jenkins, & Lois Margaret Nora, *The Mandatory Reporting of Adult Victims of Violence: Perspectives from the Field*, 90 KY. L.J. 1071, 1079 (2002).

287. See McFarlane, *supra* note 283.

288. *Id.* at 34–35.

289. *Id.* at 23–24.

290. 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).

291. See McFarlane, *supra* note 283, 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).

292. 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.").

293. Karen Oehme, Ember Urbach, & Nat Stern, *Unheard Voices of Domestic Violence Victims: A Call to Remedy Physician Neglect*, 15 GEO. J. GENDER & L. 613, 635, 637 (2014).

294. *Id.* at 636.

295. *Id.* at 620, 635, 638.

296. *Id.* at 637–38.

disclose this information to law enforcement.²⁹⁷ Then, if the survivor later decides to pursue legal action, these records are available for evidentiary purposes.²⁹⁸

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”).²⁹⁹ Protection orders generally come in two forms: temporary protection orders (granted *ex parte*) and civil protection orders (granted after an evidentiary hearing).³⁰⁰ 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. It can also prohibit an abuser from visiting specific locations such as the survivor’s school or workplace.³⁰¹ Mutual protection orders prohibit both parties from contacting each other.³⁰² However, some jurisdictions have adopted CPOs that prohibit an individual from committing future abuse, but still permit ongoing communication between the parties.³⁰³ This type of CPO has been designed to protect survivors who are unwilling to leave their relationships and wish to continue having contact with their partner.³⁰⁴ This type of CPO is only granted in a limited number of jurisdictions.³⁰⁵

297. McFarlane, *supra* note 283, at 29, 31.

298. *Id.* at 35.

299. See A.B.A. Comm’n on Domestic & Sexual Violence, Domestic Violence Civil Protection Orders (CPOs), (2020), <https://perma.cc/4PPT-FQYV>.

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

301. See Hafemeister, *supra* note 253, 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 300, 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.”).

302. See Hafemeister, *supra* note 253, at 990 (discussing how mutual protection orders have been criticized for being a quick fix, often issued as an alternative to conducting a hearing, even when there is no 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, issuing mutual protection orders shifts the responsibility for the abuse onto the survivor and fails to hold the abuser accountable).

303. 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).

304. *Id.*

305. See *id.*

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.³⁰⁶ Some states allow the domestic violence survivor to file for a CPO when they fall into one of the required relationships (i.e., current spouse, former spouse, cohabitants, dating partner, intrafamily, child or member of the same family).³⁰⁷ Other states remain silent on whether the law permits “dating partners” to include partners of the same sex.³⁰⁸ 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.³⁰⁹ 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.³¹⁰ 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.³¹¹

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.³¹² 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.³¹³

Domestic violence advocates continue to view CPOs favorably because they provide survivors with immediate relief by prohibiting abusive conduct.³¹⁴ However, protection orders are frequently violated, and few of the violators are actually jailed.³¹⁵ The potential powerlessness of a protection order was seen in *Castle Rock v. Gonzales*.³¹⁶ 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

306. See A.B.A. Comm’n on Domestic & Sexual Violence, *supra* note 299.

307. 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. 890 of 2023 Reg. Sess.); D.C. CODE ANN. § 16-1005 (West, Westlaw through Nov. 28, 2023); LA. STAT. ANN. § 46:2133D (Westlaw through 2023 1st Extraordinary, Reg., and Veto Sess.).

308. See, e.g., 8 R.I. GEN. LAWS ANN. § 8-8.1-1(1) (West 2024).

309. See A.B.A. Comm’n on Domestic & Sexual Violence, *supra* note 299.

310. See *id.*

311. *Id.*

312. See *Including Pets in Protection Orders: A State-by-State Guide*, ANIMAL WELFARE INST., <https://perma.cc/JN8Y-245J>.

313. See *id.*

314. *What is A Protection Order and How Can It Help You?* WOMENSLAW.ORG, <https://perma.cc/2H3X-WYA7>.

