

# NOTES

## **The Front and Back Ends of Domestic Violence Murder: An Exploration of the Avenues for Change and an Introduction of the Domestic Violence-Murder Doctrine**

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*The connections between domestic abuse, gun violence, and murder have received substantial media attention in recent months in the aftermath of numerous mass shootings. It seems that in the weeks following each of these horrific crimes, authorities discover a history of domestic violence in the perpetrator's past, witnesses come forward with disturbing stories that viewers think should have tipped them off, and political pundits debate the effectiveness of gun laws in America. This disheartening pattern has told the story of dozens of tragic killings in recent memory.*

*But the link between domestic violence and murder is not limited to highly publicized mass shootings. In fact, in the United States, nearly three women per day are murdered by their intimate partners. Yet these women's stories are rarely told. News coverage of their murders rarely extends outside of their local communities. Their killers are rarely prosecuted to the full extent of the law. And their families rarely get the justice they deserve.*

*The overwhelming majority of domestic violence goes unreported and unnoticed. Perhaps this is why current federal and state criminal law so grossly fails both survivors of domestic abuse and victims of domestic violence murder. On the front end, current laws allow perpetrators of domestic violence to continue possessing firearms, putting their partners at even greater risk of escalated violence. On the back end, when those offenders tragically use those firearms to kill their intimate partners, prosecutors are handcuffed by current criminal law—constrained from bringing first-degree murder charges because obtaining convictions under that doctrine is nearly impossible.*

*A broad array of structural and policy changes should be made to adequately address the epidemic of domestic violence in the United*

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\* Executive Editor, Volume 106, *The Georgetown Law Journal*; Georgetown University Law Center, J.D. 2018; Boston College, B.S. 2013. © 2018, Nick Butto. I extend my most sincere appreciation to Professors Deborah Epstein and Rachel Camp for their mentorship and for passing on the skills necessary to help give IPV survivors a voice. Thank you to *The Georgetown Law Journal* editors and staff for their outstanding work throughout the editorial process. A heartfelt thanks to Uncle Tony, Aunt Pam, Sean, Tom, Tim, Mike, and all my family and friends for their love and encouragement. And finally to my father, John, who taught me enough in the decade I knew him to last a lifetime, and my mother, Mary, for teaching me what it means to fight and overcome: thank you.

*States. This Note addresses two gaping holes in domestic violence law and policy that are easily plugged, but require a level of commitment from legislators that has been absent in recent years. By taking guns out of homes of abusive relationships and ensuring that patterns of coercive control and violence that lead to murder are not ignored, the criminal justice system can take a major step forward in acknowledging and addressing a plague in current American culture.*

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## INTRODUCTION

In 2017, North Carolina passed Britny’s Law in response to the 2014 murder of a twenty-two-year-old woman who was shot and killed by her boyfriend after enduring a four-year abusive relationship.<sup>1</sup> Britny Puryear’s boyfriend, Logan McLean, pleaded guilty to second-degree murder for shooting Britny at point-blank range in the back of the head, with their five-year-old son in the next room.<sup>2</sup> Under North Carolina criminal law, McLean could have served as few as twelve years in prison for second-degree murder;<sup>3</sup> Britny’s father feared that McLean could serve as few as five years.<sup>4</sup> Though an additional charge bumped McLean’s sentence up a degree,<sup>5</sup> Britny’s case is an example of the injustice that can result when perpetrators of domestic violence murders are charged merely with second-degree murder—a charge that may result in drastically lower sentences than those for first-degree murder.

Britny’s Law, which went into effect on December 1, 2017, attempts to address the challenge of charging domestic abusers who kill their intimate partners with first-degree murder.<sup>6</sup> “Prosecutors struggle to convince jurors that the defendant’s crimes meet the definition of first-degree murder under current law,” North Carolina Governor Roy Cooper said at the signing of Britny’s Law.<sup>7</sup> The current law Governor Cooper referenced requires prosecutors to prove premeditation in order to charge and convict a defendant of first-degree murder. That law exists in some form in every state and under federal law. Because so many domestic violence murders occur in the midst of an argument or disagreement, defendants are often successful in arguing that they killed their intimate partners in the heat of the moment, impulsively, or without premeditation, each of which ensures that the defendant is charged with no more

1. Britny’s Law, 2017 N.C. Sess. Laws 94 (codified as amended at N.C. GEN. STAT. § 14-17 (2018)); *Family Still Pushing for Stricter Domestic Violence Punishments as ‘Britny’s Law’ Takes Effect*, WRAL-TV (Nov. 30, 2017), <http://www.wral.com/family-still-pushing-for-stricter-domestic-violence-punishments-as-britny-s-law-takes-effect/17152551/> [<https://perma.cc/ZPZ6-893T>].

2. Stephen Puryear, *BRITNY’S LAW: NC Senate Bill 600—Make Domestic Violence Homicide a First Degree Offense*, CHANGE.ORG, <https://www.change.org/p/north-carolina-state-senate-britny-s-law-nc-senate-bill-600-make-domestic-violence-homicide-a-first-degree-offense> [<https://perma.cc/8X9K-AAU2>] (petition to the North Carolina legislature).

3. See N.C. GEN. STAT. § 14-17(b) (2017), *amended by Britny’s Law*, 2017 N.C. Sess. Laws 94; N.C. SENTENCING & POLICY ADVISORY COMM’N, *STRUCTURED SENTENCING: TRAINING AND REFERENCE MANUAL 4* (2014), [https://www.nccourts.gov/assets/documents/publications/sstrainingmanual\\_14.pdf](https://www.nccourts.gov/assets/documents/publications/sstrainingmanual_14.pdf).

4. See Angelica Alvarez, *Fuquay-Varina Domestic Violence Murder Spawns Push for ‘Britny’s Law’*, ABC 11 (Apr. 8, 2017), <http://abc11.com/news/domestic-violence-murder-spawns-push-for-britnys-law/1846757/> [<https://perma.cc/K4ZY-EGFW>].

5. See *id.*

6. 2017 N.C. Sess. Laws 94.

7. Craig Jarvis, *Domestic Violence History Is Now Grounds for First-Degree Murder Charges*, NEWS & OBSERVER (July 11, 2017, 6:19 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article160743064.html> [<https://perma.cc/4BYG-WV4U>].

than second-degree murder.<sup>8</sup> This legal framework means that a man<sup>9</sup> who regularly abused his partner for several years before ultimately murdering her could be sentenced, in a jurisdiction like Illinois, to only four years of probation if charged with second-degree murder.<sup>10</sup>

North Carolina has taken a small step toward addressing this critical flaw in criminal justice by passing Britny's Law. Britny's Law changes the ability of prosecutors to deal with the most heinous murders—those in which the defendant has perpetrated a cycle of violence against the victim for years prior to the murder. In the past, such murders were classified almost exclusively as second-degree murders. Britny's Law changes this classification by allowing the government to allege premeditation—a required element of first-degree murder—if the defendant has been previously convicted of domestic violence or a related crime against the same victim.<sup>11</sup> Nonetheless, this law applies only to domestic abusers who have been *convicted* of such violations, meaning that Britny's law would not have applied in Britny's own case.<sup>12</sup>

Just two weeks after Britny's killer walked into the Wake County Superior Court in Fuquay-Varina, North Carolina, to plead guilty to second-degree murder, five hundred miles north in Orchard Park, New York, David Lewczyk walked into the home of his girlfriend, Ruby Stiglmeir, and shot her three times with a handgun before turning the gun on himself.<sup>13</sup> Three months prior to the shooting, Stiglmeir successfully procured a “refrain from” order—comparable to what many states call restraining orders—against Lewczyk, after he angrily entered her home and committed several crimes.<sup>14</sup> The order, however, did not require Lewczyk to surrender his legally owned and registered gun.<sup>15</sup> Ultimately, Lewczyk used that gun to murder Stiglmeir on March 29, 2016.

In December 2017, less than two weeks after Britny's Law went into effect in North Carolina, New York Governor Andrew Cuomo proposed sweeping

8. *See id.*

9. Though intimate partner violence is a significant problem for both men and women, this Note focuses mainly on male abusers who eventually kill their female intimate partners. This focus is appropriate because research suggests that female murder victims are six times more likely to have been killed by an intimate partner than males. ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008: ANNUAL RATES FOR 2009 AND 2010, at 10 (2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf>. Where available, this Note provides corresponding statistics for male victims in footnotes.

10. *See* 730 ILL. COMP. STAT. 5/5-4.5-15(a), 5/5-4.5-30(d), 5/5-5-3(c)(2) (2018) (failing to list second-degree murder as an offense that disqualifies the convicted from probation).

11. N.C. GEN. STAT. § 14-17(a1) (2018). Related crimes include the violation of a domestic violence protective order, communicating a threat, stalking, cyberstalking, and domestic criminal trespass. *Id.*

12. *Domestic Violence Fight Gets Boost from Britny's Law*, 53 THE BUTNER CREEDMOOR 44, at 3B (Aug. 10, 2017), <http://granvilleonline.com/wp-content/uploads/2018/01/08102017.pdf>.

