

Breakups

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ABSTRACT: This Article identifies an overlooked criminalization gap. While the existence of a private sphere in which violence is allowed has been formally repudiated, a subtler form of legal immunity persists. Relationship status—that is, whether or not a couple is involved in an ongoing relationship—continues to construct crime. Though physical violence between intimate partners is categorically outlawed, patterns of controlling behavior that encompass physical violence may or may not be lawful. These patterns of controlling behavior are legally permitted when two people are together. Yet these same patterns become illegal if, and only if, the couple separates. The law thus prohibits behavior that it permits before the breakup. I call this the *de facto* separation requirement and offer a conceptual framework that explains its endurance. On analysis, the differential treatment of pre- and post-breakup patterns cannot be justified.

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INTRODUCTION

The most commonplace violence—violence between intimate partners—is different from other types of violent crime.¹ When it is embedded in a relationship, violence spans time. Unlike other violence, intimate partner violence is not episodic, nor is it limited to the realm of the physical. Incidents of acute battering are connected by dynamics of power and control. This kind of violence cannot be understood without reference to context. Its harms encompass not just bodily injury, but fear and diminished autonomy.²

The law fails to incorporate these generally accepted truths. Though domestic violence is formally outlawed, insofar as longstanding statutes are now used for prosecution, its essence remains outside the reach of existing criminal law, which prohibits only discrete incidents of physical injury. Patterns of control are overlooked, and context—meaning that which occurs in the interstices of physical violence—all but disappears.³

Until, that is, the moment of perceived separation. When relationships “end,” stalking begins. Quite suddenly, context matters; ongoing conduct becomes legally significant, as do the nonphysical harms that result when a person is subjected to power and control.⁴ In its approach to stalking, the law adopts a model of crime that, nomenclature aside, seems more closely aligned with the realities of domestic violence.

This becomes even more apparent when we juxtapose the post-separation conduct that *is* criminalized with the pre-separation conduct that *is not*, for they are of a piece. Both represent ongoing efforts to exert power and control, using

1. According to 2011 figures from the first National Intimate Partner and Sexual Violence Survey, more than one in three women in the United States has “experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.” MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2 (2011) [hereinafter *NISVS*].

2. See *infra* notes 23-42 and accompanying text. See also *infra* Section II.B.

3. See *infra* Section II.A.

4. See *infra* Section II.B.

a wide range of mechanisms that inflict a broad spectrum of injury. If this happens when we perceive that a relationship is over, we call it stalking; but if it occurs when the relationship is viewed as continuing, we do not. Thus the moment of the “breakup” becomes not only legally meaningful, but dispositive of whether a crime has even occurred.⁵ Yet until now, no notice has been given to how relationship status constructs crime.

This Article is the first to identify and critique the law’s inconsistent treatment—that is, its selective criminalization—of patterned conduct. After the breakup, ongoing conduct that significantly impinges on the victim’s well-being—by frightening, alarming, or harassing her—resembles the stranger stalking paradigm, and it is prohibited. Before the breakup, ongoing conduct that impinges on the victim’s wellbeing in just these ways is ignored. Though intricately connected to a regime of physical violence, nonphysical abuse is tolerated, along with its harms.⁶ This hidden doctrinal puzzle raises important questions about how we think about violence between intimates and the adequacy of existing legal responses.

The Article proceeds as follows. Part I draws from social science research and case law in order to contest the standard mode of distinguishing between domestic violence and stalking.⁷ The discussion challenges the hold that this battering/stalking division maintains on our legal and popular imaginations.⁸

Part II examines separation and critiques its exalted status in criminal law. Separation does not occur at a moment in time, nor is it typically the marker of a transformed practice of intimate violence. Its legal standing as such demands explanation of why a designated relationship exit on the part of the victim becomes necessary for the law to recognize context that was there all along. The *de facto* separation requirement, as I will call it, derives from an account of consent to violence in intimate relationships.

Part III explores the theoretical underpinnings of consent and applies this framework to the context of abuse. Tacit attributions of consent cannot be reconciled with what we know about the struggles of women in violent relationships. Missing from the conditions which give rise to imputed consent

5. This Article seeks to challenge social and legal conceptions of what constitutes the end of a relationship, along with related constructs (e.g., staying/leaving, breaking up). Since the discussion conveys the substance of this critique, I will discontinue the use of quotation marks around these terms.

6. For a description of the harm of nonphysical abuse, see *infra* notes 23-42 and accompanying text. The following discussion queries why this harm is recognized after the breakup but not before. In short, it observes that the law *can* redress a course of conduct that extends beyond the physical, but that it does so selectively. Though my argument here does not rest on this premise, I contend that the criminal law serves an expressive function that is promoted by accurately conceiving the nature and extent of injury to victims of domestic violence. I have defended this claim elsewhere. See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1015-19 (2004).

7. See *infra* Section III.A.

8. See *infra* Section III.C.

are voluntariness⁹ and intentionality.¹⁰ The absence of these preconditions undermines the legal imputation of consent, effectively opposing law's separation requirement.

The Article concludes by evaluating the disparate levels of protection the law affords women across the phases of relationships, and by urging an end to this criminalization gap.

I. BATTERING/STALKING

Most stalking cases involve women who are victimized by their intimates or former intimates.¹¹ Many women experience both domestic violence and stalking in their relationships, and can hardly differentiate between the two.¹² Control—violent control¹³—is central to both forms of abuse, regardless of whether a relationship is ongoing, ending, or over.¹⁴

For purposes of this Part, unless otherwise noted, I will adhere to common usages of the terms stalking and domestic violence, which the criminal law perpetuates.¹⁵ This approach implicitly defines a victim's emphatic rejection of the relationship as the triggering condition for the onset of stalking.¹⁶ In the discussion that follows, I make two claims: first, what is conventionally understood as stalking often occurs pre-breakup (though we place this under the rubric of domestic violence);¹⁷ and second, what is conventionally understood as domestic violence often occurs post-breakup (though we label this stalking).¹⁸ This raises the question of why breaking up¹⁹ matters for

9. See *infra* note 282 and accompanying text.

10. See *infra* note 283 and accompanying text.

11. See TK Logan, *Research on Partner Stalking: Putting the Pieces Together*, NAT'L. INST. OF JUSTICE 3 (2010), <http://www.victimsofcrime.org/docs/Common%20Documents/Research%20on%20Partner%20Stalking%20Report.pdf> (citations omitted) ("Research shows that partner stalking is a relatively common form of violence against women. Partner stalking is the largest category of stalking cases."); Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings from the National Violence Against Women Survey*, NAT'L. INST. OF JUSTICE 2 (1998), <https://www.ncjrs.gov/pdffiles/169592.pdf> (finding that nearly eighty percent of stalking victims are women, and sixty percent of female stalking victims are stalked by an intimate or formerly intimate partner; the two are not distinguished). See also *infra* note 49. Further reference to stalking in this Article is directed to cases involving intimates and former intimates.

12. See *infra* notes 69-79 and accompanying text.

13. The term "violent control" emphasizes that the backdrop of physical violence shapes the meaning of control. See *infra* text accompanying note 26; notes 40-42 and accompanying text.

14. I will show that this conceptualization oversimplifies the complexities of abusive relationships. See *infra* Part III.A.

15. See *infra* Section II.C.

16. I will argue that this understanding is extremely problematic. See *infra* Section II.C.

17. See *infra* Section II.A.

18. See *infra* Section II.B.

19. Though the term "break up" is not typically applied to married couples, I am using it in a general sense, to mean that one partner has conveyed that the relationship is over. This is not to deny the many possible iterations of this basic definition. See, e.g., Benoit Denizet-Lewis, *Teaching Kids How to Break Up Nicely*, N.Y. TIMES MAG., Aug. 3, 2011, <http://www.nytimes.com/2011/08/07/magazine>

purposes of defining intimate partner violence,²⁰ and prompts a related inquiry into whether it should.²¹

A. Control in Ongoing Relationships

Domestic violence, also known as battering, intimate partner violence, intimate partner abuse, or simply abuse,²² is a pattern of violent conduct predicated on power and control.²³ Psychologist Mary Ann Dutton has explained:

Abusive behavior does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with ongoing psychological abuse—is to fail to recognize what some battered woman experience as a continuing “state of siege.”²⁴

This state of siege takes many forms, which have been thoroughly documented by social scientists.²⁵ Abusers control their victims using a wide spectrum of behaviors; what these behaviors share in common is that all are rooted in the explicit or implicit threat of physical violence.²⁶ Women in violent relationships often cite the nonphysical components of abuse—or, as I am conceiving it, nonphysical violence²⁷—as the worst of what they endure.²⁸

/teaching-kids-how-to-break-up-nicely.html (discussing how, in a “Breakups 101” workshop for teenagers, the facilitator suggested that breakups involve “an agreement or mutual understanding”).

20. See *infra* Section II.C

21. See *infra* Part III.

22. Each label has its merits and drawbacks; this Article uses them interchangeably.

23. “Law enforcement experts and victim advocates understand intimate partner violence as a pattern of controlling behavior that one intimate partner directs at another.” *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, NAT’L. CTR. FOR VICTIMS OF CRIME 14 (2007), <http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf> [hereinafter *Model Stalking Code Revisited*].

24. Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993).

25. For one especially comprehensive account, see EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* (2007).

26. *Id.* at 205 (emphasizing that, in abusive relationships, the backdrop of physical violence shapes the meaning of control).

27. I recognize that this is an unconventional formulation, owing to the stranger violence paradigm that continues to dominate criminal law and influence social norms. See *infra* note 47 and accompanying text. Even so, the definition of violence is hardly fixed; rather it is “contingent and contested.” Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 602 (2011). In abusive

Along with psychological abuse, sexual abuse, threats, economic coercion, and isolation,²⁹ batterers use stalking as a means of controlling their intimate partners.³⁰ Stalking of this kind most often begins during a relationship, as opposed to at its end.³¹

relationships, nonphysical violence typically works in tandem with physical violence; both foster a constant state of vulnerability and enhance the batterer's power over the victim.

28. Empirical research on intimate partner violence consistently documents the devastating harm of nonphysical abuse. See TK LOGAN ET AL., PARTNER STALKING: HOW WOMEN COPE, RESPOND, AND SURVIVE 7, 107-47 (2006) (describing physical and mental health costs of partner stalking); Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, 14 VIOLENCE AGAINST WOMEN 634 (2008) (finding that sexual coercion, psychological abuse and stalking contribute to adverse mental health consequences for abused women, even apart from physical violence and injuries). It has become increasingly clear that the anxiety and fear caused by the unpredictability of physical violence is its own form of injury to women. See, e.g., LOGAN ET AL., *supra*, at 88-89 ("Melissa described how living with the constant threat of violence and stalking pushed her, at times, to the desperate desire for it to be over, so much so that the thought of suicide had entered her mind, 'You just want it over with period. And it's like you'll do anything. When it comes down to it you just want things [to be] done.'"); *id.* at 126 (recounting an interview with a woman who was "scared never knowing what's gonna happen to me, never knowing what's going on around me. [I was] being intimidated and threatened most of the time and isolated"). The "constant vigilance required to anticipate [the abusive] partner's reactions" exacts a painful toll. *Id.* As one battered woman explained, "I had to, well, when I lived with him I had to try to figure out what he was going to do the next day, I had to be a step ahead of him." *Id.* Given developing understandings of the effects of abuse, it may be understating the point to note that "[c]episodic physical violence, while often a devastating manifestation of the abuser's control, does not fully define its contours or map its reaches." Tuerkheimer, *supra* note 6, at 966. See also *infra* note 42 and accompanying text.

29. See ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 65 (2000). See also STARK, *supra* note 25, at 130-32, 256-57.

30. The research literature lends abundant support to this proposition. As one leading study summarized, "The stalking partners' control and dominance over women's thinking and actions alienated them from their own goals, intentions, thoughts, feelings, and it isolated them from others." LOGAN ET AL., *supra* note 28, at 135. Another researcher concluded, "The current study indicates that stalking should also be seen as a variant of IPA [Intimate Partner Abuse] during the relationship. Stalking may give the abuser greater control over his victim during the relationship and may be one of the many tactics batterers use to ensure that women stay in abusive relationships." Heather Melton, *Stalking in the Context of Intimate Partner Abuse: In the Victim's Words*, 2 FEMINIST CRIMINOLOGY 347, 361 (2007). For women's accounts of how their partner's stalking contributed to the overall scheme of control, see LOGAN ET AL., *supra* note 28, at 135-141. For a number of powerful first-person accounts of stalking during ongoing relationships, see *id.* at 17, 87-90. In an especially vivid illustration of the centrality of control to intimate partner stalking, one woman kept expecting her husband to show up during her interview for the stalking study. In her words, "I thought he would come around, because I swear I saw his truck, I swear I did." *Id.* at 88. Researchers reported that this woman "spent much of the interview looking out the window for his truck." *Id.* See also TK Logan & Robert Walker, *Partner Stalking: Psychological Dominance or "Business as Usual"?*, 10 TRAUMA, VIOLENCE & ABUSE 247, 251 (2009).

31. In one study, seventy-nine percent of women reported that their partners begin stalking them during the first two years of the relationship. LOGAN ET AL., *supra* note 28, at 38. Researchers concluded that "one of the more important findings is the pervasiveness of stalking within the intimate relationship as well as after the dissolution of the relationship." *Id.* at 57. See generally Melton, *supra* note 30 (finding that in the vast majority of examined cases, stalking began during the relationship, and collecting accounts of such behavior). Despite this reality, most empirical studies only examine partner stalking once the relationship has ended, and many women themselves do not define their partner's behavior as stalking until these behaviors continue post-breakup. LOGAN ET AL., *supra* note 28, at 47. See also Melton, *supra* note 30, at 355 ("I never considered it that [stalking] when we were together, but I think it was constant. I just didn't see it as that at the time.").

An emerging body of social science research supports this understanding.³² One recent study found that “[s]talking tactics did not occur in isolation, but rather co-occurred within the context of significant psychological, physical, and sexual violence perpetrated by the stalking partner.”³³ Another study framed stalking as “an extension of coercive control,” and posed the question of whether partner stalking is simply “business as usual” for abusers, rather than a unique form of psychological dominance.³⁴ Yet another large study of intimate partner stalking noted:

Topographical similarities between these three constructs include the fact that battering, emotional abuse, and stalking tend to be serial and ongoing and can occur during and after the termination of the romantic relationship Functional similarities include findings that battering, stalking and some aspects of emotional abuse appear to be motivated by attempts to control and intimidate the victim³⁵

In short, “stalking represents an extreme form of dominance and control when it occurs in the context of physically violent relationships.”³⁶

These conclusions are wholly consistent with first-person accounts of violence in relationships. Women who experience abuse often perceive stalking as integral to the overall pattern of conduct.³⁷ When asked why she thought her partner stalked her, one woman, Gloria, answered, “he wants total, complete control over me. I know that.”³⁸ Vanessa, another woman abused by her partner remarked, “I feel like a caged animal. I can’t be my own person. I’m not independent anymore. I can’t be independent.”³⁹

32. The legal definition of stalking, however, departs significantly from this account. See *infra* Section II.B.

33. LOGAN ET AL., *supra* note 28, at 289.

34. Logan & Walker, *supra* note 30, at 253. As the researchers noted, “One of the critical unanswered questions about partner stalking is when does partner stalking harassment or ongoing psychological or other abuse become stalking? Put differently, what determines ongoing violent and harassing behavior as stalking versus business as usual (or continuation of abuse)?” *Id.* Without providing a definitive answer, the study rightly observed that, “at some level, this question goes to the validity of the construct of stalking.” *Id.*

35. Mindy B. Mechanic et al., *Intimate Partner Violence and Stalking Behavior: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women*, 15 VIOLENCE VICTIMS 55, 68 (2000).

36. *Id.*

37. See LOGAN ET AL., *supra* note 28, at 289 (“[S]eparating psychological abuse, especially monitoring and controlling aspects of psychological abuse, from stalking has proved to be particularly difficult for women. . . . This may especially be the case for women being stalked while they are living with or dating the stalking partner. In essence, a partner can monitor and control a woman through the traditional methods of stalking, such as surveillance, harassment, and threats; but may be able to reduce some of his behaviors (e.g., surveillance) once he has established a certain level of control over her.”).

38. *Id.* at 183-84. See also *id.* at 49 (describing Gloria recounting that her partner’s stalking “made me feel like he was trying to control my life”).

39. *Id.* at 135. Vanessa was stalked by her abuser, as are many women in the course of violent relationships. See *id.* at 288 (“One significant feature underscored by this research was the pervasiveness of stalking within the relationship as well as after the dissolution of the relationship.”).

Like other mechanisms of control, stalking operates against an ever-present backdrop of physical violence.⁴⁰ And as with other nonphysical components of the battering dynamic,⁴¹ stalking creates damage that is severe and lasting. As one group of researchers explains, “Taken together, the experiences of stalking and emotional abuse create a climate of unrelenting fear that haunts battered women even after they separate from their abusive partners.”⁴² But is the stalking that occurs during ongoing relationships the same as the stalking that occurs once these relationships have ended? To answer this question, it is helpful to consider what constitutes stalking.