315. See Hafemeister, *supra* note 253, 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.”).

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

violence.³¹⁷ Consequently, a survivor who had obtained a court-issued protection order would not have legal recourse against police officers who refused to enforce her protection order.³¹⁸ This ruling “[u]ndercuts the strength and value of protective orders, as it allows police officers to enforce the orders—or not—at their own discretion.”³¹⁹

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.³²⁰ Now that forty-eight states³²¹ have abolished spousal immunity,³²² battered spouses can assert tort claims including assault, battery, intentional infliction of emotional distress, and a number of newly developed “domestic torts.”³²³

“Domestic torts” are non-traditional tort actions that a domestic violence survivor can assert, such as intentional interference with custody,³²⁴ parental kidnapping,³²⁵ defamation,³²⁶ and tortious infliction of a sexually transmitted disease.³²⁷

317. *See id.*

318. *See id.*

319. *See* Hafemeister, *supra* note 253, at 991.

320. *See* John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 223-224 (2003) (discussing the historical development of the doctrine of spousal immunity).

321. *See, e.g.*, MONT. CODE ANN. § 40-2-109 (West, Westlaw through Jan. 1, 2024 of the 2023 Sess.); 15 R.I. GEN. LAWS ANN. § 15-4-17 (West, Westlaw through Ch. 398 of the 2023 Reg. Sess.). Only Georgia and Louisiana still maintain the doctrine of spousal immunity. *See* GA. CODE ANN. § 19-3-8 (West, Westlaw through 2023 Reg. Sess. of the Gen. Assemb.); LA. STAT. ANN. §9:291 (Westlaw through the 2023 1st Extraordinary, Reg., and Veto Sess.).

322. *See generally* Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 324-26 (1997) (providing an overview of domestic torts).

323. *See id.* at 339.

324. *See, e.g.*, *State v. Sciortino*, 724 So. 2d 258, 261 (La. Ct. App. 1998) (defining 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. Ct. 1987) (holding non-custodial parents do not have a tort action for intentional interference with visitation rights).

325. *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).

326. *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 her husband made false statements about her mental health to her employer, co-workers, and friends).

327. *See, e.g.*, *Kohl v. Kohl*, 149 So. 3d 127, 130 (Fla. Dist. Ct. App. 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 her husband knew or should have known he was infected); *Coleman v. Coleman*, 566 So. 2d 482, 485 (Ala. 1990) (holding that a woman’s claim of negligent or wanton transmission of venereal disease against former husband was barred from suit because of a release clause signed during divorce proceedings).

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.³²⁸

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.³²⁹ Despite using the term 'battered woman's syndrome,' the court noted that this cause of action was available to individuals of either gender, engaged in heterosexual or homosexual relationships.³³⁰

The California legislature has codified the tort of domestic violence.³³¹ 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.³³² 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.³³³ 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.³³⁴

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.³³⁵ 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

328. M. 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 April 21, 1993), 21 S. ILL. U. L.J. 355, 377 (1997).

329. See *Cusseaux v. Pickett*, 652 A.2d 789, 793–95 (N.J. Super. Ct. App. Div. 1994).

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

331. See CAL. CIV. CODE § 1708.6(a) (West, Westlaw through Ch. 1 of 2024 Reg. Sess.).

332. See *id.*; see also CAL. PENAL CODE § 13700 (West, Westlaw through Ch. 1 of 2024 Reg. Sess.).

333. See CAL. CIV. CODE § 1708.6(b)-(c) (West, Westlaw through Ch. 1 of 2024 Reg. Sess.).

334. See CAL. CIV. PROC. CODE § 340.15 (West, Westlaw through Ch. 1 of 2024 Reg. Sess.).

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

financial safety net.³³⁶ Survivors fleeing their abusers also fear the threat of being separated from their children upon seeking refuge from domestic violence.³³⁷ 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.³³⁸ A majority of states limit the child custody and visitation rights of a perpetrator of domestic violence.³³⁹ Additionally, some states also limit the rights of the survivor.³⁴⁰ 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.³⁴¹ 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.³⁴²

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.³⁴³ The strain on resources is compounded by limited funding

336. *Id.*

337. *Id.*

338. *See, e.g.,* ALA. CODE § 30-3-131 (West, Westlaw through Act 2024-35) (finding 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* Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN’S L.J. 457, 464 (2013).

339. *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.”).

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

341. *See, e.g., In re Jon N.*, 224 Cal. Rptr. 319, 322 (Cal. Ct. App. 1986) (removing a 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).

342. *See generally* Joan Meier, Dickson, O’Sullivan, Rosen, & Hayes, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, GEO. WASH. L. FAC. PUBL’NS & OTHER WORKS, 3–4 (2019), <https://perma.cc/XR7K-F7F9>.