13. *See* Mark Belcher, *Orchard Park Woman Victim of Murder-Suicide*, WIVB-TV (Mar. 30, 2016, 10:03 AM), <http://wivb.com/2016/03/30/boyfriend-girlfriend-murder-suicide-under-investigation-by-orchard-park-pd/> [<https://perma.cc/T6K9-9HX4>].

14. *See id.*; Tim Fenster, *Taking Aim at Guns and Domestic Violence*, NIAGARA GAZETTE (Jan. 7, 2018), [http://www.niagara-gazette.com/news/local\\_news/taking-aim-at-guns-and-domestic-violence/article\\_cde98b14-e3d5-5341-963e-cdb42da6c094.html](http://www.niagara-gazette.com/news/local_news/taking-aim-at-guns-and-domestic-violence/article_cde98b14-e3d5-5341-963e-cdb42da6c094.html) [<https://perma.cc/B27A-QUT5>].

15. *See* Fenster, *supra* note 14.

legislation that would require judges to order the removal of firearms when issuing orders of protection and ban firearms from individuals convicted of domestic violence misdemeanors.<sup>16</sup> Cuomo cited “the inextricable link between domestic violence and lethal gun violence” as one of his principal reasons for introducing the legislation.<sup>17</sup> But unfortunately, even with some states taking small steps toward acknowledging and correcting the problem, both federal law and the overwhelming majority of state laws fail to appropriately limit the ability of domestic abusers to own or purchase firearms. Domestic violence murders<sup>18</sup> are a real and recognizable problem in the United States. On the front end, far too little has been done to address the glaring gaps and pluggable loopholes in federal and state law that give abusers the means and opportunity to murder their intimate partners, while on the back end, the law frequently fails to impose appropriate punishment on those abusers who do.

This Note addresses two of these critical flaws and proposes solutions and adaptations to the law that could be implemented quickly and with overwhelming public support. Part I provides a brief overview of the status quo, highlighting the prevalence of domestic violence murders today. Part II highlights the ease with which proven domestic abusers continue to possess firearms and the propensity of those offenders to use those firearms to escalate violence to fatal levels. Part III discusses the treatment of domestic violence murders after charges have been brought. It begins by discussing the two classifications of first-degree murder: premeditated, deliberate killings and killings occurring during the commission of felonies. It then explains why domestic violence murders have historically been left out of that mix and, instead, have been almost exclusively relegated to a second-degree murder classification. Part IV proposes solutions to these flaws in American criminal law. It first proposes legislative strategies to fill the loopholes in the legal treatment of domestic abusers and their firearms. It then introduces a new doctrine in the criminal law: the “domestic-violence murder doctrine,” which adopts some of the bedrock principles of Britny’s Law but includes more comprehensive language that would give domestic violence murder victims and their families the justice they deserve.

### I. THE NEED FOR CHANGE

The statistics are staggering. Domestic violence is one of the least reported crimes not only in the United States, but around the world.<sup>19</sup> Notwithstanding the

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16. *See id.*

17. Andrew Cuomo (@NYGovCuomo), TWITTER (Dec. 13, 2017, 10:56 AM), <https://twitter.com/NYGovCuomo/status/940973594468904960> [<https://perma.cc/4CET-VQ5R>].

18. This term will be used interchangeably with “intimate partner homicides” throughout this Note.

19. *See, e.g.*, BERNICE ROBERTS KENNEDY, DOMESTIC VIOLENCE: A.K.A. INTIMATE PARTNER VIOLENCE (IPV) 48 (2007) (“Domestic violence is the least reported sexual crime in the United States and it is the single greatest cause of injury to women.”); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 55 (2000); Kara Beth Stein, *Chapter 857 Prioritizes Domestic Violence Victim Safety*, 38 MCGEORGE L. REV. 175, 175 (2007) (“[D]omestic violence ‘is believed to be the most common yet least reported crime in our nation.’”); *see also*

underreporting, the number of women murdered by their abusive partners is still so significant as to command our attention. This section lays the groundwork for important change by providing a summary of the status quo.

A 2017 Centers for Disease Control and Prevention report revealed that nearly half of all female homicide victims are killed by a current or former male intimate partner.<sup>20</sup> That number rises to fifty-five percent when accounting for female homicides *relating* to intimate partner violence, which includes both family members who get involved to attempt to prevent violence and innocent bystanders with no relation to the couple.<sup>21</sup> Yet in the weeks, months, and years leading up to these murders, abuse in the home is rarely reported to authorities.<sup>22</sup>

With over 1.5 million American women suffering physical abuse from intimate partners each year<sup>23</sup> and nearly three women killed by intimate partners in the United States per day,<sup>24</sup> domestic violence is currently one of the most widespread and pressing problems in this country. Even the few who have neither personally experienced intimate partner violence nor know another who has experienced such violence may still be directly affected by it. Intimate partner violence is a social problem importing many substantial costs on society. Between medical costs, housing-related or homelessness costs, and the impact of domestic violence on the workforce, one study estimates that the overall economic cost of intimate partner violence in the United States may be around \$9.3 billion.<sup>25</sup> The violence also presents especially severe dangers to police officers. Domestic violence calls result in a higher rate of police officer fatalities than any other type of

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Rob Gilhooly, *Domestic Violence: 'Abuse Was All I Knew,'* JAPAN TIMES (May 7, 2016), [https://www.japantimes.co.jp/life/2016/05/07/lifestyle/domestic-violence-abuse-knew/#.W4\\_qDZnKh0s](https://www.japantimes.co.jp/life/2016/05/07/lifestyle/domestic-violence-abuse-knew/#.W4_qDZnKh0s) [<https://perma.cc/A4G5-GMV6>] (“[D]omestic violence remains the violent crime least reported to police, even though it accounts for around one-fifth of all violent crimes.”); Jane Martinson, *Report Reveals 'Extensive' Violence Against Women in EU,* THE GUARDIAN (Mar. 4, 2014, 7:02 PM), <https://www.theguardian.com/world/2014/mar/05/violence-against-women-eu> [<https://perma.cc/YP2J-NGCA>] (“Violence against women is one of the least reported crimes. Only 14% of women reported their most serious incident of partner violence to the police . . .”).

20. Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741 (2017), <https://www.cdc.gov/mmwr/volumes/66/wr/pdfs/mm6628.pdf>.

21. See Camila Domonoske, *CDC: Half of All Female Homicide Victims Are Killed by Intimate Partners*, NPR (July 21, 2017, 2:22 PM), <https://www.npr.org/sections/thetwo-way/2017/07/21/538518569/cdc-half-of-all-female-murder-victims-are-killed-by-intimate-partners> [<https://perma.cc/8FEU-WSWR>].

22. See EVE S. BUZAWA ET AL., RESPONDING TO DOMESTIC VIOLENCE: THE INTEGRATION OF CRIMINAL JUSTICE AND HUMAN SERVICES 27 (4th ed. 2012) (“[I]t is well known that domestic violence crimes tend as a group to be among the crimes least reported to the police.”).

23. See TJADEN & THOENNES, *supra* note 19, at 55.

24. See VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2015 HOMICIDE DATA 3 (2017), <http://www.vpc.org/studies/wmmw2017.pdf> (finding that 928 females were murdered by an intimate acquaintance in 2015). This figure is likely an underestimate of the number of homicides connected to domestic violence, as it includes husbands, ex-husbands, and boyfriends, but does not include ex-boyfriends. See *id.* at 5.

25. INST. FOR WOMEN’S POLICY RESEARCH, THE ECONOMIC COST OF INTIMATE PARTNER VIOLENCE, SEXUAL ASSAULT, AND STALKING 4 (2017), [https://iwpr.org/wp-content/uploads/2017/08/B367\\_Economic-Impacts-of-IPV-08.14.17.pdf](https://iwpr.org/wp-content/uploads/2017/08/B367_Economic-Impacts-of-IPV-08.14.17.pdf).

call.<sup>26</sup> Further, domestic violence impacts education and employment systems. Women are drastically more likely to drop out of school and less likely to complete important job trainings or maintain a livable income if they are being abused by their partner at home.<sup>27</sup> This is all to say that domestic violence not only impacts the lives of the millions who experience it each year, but also permeates every facet of American life and has costs far beyond what most perceive.