Let us consider two possible conceptualizations: one narrow,⁴³ the other broad.⁴⁴ Under a narrow definition of stalking, unwanted pursuit—physical or electronic⁴⁵—is the essence of the wrong.⁴⁶ We might call this the stranger stalking paradigm.⁴⁷ On this view, the very notion of pursuit is set against a default of geographic distance between perpetrator and victim. Only when this presumption of distance is disrupted—i.e., when the desired space is encroached upon—do we identify the undesired conduct as stalking. Although

40. For instance, Gloria’s partner would routinely threaten her with knives and guns. *Id.* at 183-85. For additional accounts of the physical violence backdrop, see *id.* at 79-82; Logan & Walker, *supra* note 30, at 248 (describing stalking as one of a “few crimes where the victim’s safety is threatened over such a long period of time”). According to researchers, “women who reported stalking also reported a more severe history of psychological abuse, serious threats, and injury during the relationship compared to women who did not report stalking. In addition, women who reported being stalked in the preceding year also reported more threats to her life, more threats and attacks with weapons and being physically and sexually assaulted more often in the year preceding the interview than women who did not report stalking.” LOGAN ET AL., *supra* note 28, at 7. Stalking in relationships is correlated with an increased risk of lethality. See Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300 (1999).

41. See *supra* notes 23-28 and accompanying text.

42. Mechanic et al., *supra* note 35, at 68. As another study characterized this harm, “the sense of looming vulnerability that accompanies threats may be more productive of psychological distress in stalking victims than the reality of actual physical assault.” Troy McEwan et al., *Identifying Risk Factors in Stalking: A Review of Current Research*, INT. J. L. & PSYCHIATRY 1, 7 (2007). See also Melton, *supra* note 30, at 353, 355, 359.

43. This conception is generally employed by social scientists without remark. For a notable exception, see Logan & Walker, *supra* note 30, at 253.

44. Common to both understandings is the recognition that context matters for purposes of evaluating the meaning and harm of a particular act. See LOGAN ET AL., *supra* note 28, at 289 (“The context and history of relationships, especially violent relationships, greatly influence women’s interpretations and responses to partner stalking behaviors. Stalking tactics did not occur in isolation, but rather co-occurred within the context of significant psychological, physical, and sexual violence perpetrated by the stalking partner. The relationship history provides a context that often only the two individuals with that history can understand.”). For a summary of the broad conceptualization, see *infra* notes 60-63 and accompanying text.

45. See Cynthia Southworth et al., *Intimate Partner Violence, Technology, and Stalking*, 13 VIOLENCE AGAINST WOMEN 842 (2007).

46. Empirical research on stalking seems largely to proceed on the basis of this definition. See *infra* note 52.

47. To be clear, relationships that have ended more closely resemble the stranger stalking model than do ongoing relationships. See *infra* notes 55-60 and accompanying text (discussing the significance of geographic distance).

behaviors that fall within even this narrow conception of stalking can⁴⁸ and often do occur within ongoing relationships,⁴⁹ the conduct goes unpunished, and even unnoticed.⁵⁰ In other words, the narrow formulation of stalking is unevenly applied. This shows how, in practice,⁵¹ relationship status obscures criminality.

Apart from the problem of inconsistency, the stalking definition posited above suffers from conceptual limitations. The narrow framing of stalking simply overlooks too much. Effectively conditioning the definition of stalking on pursuit,⁵² rather than control, discounts the possibility that much the same harm is also accomplished in intimate relationships where space is all too shared.⁵³

Conflating stalking with tracking behavior makes sense with respect to strangers (and intimates whose ties have sufficiently unwound to allow for neat analogy).⁵⁴ But a conception of stalking premised on following⁵⁵ does not adequately account for the domestic setting. In these cases, physical

48. When a domestic violence victim leaves the home—often for work or school—her abuser's stalking involves pursuit, and thus more closely approximates the stranger paradigm (though the backdrop of physical violence continues to distinguish the two). See *infra* notes 55-60 and accompanying text (elaborating on pursuit and the significance of geographic distance between stalker and victim).

49. Again, according to the NISVS, more than one third of women in the United States "have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime." *NISVS*, *supra* note 1, at 2. Among these women, approximately fourteen percent were both physically assaulted and stalked, and over twelve percent experienced all three forms of intimate partner violence. *Id.* at 41.

50. See *infra* Section II.C.

51. See *infra* notes 128-129 and accompanying text.

52. For instance, the NISVS broadly defined stalking as a "pattern of harassing or threatening tactics used by a perpetrator that is both unwanted and causes fear or safety concerns in the victim," but then significantly (and, for reasons I am suggesting, unjustifiably) narrowed the measured range of tactics in keeping with a stranger stalking paradigm. Apart from unwanted phone calls, text messages, e-mails, gifts, and the like, the NISVS list of stalking behaviors was limited to: "watching or following from a distance, spying with a listening device, camera, or global positioning system;" "approaching or showing up in places such as the victim's home, workplace, or school when it was unwanted;" "leaving strange or potentially threatening items of the victim to find;" and "sneaking into the victim's home or car and doing things to scare the victim or let the victim know the perpetrator had been there." *NISVS*, *supra* note 1, at 29.

53. A conceptual analysis of stalking's harm is largely undeveloped. The 1993 Model Anti-Stalking Code did not include a legislative history section, and few states have included statements of intent or history in their laws. *Model Stalking Code Revisited*, *supra* note 23, at 28. One unusually exhaustive statement of purpose is found in Colorado's statute: "Because stalking involves highly inappropriate intensity, persistence, and possessiveness, it entails great unpredictability and creates great stress and fear for the victim. Stalking involves severe intrusions on the victim's personal privacy and autonomy, with an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim, even in the absence of express threats of physical harm." Colo. Rev. Stat. Ann. § 18-3-601(c)-(f) (2011). The Model Stalking Code includes a legislative intent section that basically echoes this language. *Model Stalking Code Revisited*, *supra* note 23, at 24. *Cf.* *State v. Ruesch*, 571 N.W.2d 898, 903 (Wis. App. 1997) ("[Stalking legislation] serves significant and substantial state interests by providing law enforcement officials with a means of intervention in potentially dangerous situations before actual violence occurs, and it enables citizens to protect themselves from recurring intimidation, fear-provoking conduct and physical violence.").

54. See *supra* note 47 and accompanying text (identifying the stranger stalking paradigm).

55. Following may be achieved physically, electronically, or virtually (in cyberspace). See Southworth et al., *supra* note 45.

separation—a necessary condition for pursuit—is exceedingly hard to come by. Close physical proximity tends to disqualify much of the abusive course of conduct from designation as stalking. This is striking, since the absence of physical separation only heightens the victim's vulnerability to patterns of controlling behavior.⁵⁶ As the accounts that follow make clear, shared living quarters facilitate the abuser's dominance. As one woman, Linda, recounted:

I'd go to the bathroom and if I was in there, you know, just sitting there was relief. [She thought], "Thank God, I'm alone." Just to go to the bathroom—To me that was like going to Paris for some women. And if I was in there two minutes longer than he thought I should be, he would just come in there [and she motioned grabbing her hair, showing how he would drag her out of the bathroom right off the toilet]. And if I was just in there, he would say I was thinking—"conspiring."⁵⁷

And as two other women, Lauren and Alice, explained:

If I would get out of bed he had to know where I was going. If it was to the bathroom, he would say, "I'll go with you . . ."⁵⁸

[]

He's with me everywhere I go. If I go to the bathroom, he's like, "what are you doing in there? What's taking you that long for?" And if I go in the bathroom because I just want to fix my hair, if I just want to be left alone with the door shut, even though I hate to be closed in, I will shut that door in the bathroom. And he'll be standing there the whole time, "What are you doing in there? What are you doing?"⁵⁹

56. Consider this similar observation: "[S]eparating psychological abuse, especially monitoring and controlling aspects of psychological abuse, from stalking has proved to be particularly difficult for women. . . . This may especially be the case for women being stalked while they are living with or dating the stalking partner. In essence, a partner can monitor and control a woman through the traditional methods of stalking, such as surveillance, harassment, and threats; but may be able to reduce some of his behaviors (e.g., surveillance) once he has established a certain level of control over her. For example [one woman interviewed] . . . developed a social phobia during the course of their relationship [as a result of the abuse], and reports that she rarely leaves her home now. Thus, her stalking partner essentially does not have to work as hard to stalk her as perhaps he did when they first started dating." LOGAN ET AL., *supra* note 28 at 289. See also discussion *supra* note 53 (describing the harms that result from stalking within ongoing relationships).

57. LOGAN ET AL., *supra* note 28, at 32 (quoting interview with Linda).

58. *Id.* (quoting interview with Lauren).

59. *Id.* (quoting interview with Alice).

If the prerequisite of geographic distance is abandoned, the stalking/abuse divide collapses. Women who are stalked by their current and former intimates emphasize that the stalking course of conduct is predicated not on physical violence, and not on tracking, but on control.⁶⁰ When stalking is reconceptualized as the course of conduct in its entirety,⁶¹ it looks much like domestic violence.⁶²

To summarize, violence in ongoing relationships is patterned, an interconnected system of power and control. Batterers often stalk their victims, though this conduct is far less often accurately identified. Stalking may be understood in a narrow sense, as contingent on the victim's ability to find physical space away from her batterer. Or stalking may be seen as a course of conduct centered on controlling the victim through fear—in which case stalking closely resembles the *experience* of domestic violence (as opposed to its legal conception). Either way, stalking in continuing relationships is scarcely observed, much less redressed, by law.⁶³

When relationships end, this changes. Now, we see stalking—and domestic violence abruptly recedes into the past.

B. Control in Ruptured Relationships

Breakups precipitate diminished physical proximity between an abuser and his victim. Confronting the prospects of shrinking shared space and his partner exerting autonomy in new ways, a batterer often escalates his efforts to control her.⁶⁴ These tactics are readily classified as stalking. This in turn allows the meaning of a particular act to be understood in the context of a relationship—one that is in the midst of dissolving. Seemingly isolated conduct is now understood as part of a unified effort to preserve a connection that has come undone.⁶⁵ In this respect, stalking is contextualized.

60. See *infra* notes 69-75 and accompanying text.

61. As we will see, this proposition is consistent with the statutory definition of stalking that has been adopted by a majority of jurisdictions. See *infra* notes 105-120 and accompanying text.

62. To better observe this resemblance, consider the “key examples of behaviors the [Model Stalking Code advisory board] felt should be covered under a model code.” *Model Stalking Code Revised*, *supra* note 23, at 21. The list of stalking behaviors includes violating protection orders, engaging in obsessive or controlling behaviors, targeting third parties to scare a victim, killing animals, using cultural context (such as immigration-related threats) to scare a victim, using humiliating or degrading tactics such as posting pictures of the victim on the Internet, forcing a victim to take time off from work, and assaulting a victim. *Id.* Each of these behaviors is typical of domestic violence. See *supra* Section I.A.

63. See *infra* Section II.A.

64. “When a victim leaves an abusive relationship, the risk of violence actually increases because the victim has challenged the perpetrator’s unilateral exercise of power and control. The perpetrator often lashes out violently toward the victim in an attempt to retain or regain power and control.” *Model Stalking Code Revised*, *supra* note 23, at 14. See also Logan & Walker, *supra* note 30, at 248; *infra* note 264 (describing separation assault).

65. The recurrence of “not letting go” rhetoric is consistent with this orientation.

But this story is incomplete. Preserving a relationship is not the stalker's ultimate aim; the maintenance of ongoing control over his intimate is.⁶⁶ Stalkers employ a range of mechanisms to defend the relational hierarchy when domestic space is no longer available for this purpose.⁶⁷ Some methods may be different from what have come before, but many are just newly visible.⁶⁸

The argument that stalking should be recast as a continuation of the course of conduct that preceded the breakup finds ample support in the social science literature. Women's accounts of post-separation stalking prominently feature control.⁶⁹ For instance, one victim explained the behavior of her ex-husband as follows: "[H]e still has not completely let go of the control. He has, he's such a controlling person you know, I mean But it's just, it's all control. All has to do with control."⁷⁰

Another woman experienced post-separation stalking as follows:

You know, even though we separated and were going to get a divorce, it was still, he could never work it out in his head about a control issue. You can't control other people. And so this is their way of controlling you. By making you afraid. It's the only control they have over you.⁷¹

Years after their divorce, another woman's ex-husband was still "sabotaging her social relationships and her job, breaking into her home, threatening her, harassing her with false reports of child abuse," and surveilling her.⁷² This woman, Diana, described her former husband as "a terrorist."⁷³

Diana's story vividly depicts the connection between an abuser's control, a victim's fear, and the continuing course of conduct that spanned her repeated attempts to separate.⁷⁴ At the time of the interview, Diana explained that she was so frightened of her ex-husband that she had for some time been spending the night at her mother's apartment. She recounted:

66. See LOGAN ET AL., *supra* note 28, at 37 (describing stalking "as an extreme, sustained, and systematic form of psychological abuse that crosses into the public spheres of a woman's life").

67. Cf. Melton, *supra* note 30, at 354 ("[S]talking is a method abusers use to assert themselves into their victims' lives, beyond the confines of their homes.").

68. One list of stalking tactics divides the behaviors into five categories: surveillance, harassing behavior, threats, property destruction or invasion, and physical violence. LOGAN ET AL., *supra* note 28, at 19. See also Mechanic et al., *supra* note 35, at 62 (listing the most commonly reported stalking behaviors in order of occurrence).

69. See Melton, *supra* note 30, at 359 ("[C]ontrol was the number-one cited motivation for the stalking").

70. *Id.* at 352.

71. *Id.*

72. LOGAN ET AL., *supra* note 28, at 14.

73. *Id.*

74. Diana had been divorced from her husband for two years at the time of the interview, though her efforts to end the relationship even preceded the marriage, which lasted for twenty years. During this period, Diana separated from her husband six times. *Id.* at 13-14. See *infra* Section III.A.

But there have been nights that, like, I wake up and I know that my ex-husband knows where her couch sits in the apartment. She has a picture window there, and so I will actually be afraid to sleep on the couch and I'll get down on the floor and sleep because I feel like he might be out there. It affects you. You know, there are days you feel like you're going crazy because you've always—you've got to keep it on your mind all the time. You can't let your guard down. . . . I couldn't sleep knowing he was in the same house with me and then I ran him off and can't sleep because he's out lurking around. It's a lose-lose situation.⁷⁵

Women repeatedly report that stalking began prior to separation,⁷⁶ and that the relationship *while intact* was “characterized by physical abuse and control, physical assault, and sexual assault.”⁷⁷ Further proving the singularly controlling nature of the abusive course of conduct,⁷⁸ research has shown that “there may be a dose-response relationship between severity of the history of violence and fear evoked from the stalking behavior.”⁷⁹

As demonstrated by these accounts, what is often called stalking in cases of former intimates may be more usefully framed as post-domestic violence.⁸⁰ When *post-breakup* stalking is conceptually severed from stalking behaviors that came before, this fuller description of the violence disappears. Similarly, failing to situate stalking in the context of the *pre-breakup* relationship hides a deeper explanation for the dynamics of post-separation abuse.

Overall, both the stalking in domestic violence and the domestic violence in stalking remain largely hidden from social view. This is accomplished by means of an artificial domestic violence/stalking divide. The next Part considers the legal import of this divide, beginning a conversation about how⁸¹ and why⁸² breakups construct the crimes of stalking and domestic violence.

75. LOGAN ET AL., *supra* note 28, at 14. Diana concluded: “And I don’t know how desperate he is. It’s like the more I keep him away from me, the more desperate he becomes with his actions. That’s the scary thing about it. You can’t win with him. You can’t win with a stalker.” *Id.* at 14-15.

76. See *supra* notes 30-40 and accompanying text.

77. Logan & Walker, *supra* note 30, at 249.

78. See *supra* notes 64-69 and accompanying text.

79. Logan & Walker, *supra* note 30, at 249. In one study, “the severity of abuse during the relationship was associated with greater the level of fear from stalking. Specifically, the more psychological abuse tactics a woman experienced in the relationship, the greater her fear and concern about future harm from the stalker.” *Id.*

80. The more limited understanding of stalking, on the other hand, is reified by the criminal law. See *infra* Section II.C.

81. See *infra* Part II.

82. See *infra* Part III.

II. LAW'S RELATIONSHIP EXEMPTION

We turn now to the criminal law's treatment of patterned violence.⁸³ This Part describes two competing approaches to criminalization—one applied to domestic violence, the other to stalking. We will see that domestic violence is (wrongly) deemed episodic, comprised of isolated incidents of physical injury,⁸⁴ while stalking is (rightly) perceived as continuing, constituted by a pattern of behavior grounded in power and control.⁸⁵ At some precise point in time, domestic violence *becomes* stalking under the law, and the law's construction of crime shifts dramatically.⁸⁶ When does this instant occur? What reveals the pattern, or underlying dynamic, of control that has existed all along? And, perhaps most importantly, what accounts for this designation?