343. *See Domestic Violence Counts 2019: A 24-Hour Census of Domestic Violence Shelters and Services*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, 8 (2019) [hereinafter *Domestic Violence Counts 2019*], <https://perma.cc/K6QQ-M4BB>.

and an increased demand for shelter, and has led to overcrowding in many shelters,³⁴⁴ including, for example, the House of Ruth in Washington, D.C.³⁴⁵ 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.³⁴⁶ 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.³⁴⁷ The spaces available for male and transgender survivors are even more scarce because the shelters that are currently available typically cater to female survivors.³⁴⁸

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.”³⁴⁹ 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.”³⁵⁰ 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.³⁵¹ When the entire process is routine, judges do not and cannot consider alternatives that may offer survivors more protection.³⁵²

Institutional attitudes have progressed,³⁵³ but there is evidence that judges “commonly trivialize or excuse domestic violence, despite the enactment of

344. See *Funding Challenges for Domestic Violence Programs: The Impact on Victims*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, 1 (2019), <https://perma.cc/DD43-7MYS>.

345. See *Access and Admissions to Shelter*, HOUSE OF RUTH, <https://perma.cc/38BJ-AF9C>.

346. See *id.*

347. Domestic Violence Counts 2019, *supra* note 343, at 1.

348. See Amanda Kippert, *A Guide for Male Survivors of Domestic Violence*, DOMESTIC SHELTERS (Oct. 13, 2021), <https://perma.cc/T9A3-A8C2>; Jake Lilien, *When Americans Need Safe Shelter The Most, Some Will Be Turned Away Because Of Their Gender Identity*, NAT’L CMTY. REINVESTMENT COAL. (Apr. 23, 2020), <https://perma.cc/TQ3F-MH5X>.

349. Wright, *supra* note 338, at 464; see also Terrance, Plumm & Rhyner, *supra* note 215, 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].”).

350. Dahlstedt, *supra* note 300, at 32.

351. *Id.* at 33–34.

352. *Id.* (arguing for the use of GPS monitoring when a Civil Protection Order (“CPO”) is issued).

353. 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.’ Mandatory arrest policies eliminate this practice.”).

statutes granting rights to battered women.”³⁵⁴ This has been seen as a reflection of gender bias and cultural attitudes towards women.³⁵⁵ Furthermore, without exposure or training, it can be difficult to understand the oft-asked question: “why didn’t she just leave?”³⁵⁶ Familiarity with domestic violence cases and education is required to comprehend just how women are tied to their abusers—physically, financially, and emotionally.³⁵⁷ A survivor may stay in an abusive relationship because she loves her partner, fears retaliation against her or her children, is 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.³⁵⁸ One particularly strong deterrent to leaving a relationship is Martha Mahoney’s concept of “separation assault.”³⁵⁹ This concept describes how abusers “intensify their violence to prevent women from leaving, retaliate against them for leaving, or forcibly end the separation.”³⁶⁰

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.³⁶¹ It followed the earlier #WhyIStayed movement, which was specific to the stories of survivors of domestic violence and intimate partner abuse.³⁶² 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.³⁶³ While survivors still face credibility discounting, many more are being believed, showing that progress is possible.³⁶⁴

B. DOMESTIC VIOLENCE IN THE DIGITAL AGE

Surveillance of an abuser’s target is not new to domestic violence; however, “technology is now the new tool to perpetuate that surveillance.”³⁶⁵ Cyberstalking refers to the use of technologies such as cell phones, GPS, and the Internet to, for

354. Symposium, *supra* note 215, at 119.

355. *Id.*

356. See Dahlstedt, *supra* note 300, at 33 (arguing that judges need to be familiar with the complexity of domestic violence because of the unique issues it presents).

357. 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, 456 (2013).

358. See, e.g., *Domestic Violence: Reasons Why Battered Victims Stay With the Batterers*, LOS ANGELES POLICE DEPT., <https://perma.cc/WJ9C-UUQ9>.

359. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 119–20 (Aspen L. & Bus., 3d ed. 2013).

360. *Id.*

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

362. *Id.* at 415–16.

363. *Id.* at 402.

364. *Id.* at 458.