Murders occurring in the context of domestic violence are rarely the products of one argument, one fight, or one gunshot. They are most often the final act in the pattern of coercive control built up over time, often unnoticed by those outside the relationships. Abusive partners often commit punishable crimes against their partners for years leading up to the murders—crimes that, if reported and prosecuted, would almost certainly result in seizure of the abusers' firearms.<sup>28</sup> Abusers often methodically establish power and control over their partners, engaging in escalating patterns of behavior—patterns that are not unlike those of killers who stalk their victims and premeditate their murders.<sup>29</sup> The typical domestic violence murder is a culmination of repeated and escalating violence toward the offender's partner.<sup>30</sup>

But under current federal and state law, men who engage in patterns of abusive behavior face no consequences. They are permitted to retain possession of their guns because their specific crimes fall outside the scope of those that result in firearms seizure.<sup>31</sup> They are most often adjudged not guilty of premeditating their killings because their crimes are deemed to have occurred in the “heat of passion.” And their criminal conduct does not give rise to felony murder charges because their predicate crimes do not typically fall within the enumerated list of qualifying crimes.<sup>32</sup> Together, these realities deny justice for victims of domestic violence and their families. Such justice can and should be achieved through changes in federal and state law.

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26. See NICK BREUL & MIKE KEITH, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., DEADLY CALLS AND FATAL ENCOUNTERS: ANALYSIS OF U.S. LAW ENFORCEMENT LINE OF DUTY DEATHS WHEN OFFICERS RESPONDED TO DISPATCHED CALLS FOR SERVICE AND CONDUCTED ENFORCEMENT (2010–2014), at 15 (2016), [http://www.nleomf.org/assets/pdfs/officer-safety/Primary\\_Research\\_Final\\_11-0\\_updated\\_8\\_31\\_16.pdf](http://www.nleomf.org/assets/pdfs/officer-safety/Primary_Research_Final_11-0_updated_8_31_16.pdf).

27. INST. FOR WOMEN'S POLICY RESEARCH, *supra* note 25, at 2.

28. See Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L INST. JUST. J. 14, 18 (2003) (“In 70 to 80 percent of intimate partner homicides . . . the man physically abused the woman before the murder.”).

29. For examples of these behaviors, see NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, POWER AND CONTROL WHEEL (1984), <http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf>.

30. See Laura Dugan et al., *Explaining the Decline in Intimate Partner Homicide: The Effects of Changing Domesticity, Women's Status, and Domestic Violence Resources*, 3 HOMICIDE STUD. 187, 189 (1999).

31. See, e.g., Lisa Rapaport, *Gun Laws Targeting Domestic Abusers Tied to Fewer Homicides*, REUTERS (Sept. 18, 2017, 5:40 PM), <https://www.reuters.com/article/us-health-guns-domestic-violence/gun-laws-targeting-domestic-abusers-tied-to-fewer-homicides-idUSKCN1BT2N9> [<https://perma.cc/RK4E-F5RC>].

32. See Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 533 (2011); see also *infra* Section III.C.

## II. THE FRONT END: HOW FEDERAL AND STATE LAW PERPETUATE THE PREVALENCE OF GUN OWNERSHIP BY CURRENT AND FORMER DOMESTIC ABUSERS

A critical gap currently exists between federal and state law with regard to gun ownership by perpetrators of domestic violence. Through the Lautenberg Amendment, current federal law prohibits domestic abusers from owning guns only if they have been *convicted* of felony or misdemeanor domestic violence or if they have *permanent* restraining orders against them.<sup>33</sup> No such restriction exists, however, for individuals who have only temporary restraining orders issued against them, who have been convicted of stalking, or who have never cohabitated or had a child with their partner.<sup>34</sup> Moreover, thirty-five states allow those who have been convicted of misdemeanor domestic violence crimes or are the subjects of permanent restraining orders to buy or own guns.<sup>35</sup> This means that a majority of states do not even have the legal tools necessary to enforce the federal restrictions, making the federal law not only exceedingly narrow, but toothless as well. In 2014, Senator Richard Blumenthal introduced a bill to help fill the gap in federal law and to provide cities and states with the resources necessary to enforce seizure of firearms from domestic abusers.<sup>36</sup> The bill died in committee.<sup>37</sup>

Other members of Congress have attempted to close what is known as the “boyfriend loophole,” but to no avail. The boyfriend loophole refers to the gaping hole in the Lautenberg Amendment that permits abusive, non-live-in boyfriends and men convicted of stalking to buy or own guns.<sup>38</sup> Under the Lautenberg Amendment, those who commit certain domestic violence crimes are prohibited from purchasing or owning firearms.<sup>39</sup> However, because of nothing more than an omission in the law’s text, men who have been convicted of a violent assault

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33. Lautenberg Amendment, 18 U.S.C. § 922(g)(9) (2012); *see also* U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 1117, <https://www.justice.gov/usam/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted> [<https://perma.cc/2DRL-LLRL>] (entitled “Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence”). Representative Anthony Brown introduced legislation in 2017 that would modify the federal criminal code to prohibit the possession of firearms by individuals subject to temporary restraining orders. *See* H.R. 2670, 115th Cong. (1st Sess. 2017). The bill has yet to make it past the introductory stage. *See* H.R. 2670—*Protecting Domestic Violence and Stalking Victims Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/2670> [<https://perma.cc/P5XL-NG8J>] (last visited Nov. 5, 2018).

34. *See* U.S. DEP’T OF JUSTICE, *supra* note 33.

35. *See* EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA’S UNIQUELY LETHAL DOMESTIC VIOLENCE PROBLEM 3 (2014), <https://everytownresearch.org/documents/2015/04/guns-and-violence-against-women.pdf>.

36. Domestic Violence Gun Homicide Prevention Act of 2014, S. 2676, 113th Cong. (2014).

37. *See* S. 2676—*Domestic Violence Gun Homicide Prevention Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/2676?q=%7B%22search%22%3A%5B%22s2676%22%5D%7D&r=3> [<https://perma.cc/76ZH-2KUK>].

38. *See, e.g.,* Morgan Brinlee, *What is the Boyfriend Loophole? Domestic Abusers Aren’t Totally Barred from Buying Guns*, BUSTLE (Mar. 3, 2018), <https://www.bustle.com/p/what-is-the-boyfriend-loophole-domestic-abusers-arent-totally-barred-from-buying-guns-8392775> [<https://perma.cc/229S-DY56>]; *see also* 18 U.S.C. § 922(g)(9) (2012) (nicknamed the “Boyfriend Loophole Law”).

39. 18 U.S.C. § 922(g)(9) (2012).



but who have never been married to or had children with their intimate partners are not barred from purchasing or owning firearms.<sup>40</sup> In part, this is due to the narrow definitional sections in the applicable portions of the federal criminal code. In its “Firearms” chapter, the code limits the definition of an “intimate partner” to a “former spouse,” an “individual who is a parent of a child of the person,” or “an individual who cohabitates or has cohabited with the person.”<sup>41</sup> The code’s domestic violence-related firearms provisions then refer exclusively to “intimate partner[s].”<sup>42</sup> Accordingly, in cases of “dating partners” that neither live together nor have children in common, a boyfriend’s conviction for simple assault against his girlfriend would not ordinarily prohibit him from purchasing a gun. In 2015, Congresswoman Debbie Dingell introduced the Zero Tolerance for Domestic Abusers Act, which sought to expand the federal criminal code’s definition of “intimate partner” to include dating partners, as well as expand the term “misdemeanor crime of domestic violence” to include a broader set of offenses.<sup>43</sup> That bill died in committee less than two months after its introduction.<sup>44</sup> At present, only twenty-four states have laws on the books that are intended to plug the boyfriend loophole.<sup>45</sup>

Over the past twenty-five years, more intimate partner homicides have been committed with guns than with all other weapons combined.<sup>46</sup> Further, over half of all murders of women committed with guns in the United States each year are committed by the women’s intimate partners.<sup>47</sup> The availability of guns to perpetrators of domestic violence has been well documented as one of the most significant contributing factors to the prevalence of intimate partner homicides in the

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40. See *id.* § 921(a)(33)(A)(ii) (defining “misdemeanor crime of domestic violence” as a crime “committed by a current or former spouse, . . . a person with whom the victim shares a child in common, . . . [or] a person who is cohabiting with or has cohabited with the victim . . .”); Brinlee, *supra* note 38 (describing the effects of the gap in federal law).

41. 18 U.S.C. § 921(a)(32) (2006).

42. *Id.* § 922(d)(8) (2017).

43. See H.R. 3130, 114th Cong. (2015).

44. See H.R. 3130—*Zero Tolerance for Domestic Abusers Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/3130> [<https://perma.cc/76SK-MFEY>].

45. See Melanie Sevcenko, ‘Boyfriend Loophole’: Backlash After Oregon Joins 23 States in Curbing Guns, THE GUARDIAN (Mar. 21, 2018, 9:17 AM), <https://www.theguardian.com/us-news/2018/mar/21/oregon-boyfriend-loophole-bans-convicted-domestic-abusers-from-buying-guns> [<https://perma.cc/U8LM-PH34>]. Fourteen of these laws have been enacted within the past four years. See ARKADI GERNEY & CHELSEA PARSONS, CTR. FOR AM. PROGRESS, WOMEN UNDER THE GUN: HOW GUN VIOLENCE AFFECTS WOMEN AND 4 POLICY SOLUTIONS TO BETTER PROTECT THEM 16 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolence2.pdf> (stating that only 10 states had extended the ban on gun possession by domestic abusers to dating relationships at the time of the report).