To answer these questions, we begin by examining the law's response to domestic violence, which is characterized by a complete lack of recognition of ongoing conduct.⁸⁷ We will then contrast this with the law of stalking,⁸⁸ which is fully grounded in an appreciation of context. We may then discern what leads to a pattern-focused crime paradigm. The magic moment: separation.⁸⁹

A. Obscuring Patterns: The Case of Domestic Violence

The criminal law's treatment of domestic violence has evolved in important ways since the late nineteenth century, when corporal punishment, or "chastisement," was a right.⁹⁰ During the Reconstruction era and the decades following it, privacy-based rationales for nonintervention in domestic settings saturated the criminal justice system at all levels.⁹¹ In more recent times, the law's approach to intimate partner abuse has advanced, progressing from

83. I have in mind substantive criminal law in its formal statutory articulation as well as in its implementation. See *infra* notes 128-131 and accompanying text.

84. See *infra* Section II.A.

85. See *infra* Section II.B.

86. This shift has evidentiary significance, as well. In particular, deep tensions arise where "prior acts" evidence is offered in stalking prosecutions, since patterns occurring before the charged crimes (i.e., the domestic violence) are not themselves considered criminal. See *infra* Part II.C. Because the onset of stalking is typically thought to occur at breakup, a defendant's abuse before separation is generally excluded under the general prohibition on character evidence or admitted only for a limited purpose. See FED. R. EVID. 404(b). For a more thorough discussion of the evidentiary issues arising when abuse is framed as history, see Tuerkheimer, *supra* note 6, at 989-98.

87. See *infra* Section II.A.

88. See *infra* Section II.B.

89. See *infra* Section II.C. I challenge the notion of a singular moment of separation, see *infra* Section III.A, but I adopt it for the present purpose of describing the criminal law's response.

90. See Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L. J. 2117, 2129 (1996).

91. *Id.* at 2150-74. For a different historical perspective, see generally Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101 (2006).

chastisement as a right to the prosecution of domestic violence.⁹² But this progress has stalled.

The laws used to prosecute domestic violence—including assault, burglary, property destruction, violation of a restraining order, kidnapping, homicide, rape, and sexual assault—do not describe its essence. Even where state legislation seems to target the crime directly, it does so in name only: so-called “domestic violence statutes” are in essence “assault-plus-relationships” laws, which simply replicate the inadequacies of already existing approaches.⁹³ On closer examination, it is apparent that the laws purporting to reach the crime of battering leave untouched the patterns of power and control that we have been discussing.⁹⁴

There are two reasons for this failure. Criminal law is generally characterized by, first, a narrow temporal lens and, second, a limited conception of harm. Time and injury operate in tandem to obscure central features of battering.

1. *The Problem of Time*

Statutes criminalizing violence do not account for the perpetration of continuing acts. The traditional common law conception of crime as occurring at a discrete moment still endures.⁹⁵ While there are exceptions⁹⁶—most importantly for our purposes, in stalking statutes⁹⁷—transactional crime remains the norm. The incident-focused criminal law still contemplates an act that transpires at an ascertainable instant, meaning that, in theory, one can capture the commission of an archetypical crime in a photograph.

This model of crime fails utterly to describe domestic violence. A constricted temporal frame removes from criminal law’s ambit ongoing abuse that can only be understood in its totality. Since this conduct cannot be reduced to a slice of time, it lies outside of the law’s scope.

2. *The Problem of Injury*

The incident-bound nature of criminal law is compounded by an overly narrow conception of harm as physical injury or the imminent threat of it.

92. For an overview, see Tuerkheimer, *supra* note 6, at 970-71.

93. See *infra* notes 94-100 and accompanying text (detailing these limitations).

94. See *supra* Section I.A.

95. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 932-33 (1987).

96. For instance, state statutes defining harassment, menacing, and course of sexual conduct against a child all criminalize a course of conduct. In the federal system, the Racketeer Influenced and Corrupt Organizations Act (RICO), Organized Crime and Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified at 18 U.S.C. §§ 1961-1968 (2012)), is a primary example of nontransactional crime. See Lynch, *supra* note 95, at 952-53.

97. See *infra* notes 104-118 and accompanying text.

Nonphysical manifestations of power and control that define the abusive relationship—and, as we have seen, do real harm to its victims,⁹⁸ are not recognized by the criminal law. By using physicality alone to ascribe meaning, the law disregards the space between episodes of physical violence. The effect of isolating and atomizing violence in intimate relationships is to render meaningless its context: the backdrop of pervasive control against which physical episodes occur, in other words, the relationship itself.

The continuing relationship between batterer and victim is the terrain on which a system of domination is enacted. This relationship connects and organizes what might otherwise appear to be random acts, and it is essential to grasping the full measure of resulting injury.⁹⁹ Nonetheless, the crime of domestic violence does not contemplate that the relationship might be integral to an abuser's entire course of conduct.¹⁰⁰ The crime thus accomplishes a massive legal erasure of what it ostensibly targets.

B. Criminalizing Patterns: The Case of Stalking

The law of stalking represents an important move toward criminalizing context.¹⁰¹ Unlike domestic violence laws, stalking statutes encompass ongoing conduct.¹⁰² For instance, one model statute reads as follows:

Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to: (a) fear for his or her safety or the safety of a third person; or (b) suffer other emotional distress is guilty of stalking.¹⁰³

98. See *supra* notes 30-40 and accompanying text.

99. See Sarah M. Bucl, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1341 (2010) ("The cumulative harm of this multifaceted abuse can result in the victim exhibiting low self-esteem, guilt, shame, anger, sadness, unrealistic hope, denial, self-blame, and, especially, fear.").

100. I have previously proposed a model statute that would do so. See Appendix: Model Domestic Violence Statute. For a discussion of this statute, see *infra* note 134 and accompanying text.

101. For an overview of the development of stalking legislation nationwide, see *Domestic Violence, Stalking, and Antistalking Legislation: An Annual Report to Congress under the Violence Against Women Act*, NAT'L INST. OF JUSTICE (1996), <https://www.ncjrs.gov/pdffiles/stlkbook.pdf> [hereinafter *NIJ Report*].

102. See *infra* notes 106-110 and accompanying text.

103. *Model Stalking Code Revisited*, *supra* note 23, at 24. This statutory language was proposed by the National Center for Victims of Crime in its 2007 report evaluating the 1993 Model Anti-Stalking Code. *Id.* at 9-10. The older model, which was developed by the National Institute of Justice, "served as an excellent template for its time," and "[m]any states incorporated provisions of the original model code when drafting or expanding their state stalking statutes, and some courts referred to the model law when interpreting provisions in state stalking laws." *Id.* at 12. In relevant part, the 1993 Model Anti-Stalking Code provides as follows: "Section 1. For purposes of this code: (a) 'Course of conduct' means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person; (b) 'Repeatedly' means on two or more occasions; and

By codifying the insight that seemingly isolated events are properly viewed as a whole, anti-stalking legislation accounts for abusive patterns of behavior. As one example, the District of Columbia Code's section on legislative intent explicitly states that "stalking includes a pattern of following or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means."¹⁰⁴

Though state stalking statutes vary,¹⁰⁵ they generally share two key features. First, the crime is understood as occurring over time.¹⁰⁶ Most states specifically require that a person engage in a "course of conduct."¹⁰⁷ This term

(c) 'Immediate family' means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

Section 2. Any person who:

(a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and

(b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and

(c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family; is guilty of stalking." NAT'L INST. OF JUSTICE, MODEL ANTI-STALKING CODE FOR THE STATES §§ 1-2 (1993). The remainder of this discussion focuses on state stalking statutes, rather than on either model.

104. D.C. CODE § 22-3131 (2001); see also N.C. GEN. STAT. ANN. § 14-277.3A (West 2011) (same, but including "observing"). See *infra* notes 108-110 and accompanying text (describing "pattern of behavior" statutes and relevant definitions).

105. The most important variables are whether a threat is required (and if so, whether it must be explicit or implicit), whether intent to cause fear is required, and whether fear (actual or reasonable) or alarm/annoyance on the part of the victim is required. See *NIJ Report, supra* note 101, app. E at E-2 to E-5 (summarizing state statutes).

106. This is typically accomplished by requiring a "course of conduct." See *infra* note 107. In a minority of jurisdictions, the term "repeatedly" is instead used to modify the prohibited behavior (e.g., following, harassing, making credible threats). See ALA. CODE § 13A-6-90(a) (2011); CAL. PENAL CODE § 646.9(a) (West 2012); COLO. REV. STAT. ANN. § 18-3-602(1)(a) (West 2011); LA. REV. STAT. ANN. § 14:40.2(A) (2012); MINN. STAT. ANN. § 609.749(2) (West 2012); OKLA. STAT. ANN. tit. 21, § 1173(A) (West 2012); OR. REV. STAT. ANN. § 163.732(1)(a) (West 2011); S.D. CODIFIED LAWS § 22-19A-1(1) (2011); WASH. REV. CODE ANN. § 9A.46.110(1)(a) (West 2012); W. VA. CODE ANN. § 61-2-9a(a) (West 2011).

107. Most states use this specific language in their statutory definitions. See ALASKA STAT. ANN. § 11.41.270(a) (West 2011); ARK. CODE ANN. § 5-71-229(a)(1) (West 2011); DEL. CODE ANN. tit. 11, § 1312(a) (2012); D.C. CODE § 22-3133(a) (2012); FLA. STAT. ANN. § 784.048(1)(a) (West 2012); HAW. REV. STAT. § 711-1106.5(1) (2011); IDAHO CODE ANN. § 18-7906(1)(a) (2011); 720 ILL. COMP. STAT. ANN. 5/12-7.3(a) (West 2012); IND. CODE ANN. § 35-45-10-1(1) (West 2011); IOWA CODE ANN. § 708.11(2)(a) (West 2012); KAN. STAT. ANN. § 21-5427(a)(1) (West 2011); KY. REV. STAT. ANN. § 508.130(1)(a) (West 2011); ME. REV. STAT. ANN. tit. 17-A, § 210-A(1)(A) (2011); MD. CODE ANN., CRIM. LAW, § 3-802(a) (West 2011); MASS. GEN. LAWS ANN. ch. 265, § 43(a)(1) (West 2011); MICH. COMP. LAWS ANN. § 750.411h(1)(d) (West 2011); MISS. CODE ANN. § 97-3-107(1)(a) (West 2011); MO. ANN. STAT. § 565.225(2) (West 2012); NEB. REV. STAT. § 28-311.02(2) (2011); NEV. REV. STAT. ANN. § 200.575(1) (West 2011); N.H. REV. STAT. ANN. § 633:3-a(1)(a) (2012); N.J. STAT. ANN. § 2C:12-10(b) (West 2012); N.M. STAT. ANN. § 30-3A-3(A) (West 2011); N.Y. PENAL LAW § 120.45, 50(3), 55(4) (McKinney 2012); N.C. GEN. STAT. ANN. § 14-277.3A(c) (West 2011); N.D. CENT. CODE ANN. § 12.1-17-07.1(1)(c) (West 2012); 18 PA. CONS. STAT. ANN. § 2709.1(a)(1) (West 2012); S.C. CODE ANN. § 16-3-1700(C) (2011); TENN. CODE ANN. § 39-17-315(a)(4) (West 2011); TEX. PENAL

“contemplates a pattern of conduct comprised of a series of acts over a period of time, however short, evidencing a continuity of purpose.”¹⁰⁸ “Continuity of purpose” language, also referred to as a “scheme,”¹⁰⁹ spotlights the connections between episodes. This gives the space “between” incidents the attention it merits, effectively solving the problem of time that plagues the criminal law’s approach to domestic violence.¹¹⁰

Second, with respect to the problem of injury,¹¹¹ stalking statutes also transcend the limitations of the traditional crime archetype. Rather than using physical injury or the imminent threat of it as a proxy for harm, the law of stalking adopts a more expansive view—one that, albeit imperfectly (because mention of control itself is missing), better reflects the nature of the injury to victims. Fear becomes one measure of harm: fear of death or physical injury to oneself or a family member,¹¹² or for safety.¹¹³ This alone represents a significant departure from the transactional crime archetype, since the statutory framework contemplates that a victim’s fear derives from the stalker’s course of conduct in its entirety, as opposed to any one incident.¹¹⁴

Most jurisdictions define victims’ injuries as encompassing far more than fear of physical harm. For instance, stalking occurs when a course of conduct would cause a reasonable person to suffer “significant mental anguish or distress that may, but does not necessarily, require medical or other

CODE ANN. § 42.072(a) (West 2011); UTAH CODE ANN. § 76-5-106.5(2) (West 2011); VT. STAT. ANN. tit. 13, § 1061(1) (West 2011); WIS. STAT. ANN. § 940.32(2)(a)-(b) (West 2011).

108. See, e.g., ALA. CODE § 13A-6-92(a) (2011); CAL. PENAL CODE § 646.9(f) (West 2012); FLA. STAT. ANN. § 784.048(1)(b) (West 2012); KAN. STAT. ANN. § 21-5427(f)(1) (West 2011); KY. REV. STAT. ANN. § 508.130(2) (West 2011); LA. REV. STAT. ANN. § 14:40.2(C)(2) (2011); MD. CODE ANN., CRIM. LAW § 3-801 (West 2011); MICH. COMP. LAWS ANN. § 750.411h(1)(a) (West 2011); MISS. CODE ANN. § 97-3-107(8)(a) (West 2011); MO. ANN. STAT. § 565.225(1) (West 2012); NEB. REV. STAT. § 28-311.02(2)(b) (2011); NEV. REV. STAT. ANN. § 200.575(6)(a) (West 2011); N.H. REV. STAT. ANN. § 633:3-a(II)(a) (2012); N.D. CENT. CODE ANN. § 12.1-17-07.1(1)(a) (West 2012); OKLA. STAT. ANN. tit. 21, § 1173(F)(2) (West 2012); 18 PA. CONS. STAT. ANN. § 2709.1(f) (West 2012); R.I. GEN. LAWS ANN. § 11-59-1(1) (2011); S.C. CODE ANN. § 16-3-1700(D) (2011); S.D. CODIFIED LAWS § 22-19A-5 (2011); TENN. CODE ANN. § 39-17-315(a)(1) (West 2011); VT. STAT. ANN. tit. 13, § 1061(2) (West 2011); WIS. STAT. ANN. § 940.32(1)(a) (West 2011); WYO. STAT. ANN. § 6-2-506(a)(i) (West 2011).

109. See, e.g., TEX. PENAL CODE ANN. § 42.072(a) (West 2011).

110. See *supra* notes 95-97 and accompanying text.

111. See *supra* text accompanying notes 98-100.

112. See, e.g., ALA. CODE § 13A-6-92(b) (2011); ALASKA STAT. ANN. § 11.41.270(a) (West 2011); ARK. CODE ANN. §§ 5-71-229(a)(1), 5-71-229(b)(1) (West 2011); CAL. PENAL CODE § 646.9(a) (West 2012); CONN. GEN. STAT. ANN. §§ 53a-181d(a), 53a-181e (West 2011); GA. CODE ANN. § 16-5-90(a)(1) (West 2011); IOWA CODE ANN. § 708.11(2)(a)-(c) (West 2011); KAN. STAT. ANN. § 21-5427(a)(1)-(3) (West 2011); MISS. CODE ANN. § 97-3-107(1)(a) (West 2011); N.H. REV. STAT. ANN. § 633:3-a(I)(a)-(b) (2012); N.M. STAT. ANN. § 30-3A-3(A) (West 2012) (including a reasonable apprehension of sexual assault); S.D. CODIFIED LAWS § 22-19A-1(2) (2011); VT. STAT. ANN. tit. 13, § 1061(1)(B) (West 2011); VA. CODE ANN. § 18.2-60.3(A) (West 2011).