365. Aarti Shahani, *Smartphones Are Used To Stalk, Control Domestic Abuse Victims*, NAT’L PUB. RADIO (Sept. 15, 2014, 4:22 PM), <https://perma.cc/Y2F8-724C>.

example, send threatening emails, trace another person's computer, or post threatening or harassing messages on social media.³⁶⁶ "Cyberstalking is now a standard part of domestic abuse in the U.S."³⁶⁷ Technology makes it easier for abusers to harass their targets, which hinders the targets' ability to escape their abusers.³⁶⁸ Abusers use cell phones to stalk and harass their targets.³⁶⁹ For example, an 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.³⁷⁰ 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.³⁷¹ "Spoofing" disguises the identity and origin of a call.³⁷² When a person uses spoofing, a fake number appears on the receiver's phone caller ID and in the telephone company's records.³⁷³ This makes tracing the call extremely difficult for targets, law enforcement, and prosecutors and allows abusers to violate orders of protection fairly easily.³⁷⁴

In addition to cell phones, abusers use GPS to track the locations of their targets.³⁷⁵ 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.³⁷⁶ 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.³⁷⁷ The abusers can control the GPS devices at home through a simple click on the computer.³⁷⁸ Computer monitoring software also enables abusers to track their targets' computer activity, activate webcams, and take pictures of the targets and their rooms.³⁷⁹ 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."³⁸⁰ Even if

366. 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).

367. Shahani, *supra* note 365.

368. *Id.*

369. 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://perma.cc/4PSC-843H>.

370. *Id.*

371. *Id.*

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

373. *Id.*

374. *Id.* at 1159.

375. *See* Shahani, *supra* note 365.

376. *Id.*

377. *See* Olsen, *supra* note 369, at 86.

378. *Id.*

379. *Id.*

380. Kaofeng Lee & Erica Olsen, *Cell Phone Location, Privacy, and Intimate Partner Violence*, DOMESTIC VIOLENCE REP. 1, 3 (Aug./Sept. 2013), <https://perma.cc/29HP-6V84>.

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.³⁸¹ All of this can be done without the target's awareness.³⁸²

Even though abusers are usually the ones taking advantage of technology, Robin McGraw has developed *Aspire News*, an application for survivors of domestic violence to be able to take advantage of technology.³⁸³ 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.³⁸⁴ The application looks like a normal app that any person would use and the "Help Section" uses location services to find shelters located nearby.³⁸⁵ 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.³⁸⁶ There are also links for survivors to educate themselves about domestic violence.³⁸⁷ *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.³⁸⁸

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.³⁸⁹ 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 life-line to the community resources, life-saving services, and support network they need to leave their abuser and abusive environment."³⁹⁰ 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.³⁹¹

Advocates with the National Network to End Domestic Violence ("NNEDV") are also taking steps to raise awareness around how technology impacts the lives

381. *Id.*

382. *Id.* at 2.

383. *Aspire News App*, WHEN GEORGIA SMILED, <https://perma.cc/2U5P-DL6P>.

384. See Kim LaCapria, '*Aspire News*' App Allows Furtive Reporting of Abusive Relationships, SNOPEs (June 29, 2015), <https://perma.cc/V6VV-V3ZQ>.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. See Olsen, *supra* note 369, at 87.

390. 2015 CAL. LEGIS. SERV. 3742 (West).

391. *Id.* at 3742-43.

of domestic violence survivors.³⁹² 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 offenders' technological tactics, and advocates on behalf of domestic violence survivors.³⁹³

Federal and state laws need to adjust to address technological advancement and how it impacts domestic violence.³⁹⁴ Many of the anti-stalking statutes originally passed by states and Congress required the stalker to be visually or physically proximate to the survivor.³⁹⁵ Since 1996, Congress and some states have modified their stalking statutes to reflect the use of technology in stalking cases.³⁹⁶ For instance, Florida's stalking statute includes a definition of cyberstalking that ensures the statute encompasses stalking through technological means, such as cell phones, GPS, and computers.³⁹⁷ Likewise, California's stalking statute describes "electronic communication devices" such as telephones, cellular phones, computers, video recorders, fax machines, or pagers.³⁹⁸ Cyberstalking laws typically address only stalking through the Internet.³⁹⁹ States are encouraged to follow the Model Stalking Code when reviewing and modifying their existing stalking laws.⁴⁰⁰ The 2007 revision of the Model Stalking Code covers many technological advances and is broader in coverage than most cyberstalking statutes.⁴⁰¹

Along with cyberstalking, another form of emotional abuse has become more prevalent in recent years.⁴⁰² Nonconsensual pornography ("NCP") is colloquially known as "revenge porn," which is 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.⁴⁰³ NCP is defined as the distribution of sexually graphic images or videos of individuals without their

392. See *Safety Net Project*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <https://perma.cc/J8ML-GU89>.

393. *Id.*

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

395. *Id.*

396. See FLA. STAT. ANN. § 784.048(d) (West, Westlaw through 2023 Spec. B and C Sess. and 2023 1st Reg. Sess.) (expanding the definition of cyberstalking).