46. Letter from April M. Zeoli, Assistant Professor, Mich. State Univ. Sch. of Criminal Justice, to Senators Patrick J. Leahy and Charles Grassley (Jan. 28, 2013), <https://www.judiciary.senate.gov/imo/media/doc/013013RecordSub-Leahy.pdf>.

47. See COOPER & SMITH, *supra* note 9, at 10; EVERYTOWN FOR GUN SAFETY, *supra* note 35.

United States.<sup>48</sup> And the overwhelming majority of Americans would support a change in the policy that permits such ease of access to guns by perpetrators of domestic violence. According to a 2015 poll, eighty-two percent of Americans would support legislation prohibiting individuals convicted of stalking or domestic abuse against their “dating partners” from purchasing guns.<sup>49</sup> But the issue has garnered far too little attention from policymakers. The first step in addressing the epidemic of domestic violence murders in the United States is to fill the inexplicable gaps and loopholes in federal law (and in state law by example) by restricting firearm access for domestic abusers.

### III. THE BACK END: THE INSUFFICIENCY OF FIRST-DEGREE MURDER CHARGES FOR DOMESTIC VIOLENCE MURDERS UNDER EXISTING FEDERAL AND STATE LAW

Most states classify first-degree murder or its equivalent in one of two ways. The first classification is a killing that is “willful, deliberate, and premeditated.”<sup>50</sup> Some jurisdictions also require “malice aforethought,”<sup>51</sup> though those states differ on the amount of malice required and on whether this fourth element is, in fact, a separate requirement from the first three. The second classification is a killing that occurred during the commission of an inherently dangerous felony, otherwise known as the “felony-murder rule.” This Part lays the foundation for the inclusion of domestic violence murders as first-degree murders by discussing both classifications in detail and then explaining why domestic violence murders should be included as a third, comparable classification.

#### A. DELIBERATION, PREMEDITATION, AND MALICE AFORETHOUGHT

Despite the historically dynamic nature of the elements of first-degree murder, and the current jurisdictional inconsistency of their definitions, the principles underlying each element support their application to domestic violence murders. The element that appears, on the surface, to be absent from most domestic violence murders is premeditation.<sup>52</sup> Its legal definition—“consciously considered beforehand”<sup>53</sup>—might seem at odds with the typical domestic violence murder, where a man has killed his intimate partner in the heat of an argument. But questions as to how consciously an individual must “consider” the killing, and what length of time qualifies as “beforehand,” have answers that vary widely among states. So, too, does the question of how premeditation relates to malice aforethought.

48. See EVERYTOWN FOR GUN SAFETY, *supra* note 35.

49. Memorandum from Tom Jensen, Dir. of Pub. Policy Polling, to Interested Parties (July 22, 2015), <https://cdn.americanprogressaction.org/wp-content/uploads/2015/07/DomesticViolenceMemo7.22.15-Final.pdf>.

50. See, e.g., VA. CODE ANN. § 18.2-32 (2017).

51. See, e.g., MASS. GEN. LAWS ch. 265, § 1 (2018).

52. This Note is primarily concerned with domestic violence murders in which there was little to no question that the defendant “willfully” killed the victim. Section III.A therefore focuses on the remaining three elements which are generally the most difficult to prove in domestic violence murder cases.

53. *Premeditated*, BLACK’S LAW DICTIONARY (10th ed. 2014).

The premeditation doctrine arose in 1794, when Pennsylvania became the first state to divide murder into two degrees.<sup>54</sup> Until 1786, American law imposed the death penalty for a swath of crimes, ranging from mayhem to manslaughter.<sup>55</sup> But in the late-eighteenth century, public sentiment began to shift away from the harshness of a far-reaching death penalty and toward a less severe punishment structure.<sup>56</sup> In 1794, in line with this shift, Pennsylvania passed legislation differentiating second-degree murder, which could not be punished by the death penalty, from first-degree murder, which could.<sup>57</sup> The preamble to the Pennsylvania Act of 1794 implied that its purpose was to prevent imposition of the death penalty except when necessary for the safety of the public.<sup>58</sup>

In the mid-nineteenth century, Pennsylvania courts began to clarify what constituted “deliberate” or “premeditated” killing. The first case to do so was *Commonwealth v. Drum*, in which the Pennsylvania Supreme Court held that a killing is deliberate if the killer’s mind is “fully conscious of its own purpose and design,” and is premeditated if there is “sufficient *time*” for the killer “fully to frame the design to kill, and to the select the instrument” with which he will kill.<sup>59</sup> The court did not specify an amount of time necessary to satisfy the premeditation requirement, but it did explicitly state that the law “fixes upon no length of time as necessary to form the intention to kill.”<sup>60</sup> Over the following century, Pennsylvania courts interpreted the words “deliberate” and “premeditated” based on common understanding,<sup>61</sup> and additional states began to adopt the structure of multiple degrees of murder.<sup>62</sup>

Around the turn of the twentieth century, the line between first- and second-degree murder began to blur. Courts across the country began holding that the distinction between first- and second-degree murder existed primarily in the specific intent to take life, and that such intent is necessary to satisfy the deliberation and premeditation elements.<sup>63</sup> Some jurisdictions stopped requiring the passage

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54. See 1794 Pa. Laws 599; Frank Brenner, *The Impulsive Murder and the Degree Device*, 22 *FORDHAM L. REV.* 274, 274 (1953). In fact, the Pennsylvania Act of 1794 classified first degree murder in much the same way most criminal jurisdictions do today—establishing the “wilful, deliberate, and premeditated killing” requirement as well as a barebones felony-murder rule. 1794 Pa. Laws 600.

55. See Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 *U. PA. L. REV.* 759, 763, 767 (1949) (crimes such as counterfeiting, larceny, and buggery were punishable by death).

56. See Brenner, *supra* note 54, at 275.

57. See 1794 Pa. Laws 599–600.

58. *Id.*

59. 58 Pa. 9, 16 (1868) (emphasis added).

60. *Id.*

61. See Keedy, *supra* note 55, at 773–77 (discussing the evolution of case law regarding the meaning of the words “deliberate” and “premeditated”).

62. See Jonathan Simon, *How Should We Punish Murder?*, 94 *MARQ. L. REV.* 1241, 1243, 1262–66 (2011).

63. See, e.g., *Petty v. State*, 89 S.W. 465, 466 (Ark. 1905); *Commonwealth v. Jones*, 50 A.2d 317, 319 (Pa. 1947) (“[T]he main distinction of murder in the first from that of the second degree’ lies in the specific intent to take life required for the former” (quoting *Commonwealth v. Iacobino*, 178 A. 823, 825 (Pa. 1935))); *English v. State*, 30 S.W. 233, 235 (Tex. Crim. App. 1895).

of any time at all between the moment an individual developed the intent to kill and the actual act of killing.<sup>64</sup> In those jurisdictions, premeditation and deliberation could be formed in the time it took the killer to “press[] the trigger that fired the fatal shot.”<sup>65</sup>

The relationship between malice aforethought, willfulness, deliberation, and premeditation also became quite obscure. Some jurisdictions now consider the three to be exactly the same.<sup>66</sup> Others have explicitly held that these states of mind are entirely independent and distinct from one another.<sup>67</sup> For example, in California, a court can only find a killing to be deliberate where the defendant carried out his crime “as a result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; [or] carried on coolly and steadily,”<sup>68</sup> and it is only premeditated if the defendant formed the idea upon “pre-existing reflection.”<sup>69</sup> In Idaho, “malice may be presumed from the intentional use of a deadly weapon in a deadly and dangerous manner.”<sup>70</sup> And in Arizona, jury instructions stating that premeditation can be as “instantaneous as successive thoughts” are considered constitutional.<sup>71</sup> The bottom line is that the elements that distinguish first-degree murder from second-degree are not universally defined. These elements have changed with time, vary by jurisdiction, and, in many cases, are applied inconsistently by courts within the same jurisdiction. What is important, however, is the history and rationale behind requiring these elements to prove first-degree murder because both the history and rationale serve to support the inclusion of domestic violence murders within the category of first-degree murder.

64. See, e.g., *Macias v. State*, 283 P. 711, 718 (Ariz. 1929); *People v. Thomas*, 156 P.2d 7, 14 (Cal. 1945); *State v. Koho*, 423 P.2d 1004, 1006 (Idaho 1967) (“It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation . . . no matter how rapidly they may be followed by the act of killing.”).

65. See, e.g., *Hays v. State*, 599 So. 2d 1230, 1238 (Ala. Crim. App. 1992) (quoting *Caldwell v. State*, 84 So. 272, 276 (Ala. 1919)).