113. See, e.g., ARIZ. REV. STAT. ANN. § 13-2923(A)(1) (2011); 720 ILL. COMP. STAT. ANN. 5/12-7.3(a)(1) (West 2012).

114. See *supra* notes 105-109 and accompanying text on the importance of contextualizing conduct.

professional treatment or counseling”;¹¹⁵ or when the course of conduct would cause a person to “feel seriously alarmed, disturbed, or frightened; or suffer emotional distress”;¹¹⁶ or when the conduct would cause “substantial emotional distress. . . and serve[] no legitimate purpose.”¹¹⁷ In some jurisdictions, no requisite showing of harm whatsoever is included in the statute; the defendant’s conduct may itself establish a crime.¹¹⁸

These definitions all depart from a physical-injury-based understanding of harm.¹¹⁹ In this respect, as in its rejection of incident-bound description, the crime of stalking approximates stalking as it exists outside the law. The statutory language captures the relevance of the relationship, along with the patterns of control embedded in it.¹²⁰

The law of stalking thus represents what might be called a contextual approach to crime. When compared to the law of domestic violence and its

115. DEL. CODE ANN. tit. 11, § 1312(a)(2) (2012). *See also* N.C. GEN. STAT. ANN. §§ 14-277.3A(b)(4), 277.3A(c) (West 2011) (using “suffering” rather than “anguish”); TENN. CODE ANN. § 39-17-315(a)(2) (West 2011) (same). For similar provisions, *see* COLO. REV. STAT. ANN. § 18-3-602(1)(c) (West 2011); LA. REV. STAT. ANN. § 14:40.2(A) (2012); N.J. STAT. ANN. § 2C:12-10(a)(3), (b) (West 2012); OHIO REV. CODE ANN. §§ 2903.211(A)(1), 2903.211(D)(2) (West 2012); 18 PA. CONS. STAT. ANN. § 2709.1(a)(1)-(2) (West 2012); S.C. CODE ANN. §§ 16-3-1700(A), 16-3-1700(B) (2011); UTAH CODE ANN. §§ 76-5-106.5(1)(d), 76-5-106.5(2) (West 2011); VT. STAT. ANN. tit. 13, § 1061(1)(B) (West 2011); W. VA. CODE ANN. § 61-2-9a(a) (West 2011); WIS. STAT. ANN. § 940.32(2)(a)-(c) (West 2011); WYO. STAT. ANN. § 6-2-506(a)(ii) (West 2011).

116. D.C. CODE § 22-3133(a)(1)(B)-(C) (2012). *See also* IDAHO CODE ANN. § 18-7906(1)(a) (West 2011) (“seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress”); IND. CODE ANN. § 35-45-10-1(1) (West 2011) (“terrorized, frightened, intimidated, or threatened”); KY. REV. STAT. ANN. § 508.130(1)(a)(2) (West 2011) (“alarms, annoys, intimates, or harasses”); ME. REV. STAT. ANN. tit. 17-A, §§ 210-A(1)(A)(1), 210-A(4), 210-A(5) (2011) (“serious inconvenience or emotional distress,” “damage or destruction to or tampering with property,” and fear of “injury to or the death of an animal”); MASS. GEN. LAWS ANN. ch. 265 § 43(a)(1) (West 2012); MICH. COMP. LAWS ANN. § 750.411h(1)(d) (West 2011); MINN. STAT. ANN. § 609.749(1) (West 2012) (“frightened, threatened, oppressed, persecuted, or intimidated”); MO. ANN. STAT. § 565.225(3) (West 2012); MONT. CODE ANN. § 45-5-220(1) (2011); NEB. REV. STAT. § 28-311.02 (2011) (“terrified”); NEV. REV. STAT. ANN. § 200.575(1) (West 2011); N.Y. PENAL LAW § 120.45(A)(3) (McKinney 2012) (reasonable fear that one’s employment, business, or career is threatened, and the actor was previously clearly informed to cease that conduct); N.D. CENT. CODE ANN. § 12.1-17-07.1(1)(c) (West 2012) (“fear, intimidation, or harassment”); OKLA. STAT. ANN. tit. 21, § 1173(A)(2) (West 2012) (“terrorized, frightened, intimidated, threatened, harassed, or molested”). Oregon includes “alarms or coerces,” OR. REV. STAT. ANN. § 163.732(1)(a) (West 2011), and further defines these terms as “to cause apprehension or fear resulting from the perception of danger” and “to restrain compel or dominate by force of threat,” respectively, *id.* at § 163.730(1), (2).

117. FLA. STAT. ANN. § 784.048(1)(a) (West 2012).

118. In Hawaii, “a person commits the offense of harassment by stalking if, with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, that person engages in a course of conduct involving pursuit, surveillance, or nonconsensual contact upon the other person on more than one occasion without legitimate purpose.” HAW. REV. STAT. § 711-1106.5(1) (West 2011). The “no legitimate purpose” clause is found in a number of other stalking statutes. *See, e.g.,* FLA. STAT. ANN. § 784.048(1)(a) (West 2012); KY. REV. STAT. ANN. § 508.130(1)(a)(3) (West 2011); N.D. CENT. CODE § 12.1-17-07.1(1)(c) (West 2012); S.C. CODE ANN. § 16-3-1700(A)-(B) (2011); TENN. CODE ANN. § 39-17-315(a)(3) (West 2011) (“Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.”). Apart from immunizing the legislation against constitutional challenge, this language serves to emphasize that context matters in assessing meaning.

119. *See supra* notes 98-100 and accompanying text.

120. *See supra* Section I.B.

constricted view of abuse,¹²¹ it is striking that this approach corresponds reasonably well with epistemological realities. The law *can* criminalize a course of conduct, and it *can* move beyond physical injury, but it does so selectively.¹²² Domestic violence is not subject to contextual treatment, but stalking is. Given their functional similarity,¹²³ this demands explanation.

The next section asks what transforms battering into stalking, thereby recalibrating law's response.¹²⁴ Before turning to this inquiry, it is worth observing the curious underutilization of stalking laws. While the language of stalking statutes describes ongoing patterns *of a nonphysical sort*,¹²⁵ these statutes are not generally used to prosecute domestic violence *of a nonphysical sort*.¹²⁶ This is somewhat puzzling, since, apart from their name, stalking statutes seem a far better fit for domestic violence than do statutes aimed at domestic violence.¹²⁷ Stalking laws criminalize a course of conduct, target patterns, and address a broad range of harm. In these important respects, stalking legislation more fully describes domestic violence than any other statute enacted to date.

Prosecutors in at least one jurisdiction have applied stalking statutes to reach domestic violence.¹²⁸ The advantage of doing so is clear: when a defendant is charged with stalking, his entire range of coercive behavior is not only relevant to the crime charged; it *is* the crime charged. As a fuller picture comes into focus, otherwise disregarded injury is recognized. Punishment can at last be commensurate with the (real) crime.

A relationship-neutral stance toward the implementation of stalking legislation can go some way toward redressing previously concealed patterns of abuse. More specifically, I am contemplating a prosecutorial commitment to using the course of conduct language found in stalking statutes wherever it is

121. See *supra* notes 98-100 and accompanying text (discussing competing transactional approaches).

122. See *infra* Section II.C.

123. To be clear, the control that a batterer exercises during an ongoing relationship is akin to the control exerted by the stalker once the relationship is deemed over. It is violent control, or "coercive control," see Stark, *supra* note 25, and it is far different from the influence that intimate partners have over one another in nonviolent relationships. See *supra* note 13. The separation requirement thus cannot be defended as a means of locating the boundary between legitimate control and illegitimate control; violent control is the same, regardless of relationship status. (Unless, of course, relationship is a signifier of consent—a possibility I take up shortly.)

124. See Section II.C.

125. See *supra* notes 111-119 and accompanying text.

126. It bears emphasizing that the nonphysical patterns at issue are rooted in a context of physical violence. See *supra* notes 40-41 and accompanying text.

127. See *supra* Section II.A.

128. As an Assistant District Attorney in New York County, I prosecuted domestic violence cases and trained junior assistants to do so. During my five years in the office, domestic violence prosecutors regularly applied New York's stalking statute to domestic violence in the manner I am outlining here. I left the office in 2001, and do not know if this practice has continued. Whether other District Attorneys' offices are generally using stalking laws to prosecute domestic violence remains to be seen, though I find no indication of this in case law or other public records.

applicable, within or outside relationships—that is, to charging conduct that fits the statute’s technical definition irrespective of whether the behavioral pattern at issue falls within conventional (pursuit-based) understandings of stalking. Regardless of whether a course of conduct precedes, follows, or spans the demise of a relationship, if it satisfies the definition of stalking, it is criminal.

But this type of prosecutorial charging is exceedingly uncommon. In practice, the use of stalking laws has been almost wholly confined to post-breakup conduct readily perceived as stalking.¹²⁹ The law of stalking thus is governed on the ground not by the formal statutory regime, but by the bounds of conventional social understandings. Since the application of a criminal statute is dictated by the decisions of prosecutors, judges, and ultimately juries, it comes as no surprise that the technical language of stalking legislation is being implemented in ways that comport with widespread beliefs about stalking.¹³⁰

Although this unduly crabbed interpretation is not normatively defensible, as I will explain,¹³¹ it is important to emphasize that the use of stalking statutes to prosecute domestic violence is an imperfect solution to the problems I am identifying. This is because, as I have previously observed, “What the law defines as domestic violence (and what the law denies is domestic violence) is generative of extra-legal meaning.”¹³² By way of elaboration:

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

129. See J. Leslie Kurt, *Stalking as a Variant of Domestic Violence*, BULL. AM. ACAD. PSYCHIATRY & L. 219, 221 (1995) (“Common wisdom suggests that stalking behavior is generally employed following a separation or the dissolution of a relationship.”); LOGAN ET AL., *supra* note 28, at 288 (“[M]ost people tend to define stalking as something that occurs at the end of the intimate relationships . . .”). See *supra* note 46 (describing the dominant approach to the definitional question).

130. Cf. David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC’Y REV. 247, 294 (1998) (noting that a major “source of uncertainty in the construction of crimes is the fact that no one person makes the charge decision. In the United States the charge decision is usually the prosecutor’s ultimate responsibility, but that decision is ‘shared’ with more people than one might suppose: complaining victims and citizens, patrol officers who respond to complaints, detectives who investigate and gather evidence, witnesses, judges who conduct preliminary hearings, grand juries who decide whether or not to indict, and defendants who choose whether or not to end the case with a plea or a trial.”). See *infra* note 271.

131. See *infra* Part III.

132. See Tuerkheimer, *supra* note 6, at 1018.

landscape of law. Worse, what the law quietly calls legal becomes, or remains, socially legitimate.¹³³

There is a better way. I have proposed a model statute that would separately criminalize domestic violence in a manner that captures its nature and its harms.¹³⁴ To do this, the same course-of-conduct language upon which stalking laws are premised can readily be adapted to the particularities of battering. In other words, there is strong precedent for the type of statute I am envisioning.

But for now, the law emphatically distinguishes between domestic violence and stalking; the former is framed as episodic and the latter as ongoing; and stalking (but not domestic violence) causes nonphysical harm. In sum, it matters a great deal when domestic violence becomes stalking. We now turn to the shift in criminalization paradigms and what brings it about.

C. The De Facto Separation Requirement

In ongoing relationships, the law prohibits only physical violence.¹³⁵ Nonphysical abuse,¹³⁶ though integral to the ongoing exercise of violent control, is disregarded, and thus tacitly condoned.¹³⁷ Just as patterned conduct is overlooked, so, too, is the injury that results.¹³⁸ Put simply, the criminal law does not conceive of many women in abusive relationships as victims of ongoing abuse.

When relationships end,¹³⁹ however, patterns of abuse suddenly become salient. Though the violent exercise of power and control occurs in virtually seamless fashion throughout the stages of relationship, women must leave in order for criminal law to take note. In functional terms, what this means is that that prosecutors, perhaps anticipating the reaction of jurors to more imaginative charging decisions, charge defendants with stalking for exclusively post-separation conduct, despite the technical applicability of stalking laws to domestic violence. And it means that appeals courts opine in these cases without seeming to notice the artificiality of the stalking/domestic violence

133. *Id.* at 1019.

134. For the full model statute, see Appendix. For an explanation of its statutory provisions, see Tuerkheimer, *supra* note 6, at 1019-23. See also Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613, 613-14 (2007).

135. See *supra* notes 98-100 and accompanying text.

136. See *supra* note 27 (on nonphysical violence).

137. See *supra* Section II.A.

138. See *supra* notes 30-40 and accompanying text.

139. For sake of readability, I will not use the terminology of "perceived ending," even though, in the present context, this is the meaning of "end" that I intend. See *infra* Section III.A.

divide.¹⁴⁰ What marks this divide is a woman's leaving of the relationship, which activates a newfound systemic receptivity to ongoing conduct, to nonphysical injury, and to context.

I will call this law's de facto separation requirement. This requirement is satisfied by a woman's leaving the relationship, which can take any number of forms, including breaking up,¹⁴¹ obtaining an order of protection,¹⁴² and dissolving a marriage by separation or divorce.¹⁴³ At times, these mechanisms of departure are afforded equal status. Other times, women seem obligated to take formal legal action to sever their ties. All this is without judicial discussion.

As the intimate partner stalking cases show,¹⁴⁴ separation divulges context. Prior to it, abuse is relegated to "history,"¹⁴⁵ seen (if at all) as mere prelude to the crime of stalking. Only when a woman leaves the abuser does injury that results from ongoing conduct become law's concern.¹⁴⁶ In other words, separation is the necessary condition for victimization. Even more precisely, separation is the necessary condition for victimization by a violent course of conduct predicated on power and control – to wit, domestic violence, at least as

140. In other words, the assumptions that underlie the de facto separation requirement saturate all levels of criminal justice, resulting in a criminal law that embeds the very same assumptions. *See supra* notes 128-129 and accompanying text (describing underutilization of stalking laws and positing explanation for same).

141. *See, e.g.,* *People v. Woolever, Jr.*, 2008 Cal. App. LEXIS 2907 (in which a defendant, who committed repeated acts of violence against his girlfriend, was charged with stalking based on violence that occurred only after she broke up with him); *People v. Weisman*, 2002 Cal. App. LEXIS 3916 (in which a defendant, who committed repeated acts of violence against his girlfriend during the course of a "rocky" five year relationship, was charged with stalking based on conduct that occurred only after she broke up with him); *People v. Ledesma*, 2002 Cal. App. LEXIS 360 (in which a defendant, who committed repeated acts of physical and sexual violence against his girlfriend, was charged with stalking based on conduct that occurred only after she broke up with him). It should be noted that the California evidence code is unusually receptive to the admission of prior acts of domestic violence. CAL. EVID. CODE § 1109 (West 2003-04) (generally allowing evidence of defendant's "commission of other domestic violence" in prosecution for an offense involving domestic violence, subject to balancing of probative value against prejudicial effect). In contrast, the rules in most jurisdictions make it more difficult to discern a history of abuse from case law. *See supra* note 86.

142. *See, e.g.,* *People v. Ogle*, 185 Cal. App. 4th 1138 (2010) (in which a defendant, who committed repeated acts of violence against his wife, was charged with stalking based on conduct that occurred only after she obtained a protection order); *People v. Webb*, 2009 Mich. App. LEXIS 2541 (in which a defendant, who committed repeated acts of violence against his girlfriend, was charged with stalking based on conduct that occurred only after she obtained a protection order); *People v. Ramonez*, 2003 Mich. App. LEXIS 1561 (in which, despite a "history of domestic violence," the defendant was charged with stalking based on conduct that occurred only after his girlfriend obtained a protection order). *See also infra* notes 149-185 and accompanying text.

143. *See, e.g.,* *People v. Duran*, 2009 Cal. App. LEXIS 6440 (in which a defendant, who committed repeated acts of violence against his wife, was charged with stalking based on conduct that occurred only after she separated from him); *People v. McCray*, 58 Cal. App. 4th 159 (1997) (same). *See also infra* notes 187-212 and accompanying text.

144. *See infra* notes 149-243 and accompanying text.

145. *See supra* note 86.

146. As this Article shows, the criminal law (along with the rules of evidence) effectively hides the nonphysical aspects of battering. As a result, descriptions of the violent course of conduct can be barely glimpsed in the fissures of appellate decisions.

it exists outside the bounds of criminal law. It should also be noted that even incident-based violence, which accords with traditional paradigms, often goes unaddressed, as illustrated by the accounts that follow.¹⁴⁷

What follows are four case studies in the selective criminalization of patterned behavior. In each instance, ongoing abuse that occurred before separation is deemed lawful (i.e., not criminal). Pre-breakup conduct matters only insofar as it is thought to bear on the stalking. As is typical of the case law, we will see that the stalking behavior involved represents a continuation of the course of conduct that characterized the intact relationship. Yet stalking is prosecuted as if it began upon the victim's departure.¹⁴⁸ On analysis, these cases demonstrate the de facto separation requirement in action.

1. *State v. Vigil*¹⁴⁹

Sara met and began dating Christopher, the defendant, when she was fifteen and he was twenty or twenty-one.¹⁵⁰

When she turned eighteen, she moved into an apartment with him and shortly thereafter, she became pregnant. From the beginning of their relationship, the defendant verbally abused her, and later in the relationship, he also physically abused her.¹⁵¹ After their son was born, her relationship with the defendant was "horrible." The defendant continued his physical abuse, which resulted in her receiving several injuries. . . . She ultimately left the defendant because she knew that he was going to hurt their son and kill her.¹⁵²

This abuse falls under the rubric of domestic violence; it occurred pre-breakup, and is accordingly framed as only a preamble to the course of conduct said to begin when Sara sought an order of protection against Christopher.¹⁵³

Over the next year, Christopher came to Sara's house numerous times, at least once with a gun;¹⁵⁴ he beat on her windows and doors;¹⁵⁵ he followed her

147. See *infra* text accompanying note 275 (suggesting that the theory of imputed consent may also help to explain the underenforcement of existing laws in cases of intimate relationships).