397. *Id.*

398. See CAL. PENAL CODE § 646.9(h) (West, Westlaw through Ch. 1 of 2024 Reg. Sess.).

399. See NAT'L CTR. FOR VICTIMS OF CRIME, *The Model Stalking Code Revised: Responding to the New Realities of Stalking* 16 (2007), <https://perma.cc/GYS9-7P7K>.

400. *Id.* at 23.

401. *Id.* at 15–16.

402. Haley Goldberg, *Revenge Porn: When Domestic Violence Goes Viral*, SELF (Mar. 21, 2017), <https://perma.cc/X44S-GWBL>. For the purposes of this Article, we categorize revenge porn as a form of domestic violence.

403. *Abuse Using Technology*, WOMENSLAW.ORG, <https://perma.cc/FAV2-N48L>.

consent or knowledge.⁴⁰⁴ Similar to physical forms of domestic violence, the abusers engaging in NCP are often significant others and trusted individuals who use personal images to harass past or current partners.⁴⁰⁵ As of 2020, one in twelve U.S. adults report they have been victims of image-based abuse.⁴⁰⁶

NCP laws are still relatively new and are continuing to develop.⁴⁰⁷ The first federal civil cause of action targeting the unauthorized spread of intimate images was enacted on October 1, 2022.⁴⁰⁸ Forty-eight states, the District of Columbia, and two territories have adopted revenge porn laws.⁴⁰⁹ 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 showing the target “engaging in a sexual act.”⁴¹⁰ 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.”⁴¹¹

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.”⁴¹² 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.⁴¹³ Federal and state laws have become more adept at addressing the needs of domestic violence survivors, but modern domestic violence laws still leave LGBTQIA+ individuals and persons who do not conform to the image of an “ideal battered woman” unprotected. While Title IX increased accountability for campus sexual assault and sexual harassment claims, the Trump Administration pushed progress

404. See, e.g., *When Abusers Threaten Revenge Porn*, DOMESTICSHELTERS.ORG (Sept. 30, 2016), <https://perma.cc/H43X-TA2R> (framing nonconsensual pornography as a form of domestic violence because it is “another tactic abusers use to exert control”).

405. *Id.*

406. *15 Surprising Facts About How Common Revenge Porn Is*, FIGHT THE NEW DRUG, <https://perma.cc/2444-8JTC>.

407. Goldberg, *supra* note 402.

408. See CONG. RSCH. SERV., LSB10723, *FEDERAL CIVIL ACTION FOR DISCLOSURE OF INTIMATE IMAGES: FREE SPEECH CONSIDERATIONS* (Apr. 1, 2022).

409. *Nonconsensual Distribution of Intimate Images*, CYBER C. R. INITIATIVE, <https://perma.cc/T6TG-Q3QQ>.

410. *State Revenge Porn Laws*, FINDLAW (Oct. 23, 2023), <https://perma.cc/752H-Z4FF>.

411. *Id.*

412. Beishline, *supra* note 253, at 1.

413. See, e.g., Dahlstedt, *supra* note 300, at 35 (discussing resolutions passed in Cincinnati and Baltimore “declaring that freedom from domestic violence is a fundamental human right”).

back.⁴¹⁴ Further, the trend toward mandatory protective measures against perpetrators of abuse aims to protect survivors and hold offenders accountable, but these policies 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.

414. See Ayanna Runcie, *Student Activists Plan to Fight Proposed Campus Sex Assault Rules*, CBS NEWS (Nov. 21, 2018, 8:20 PM), <https://perma.cc/5WHX-F63X> (finding that former Secretary of Education Betsy DeVos' new regulations would narrow the definition of sexual assault, require cross-examination of victims, and provide schools with more freedom to determine how they address assault cases).