66. See, e.g., *Brown v. State*, 410 A.2d 17, 22 (Md. Ct. Spec. App. 1979) (“The use of [willful, deliberate, and premeditated] seems to us to serve no purpose other than to shroud the intention in an aura of redundancy so as to convey the seriousness of the matter”); *Windham v. State*, 602 So. 2d 798, 801 (Miss. 1992) (“It has long been the case law of this state that malice aforethought, premeditated design, and deliberate design all mean the same thing.”); *Nika v. State*, 198 P.3d 839, 847 (Nev. 2008) (“‘[W]illful,’ ‘deliberate,’ and ‘premeditated’ need not be separately defined, but rather those terms constitute[] a single phrase”).

67. See, e.g., *Thomas*, 156 P.2d at 18 (“It is obvious that the phrases ‘malicious intent’ and ‘malice aforethought’ are not synonymous with ‘willful, deliberate, and premeditated’ intent.” (citing *People v. Holt*, 153 P.2d 21 (Cal. 1944))); *Hern v. State*, 635 P.2d 278, 280 (Nev. 1981) (“Malice is not synonymous with either deliberation or premeditation. To view it otherwise would be to obliterate the distinction between the two degrees of murder.”); *State v. Bush*, 942 S.W.2d 489, 501 (Tenn. 1997).

68. See *People v. Anderson*, 447 P.2d 942, 948 (Cal. 1968) (citing *People v. Caldwell*, 279 P.2d 539, 542 (Cal. 1955)); see also *Moore v. State*, 174 P.2d 282, 289 (Ariz. 1946) (finding that deliberate means an action “carried on coolly and steadily, esp. according to a preconceived design”).

69. See, e.g., *People v. Cole*, 95 P.3d 811, 848 (Cal. 2004).

70. *State v. Snowden*, 313 P.2d 706, 709 (Idaho 1957) (quoting 40 C.J.S. *Homicide* § 25 (1944)).

71. *State v. Booker*, 53 P.3d 635, 638 (Ariz. Ct. App. 2002) (quoting STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL) 11.051 (2d ed. Supp. 2000)).

## B. THE FELONY-MURDER DOCTRINE

The second classification of first-degree murders exists in the felony-murder rule. This rule—which permits a defendant who killed someone during the commission of an inherently dangerous felony to be charged with first-degree murder—has been much maligned by scholars and courts for decades,<sup>72</sup> touted as an unconstitutional broadening of the crime of murder because of its apparent lack of a *mens rea* requirement.<sup>73</sup> Yet the felony-murder doctrine exists as law in some form in forty-three states in the U.S.;<sup>74</sup> in thirty-two states, felony murder is a capital offense.<sup>75</sup>

Despite a sweeping modern notion by the courts that the distinction between first- and second-degree murder would be meaningless without deliberation and premeditation requirements that go beyond the specific intent to kill,<sup>76</sup> the felony-murder rule in most states functions as a substitute for both. As one court put it, “[the felony-murder rule] is merely a particular statutorily prescribed method for showing the mental elements of deliberation and premeditation.”<sup>77</sup> In some of those states, that floating fourth element of “malice aforethought” is still technically required, in addition to the felony, to prove first-degree murder. But it, too, may often be implied from the commission of a felony alone.<sup>78</sup> Thus, the most widely accepted justifications for the felony-murder doctrine are policy related: the rule is believed to fulfill both deterrence goals and retributive goals.<sup>79</sup>

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72. See, e.g., *People v. Washington*, 402 P.2d 130, 130 (Cal. 1965) (“The felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability.”); *People v. Aaron*, 299 N.W.2d 304, 306 (Mich. 1980) (“The existence and scope of the felony-murder doctrine have perplexed generations of law students, commentators and jurists . . . .”); Binder, *supra* note 32, at 404 n.1 (citing numerous sources); Michael J. Roman, “*Once More Unto the Breach, Dear Friends, Once More*”: A Call to Re-Evaluate the Felony-Murder Doctrine in Wisconsin in the Wake of *State v. Oimen and State v. Rivera*, 77 MARQ. L. REV. 785, 821 (1995) (“Nearly all of [the commentary on felony murder] is derogatory to the doctrine, yet felony murder remains a part of nearly every jurisdiction in the United States.”) (footnote omitted); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1431 n.10 (1994) (citing numerous sources).

73. See *Aaron*, 299 N.W.2d at 334 (Ryan, J., concurring in part); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 453–54 (1985).

74. See GUYORA BINDER, *FELONY MURDER* 190, 307 n.64 (Markus D. Dubber ed., 2012).

75. Traci Rose Francis, *Availability of the Felony-Murder Rule Today: Equitable and Just or Unfair and Excessive?* 53 tbl.4 (2005) (unpublished M.A. thesis, University of Central Florida), <http://stars.library.ucf.edu/cgi/viewcontent.cgi?article=1443&context=etd> [<https://perma.cc/7GLD-4L6M>]. Five of the states require the prosecution to prove a specific *mens rea* in order to impose the death penalty. *Id.*

76. See, e.g., *People v. Anderson*, 447 P.2d 942, 948 (Cal. 1968) (“[T]he legislative classification of murder into two degrees would be meaningless if ‘deliberation’ and ‘premeditation’ were construed as requiring no more reflection than may be involved in the mere formulation of a specific intent to kill”).

77. *State v. Williams*, 285 N.W.2d 248, 270 (Iowa 1979).

78. See *State v. Taylor*, 287 N.W.2d 576, 578 (Iowa 1980).

79. See Roth & Sundby, *supra* note 73, at 457–58 (arguing that the justifications for the felony-murder rule are deterrence and the notion that the felon has exhibited an “evil mind”).

## 1. Deterrence

Advocates of the deterrence justification for the felony-murder rule support their position through either of two theories. Some believe the felony-murder rule deters criminals from committing inherently dangerous felonies because of the potentially severe penalties,<sup>80</sup> whereas others believe it makes criminals who are going to commit these felonies more careful not to kill anyone during the commission of the crimes.<sup>81</sup> Overall, supporters of the felony-murder rule believe that stricter punishments send a strong message to criminals (or would-be criminals) about the consequences of their actions.<sup>82</sup> In Professor David Crump's words, "[f]elons know enough to figure out that they have bought much more trouble if their actions result in the loss of human life."<sup>83</sup> Critics of the rule argue that criminals do not know the law and therefore will not be deterred by the threat of a first-degree murder charge.<sup>84</sup> But such an argument stands opposed to the basic notions of penalizing negligence or creating strict liability.<sup>85</sup> The argument that such liability punishes killings with no requisite culpability ignores the culpability of committing the inherently dangerous felony itself, instead focusing solely and myopically on the intent to take a life.<sup>86</sup>

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80. See *State v. Martin*, 573 A.2d 1359, 1368 (N.J. 1990) ("[I]f potential felons realize that they will be culpable as murderers for a death that occurs during the commission of a felony, they will be less likely to commit the felony."). *But see* O.W. HOLMES, JR., *THE COMMON LAW* 58 (Bos., Little, Brown & Co. 1881) ("If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.").

81. See, e.g., *People v. Davison*, 923 N.E.2d 781, 785 (Ill. 2010) ("The felony-murder statute is intended to limit violence caused by the commission of a forcible felony, subjecting an offender to a first degree murder charge if another person is killed during that felony."); see also *Whalen v. United States*, 445 U.S. 684, 713 (1980) (Rehnquist, J., dissenting) (finding that § 22-2401, a D.C. felony murder statute at the time, "was intended to protect human life").

82. See, e.g., David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359 (1985) (defending deterrence as a justification for the felony-murder rule). *But see*, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003) (discussing the reasons to be skeptical of deterrence in the context of applying the felony-murder rule).

83. David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend Upon the Particular Rule at Issue?*, 32 HARV. J. L. & PUB. POL'Y 1155, 1184 (2009). Crump further asserts that "the persistence of our law of negligence and strict liability . . . evidences a belief that accidents are deterrable to some degree." *Id.*

84. See, e.g., Constantino Diaz-Duran, *William Murphy and the Felony Murder Rule*, THE DAILY BEAST (Oct. 19, 2010, 6:43 PM), <https://www.thedailybeast.com/william-murphy-and-the-felony-murder-rule> [<https://perma.cc/3JK3-SNNS>] ("Most people haven't the slightest idea whether their state has a felony murder rule or not . . . How can the rule produce some kind of deterrent effect when people don't know what the rule is?" (quoting Professor Paul H. Robinson)).

85. See Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 984-85 (explaining that many critics of the felony-murder rule see it as imposing strict liability for accidental death during the commission of a felony).

86. States vary in what they consider "inherently dangerous felonies," but most states enumerate a list of felonies that include such crimes as robbery, kidnapping, and rape, among others. See Binder, *supra* note 32, at 533-42. Some states include crimes that are less obviously dangerous in the context of felony murder, including "endangering the food supply," burglary, and various drug crimes. See, e.g., KAN. STAT. ANN. § 21-5402(c)(1)(I), (O), (P) (2017).