148. A note on methodology: in order to identify the legal onset of stalking in these cases, I relied on judicial references to indictment dates and/or discussions of "prior acts" evidentiary rulings.

149. 65 S.W.3d 26 (Tenn. Crim. App. 2001).

150. *Id.* at 28.

151. One police officer testified that he "routinely drove by the victims' house" and was "concerned for [her] welfare." *Id.* This officer had responded to Sara's house at least ten times regarding domestic disputes with the defendant. *Id.* Once, Christopher kicked down the door after Sara had locked herself in; this was the only time that Christopher was arrested prior to the couple's breakup. *Id.*

152. *Id.* at 28-29.

153. *Id.* at 29.

154. *Id.* at 30.

155. *Id.* at 29.

to the supermarket and attempted to take their son from her;¹⁵⁶ he drove to the parking lot of the college administration building in which Sara was meeting with her financial aid advisor;¹⁵⁷ he mailed her a letter.¹⁵⁸ Based on this conduct, Christopher was convicted of stalking.¹⁵⁹

The case shows how the law selectively criminalizes a controlling pattern of behavior.¹⁶⁰ Christopher's ongoing violence was unlawful to the extent it occurred subsequent to Sara's departure. All that antedated her leaving does not register.

2. *People v. Zavala*¹⁶¹

Mario and Alicia Zavala were married in 1989.¹⁶² Three years later, after "a domestic violence incident" prompted Alicia to obtain a protection order against Mario, the two were separated and divorced.¹⁶³ They had one child in common.¹⁶⁴

Mario and Alicia "subsequently reconciled and they resumed living together without remarrying, and had a second child together."¹⁶⁵ The "history" of violence¹⁶⁶ (the domestic violence) began in 2002, and ended (became stalking) on June 20, 2003, when Alicia obtained a protection order requiring Mario to leave the home.¹⁶⁷

In one pre-breakup incident, Mario threw a plate at Alicia and called her a "stupid bitch" while grabbing her with sufficient force to rip her shirt, bruise

156. *Id.*

157. *Id.*

158. By situating this act in the context of the entire abusive pattern, the court was able to accurately observe that "[w]hile this letter is not threatening on its face, the defendant's mere contact with the victim through this letter, regardless of its substance, may be sufficient to establish harassment as defined by the stalking statute, given the history between the parties." *Id.* at 35.

159. The relevant statute, as cited in the opinion, reads as follows: "A person commits the offense of stalking who intentionally and repeatedly follows or harasses another person in such a manner as would cause that person to be in reasonable fear of being assaulted, suffering bodily injury or death." TENN. CODE ANN. § 39-17-315(a)(1). Further, "(A) 'Follows' means maintaining a visual or physical proximity over a period of time to a specific person in such a manner as would cause a reasonable person to have a fear of an assault, bodily injury or death; (B) 'Harasses' means a course of conduct directed at a specific person which would cause a reasonable person to fear an assault, bodily injury, or death, including, but not limited to, verbal threats, written threats, vandalism, or unconsented-to physical contact; and (C) 'Repeatedly' means on two (2) or more separate occasions. TENN. CODE ANN. § 39-17-315(a)(2)(A)-(C). *Vigil*, 65 S.W.3d at 32.

160. As the court noted, "The statute which defines stalking as a criminal offense contemplates a series of discrete actions amounting to a continuing course of conduct." *Vigil*, 65 S.W.3d at 35 (citing *State v. Moxie*, 963 S.W.2d 737, 743 (Tenn. 1998)).

161. 130 Cal. App. 4th 758 (2005).

162. *Id.* at 762.

163. *Id.*

164. *Id.*

165. *Id.* See *infra* notes 250-259 and accompanying text (noting typicality of multiple departures).

166. This history is referred to as "prior uncharged acts." *Id.* See *supra* note 86 (discussing evidentiary framework governing domestic violence history).

167. *Zavala*, 130 Cal. App. 4th at 763.

her arm, and cause several drinking glasses to shatter on the floor.¹⁶⁸ On another occasion, he choked her until she lost breath in the presence of their daughter.¹⁶⁹ One time, he spit food at her and “challenged her by asking what she was going to do about it.”¹⁷⁰ “[S]hocked and scared,” Alicia left home.¹⁷¹

Another incident involved Mario slashing Alicia’s tires, after telling her that she was “not going anywhere.”¹⁷² After this episode,

Police responded to the 911 hang-up call, and saw the two front tires had been deflated. [Alicia] showed police the bruises on her arm, and told them she was afraid of her husband and scared for her children, and that Zavala kept guns and a knife in the home. Police found four or five rifles, two handguns and a knife inside the home, and removed the weapons. [Alicia] took the children with her to her parents’ house, where they stayed that night.¹⁷³

The next day, Alicia obtained a protection order requiring removal from the home,¹⁷⁴ and transaction-bound domestic violence *became* stalking.¹⁷⁵

Mario’s course of conduct continued virtually unabated. He parked his car in Alicia’s driveway.¹⁷⁶ He phoned her, sometimes without speaking and other times with verbal abuse (“stupid bitch,” again).¹⁷⁷ He came to the home on their son’s birthday, and pushed past Alicia (“fuck you, bitch”).¹⁷⁸ He continued to drive past the home, and once followed her to a shopping center.¹⁷⁹ He called Alicia’s cell phone and threatened, “I’m going to kill you, just watch,” and told her the children would be better off with a foster parent than with her.¹⁸⁰ He left messages “laced with vulgarities . . . and threatening to kill her.”¹⁸¹ He cut

168. *Id.* at 762.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 763.

173. *Id.*

174. *Id.*

175. To commit the offense of stalking in California, a defendant must “willfully, maliciously, and repeatedly [follow] or willfully and maliciously [harass] another person and . . . [make] a credible threat with the intent to place that person in reasonable fear for his or her safety.” CAL. PENAL CODE § 646.9(a) (West 2012). The term “harass” is defined as a “course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.” CAL. PENAL CODE § 646.9(c) (West 2012). “Credible threat” is defined as a threat “made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety.” CAL. PENAL CODE § 646.9(g) (West 2012).

176. *Zavala*, 130 Cal. App. 4th at 763.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 764. He added, “The next time they see me I’ll be behind a glass wall.” *Id.*

181. *Id.* The court noted, “During this time, Wife was taking precautions for her safety, including staying at her parents’ house, keeping her windows closed at night, and going around the block to make sure Zavala was not in a position to intercept her before she could get inside the home.” *Id.* at 765.

power to her residence, took a vehicle from the garage, and vandalized Alicia's motor home in back.¹⁸² He drove by in a truck and "waved and smiled" at Alicia.¹⁸³ Shortly thereafter, Alicia went to the Police Department to meet with a detective about the case against Mario.¹⁸⁴ The detective later found that Mario had signed the visitor's log next to Alicia's name.¹⁸⁵

Alicia was required to obtain a protection order for Mario's course of conduct as a whole¹⁸⁶ to be deemed criminal. Separation turned domestic violence into stalking, allowing for the latter to be legally remedied.

3. *People v. Mustafa Sirat*¹⁸⁷

Mustafa Sirat and Bahijah Ab Salam were married in Germany in 1997. The following year, they moved to the United States to live with Mustafa's family.¹⁸⁸

Once there, Sirat began restricting Ab Salam's freedom. Ab Salam was not allowed to have friends and she could not leave the house without Sirat's permission. She was not even allowed to choose her own clothing or hairstyle. She could only attend English classes and go to work.¹⁸⁹

Shortly thereafter, Ab Salam¹⁹⁰ discovered that she was pregnant.¹⁹¹ About a month later, Sirat violently assaulted her, repeatedly kicking her in the abdomen and causing her to miscarry.¹⁹² The court described the next two months of the relationship as follows:

182. *Id.*

183. *Id.* This episode perfectly illustrates the importance of context to intimate partner violence. Alicia was of course afraid of this wave and smile. *Id.* Alicia's and Mario's relationship—rather than the acts themselves, in isolation—explains why. But only because Alicia had separated from Mario, and his conduct was therefore viewed as stalking, was context considered.

184. *Id.*

185. *Id.*

186. *See supra* note 175.

187. 2002 Cal. App. LEXIS 11 (Apr. 16, 2002).

188. *Id.* at *2. Nowhere does opinion mention Ab Salam's immigration status, particularly whether she was dependent on Sirat for residency status. On the enormous challenges facing immigrant battered women, see Julie Dinnerstein, *Working with Immigrant Victims of Domestic Violence*, in *LAWYERS MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 277 (Jill Laurie Goodman & Dorchen Leidholdt eds., 4th ed. 2005).

189. *Sirat*, 2002 Cal. App. LEXIS 11, at *2.

190. Because I am quoting extensively from the opinion and the court uses last names, I will do so here as well.

191. *Id.* The onset of pregnancy is often a particularly dangerous time for women. See Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 *IND. L.J.* 667, 670-73 (2006).

192. *Sirat*, 2002 Cal. App. LEXIS 11, at *2-3. "She did not seek medical treatment immediately because she did not have health insurance. Over the next two days, the bleeding increased; Ab Salam became dizzy to the point she could hardly walk. Sirat took Ab Salam to the emergency room. . . . Hospital staff asked if she had been beaten. Ab Salam said she did not know how she was injured, reluctant to tell the truth because she was afraid of Sirat." *Id.* at *3. This incident was ultimately charged as an assault in conjunction with the stalking prosecution. *Id.* at *1.

Ab Salam continued to bleed heavily over the next several months. In early June 1999, Sirat forced Ab Salam to have anal sex, angry that she was still experiencing vaginal bleeding. Ab Salam did not report the sodomy because she feared her husband and also felt it was inappropriate to talk about the matter. She also hoped that her situation would improve.¹⁹³

...

On June 30, 1999, Ab Salam and Sirat got into another argument where Sirat again became violent. It began when Ab Salam told Sirat she wanted to move out of his family's house to a place of her own. Ab Salam was lying on her back on the bed. Sirat got on top of her, planting his knees into her thigh and torso, grabbing her neck and striking her. Sirat told her she did not have the right to choose where she lived.¹⁹⁴

The next morning, Ab Salam called a friend from English classes and requested, "If anything happens to me, please call my parents in Morocco."¹⁹⁵ As a result of her friend's subsequent intervention, Ab Salam left the marital residence and obtained a protection order.¹⁹⁶ Soon after, she "decided to go back to Sirat after he apologized to her,"¹⁹⁷ and the two moved into an apartment (apart from his family). But Sirat "began exhibiting new and strange behavior," and "became very jealous of Ab Salam."¹⁹⁸ The couple's reconciliation lasted only a few months. In early November 1999, the two separated¹⁹⁹—this time, long enough to recalibrate the criminal law's response to Sirat's course of conduct.²⁰⁰

The legally recognized stalking²⁰¹ thus began when Sirat moved out of the apartment.²⁰² Immediately after moving out,²⁰³ he called her thirty to forty

193. When medical personnel inquired about the sources of bruises on her body, Ab Salam was sufficiently fearful of Sirat that she again denied she had been beaten, claiming she had hit a table. *Id.* at *3.

194. *Id.* at *4.

195. *Id.* at *5.

196. *Id.* at *6. Sirat's response upon receiving news from this friend that Ab Salam was "ill and might die," was, "[b]etter she should die than not be here at home with me." *Id.*

197. *Id.* Ab Salam was reported to have "cancelled the restraining order, thinking things had changed and they could start a new life together." *Id.* See *infra* notes 257-258 and accompanying text (discussing the typicality of multiple departures). In this case, because Ab Salam later returned to Sirat, obtaining an order of protection was not enough to transform domestic violence to stalking; more (permanent-seeming) separation was required.

198. *Sirat*, 2002 Cal. App. LEXIS 11, at *6.

199. *Id.* Ab Salam stayed in the apartment, and Sirat moved back to the family's home. *Id.*

200. See *supra* note 197 (discussing the imperative that separation appear to be permanent).

201. For California's stalking definition, see *supra* note 175.

202. In its description of the stalking (as opposed to what preceded it), the court conceived of Sirat's behavior as a pattern of control.

203. *Sirat*, 2002 Cal. App. LEXIS 11, at *6.

times a day, leaving messages when she did not answer.²⁰⁴ He appeared almost daily at the apartment, and often at her work.²⁰⁵ He threatened to commit suicide after murdering her, and “several times threatened kill her if he caught her with another man or if she left him permanently.”²⁰⁶

Interestingly, the court flashed back to the “past” domestic violence in explaining why Ab Salam responded to these threats with fear:

Ab Salam took his threats seriously because he had been violent with her in the past. Also, while they were together in the [] apartment, Sirat had told her he had nightmares of strangling her. Once Ab Salam was unable to find the kitchen knives when she wanted to cook. Sirat said he had hidden the knives in their bedroom because he was worried he might unwittingly kill her.²⁰⁷

On the day before his arrest, Sirat came to the apartment, “grabbed Ab Salam tightly around her left arm and dragged her around the apartment to see if a man was with her. . . . He again threatened to kill her if she was with another man.”²⁰⁸ The following day, Ab Salam phoned her attorney to request another protection order. That evening, she saw Sirat waiting for her in his car at the gate of the apartment complex.

He demanded that she let him into the apartment, threatening to kill her if she refused. He made a slicing motion with his finger across his throat as he said this. Ab Salam understood this gesture to mean he would kill her. She ran to her apartment and locked herself in, barricading the door with chairs. Sirat came to the door, and Ab Salam called the police.²⁰⁹

When the police arrived, Ab Salam was “visibly shaken and crying.”²¹⁰ While the officer was talking to Ab Salam, a neighbor knocked on her door. “Startled by the knock,”²¹¹ and in response to *all* that had come before, Ab Salam urinated on herself.²¹²

From the perspective of criminal law,²¹³ what mattered occurred just the week before.

204. *Id.*

205. *Id.* at *6-7.

206. *Id.* at *7.

207. *Id.*

208. *Id.* at *8. After he left, Ab Salam “locked the door, barricaded it with chairs, and called the police. The police found Sirat outside the apartment. Inside the apartment, the officers found Ab Salam obviously upset and afraid Sirat might enter. Ab Salam told the police she did not want to press charges against Sirat, but only wanted him to leave her alone.” *Id.*

209. *Id.* at *8-9.

210. *Id.* at *9.

211. *Id.*

212. *Id.*

213. See *supra* notes 139-141 and accompanying text.

4. *State v. Whitesell*²¹⁴

The relationship between Julie and Jon Whitesell was violent almost from the beginning. As a court would later describe:

The relevant facts of this case span over an 8-year period. Julie met [Jon] Whitesell in 1989, became pregnant, and married him in 1990. Whitesell and Julie rarely lived together as the relationship was abusive from the start. When Julie and Whitesell did live together, Julie would often flee with her children to her sister's house when Whitesell became violent.²¹⁵

The court recounted a litany of abuse occurring over the course of the Whitesells' relationship.²¹⁶ Jon threw Julie into a closet and refused to let her out.²¹⁷ He laid out all their knives in a pattern on the kitchen table.²¹⁸ He pulled Julie from the driver's seat and began driving dangerously fast until Julie managed to jump out of the car and run away at a stop light.²¹⁹ He threatened her on the phone, telling her that she hadn't "seen anything yet" and that he could find her if he needed.²²⁰ He threw water on her while she was sleeping and told her that he was taking their daughter. When Julie tried to stop Jon from driving away, he pounded her head against the steering wheel, shoved her to the ground, and pulled her hair out.²²¹ He disabled the air conditioner and removed parts from Julie's car.²²²

After Julie obtained a protective order,²²³ Jon tried breaking into her home.²²⁴ He told Julie that marriage was "till death do us part."²²⁵ He pushed her, locked her in the bedroom, threw her into the corner and "pressed his pelvis into her," like he was going to rape her. Instead he threw her in the hall "with so much force that [her] foot went through the wall."²²⁶

214. 13 P.3d 887 (Kan. 2000).

215. *Id.* at 896. The court's recitation of facts includes various physical departures and returns on the part of both Julie and Jon. For instance, Jon moved back into the house with Julie when she was diagnosed with cancer. *Id.* See *infra* notes 250-259 and accompanying text.

216. Here too, the incident-based narrative is a byproduct of the applicable criminal-evidentiary framework. See *supra* note 86.

217. *Whitesell*, 13 P.3d at 896.

218. *Id.*

219. *Id.*

220. *Id.*

221. See *infra* note 243 (detailing the conviction for this assault).

222. *Whitesell*, 13 P.3d at 896.

223. Given what came after (i.e., Julie's return to Jon), this act was not enough to transform domestic violence to stalking. See *supra* note 197 (noting the same phenomenon in *Sirat*).

224. *Id.*

225. *Id.*

226. *Id.*

Once Jon threw a television set.²²⁷ When Julie tried to leave the home, he slapped and kicked her, forcing her to escape to the bedroom with the children. He kicked in the door to the bedroom.²²⁸ He went to Julie's father's house screaming for his gun.²²⁹ He broke into the garage.²³⁰ He called the prosecutor and said that he had a gun and would kill Julie.²³¹ He followed her, drove by her house, and sent her a note referencing the ongoing O.J. Simpson trial.²³² He left suicide notes inside of her locked car and sent a birthday card that read, "I will not quit!"²³³

Julie filed for divorce²³⁴ and obtained a second protective order. This time, legally sufficient separation was achieved; all that followed was deemed stalking.²³⁵ Jon drove by her house by car and by bicycle, over and over again.²³⁶ He parked nearby with his lights off and binoculars in the car.²³⁷ Once he drove by while Julie's new boyfriend was mowing the lawn and "called [her] a slut and a whore and told her to watch her back."²³⁸ Julie and a deputy believed that Jon watched the house from a field near the yard.²³⁹ He sent her a copy of the Kansas adultery statute and a bible with a handwritten inscription saying that he would not quit.²⁴⁰ He followed Julie's boyfriend to work and "confronted him about 'screwing his wife.'"²⁴¹ Jon was subsequently arrested and charged with stalking.²⁴²

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 897.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* This was the second time Julie filed for divorce. The first time she dismissed the divorce action after discovering that she was pregnant with Jon's baby. *Id.* at 896.

235. *Id.* at 897-98. The Kansas statute (at the time of the opinion) read in relevant part as follows: "(a) Stalking is an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety. . . .

(d) For the purposes of this section:

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

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

(3) 'Credible threat' means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety." *Whitesell*, 13 P.3d at 899 (quoting KAN. STAT. ANN. § 21-3438 (1999)).

236. *Whitesell*, 13 P.3d at 897-98.

237. *Id.* at 897.

238. *Id.* at 898.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* See *supra* note 235 for the definition of stalking in Kansas at that time.

The ongoing abuse that Julie endured before fulfilling the law's separation requirement was disregarded.²⁴³

III. A THEORY OF IMPUTED CONSENT

Separation marks a legal receptivity to more fulsome accounts of intimate partner abuse. In this Part, I will argue that criminal law's privileging of breakups in this manner is problematic. I identify two separate but related grounds for critique.

First, legal preoccupation with a moment of departure does not comport with reality.²⁴⁴ As we will see, locating a singular instance of separation is often arbitrary, particularly when context surrounding the violence is taken into account. As such, ascribing separation with transforming power—i.e., by defining it as the trigger for a strikingly different approach to criminalization—makes little sense.²⁴⁵

If separation is thus an artificial designation, we might wonder whether another purpose is served by the breakup. In discussing a second, more profound, objection to the privileging of breakups,²⁴⁶ I will propose that separation implicitly functions to define the border between violence that is consented to (and therefore lawful), and violence that is not (hence unlawful). The tacit imputation of consent helps to explain law's discrepant treatment of battering and stalking.²⁴⁷ I will then expand on this theory by considering the normative framework governing consent. This analysis shows that imputing consent to women in abusive relationships cannot be squared with basic understandings about the conditions required for consent.

A. The Transactional Breakup as Legal Fiction

The paradigm of the transactional breakup—one that occurs at a distinct moment in time, upon mutual agreement by two parties²⁴⁸—hopelessly fails to capture the complexities that attend ending abusive relationships. In these relationships, separation is a process. Breaking up is often difficult,²⁴⁹ but the

243. With one exception, seven years of pre-separation battering went unnoticed by the criminal justice system. The exception is that Jon was convicted of one count of domestic battery years earlier for an attack that was witnessed by (and required the intervention of) several firemen. *Whitesell*, 13 P.3d at 896.

244. See *infra* Section III.A.

245. Each of the case studies discussed above raises this issue.

246. See *infra* Section III.B.

247. Put differently, surfacing consent mythology helps to explain continued resistance to fully criminalizing domestic violence.

248. See *supra* note 19 (referencing role of mutuality in breakups).

249. As Cheryl Hanna has written, "Just about everyone has been in a romantic relationship that, in hindsight, should have ended sooner than it did. Why do people stay? Hope, or commitment, or because they share a lease or she owns the car. Life and love are complicated, and, as Neil Sedaka sang,

realities confronting battered women make separating from a partner distinctly dangerous, complicated, and protracted.²⁵⁰ For these women, there is typically no moment of breakup; rather, domestic violence victims “leave” relationships multiple times, in different ways, to varying degrees of success.

In her seminal work on separation over two decades ago, Martha Mahoney wrote:

The question “why didn’t she leave” is actually an objectifying statement that the woman did *not* leave. Asking this question often makes actual separation disappear. . . . If we ask the woman, “What did you do?” the answer very often turns out to be, “I sought help.” . . . When we ask the woman, “Exactly what did you do in your search for help?” the answer often turns out to be that she left—at least temporarily.²⁵¹

In the years since Mahoney articulated this insight, empirical research has enhanced our understanding of separation as process.²⁵² A developing social science literature demonstrates,²⁵³ explains,²⁵⁴ and models²⁵⁵ a nonlinear progression toward ending relationship violence. What we now know about this dynamic process severely undermines the criminal law’s insistence on a breakup moment. In short, legal misconceptions of separation²⁵⁶ sit uneasily with the ongoing struggles of battered women.

Most women describe numerous attempts to leave their abusers. In one study of post-relationship stalking, 40% of a sample of battered women reported that they made 1 to 5 attempts to leave, almost a quarter reported 6 to 10 attempts, 10% reported 11 to 40 attempts, and 16% reported that they “left

“Breaking up is hard to do.” Cheryl Hanna, *Because Breaking Up Is Hard To Do*, 116 YALE L.J. POCKET PART 92 (2006).

250. Locating the divide between relationships that are abusive (and typically characterized by breakup as process) and those are that not abusive (and subject to what I am calling the transactional breakup) raises its own set of issues. But, as Deborah Denno has remarked, “There are many line-drawing dilemmas throughout the criminal law.” Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 274 (2002). My claim here does not rest on a sharp differentiation between relationships that are violent and those that are not. Rather, I am asserting that in abusive relationships, the notion of a transactional breakup tends to be undermined.

251. Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 61 (1991).

252. See *infra* notes 253-266 and accompanying text. Notwithstanding this body of research, the law still tends to fixate on separation. For a critical analysis, see MELISSA HAMILTON, EXPERT TESTIMONY ON DOMESTIC VIOLENCE: A DISCOURSE ANALYSIS 147-152 (2009).

253. See *infra* notes 256-257 and accompanying text.

254. See *infra* notes 259-264 and accompanying text.

255. See *infra* notes 265-266 and accompanying text.

256. Although this discussion is confined to the criminal law context, legal misconceptions about separation may distort the civil protection realm, as well. See Jane K. Stoecker, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303 (2011).

the relationship more times than they could count.”²⁵⁷ These figures confirm a growing body of research showing the unlikelihood that an initial separation from an abusive partner will ultimately succeed,²⁵⁸ and suggesting that battered women “leave” relationships repeatedly.

Sarah Buel has observed “[t]hat abuse victims make many courageous efforts to flee the violence is too often overlooked.”²⁵⁹ Women stay for “many valid reasons”²⁶⁰—reasons that explain the difficulty confronting women attempting separation, as well. A nonexhaustive list of these challenges includes financial dependence, housing needs, immigration-related concerns, shame, religious teachings, familial pressures, hope for change, and love.²⁶¹ Battered women who are mothers also confront especially acute dilemmas related to their children.²⁶²

At its heart, the process of separation cannot be understood without reference to the dangers that surround exit from violent relationships. Battered women are legitimately fearful of leaving their abusers, for they put themselves at the greatest risk of physical injury and death when doing so.²⁶³ More broadly, control is ratcheted up when women attempt to separate. Martha Mahoney named this dynamic “separation assault.”

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

257. Mechanic et al., *supra* note 35, at 51-52.

258. See, e.g., Andrew J. Martin et al., *The Process of Leaving an Abusive Relationship: The Role of Risk Assessments and Decision-Certainty*, 15 J. FAM. VIOLENCE 109 (2000); James C. Roberts et al., *Why Victims of Intimate Partner Violence Withdraw Protection Orders*, 23 J. FAM. VIOLENCE 369 (2008).

259. Sarah M. Buel, *Fifty Obstacles of Leaving, a.k.a. Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19 (1999).

260. *Id.*

261. *Id.* See also *supra* note 251 and accompanying text (discussing separation assault).

262. See Tuerkheimer, *supra* note 191, at 680-81. (“[S]ingle mothers tend to live at or below the poverty line, and welfare reform has only served to worsen their plight. Faced with the prospect of living without sufficient food or shelter for themselves or their children, it is not surprising that many women ‘choose’ to remain in a relationship with a man who can help to provide these subsistence items—even if the cost of the exchange is continued violence.”) (citations omitted). See also *id.* at 683 (noting that battered mothers “confront not only adverse material consequences, but a societal message that many have internalized: children raised in households headed by single mothers are damaged emotionally, developmentally, and financially”).

263. A number of studies have documented the correlation between stalking and intimate partner homicide or attempted homicide. LOGAN ET AL., *supra* note 28, at 7-8 (collecting research). One such study found that 76% of women murdered by an intimate, and 85% of women who were victims of attempted murder by an intimate, had been stalked prior to the attack. *Id.* (quoting J. McFarlane et al., *Intimate Partner Stalking and Femicide: Urgent Implications for Women’s Safety*, 20 BEHAV. SCI. & L. 51 (2002)). As Martha Mahoney has written, “The fact that marital separation increases the instigation to violence shows that these attacks are aimed at preventing or punishing the woman’s autonomy. They are major—often deadly—power moves.” (citation omitted). Mahoney, *supra* note 251, at 65.

regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.²⁶⁴

Just as the batterer's post-separation efforts to control the victim develop over time, so too do the victim's attempts to leave evolve in response.²⁶⁵ Breaking away from an abusive relationship entails a process. Progress is often halting, and change cyclical.²⁶⁶ Empirical and conceptual accounts thus suggest that the paradigm of the transactional breakup is ill-suited to relationships predicated on power and control. The criminal law's insistence that separation occurs at a precise moment, unequivocally, to transfiguring effect, is in deep tension with the realities of abuse.

Because an abusive course of conduct is ongoing throughout the stages of relationship, it makes little sense for any given departure to carry the meaning now accorded it. Yet the law turns a perceived breakup into the necessary condition for contextualizing—and criminalizing—an abuser's behavior, without regard to ongoing patterns that pre-existed the instant separation.²⁶⁷ The disconnect between this *de facto* separation requirement and the empirical realities underlying it should give us pause.

Apart from its conceptual incoherence, it is worth noting that this burden of separation imposes considerable costs on women who are victimized in ongoing relationships. Unless they "leave" to the law's satisfaction, their suffering must be endured without recourse. We might simply conclude that intimate relationships continue to exist within a private sphere into which the law does not interfere. But this would not account for intrusions into the domain of intimacy where violence—certain forms, at least—has been found to be unacceptable.

Interesting and important parallels can be drawn between the law's discrepant treatment of intimate partner violence and its historical and contemporary approach to marital rape. Once, the right of corporal

264. Mahoney, *supra* note 251, at 65-66.

265. For women's accounts of the dynamic process of separation, see *id.* at 66-68. See also Stoever, *supra* note 256, at 324 ("In the context of domestic violence, the change an individual makes is relational, and an understanding of [how abuse victims end the violence] must take into account the influence of the partner and his reaction to this relationship change.").

266. One widely accepted psychological model of change-making has recently been applied to explain the process of ending relationship violence: "Researchers discovered the validity of this application by conducting in-depth interviews of women who had recently experienced domestic violence or were currently in abusive relationships The women described five stages of change [pre-contemplation, contemplation, preparation, action, and maintenance], consistent with the Stages of Change Model. . . . The Stages of Change Model assumes that progression through the stages is a dynamic process and posits that progress through the stages occurs in a cyclical, rather than linear, sequence. It is expected that a survivor will revisit earlier stages as she moves toward maintenance Essentially, ending violence is a process that occurs in stages, and the change is frequently iterative." Stoever, *supra* note 256, at 323-24.

267. Any earlier periods of separation are inevitably overlooked as part of this differentiation between relationship and post-relationship abuse. See, e.g., *supra* note 197.

punishment²⁶⁸ and the marital rape exemption²⁶⁹ were justified; yet they are no longer.²⁷⁰ This tells us that harms that occur within relationships can be (and often are) criminalized without regard for continuing intimacy. But they are not always so treated. In the case of nonphysical violence, relationship still makes all the difference.

Why, in this case, does the law assign separation undue meaning? If separation does not truly mark the onset of patterned abuse, why does it initiate its criminalization? The next Section provides an answer.

B. Surfacing Consent Mythology

The law makes separation the pivot point for criminalizing patterns without remark. Without acknowledging that departure matters—much less why it matters—no rationale need be offered for treating abuse within relationships differently from abuse without. To discern one, then, it is helpful to observe how the criminal law reflects social biases regarding women who stay,²⁷¹ just as it reinforces these very same misconceptions,²⁷² all in service of seemingly natural (and neutral) distinctions between battering and stalking.

The result is an exemption for relationship violence of a nonphysical kind. This exemption is fully consistent with, and perhaps best explained by, tacit attributions of consent. On this view, unless and until they leave the relationship, women are believed to consent to the controlling course of conduct. Separation sparks the shift in crime paradigms because separation

268. See *supra* notes 90-91.

269. See Jill Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000) (“At common law, husbands were exempt from prosecution for raping their wives. Over the past quarter century, this law has been modified somewhat, but not entirely. A majority of states still retain some form of the common law regime.”). Similarities between the two selective criminalization regimes and their underlying rationales, both expressed and implied, are striking.

270. But see *supra* text accompanying note 147.

271. Regarding this general dynamic, consider the following helpful description: “[C]riminalization” constitutes an appropriate conceptual framework within which to gather together the constellation of social practices which form the subject matter of criminal law on the one hand and criminal justice and criminological studies on the other. . . . Escaping the notion of crimes as “given,” the idea of criminalization captures the dynamic nature of the field as a set of interlocking practices in which the moments of “defining” and “responding” to crime can rarely be completely distinguished and in which legal and social (extra-legal) constructions of crime constantly interact. . . . [I]t allows the instrumental and symbolic aspects of the field to be addressed, as well as encompassing empirical, interpretive, and normative projects. It embraces questions about offenders and victims, individuals and collectivities, state and society.” Nicola Lacey, *Legal Constructions of Crime*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 197 (Mike Maguire et al., eds., 2007) (citations omitted).

272. “Social meaning plays a critical role in criminal law. Economists speak of criminal law as a mechanism for pricing misconduct, but ordinary citizens think of it as a convention for morally condemning it. Against the background of that expectation, the positions that the law takes become suffused with meaning.” Dan M. Kahan, *Social Meaning, Social Influence, and Deterrence*, 83 VA. L. REV. 349, 362 (1997). See also Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352 (1996) (“Because criminal law expresses condemnation, what a political community punishes, and how severely, tell a story about whose interests are valued and how much.”).

marks the moment of nonconsent: nonconsent to the relationship and, thus, nonconsent to relationship violence (the two are equated).²⁷³

In sum, I am proposing a theory of imputed consent—or attributing consent “when and because none has been granted in fact”²⁷⁴—to explain the differential treatment of abuse within and without relationships. This theory may also partly explain the underenforcement of existing laws against assault and rape.²⁷⁵ Imputed consent reflects the endurance of formally repudiated distinctions between the public and private realms.²⁷⁶ In this account, violence within intimate relationships is justified as the product of choice on the part of its victims. Within the realm of intimacy, the “sphere of choice,”²⁷⁷ what would not be tolerated absent a relationship is quite acceptable for precisely this reason: the existence of an ongoing relationship becomes a proxy for a woman’s consent to all that takes place within it (at least, to the point of physical assault).

If this theory is correct, separation serves a function somewhat different from defining the parameters of a novel course of conduct. The privileging of separation does not correspond to the batterer’s (changed) behavior. Instead, it reflects implicit judgments of the victim’s.

For present purposes, a few general observations about the nature of consent are in order. Consent is morally transformative, insofar as it moves wrongful conduct into the realm of the permissible.²⁷⁸ Consent has both a descriptive²⁷⁹ and a normative component,²⁸⁰ and the latter is necessitated by its

273. See *infra* Subsection III.B.2.

274. Heidi M. Hurd, *Was the Frog Prince Sexually Molested?: A Review of Peter Westen’s The Logic of Consent*, 103 MICH. L. REV. 1329, 1341 (2005). See Peter Westen, *THE LOGIC OF CONSENT* 271 (2004) (claiming that imputed consent “consists of attributing prescriptive consent on persons that do not possess it.”). See also Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 337 (2004) (discussing areas of rape doctrine where “the law imputes such an actual choice to her, despite her having neither experienced nor manifested it.”).