But perhaps whether these felonies are deterrable depends on the crime. In a study of FBI crime data on four crimes that fall under the felony-murder rule, Professor Anup Malani found that states employing the felony-murder rule see a lower percentage of burglaries, auto thefts, and larcenies resulting in the victim's death.<sup>87</sup> These data provide some support for the theory that the threat of first-degree felony murder charges makes criminals more careful during the commission of their crimes. However, the differential in the overall number of felonies, the overall number of felony deaths, and the overall number of murders in states employing the felony-murder rule is not statistically significant.<sup>88</sup> Professor Malani's study lends credibility to the view that a domestic violence murder law formulated like a felony-murder rule may have the effect of decreasing the number of murders that result from domestic violence, but may not go far enough to deter the underlying offense.

## 2. Culpability

The culpability justification comports with the retributive theory of punishment, which focuses on the harm resulting from a perpetrator's crimes rather than his mental state at the time he acted.<sup>89</sup> Though this theory may have originated in the late 1700s at a time when the idea of *mens rea* had not been fully developed,<sup>90</sup> it became relevant to felony murder when legislatures began enacting felony-murder laws in the mid-1800s.<sup>91</sup> Then, in the late twentieth century, most jurisdictions brought any "act foreseeably causing death" under the umbrella of felony murder.<sup>92</sup>

Today, the felony-murder rule has continued to play a major role not only in murder cases, but in capital punishment proceedings as well. In *Tison v. Arizona*, the Supreme Court held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state" that may be considered in capital sentencing.<sup>93</sup> Most states that still impose capital punishment include the commission of some enumerated felonies in the list of aggravating factors.<sup>94</sup>

### C. FORGETTING ABOUT DOMESTIC VIOLENCE

Despite the emergence of the felony-murder rule broadening the scope of first-degree murder, domestic violence murders have continued to be left out. The Model Penal Code explicitly provides for a felony-murder rule by creating a

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87. Anup Malani, Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data 23–24 (Dec. 3, 2007) (unpublished manuscript) (on file with *The Georgetown Law Journal*).

88. *Id.* at 24.

89. See Roth & Sundby, *supra* note 73, at 458 (discussing how the "evil mind" theory of felony murder developed).

90. *Id.*

91. See Binder, *supra* note 85, at 976.

92. *Id.* at 979.

93. 481 U.S. 137, 157–58 (1987).

94. See *Aggravating Factors for Capital Punishment by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/aggravating-factors-capital-punishment-state> [<https://perma.cc/M8A8-VUZ8>].

presumption of the requisite recklessness and indifference to human life if the actor is engaged in, or was an accomplice to, certain felonies at the time of the killing.<sup>95</sup> However, neither state law nor the Model Penal Code include the felony of aggravated assault, commonly committed in domestic violence murder cases, within the felony-murder classification.<sup>96</sup> Only six states include any reference to domestic violence or restraining orders among the enumerated aggravating factors in their capital punishment structures,<sup>97</sup> and neither the federal death penalty statute<sup>98</sup> nor the Model Penal Code's definition of murder<sup>99</sup> reference either.

One justification for this absence is a concern that attaching aggravated assault to the felony-murder doctrine would result in “bootstrapping” in cases in which the defendant is charged with committing assault and homicide concurrently.<sup>100</sup> In such cases, courts express concern that evidence of the assault would lead juries to find defendants guilty of homicide based solely on the assault evidence, essentially coupling the homicide charge with the assault charge rather than keeping the charges distinct.<sup>101</sup> Thus, attaching aggravated assault to the felony-murder doctrine usurps homicide law by relieving the prosecution of the burden of proving malice.<sup>102</sup> To avoid this problem, courts employ what is known as the “merger doctrine.”<sup>103</sup> The merger doctrine holds that the underlying predicate felony resulting in a felony murder charge must be distinct from the murder; otherwise, the felony and the murder would “merge” into the same crime.<sup>104</sup>

For example, in most states, the elements of murder incorporate roughly the same elements as assault.<sup>105</sup> Therefore, in these states, if courts apply the felony-murder doctrine whenever the prosecution proves both assault and murder arising from the same event, every murder would be classified as felony murder because

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95. See MODEL PENAL CODE § 210.2(1)(b) (AM. LAW INST. 1980) (“Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.”).

96. See Hava Dayan, *Assaultive Femicide and the American Felony-Murder Rule*, 21 BERKELEY J. CRIM. L. 1, 20–21 (2016).

97. See ALA. CODE § 13A-5-40(a)(19) (2018); FLA. STAT. § 921.141(6)(p) (2017); KY. REV. STAT. ANN. § 532.025(2)(a)(8) (West 2012); LA. STAT. ANN. § 14:30(A)(8) (2015); 42 PA. CONS. STAT. § 9711(d)(18) (1999); WASH. REV. CODE § 10.95.020(14) (2003).

98. 18 U.S.C. §§ 3591–99 (2006).

99. MODEL PENAL CODE § 210.2(1)(b) (AM. LAW INST. 1980).

100. See, e.g., *People v. Hansen*, 885 P.2d 1022, 1028 (Cal. 1994) (quoting *People v. Ireland*, 450 P.2d 580, 590 (Cal. 1969)); *People v. Garcia*, 74 Cal. Rptr. 3d 912, 919 (Cal. Ct. App. 2008) (quoting *Ireland*, 450 P.2d at 590).

101. See *Ireland*, 450 P.2d at 590.

102. *Hansen*, 885 P.2d at 1028.

103. See Dayan, *supra* note 96, at 23–24 (explaining how courts employ the “merger doctrine,” which she refers to as “the principle of merger”); Binder, *supra* note 32, at 525–49 (describing development of the “merger doctrine”).

104. Dayan, *supra* note 96, at 22–25.

105. See, e.g., Binder, *supra* note 32, at 527–30 (referencing cases in which elements of assault were found to be “ingredients” of first-degree murder); Dayan, *supra* note 96, at 13 (stating that merger excludes “mainly the offense of assault” which is considered to be “already included within the legal elements” of homicide).



the elements of the two crimes would “merge.” In contrast, a bank robbery and murder arising from the same event would not result in merger because the elements of bank robbery are not incorporated within the elements of murder. To simplify court application of the merger doctrine, most states enumerate lists of felonies sufficiently distinct from murder to avoid the problem of merging.<sup>106</sup> Such states typically have two degrees of felony murder—first-degree, based on the statutorily enumerated felonies, and second-degree, based on non-enumerated felonies.<sup>107</sup> However, a study by Professor Guyora Binder found that, as of 2011, second-degree felony murder was imposed in only eight reported cases, and none of those cases involved an assault on the deceased victim.<sup>108</sup>

The merger doctrine adds particular complexity to fitting domestic violence murders into a single classification of degree because the crime attached to the murder is often aggravated assault. Defendants often successfully argue that the aggravated assault leading to the felony murder charge arose from the same incident as the murder.<sup>109</sup> This is a problem of framing. Aggravated assault is a crime that can occur in an instant. However, rather than focusing on an instantaneous moment, the recent trend in domestic violence literature has shifted the focus away from single incidents of physical violence to the cycle of coercive control throughout the relationship manifesting through physical, mental, and emotional abuse.<sup>110</sup> Understanding the concept of coercive control is to understand that the crimes underlying domestic violence murders are not limited to the aggravated assaults that may have come just before the fatal gunshot, but could include years of abuse, often supplemented by frequent unreported crimes against the person. To alleviate the commonly raised “bootstrapping” concern, domestic violence law must avoid narrowly focusing on assault occurring at the time of the murder and must instead broadly target the long-term pattern of assaultive behavior leading up to the murder. This view of domestic violence murder would constitute a more holistic approach to classifying the crime, rather than simply limiting the inquiry to the perpetrator’s one final act of violence. Such a proposal is advanced in Part IV.

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106. See Binder, *supra* note 32, at 533 (citing various state laws). Professor Binder also adds reference to twelve states which define predicate felonies categorically, but he refers to them as a “substantial minority.” *Id.*

107. *Id.* at 526.

108. *Id.*

109. See, e.g., *People v. Pelt*, 800 N.E.2d 1193, 1197 (Ill. 2003); *Johnson v. State*, 4 S.W.3d 254, 257–58 (Tex. Crim. App. 1999).

110. See, e.g., LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 36–40 (2012) (explaining the nature of “coercive control theory” in social science research). See generally EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* (2007) (introducing the concept of “coercive control” and discussing its relationship to intimidation, isolation, control, and domestic violence).

#### IV. INTRODUCING THE THEORY OF THE SOFT DOMESTIC VIOLENCE-MURDER DOCTRINE

To properly address the severity of domestic violence murder, such murders must be explicitly named under the Model Penal Code's murder section and under states' first-degree murder statutes. With the enactment of Britny's Law, North Carolina attempted such legislative advancement by creating a "rebuttable presumption that murder is a 'willful, deliberate, and premeditated killing' . . . if the perpetrator has previously been convicted of [a domestic violence offense involving the same victim]."<sup>111</sup> In one sense, this law may go too far—in another, not far enough. The presumption created by Britny's Law must be reined in a bit, as its current form may constitute a violation of the Fourteenth Amendment's Due Process Clause. However, the law only addresses murderers who have previously been *convicted* of domestic violence offenses, without mentioning abusers against whom formal criminal charges were never brought. The legislative advancements necessary to address this systemic problem must be drafted in such a way as to not only conform with the requirements of the Due Process Clause, but also include all abusers, particularly those who have not yet been criminally convicted.

##### A. THE CONSTITUTIONALITY OF THE DOMESTIC VIOLENCE-MURDER DOCTRINE

Opponents of the presumption in Britny's Law may argue that it violates the Fourteenth Amendment. The Due Process Clause requires that the prosecution prove beyond a reasonable doubt "*every fact* necessary to constitute the crime" with which it charges a defendant.<sup>112</sup> Therefore, any mandatory presumption which "relieve[s] the State of the burden of persuasion on an element of an offense" would violate the Due Process Clause.<sup>113</sup> Contrarily, a "permissive inference," which suggests to the jury a "*possible* conclusion" based on predicate facts, violates the Due Process Clause only if the suggested conclusion "is not one that reason and common sense justify in light of the proven facts before the jury."<sup>114</sup> Thus, the two relevant questions are, first, how to create a rebuttable presumption—that a killing is willful, deliberate, and premeditated if it occurs under circumstances reflecting a history of domestic violence—constituting a permissive inference rather than a mandatory presumption; and second, whether such an inference would be justified by reason and common sense considering the proven facts demonstrating the history of domestic violence.

Within the classification of permissive jury instructions, there is an important distinction between permissive inference instructions and permissive rebuttable presumptions. If a jury finds the existence of Fact A, a permissive inference instruction informs jurors that they may, but need not, infer the existence of Fact

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111. N.C. GEN. STAT. § 14-17(a1) (2017).

112. *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

113. *Francis v. Franklin*, 471 U.S. 307, 313–14 (1985) (citing *Patterson v. New York*, 432 U.S. 197, 215 (1977)).

114. *Id.* at 314–15 (emphasis added).

B.<sup>115</sup> A permissive rebuttable presumption, however, permits jurors to infer the existence of Fact B, but also permits the defense to introduce evidence challenging either the existence of Fact A, the legitimacy of the inference itself, or the existence of Fact B.<sup>116</sup> Though permissive inferences or presumptions are rebuttable by the opposing party, not all rebuttable presumptions are permissive. A rebuttable presumption is mandatory if the jurors would reasonably interpret the instruction to mean they “must” presume Fact B, though the opposing party could offer evidence to reject that finding.<sup>117</sup> A law requiring jurors to be instructed that they “shall” presume something, therefore, would constitute a mandatory rebuttable presumption.<sup>118</sup> If a jury instruction shifts the burden from the State to the defendant to disprove an element of the crime, it violates the Due Process Clause.<sup>119</sup> Therefore, to withstand a Due Process challenge, the criminal law must be made in the form of a permissive inference. For example, such an inference might include language to the effect of, “a jury shall be permitted to presume that a murder is ‘willful, deliberate, and premeditated’ if . . . .”

Unsurprisingly, the question whether such a permissive inference would be justified by reason and common sense in the context of domestic violence murders is subjective. Courts examine this question on a case-by-case basis.<sup>120</sup> The question commonly arises in murder cases in which juries are instructed that they may, but are not required to, presume malice from the use of a deadly weapon.<sup>121</sup> Those instructions are commonly upheld as justified by reason and common sense considering the facts proven.<sup>122</sup>

#### B. THE EXPANSIVE NECESSITY OF THE DOMESTIC VIOLENCE-MURDER DOCTRINE

Given the staggering statistics of domestic violence, low reporting rates, and even lower prosecution rates, it is critical that protective orders—often the only evidence of a domestic violence perpetrator’s wrongdoing—be permitted to show a defendant’s pattern of abuse leading up to the murder of an intimate partner. It is no secret that the reporting rate of domestic violence incidents is

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115. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1187 n.1 (1979).

116. See NEIL C. BLOND, BLOND’S LAW GUIDES: EVIDENCE 70 (Joel Wm. Friedman ed., Aspen Publishers, 4th ed. 2007) (2005).

117. See, e.g., *Pattison v. State*, 54 N.E.3d 361, 366 (Ind. 2016).

118. See *id.*

119. See *Francis*, 471 U.S. at 318.

120. See, e.g., *Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 161 (1979); *United States v. Warren*, 25 F.3d 890, 898 (9th Cir. 1994).

121. See, e.g., *Francis*, 471 U.S. at 314–15; *Clinkscales v. Stevenson*, No. 6:11-1160-TMC-KFM, 2012 WL 1030345, at \*9–10 (D.S.C. Jan. 27, 2012); *Hereford v. State*, 342 P.3d 1201, 1205 (Wyo. 2015).

122. See, e.g., *Jones v. State*, 753 So. 2d 1174, 1188–89 (Ala. Crim. App. 1999); *Hereford*, 342 P.3d at 1208–09; see also *Gray v. Delbioso*, No. 14-4902, 2017 WL 2834361, at \*7 (E.D. Pa. June 30, 2017) (upholding presumption of malice based on use of deadly weapon on a “vital part” of the body). *But see Kruckcheck v. State*, 671 P.2d 1222, 1225 (Wyo. 1983) (holding that a permissive presumption instruction violated the Fourteenth Amendment because the instruction did not inform the jury that it could refuse to use the presumption).

extremely low. Based on existing domestic violence data, most of which is extremely outdated, only about one-fifth of all rapes, one-quarter of all intimate partner physical assaults, and one-half of all stalking offenses perpetrated against females are reported to the police.<sup>123</sup> As of 2000, the estimated number of intimate partner rapes and physical assaults occurring annually in the United States was close to five million<sup>124</sup>—a number that has surely grown since then. But even more concerning and relevant to this Note's proposals is that only a small percentage of intimate perpetrators who raped, physically assaulted, or stalked females were prosecuted and, of those, less than half were convicted.<sup>125</sup> Statewide studies show that it is common for over eighty percent of domestic violence cases to be dismissed.<sup>126</sup> So, of the nearly five million incidents of intimate partner violence that occur annually in the United States, it is estimated that fewer than 200,000 perpetrators are convicted.<sup>127</sup> A law that targets only those abusers who have been *convicted* of domestic violence addresses far too small a percentage of those who actually commit it.

Restraining orders for domestic violence were established as a response to the failure of the criminal justice system to effectively protect individuals from abuse by their intimate partners.<sup>128</sup> A significantly higher number of females successfully obtain temporary restraining orders against their abusers. The same study reported that approximately twenty percent of women who experienced rape, physical assault, or stalking successfully obtained temporary restraining orders against their abusers.<sup>129</sup> Logic would imply that these numbers have risen in the past seventeen years, as the epidemic of domestic violence has been brought into the spotlight; and ideally those percentages will see even greater increases in the coming years, particularly as America enters the #MeToo era, in which confronting an abuser in a public courtroom to argue for a restraining order seems more socially acceptable than perhaps at any time in history.<sup>130</sup> The existence or

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123. TJADEN & THOENNES, *supra* note 19, at v. Even fewer of these crimes perpetrated against males were reported to the police. *Id.*

124. *Id.*

125. *Id.* at 52.

126. See, e.g., Mike Gallagher, *Violence Cases Rarely Go to Trial*, ALBUQUERQUE J. (May 1, 2005), <https://www.abqjournal.com/news/metro/344905metro05-01-05.htm> [<https://perma.cc/AE5M-5YLN>]; Claire Lowe, *Why 80 Percent of New Jersey's Domestic Violence Cases Are Dismissed*, PRESS OF ATLANTIC CITY (Apr. 11, 2017), [http://www.pressofatlanticcity.com/breaking-the-cycle/why-percent-of-new-jersey-s-domestic-violence-cases-are/article\\_d9878dce-e162-5f98-8d6a-95eee8cb8884.html](http://www.pressofatlanticcity.com/breaking-the-cycle/why-percent-of-new-jersey-s-domestic-violence-cases-are/article_d9878dce-e162-5f98-8d6a-95eee8cb8884.html) [<https://perma.cc/5LWW-TV57>].

127. See TJADEN & THOENNES, *supra* note 19, at 51 (based on data provided in Exhibit 18).

128. Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & C.R. L. REV. 557, 564 (2006).