275. See *supra* text accompanying note 147.

276. See CATARINE MACKINNON, *FEMINISM UNMODIFIED* 100 (1987) (“In private, consent tends to be presumed. It is true that a showing of coercion voids this presumption. But the problem is getting anything private to be perceived as coercive. Why one would allow force in private—the ‘why doesn’t she leave’ question asked of battered women—is a question given its urgency by the social meaning of the private as a sphere of choice.”).

277. *Id.*

278. As Franklin Miller and Alan Wertheimer write in their preface to a notable collection of works on consent, “A requirement of consent, from a moral perspective, protects people from unauthorized invasions of their bodies and property. In addition to its protective function, consent is a facilitative moral power. Our consent makes interpersonal conduct permissible that would otherwise be prohibited as wrongful.” Franklin G. Miller & Alan Wertheimer, *Preface: The Ethics of Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* ix (Franklin G. Miller & Alan Wertheimer eds., 2010). See also John Kleinig, *The Nature of Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE*, *supra*, at 3, 12 (“[C]onsent transforms the moral relations that exist between persons.”).

279. My claims do not depend on whether consent is an internal state of mind or requires an outward manifestation of a mental state. See Kleinig, *supra* note 278, at 9–11 (discussing this as a broad area of disagreement among philosophers). See also Vera Bergelson, *Consent to Harm*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE*, *supra* note 278, at 163, 175 (“Conceptually, factual consent may be understood in one of two ways: either as the consenter’s subjective state of mind, that is, his

moral force.²⁸¹ With regard to normative content, it is accepted that consent must be given voluntarily²⁸² and intentionally²⁸³ by a competent person with knowledge.²⁸⁴ These requirements are sometimes framed in terms of autonomy.²⁸⁵

With these parameters in mind, it becomes apparent that implicit attributions of consent are misplaced.²⁸⁶ On analysis, the legal imputation of consent cannot withstand scrutiny. Women do not consent to relationship violence, even²⁸⁷ the nonphysical, and even violence that is inflicted over time. Axiomatic understandings of what consent requires simply cannot be squared with the realities of abuse victims' lives.²⁸⁸ In other words, departure is not the

willingness to agree with what another person proposes (factual attitudinal consent), or the consenter's expression of acquiescence by words or conduct (factual expressive consent).").

280. See Tom L. Beauchamp, *Autonomy and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE, *supra* note 278, at 55, 56 (claiming that the "distinction between the factual and the moral is vital, but it may foster precarious claims such as: (1) analysis of consent and autonomy are conceptual and empirical tasks, not moral ones; and (2) a theory of consent and a theory of autonomy should not be grounded in moral notions, but on a theory of mind, self, or person"); Brian H. Bix, *Contracts*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE, *supra*, at 251, 253 ("[I]f one treats the presence or absence of consent as an empirical matter, there remain normative questions in moral and legal inquiries to determine the effect of the consent in question."); Kleinig, *supra* note 278, at 4 ("Consent is not a neutral act that is then separately justified as having normative force, but is normative through and through even though it also has a descriptive content.").

281. See Kleinig, *supra* note 278, at 13 ("As an act that morally transforms a situation, it must satisfy certain conditions—in particular, those for constituting it responsible behavior.").

282. "If A is coerced into doing what ordinarily signifies consent. . . he does not act voluntarily and what he does does not constitute consent." *Id.* at 14-15.

283. "When A consents to ϕ , A consents to ϕ under a certain description In certain circumstances, it will be important to specify fairly precisely what is consented to." *Id.* at 17-18.

284. "If consent is to be a communicative act for which responsibility is presupposed, it must be the act of an agent who is competent to consent; it must be voluntary, in the sense of being free from coercion; it must be based on understanding, in the sense that it is appropriately informed; and it must be intentional." *Id.* at 13. Because voluntariness and intentionality are so evidently lacking in abusive relationships, I focus the discussion here, and I do not address the remaining conditions of competence, *see id.* at 13-14, or of knowledge, *see id.* at 16-17.

285. See Beauchamp, *supra* note 280, at 65 (articulating an account of autonomy that "is based on analysis of autonomous action in terms of normal choosers who act (1) intentionally, (2) with understanding, and (3) without controlling influences"). For a different conception, see generally Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999).

286. This is true whether we view consent in moral or legal terms. The discussion that follows will focus on the conditions of consent that give it moral power. For present purposes, it suffices to note that these same conditions characterize the law's various formulations of valid consent. This overlap is of course not coincidental. See Kleinig, *supra* note 278, at 4 ("Although consent figures quite importantly in certain formalized contexts—especially the law—it draws its strength in those contexts from the sense that I have characterized as morally transformative.").

287. It may be more accurate to say "especially," rather than "even," since ongoing abuse of a nonphysical nature tends to be the most harmful aspect of domestic violence. See *supra* notes 30-40 and accompanying text.

288. Questions about battered women's agency are endemic to feminist theorizing. See, e.g., Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1465 (2001) ("What does women's continued presence in battering relationships say about their ability to act as their own agents? If they feel compelled to stay, does that make them incapable of protecting themselves?"). When the state contemplates taking actions that are contrary to what a battered woman would choose, this tension is especially acute. Cheryl Hanna has elaborated on this tension: "Whether autonomy and the right to make one's own decisions offer more liberation for women, or are false notions masking subordination,

consensual fulcrum that the criminal law imagines. Accordingly, I will argue that the legal meaning of separation is tenuous and in need of revision.

In the next sections, I will examine the workings of abusive relationships in order to challenge the law's implicit attribution of consent.²⁸⁹ We will see that many women in relationships of ongoing abuse are not consenting to stay,²⁹⁰ and that those who are consenting to stay are not consenting to the ongoing abuse.²⁹¹ In short, the preconditions for consent—particularly voluntariness²⁹² and intentionality²⁹³—are vitiated by the ongoing course of conduct that is domestic violence.

Before defending these assertions, I wish to draw one final distinction between the criminal law's response to intimate partner violence and its response to violence more generally. Even where consent is given, this consent is not always reflected in the law.²⁹⁴ With few exceptions, the criminal law declines to acknowledge a victim's consent to physical harm as a defense to prosecution.²⁹⁵ Consensual harm may violate the victim's rights or her dignity.²⁹⁶ Either way, there may be good reasons to punish consensual harm.²⁹⁷

continues to be debated in feminist legal scholarship. In practice, most victims want the violence in their relationships to stop and to that extent will cooperate with the state. Many women, however, will resist outcomes that involve criminal records, jail, fines, or other punitive measures. When a woman wants her partner to receive treatment despite a serious offense or his long-term dangerousness, the prosecutor and judge must navigate the tricky waters between a victim's personal autonomy and concerns for public safety and justice." Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1556-57 (1998).

My argument is somewhat orthogonal to this issue. I contend that a battered woman is not actually consenting to violence, as opposed to the claim that she is consenting to violence but that we should nevertheless disregard this consent because she is insufficiently agentic.

289. See *infra* Subsections III.B.1-2.

290. See *infra* Subsection III.B.1.

291. See *infra* Subsection III.B.2.

292. See *supra* note 282 and accompanying text.

293. See *supra* note 283 and accompanying text.

294. See Bergelson, *supra* note 279, at 165 ("Today, American law continues to maintain that one's life and body do not quite belong to him. Courts habitually disregard the voluntary nature of private harmful interactions, citing various public policies. Among those are concerns that private violence may disturb peace; that the injured person may become public charge; and that harmful conduct has no social utility, is immoral, and expresses the parties' disrespect to law and social order.").

295. See *id.* ("[T]he individual's power to authorize an act that may affect his physical well-being remains strictly limited."). As a rule, any harmful act that does not fall within an exception for athletics or medical treatment is criminal unless the injury is not serious. *Id.* at 166. As Vera Bergelson notes, however, "assessment of the seriousness of the victim's injury determines the outcome of many cases involving consensual harm." Even the Model Penal Code admits that this assessment is often influenced by "moral judgments about the iniquity of the conduct involved." *Id.* at 168. For more on this normative aspect of evaluating harm, see Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 249-256 (2001).

296. See Bergelson, *supra* note 279, at 177 (noting the growing scholarly recognition that the concept of criminal harm is not limited to violations of one's autonomy, but also includes violations of dignity). See also *id.* at 179 ("The two kinds of criminal harm comprise the same evil—objectification of another human being. That evil may be brought by an injury to a vital human interest, combined with either a rights violation (e.g., theft) or disregard of the victim's dignity (e.g., consensual deadly torture). The absolute majority of criminal offenses, being *nonconsensual*, include both kinds of harm.").

297. *Id.* at 179.

For now, I will not pursue this line of thought. Since battered women ordinarily *do not consent* to abuse in their relationships, it follows that the legal attribution of the contrary is unsound.²⁹⁸ Indeed, it makes little sense to attribute consent to a category of people who are not actually consenting.²⁹⁹ Given the meaning of consent, the current rule is unjustified.

1. (Non)Consent to Violent Relationships

We have already observed that battered women often remain in abusive relationships because they cannot escape them.³⁰⁰ Abuse is about control,³⁰¹ and control makes leaving difficult,³⁰² if not impossible.³⁰³ Many women stay because, for all practical purposes, they are trapped.³⁰⁴ Since a *sine qua non* for consent is voluntariness,³⁰⁵ these women in this position do not consent to their ongoing relationships.

Recall that the course of conduct that characterizes abuse is quintessentially coercive³⁰⁶—in particular with respect to a woman's decision to end the relationship.³⁰⁷ This state of coercion is incompatible with the prerequisites for consent, especially the voluntariness condition.

298. In other words, the question of whether law ought to recognize (actual) consent is not at issue here, as I will soon show. See *infra* notes 300-328 and accompanying text.

299. For the purposes of this argument, I need not claim (and I do not claim) the factual impossibility of consent to harm under these circumstances. An extraordinary case could entail actual consent and thus raise the question of an appropriate criminal law response. This inquiry would almost inevitably be tethered to judgments about women's injuries and the extent to which they are worthy of redress. See *supra* note 295 (claiming that evaluating the severity of injury is a subjective enterprise). Cf. Hanna, *supra* note 295, at 250 (noting that, in judicial determinations of whether to allow consent as a defense, "what is legally relevant is the social utility of the activity itself").

300. See *supra* notes 251-264 and accompanying text. Given the absence of the preconditions for consent, it seems exceedingly unlikely that there is legitimate reason to impute consent where factual consent is missing. That said, if my theory of imputed consent (and the gap that it purports to explain) prompts efforts to articulate just such a rationale, the arguments could of course be evaluated.

301. See Mahoney, *supra* note 251, at 53 ("Battering is about domination: 'Violence is a way of 'doing power' in a relationship,' an effort by the batterer to control the woman who is the recipient of the violence.") (quoting JAN E. STETS, DOMESTIC VIOLENCE AND CONTROL 110 (1998)). See also *id.* at 53-61 (urging attention to "the interplay of power and control, domination and subordination in the battering relationship").

302. See *supra* notes 251-264 and accompanying text.

303. I am contemplating women who kill their abusers, women who are killed by their abusers, and women who are abused until they die.

304. See STARK, *supra* note 25, at 13 (suggesting that "coercive control is a liberty crime rather than a crime of assault").

305. See *supra* note 282 and accompanying text.

306. See *supra* Section I.A.

307. Dalton has offered these observations: "By the time a woman acknowledges to herself that she cannot control the violence, and that it is not an aberration, but a permanent aspect of her relationship with her partner, she may be in too deep to make an easy escape. She may have made efforts to seek help, and found little response, whether from police, the courts, her doctor, her priest, pastor or rabbi, or even other members of her family. Those efforts may have elicited threats from her partner about what he will do if she discloses his violence to others, or seeks to leave him—threats that are perfectly credible given his past behavior. She may have children by now, locking her in to a co-parenting relationship from which she fears, with justification, that the legal system will not allow her to withdraw

To act voluntarily,³⁰⁸ a person must be “free of controls exerted either by external sources or internal states that rob the person of self-directedness.”³⁰⁹ Thus, consent is invalid³¹⁰ when a person is coerced³¹¹ or when she acts under duress.³¹² Under these circumstances, a person’s assent is involuntary,³¹³ and therefore not morally or legally persuasive.³¹⁴ For women who would leave the relationship if only they could, the batterer’s violence and control negate voluntariness. These victims remain in their relationships, but they do so involuntarily, and therefore nonconsensually.

But some women would not leave their abusers, even if they could.³¹⁵ These victims may want the relationship to continue for any number of

unless she abandons her children to her abuser. Her batterer is likely to reinforce those fears, telling her that if she tries to leave she will lose her children. She may be daunted by the economic realities of escape—how to find shelter, food, a job, or child care—when she has no separate funds, and cannot even use a check or credit card without revealing her whereabouts to her batterer.” Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 337 (1997).

308. This account distills overarching norms and themes that span doctrinal areas. Cf. Miller & Wertheimer, *supra* note 278, at x (criticizing a lack of “cross-fertilization” across different domains, and framing consent as best understood by the application of “hybrid vigor,” which includes consideration of contrasts, sexual consent, and medical procedures). Fourth Amendment consent doctrine is yet another useful lens through which to view questions of voluntariness. See, e.g., Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211 (2001); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153.

309. Beauchamp, *supra* note 280, at 69.

310. But see Kleinig, *supra* note 278, at 14 (“If A is coerced into what ordinarily signifies consent . . . he does not act voluntarily and what he does does not constitute consent. Some might argue that in such cases consent is given but, because it is coerced, it is not valid. But invalid consent no more counts as consent than an invalid vote counts as a vote. It has form but no substance. It is, I believe, more accurate to say that although A gave his assent, this did not amount to consent.”).

311. Beauchamp, *supra* note 280, at 69 (“Coercion occurs if a credible and intended threat disrupts and reorders a person’s self-directed course of actions. Under these coercive conditions, even intentional and well-informed actions can be nonvoluntary.”).

312. “Assent that is given under duress does not have the moral force of consent.” Kleinig, *supra* note 278, at 12; see also Bix, *supra* note 280, at 258 (characterizing undue influence as a “combination of overpersuasion by one party and vulnerability or susceptibility by the other party”).

313. Cf. Beauchamp, *supra* note 280, at 70-71 (“[A]cts can satisfy both the conditions of understanding and the absence of controlling influence to a greater or lesser extent. . . . Actions are autonomous by degrees, as a function of satisfying these conditions to differing degrees. A continuum of both understanding and noncontrol runs from full understanding and begin entirely noncontrolled to full understanding and being fully in control. Cut-off points on these continua are required for the classification of an action as either autonomous or nonautonomous.”).

314. See Kleinig, *supra* note 278, at 16 (“Ensuring the voluntariness of agreements is one of the conditions that enables acts of consent to constitute a responsible transformation of the moral landscape for those who are party to it.”).

315. These two categories are not entirely discrete. As Sally Goldfarb has explained, “Women have many reasons for staying with or returning to violent partners, including financial dependency, fear of retaliation, social isolation, community pressure, and concern about losing custody of children.” Sally Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship*, 29 CARDOZO L. REV. 1487, 1499 (2008). As this list suggests, at times it may be difficult to identify whether any given reason for staying in a relationship is consistent with voluntariness. What would generally fall within this category are cases where “the woman has a deep emotional bond with her partner and wants to preserve and improve the relationship.” *Id.*

reasons,³¹⁶ some of which sit uneasily with established conceptions of voluntariness.³¹⁷ But, in such cases, we need not decide the difficult question of whether staying in the relationship satisfies the criteria for consent to the relationship. For even assuming *arguendo* that it does, consent to the violence does not follow.

2. (Non)Consent to Violence

Consent to a relationship, even one in which abuse is ongoing, is not synonymous with consent to further violence. Established understandings of consent embed a requirement of intentionality.³¹⁸ As a corollary, the scope of consent must be closely circumscribed.³¹⁹

In the domestic violence context, the meaning of intentionality has been markedly undertheorized. Largely absent from sociolegal accounts is the insight that a woman may consent to the continuation of a relationship that is abusive while, at the same time, fully desiring an end to the violence itself.³²⁰ To the extent she experiences further abuse in this relationship, this violence is properly conceptualized as involuntary, and thus nonconsensual.³²¹

Although the frequency with which battered women in fact consent to further relations with their partners can be overstated,³²² this scenario

316. Goldfarb has written: "[A]busive relationships are often multidimensional, with episodes of abuse occurring in a context that also includes positive attributes like mutual emotional commitment, companionship, intimacy, and sharing. Battered women's feelings about their relationships frequently include hope for the future and a willingness to forgive, traits that are generally considered admirable human qualities and that can be a source of personal strength." *Id.* at 1500.

317. While advocating for legal reform that "permit[s] a woman to choose whether she wants to leave her abuser instead of making that decision for her," Goldfarb concedes that "abusive relationships can be so damaging that they actually interfere with, rather than promote, women's autonomy." *Id.* at 1502. *See also* Dalton, *supra* note 307, at 337 ("She may also, if the abuse has been prolonged and severe, be in a state of psychological depletion and paralysis that makes it almost impossible for her to take charge of her life in such new and risky ways. In this situation, she may marshal [sic] all the resources at her disposal to control the violence as best she can from within the relationship, and keep herself and her children safe from day to day, without triggering the explosive rage she knows from experience is associated with any attempt on her part to challenge her partner's control, or set limits with him."); Hanna, *supra* note 288, at 1558-59 (claiming that battered women's hope "masks a deeper sense of powerlessness").