129. See *id.* at 52 (based on data provided in Exhibit 19).

130. The #MeToo movement began in October 2017, when actress Alyssa Milano popularized the phrase that had long been used by social activist Tarana Burke to publicize the prevalence of misogyny and sexual assault in America. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://nyti.ms/2zocwiU>]. Several articles published in the months following the #MeToo movement highlighted women who have used the hashtag to publicize their own experiences with domestic violence. See, e.g., Rachel Leah, *Is #MeToo Moving Into Domestic Violence?*, SALON

violation of protective orders already appear as aggravating factors in six states' capital-punishment regimes<sup>131</sup> in recognition of a perpetrator's relentlessness in targeting a specific individual. That states are permitted to include restraining orders in their aggravating factors demonstrates that these orders "genuinely narrow the class of persons eligible for the death penalty."<sup>132</sup> Including the same in first-degree murder statutes would similarly serve to narrow the class of persons charged with first-degree murder and avoid blurring the bright line between the degrees of murder, which often causes courts concern.<sup>133</sup>

## V. PROPOSALS

Some scholars rightly question whether any proposed legislation, change to the Model Penal Code, or shift in policy focus will have a meaningful impact on a subset of violence that exists behind closed doors in every racial, socioeconomic, geographic, and other subgroup in America. Such a change is complex and unlikely. The rates of prosecution have been so low that many experts doubt whether criminal law can ever be an effective mechanism in protecting against intimate partner violence.<sup>134</sup> However, after passage of the Violence Against Women Act of 1994 (VAWA),<sup>135</sup> the rate of intimate partner violence against females declined fifty-three percent in a span of fifteen years.<sup>136</sup> During the same period, female homicide victims killed by intimate partners fell by twenty-six percent.<sup>137</sup> For those still concerned with the fiscal impact of domestic violence, it is worth noting that VAWA is also estimated to have reduced medical and social service costs by \$12.6 billion in its first six years alone.<sup>138</sup> Accordingly, the prospect of affecting results through changes in the law is not entirely bleak. It is critical, however, to focus attention on the failures that are curable, of which there are several.

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(Dec. 8, 2017, 5:12 PM), <https://www.salon.com/2017/12/08/lucy-mcintosh-mark-houston-metoo-domestic-violence/> [<https://perma.cc/4C9N-UGK5>].

131. See *supra* note 97.

132. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

133. See, e.g., *State v. Booker*, 53 P.3d 635, 639 (Ariz. Ct. App. 2002).

134. See, e.g., Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1276–93 (2010); Franklin E. Zimring, *Toward a Jurisprudence of Family Violence*, 11 CRIME & JUST. 547, 564 (1989). But see Carol E. Jordan, *Intimate Partner Violence and the Justice System: An Examination of the Interface*, 19 J. INTERPERSONAL VIOLENCE 1412, 1427 (2004) ("There is good news . . . in that it appears that arrest and civil protective orders are often associated with reduced experience with subsequent violence.").

135. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

136. SHANNAN CATALANO ET AL., U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENCE 2 (2009). The rates of violence against males also decreased by roughly the same margin—fifty-four percent between 1993 and 2008. *Id.*

137. *Id.* at 3.

138. Office of the Press Sec'y, *FACT SHEET: Standing Up for Women's Civil Rights, 20 Years After VAWA*, WHITE HOUSE (Sept. 9, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/09/fact-sheet-standing-women-s-civil-rights-20-years-after-vawa> [<https://perma.cc/NH6N-VX4A>].

## A. TARGET THE GUNS OF DOMESTIC ABUSERS

Research has demonstrated that states with statutes restricting access to firearms for individuals subject to temporary restraining orders for domestic violence-related offenses see significantly lower numbers of domestic violence murders.<sup>139</sup> Congress must follow through with meaningful changes like Senator Blumenthal's 2014 proposal to bring temporary restraining orders under the umbrella of firearms seizure laws.<sup>140</sup> Such laws could serve as a stepping stone to eliminate the ability of domestic abusers to retain possession of their guns after they have had a restraining order issued against them, in any capacity, for domestic violence-related conduct. Temporary restraining orders are often not the first indicator that a man is a serious danger to his intimate partner, but they are an official, documented record that can serve as grounds for improving the safety of those in danger of an offender's escalating behavior. Additionally, Congress must close the "boyfriend loophole" by amending the definition of "intimate partner" in the federal criminal code to include any partner with whom the individual was engaged in a dating or sexual relationship, regardless of cohabitation or children in common.

## B. INTRODUCE THE DOMESTIC VIOLENCE-MURDER DOCTRINE INTO THE CRIMINAL LAW WHERE IT IS CONSPICUOUSLY ABSENT

Domestic violence murder is more akin to first-degree murder than any other crime. Yet these murders are too commonly held by courts and prosecutors to lack the requisite elements needed to charge and convict defendants with murder in the first degree. Federal and state laws do not explicitly exclude domestic violence murders from premeditation qualifications. But they do not explicitly include them either. To bring domestic violence homicides more explicitly in line with criminal law, the Model Penal Code should be updated to include a clause that specifies that "a jury shall be permitted to presume that a murder is 'willful, deliberate, and premeditated' if the perpetrator had previously been the subject of a restraining order or order of protection procured by the victim in a case related to domestic violence." Such language avoids speculation about the "level" of domestic violence that occurs behind closed doors, as any action resulting in such an order would have already been deemed sufficiently serious to warrant the order in domestic violence court.

It is critical to ensure that the use of protective orders as evidence in criminal proceedings does not interfere with the ability of survivors to report abuse. A survivor of domestic abuse is less likely to report it if doing so would risk retaliatory violence by her partner.<sup>141</sup> And the risk of retaliatory violence increases

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139. See April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 INJ. PREVENTION 90, 92 (2010).

140. See *supra* note 36.

141. See Deborah Epstein & Lisa A. Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women*, 167 U. PENN L. REV (forthcoming 2019) ("It is hardly surprising that a major reason survivors cite for withholding

significantly once a survivor involves the courts.<sup>142</sup> Attaching blanket criminal consequences to civil protection orders would therefore be likely to depress reporting rates. In order to avoid this undesirable result, the law must be strictly limited to domestic violence *murders*. This will ensure that restraining orders are not weaponized and continue to function not as a sword, but as a shield for survivors.

The appearance of the clause listed above in every state's murder statute would constitute just one small piece of what is necessary to address the problem described in this Note. The Model Penal Code, designed to stimulate and assist legislatures in standardizing the penal law across the United States, must adopt a clause defining domestic violence and acknowledging the role it plays in murders. It must expand its definition of the felony-murder rule so that it encompasses unremitting abuse. Individual states must follow the lead of North Carolina in making the prosecution of domestic violence and related crimes more straightforward. And they must follow the lead of the six states that have already explicitly or implicitly acknowledged the role of domestic violence in murders by including it among their enumerated aggravating factors. Britny's Law has set a positive example for state legislatures around the country, but those legislatures must acknowledge the existence of the problem before they will be able to take steps toward solving it.

#### CONCLUSION

As awareness of the systematic exclusion of domestic violence murders from meaningful criminal interventions grows, the public has begun to demand that the justice system hold perpetrators of abuse appropriately accountable. Public support for legislation like Governor Cuomo's is overwhelming, yet government officials have shown no urgency or willingness to see such legislation through to enactment.

Addressing the flaws in criminal law that permit domestic abuse perpetrators to so freely and easily purchase and keep firearms is a critical first step in combating the front end of domestic violence murder. Though unfortunately, given the frequency with which such murders are committed in the United States, the back end needs work as well. The domestic-violence murder doctrine that this Note has introduced walks the fine line of constitutionality in a similar manner to the felony-murder doctrine, without crossing that line. The implementation of these proposals or similar avenues of change could have monumental impacts on the lives of thousands of potential victims, and would send a message to the

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cooperation from prosecutors is fear of future harm"); Louise Ellison, *Prosecuting Domestic Violence Without Victim Participation*, 65 MOD. L. REV. 834, 839 (2002) ("A significant number of domestic violence victims no doubt withdraw for fear of retaliatory violence . . .").

142. See Carol E. Jordan, *Intimate Partner Violence and the Justice System: An Examination of the Interface*, 19 J. INTERPERSONAL VIOLENCE 1412, 1413 (2004) (citing multiple sources finding that women are often threatened by their partners for seeking protective orders); see also Christopher T. Benítez et al., *Do Protection Orders Protect?*, 38 J. AM. PSYCHIATRY L. 376, 385 (2010) (citing study in which twenty percent of protection orders resulted in an escalation in violence and abusive behavior).

millions of survivors living in America today that the criminal justice system takes domestic violence and its consequence seriously. Shortly after his daughter's killer was sentenced, Stephen Puryear summed up the current state of the law perfectly: "[t]his is what these guys think, that they can kill someone and pull their five years and get it over with."<sup>143</sup> The status quo perpetuates the violence. It allows perpetrators to escalate their abuse without any real threat of significant consequence. Only through acknowledgement and action can our government ensure that the families of women like Britny Puryear see justice served on the individuals who take the lives of their partners.

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143. See Alvarez, *supra* note 4.