318. *See supra* note 283 and accompanying text.

319. *See* Kleinig, *supra* note 174, at 17-18 ("Consent is relatively determinate, and . . . some conventional expectations can usually be assumed to inform such acts of consent.").

320. In the case of physical violence, the rule of nonconsent has become more generally accepted; criminal law reflects this understanding. *See* Siegel, *supra* note 20, at 2129; Tuerkheimer, *supra* note 6, at 970-71.

321. *See supra* Subsection III.B.1 (analyzing voluntariness with respect to the ongoing relationship).

322. This is an empirical question with strong normative dimensions. *See supra* note 315 (noting the difficulty of classifying a woman's professed reasons for staying in the relationship as voluntary/involuntary; or, in effect, of identifying agentic expression). I suspect that recent scholarly attention to this fact pattern may unwittingly have distorted its prevalence, particularly in proportion to cases involving nonconsensual relationships.

undoubtedly occurs.³²³ Yet, in these cases, women's nonconsent to violence is socially and legally eclipsed by their wish to preserve their relationship. As a result, consent to continuing the relationship is equated with consent to violence.³²⁴

This imputed consent³²⁵ cannot be squared with the realities of battered women's lives.³²⁶ Women who are not seeking to end their relationships often engage in active efforts to end the violence.³²⁷ Where these attempts have proven ineffectual, women nevertheless persist in struggling to manage the violence.³²⁸ In short, what we know about battered women requires a conceptual and legal division of *consent to violence* from *consent to relationship*.

When it comes to episodic physical violence, this decoupling has already occurred. The dominant social view of physical violence as consented to within a relationship has advanced.³²⁹ No longer does the existence of a relationship provide an exemption to prosecution for crimes involving physical injury. But there lingers a widespread perception that nonphysical violence³³⁰ is consented to by women who remain with their abusers. Such cases therefore remain outside of our criminal law. Until consent to relationship and consent to violence are unyoked, the legal meaning of separation will endure.

323. See Goldfarb, *supra* note 315, at 1500-01 ("For a substantial number of women who find themselves in [abusive] relationships, the ideal outcome would be to eliminate the abuse while keeping the relationship.").

324. *But see* Hanna, *supra* note 288, at 244-45 ("[W]omen cannot implicitly consent to violence by refusing to press charges or cooperate with the prosecution.").

325. More precisely, this type of consent may be described as constructive consent, a "species of imputed consent" in which "the victim's acquiescence to one act presupposes acquiescence to some other act too." Bergelson, *supra* note 279, at 175-76. See also Westen, *supra* note 274, at 272-80 (discussing constructive consent).

326. A number of legal scholars who have experienced abuse and/or worked with abuse victims have emphatically articulated this point. See, e.g., Mary Becker, *Passions of Battered Women*, 8 WM & MARY J. WOMEN & L. 1, 59 (2001) ("Many remain—despite the violence—deeply attached to their abusers and hope repeatedly that the abuse has ended. That is why they stay."); Bucl, *supra* note 259, at 22 ("A victim may say she still loves the perpetrator, although she definitely wants the violence to stop."); Hanna, *supra* note 288, at 1558-59 ("Women 'stay' for many reasons. . . . Many women believe that the violence will stop and the relationship will improve if only . . . (fill in the blank).") (ellipsis in original). See also Dalton, *supra* note 307, at 336-38. In my experience prosecuting domestic violence cases, victims—even those refusing to cooperate with the State, and even those wishing to continue their relationships—did not consent to their abuse.

327. See, e.g., Kate Cavanagh, *Understanding Women's Responses to Domestic Violence*, 2 QUALITATIVE SOC. WORK 229, 234 (2003) (describing a recurring theme of her interviews with abuse victims that "women actively struggled to make the relationship nonviolent and devised strategies to this end").

328. *Id.* at 246 ("Women struggled continuously to change the man's violent behaviour. At some points in time the struggle to change took second place to the struggle to survive but not even women subjected to the extremes of abuse totally 'gave up.'").

329. See *supra* notes 90-92 and accompanying text.

330. See *supra* note 27 (explaining this term).

C. Masochism Modernized

In the past century, the idea that battered women enjoy their abuse³³¹ has gone from widespread acceptance³³² to social scientific repudiation.³³³ In large part due to the efforts of feminist activists and researchers,³³⁴ the notion that victims of abuse are masochistic³³⁵ has been exposed as myth³³⁶—albeit one with continued staying power.³³⁷

331. See generally, e.g., Helene Deutsch, *The Significance of Masochism in the Mental Life of Women*, 11 INT'L J. PSYCHOANALYSIS 48 (1930). Deutsch was a disciple of Freud. See also Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1301 n.13 (1993).

332. "In the 1960s and 1970s, the psychological view of battered women supported the feminist contention that professionals 'blam[ed] the victim.' The prevailing view was that battered women were masochistic and that the violence filled this need." G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 254 (2005) (quoting SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISITATIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 22 (1982)). Joan Meier has described the psychoanalytic origins of this perspective: "[I]n the 1930s, the rise of Freudian psychoanalytic thought, while viewing family violence as deviant and unhealthy, focused on female 'masochism' as the reason for women's victimization. The 'pathologizing' of domestic violence 'reflected and reinforced the societal belief that spouse abuse was an isolated problem in unusually disturbed couples in which the violence was viewed as "fulfilling masochistic needs of the wife and necessary for the wife's (and the couple's) equilibrium."'" Meier, *supra* note 331, at 1301 (quoting ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 158; Elaine Hibberman, *Overview: The 'Wife-Beater's Wife' Reconsidered*, in THE GENDER GAP IN PSYCHOTHERAPY 213 (Elaine (Hibberman) Carmen & Patricia Ricker eds., 1984)).

333. Michael Dowd, *Battered Women: A Perspective on Injustice*, 1 CARDOZO WOMEN'S L.J. 1, 13 (1993) (stating that the theory of battered women's masochism has been "widely debunked by sociologists and psychologists."). See also Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 688 (1998) (arguing against a "return to the erroneous stereotype of the battered woman as masochist").

334. See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 614 (2000) ("The first generation of feminist researchers had to challenge early research and the widespread belief that battered women were to blame for or somehow caused their own abuse."). See also Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 541 n.83 (1992) (outlining feminist critiques of psychological approaches to understanding domestic violence).

335. LENORE E. WALKER, *THE BATTERED WOMAN* 20 (1979) ("By masochism, it is meant that [the battered woman] experiences some pleasure, often akin to sexual pleasure, through being beaten by the man she loves."). Anne M. Coughlin has observed that "[t]he literature on battered woman syndrome does not offer a sophisticated description of the construct 'masochism.'" Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 60 n.297 (1994).

336. The debunking of this myth has been facilitated by the widespread admissibility of expert testimony that more accurately explains why women stay in abusive relationships. See, e.g., *State v. Kelly*, 478 A.2d 364, 370 (1984) (citing WALKER, *supra* note 335, at 70). According to Lenore Walker's original formulation of the theory, women stay in abusive relationships, not because they find pleasure in the pain of violence, but because they continue to love their partners, and have become helpless to effectuate change. As empirical understandings of the effects of battering have evolved, expert testimony has in recent years become more encompassing and less focused on helplessness, mitigating the pathologizing effects of the syndrome. See also Sarah M. Bucl, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 277-80 (2003).

337. See Meier, *supra* note 331, at 1301-02 ("Although Freudian concepts of 'female masochism' are less in favor today, modern psychiatric evaluations still frequently diagnose battered women as 'paranoid,' or having any of a number of character disorders such as 'Schizoid Personality Disorder,' 'Borderline Personality,' 'Dependent Personality Disorder,' etc."). See also Coughlin, *supra* note 335, at 61 n.301 (stating that clinicians continued to use masochism to supplement alternative explanations for

Yet alongside this progress, our substantive criminal law continues to impose a separation requirement,³³⁸ the effect of which is to exempt abuse in ongoing relationships. I have offered a theory of imputed consent to explain this exemption: unless and until they leave the relationship, women are believed to consent to the controlling course of conduct. Separation sparks the shift in crime paradigms because separation marks the moment of nonconsent: nonconsent to the relationship and, thus, nonconsent to relationship violence (the two are equated).

If this conceptualization is accurate, masochism has a new face.³³⁹ We no longer contend that women enjoy *physical* violence; to this extent, the old lore has been put to rest.³⁴⁰ But women who remain with their batterers are considered perpetually consenting to all *nonphysical* manifestations of violent control.³⁴¹

Whether these women are thought to experience pleasure from the abusive course of conduct is beside the point.³⁴² For whatever reason, they are perceived as choosing to remain in their relationships³⁴³ and therefore choosing to experience what comes along with them. The nonepisodic abuse is not disentangled from the relationship itself, and consent to *both* is attributed to the battered woman who stays.³⁴⁴

why women remain in abusive relationships). Accounts of battered woman syndrome have themselves been criticized for describing masochism in only slightly modified terms: "[B]y characterizing love as a compelling force that bends women to the wills of violent men and, particularly, by coupling that construction of 'love' with the other explanations concerning the special psychological deficits of women, the defense constitutes a trivial redefinition of the popular meaning of masochism According to the defense, women may not taste 'masochistic' erotic pleasure in brutal beatings, but they tenaciously cling to the men who dole out the beatings because they 'love' those men. This explanation would seem to be masochism sanitized of eroticism—only the woman's sexual pleasure is omitted. The defense thus offers an explanation of the woman's conduct that exploits the popular understanding of women's masochism with only that one slight adjustment, seemingly calculated to make the explanation more acceptable to a decisionmaker who is being asked to treat the woman sympathetically." Coughlin, *supra* note 335, at 60-61.

338. See *supra* Section II.C.

339. See *infra* note 341.

340. Assaulting one's wife is a crime and, while underenforced, is of course prosecuted frequently.

341. This view may arise from misconceptions about violent control and an incorrect equation of this dynamic with the kind of influence that intimate partners often have over one another in relationships. See *supra* notes 135-147 and accompanying text (describing violent control and its harm). Imputed consent may also stem from misunderstandings of the conditions of battered women's lives. See *infra* Section III.B.

342. The new face may seem to distort the old concept almost beyond recognition. Most notably, the iteration of masochism that finds expression today is not only sanitized of erotic pleasure, see Coughlin, *supra* note 335, at 61, but of pleasure altogether. I suggest that this makes sense if we see the concept as effectively unmoored from its Freudian roots (and from the realm of psychology altogether), and newly tethered to the legitimizing framework of legal consent.

343. Cf. Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 1 N.Y.U. REV. L. & SOC. CHANGE 433, 466 (1994) ("Society attributes a number of choices to battered women who kill: first they choose the wrong guy, then they choose to marry (or live with or date) him, then they choose to be beaten (or accept it or fail to successfully resist it), then they choose to stay, and then they choose to kill him.").

344. It might also be the case that the criminal law distinguishes between abuse in ongoing relationships and abuse in ended relationships based on a differing conception of harm. Since such a

All of this confirms that the perennial question of “why didn’t she leave” endures³⁴⁵ —albeit in a variation that may serve to legitimate (and revitalize) it.³⁴⁶ As others have persuasively argued, the question is of concern, both because it indicates skepticism of all answers,³⁴⁷ and because of the troubling assumptions that it embeds.³⁴⁸

Without denying the continuing power of these critiques, I mean to suggest that the meaning of “why doesn’t she leave” has evolved. Staying once meant that a woman was generally disbelieved when she alleged abuse, since it could hardly be fathomed that anyone would experience such abuse and not leave.³⁴⁹ But another possibility is raised by the law’s inconsistent treatment of abuse within and without relationship: the woman’s account is both credited *and* legally discounted. Rather than assume that she wasn’t abused if she stayed, the law presumes just the opposite—i.e., she stayed, hence she consented to the nonphysical abuse. To the extent “why didn’t she leave,” was ever a question, it is no longer. It is a proclamation that she didn’t leave, and that real consequences for the construction of crime flow from this.

distinction would seem implicitly to rely on a theory of imputed consent, I do not separately address this possibility.

345. The stated inquiry has received considerable attention by feminist activists and theorists over the decades. For instance, Ann Jones articulated this critique: “Despite the immense achievements of the battered women’s movement in the past fifteen years, those who work to stop violence against women—those who staff the hotlines and the shelters and the legal service centers, those who press to make law enforcement and criminal justice act responsibly, those who lobby for legislative reform—know that the next time a woman is battered . . . few people will ask: What’s wrong with that man? What makes him think he can get away with that? Is he crazy? Did the cops arrest him? Is he in jail? When will he be prosecuted? Is he likely to get a serious sentence? Is she getting adequate police protection? Are the children provided for? Did the court evict him from her house? Does she need any other help? Medical help maybe, or legal aid? New housing? Temporary financial aid? Child support? No, the first question, and often the only question, that leaps to mind is: *Why doesn’t she leave?*” ANN JONES, NEXT TIME, SHE’LL BE DEAD: BATTERING AND HOW TO STOP IT 131 (1994).

346. See *supra* note 342 (citing the legitimizing framework of consent).

347. For an overview of answers to the question of “why didn’t she leave?”, see Dalton, *supra* note 307, at 336-38.

348. See Goldfarb, *supra* note 315, at 1499 n.70 (“As many commentators have pointed out, ‘Why doesn’t she leave?’ is a misguided question for several reasons, including its implication that battered women don’t leave, its assumption that leaving would guarantee safety, and its focus on the victim’s actions rather than the perpetrator’s.”); Mahoney, *supra* note 251, at 64 (“Every legal case that discusses the question ‘why didn’t she leave?’ implies that the woman *could* have left. We need to challenge the coercion of women’s choices, reveal the complexity of women’s experience and struggle, and recast the entire discussion of separation in terms of the batterer’s violent attempts at control.”); Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO L. J. 2093, 2101 (1992) (“Feminist commentators tend to reject this question because it blames the woman and because it neglects the constraints she may experience due to economic dependency and a commitment to her children. Instead, feminist critics emphasize these constraints and call for attention to questions about why men batter women, how women can be justified when they defend themselves against intimate violence, and what changes in police practices, child custody rules, and shelter and employment programs would help battered women.”).

349. I do not mean to suggest that this no longer occurs. See, e.g., Stoecker, *supra* note 256, at 338 (observing that “[t]he survivor’s failure to leave earlier often negatively affects the court’s view of her credibility”).

CONCLUSION

It has been assumed that the law now criminalizes behavior in a relationship-neutral manner. Certain conduct is wrongful, and codified as such, regardless of how the victim is known to the perpetrator.

Close analysis of the law's response to intimate partner violence challenges this conventional understanding. When violence is domestic, it is partially criminalized:³⁵⁰ only isolated physical incidents count. This approach is turned on its head when domestic violence becomes stalking. Now, an entire course of conduct comes into legal view (though it is wrongly assumed to have begun at the breakup). Until now, these competing crime paradigms have gone unnoticed.

Attending to the selective criminalization of patterns reveals the rather jarring likelihood that departure from relationship is required to manifest nonconsent to violence. Before the breakup, ongoing violence of a nonphysical nature is not a crime, because victims who stay are believed to consent to the harm. Only when women leave do their experiences of continuing harm find outlet in the law.

This dual treatment cannot be justified. Because the normative requirements of consent do not map onto the conditions of abuse, the significance of separation falters under conceptual analysis. Deconstructing the legal meaning of breakups begins to undo the criminalization gap, which has the effect of affording relatively limited protection to women in violent relationships.³⁵¹ For now, our criminal justice system's response to violence against women remains an incomplete evolution.

APPENDIX: MODEL DOMESTIC VIOLENCE STATUTE³⁵²

A person is guilty of Domestic Violence when:

He or she intentionally engages in a course of conduct directed at a family or household member; and

He or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member [*alternately*, tracking the language of the Model Stalking Code and many state

350. By identifying a partial exemption for relationship violence, this Article lays the groundwork for further exploring limitations in the law's response to violence between intimates.

351. See *supra* note 134 and accompanying text.

352. This statutory definition—which would not supplant any existing laws or preclude the ability of prosecutors to charge them instead where appropriate—might well constitute the lowest degree of domestic violence. A reasonable penal classification scheme would use this statutory language as a basis for enhancing the degree of the crime in relation to the presence of certain aggravating factors enumerated by statute. Such aggravating factors might include the use of a weapon, infliction of physical injury or serious physical injury, the commission of a predicate act that is defined as felonious, or a prior conviction for domestic violence.

stalking statutes: He or she knows or reasonably should know that such conduct would cause a reasonable person to (a) fear for his or her safety or the safety of a third person; or (b) suffer other emotional distress]; and

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

Definitions

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

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

“Crime” means a misdemeanor or a felony.