

2011

If All You Have is a Hammer: Society's Ineffective Response to Intimate Partner Violence

Thomas L. Hafemeister

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Thomas L. Hafemeister, *If All You Have is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 Cath. U. L. Rev. 919 (2011).

Available at: <https://scholarship.law.edu/lawreview/vol60/iss4/3>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

IF ALL YOU HAVE IS A HAMMER: SOCIETY’S INEFFECTIVE RESPONSE TO INTIMATE PARTNER VIOLENCE

Thomas L. Hafemeister[†]

I. CHRONICLING SOCIETY’S RESPONSE TO IPV THROUGH THE LAW	926
II. THE DIFFERENT FACES OF IPV	939
III. DEFINING IPV	945
IV. MANDATORY REPORTING.....	949
A. <i>Who Must Report</i>	951
B. <i>When to Report</i>	953
C. <i>Penalties for Failure to Report and Immunity from Liability</i>	956
D. <i>To Whom to Report</i>	957
E. <i>Responses to Filed Reports</i>	958
F. <i>Critique of Mandatory IPV Reporting</i>	959
V. OTHER EFFORTS TO COMBAT IPV	971
A. <i>Penal Provisions and Greater Involvement of the Criminal Justice System</i>	972
B. <i>Removal of “Marital Rape” Immunity</i>	974
C. <i>Stalking Statutes</i>	976
D. <i>Mandatory-Arrest Laws</i>	978
E. <i>No-Drop Prosecutions</i>	982
F. <i>Civil Protection Orders</i>	985
G. <i>Specialized Courts</i>	991
H. <i>Private Lawsuits</i>	994
I. <i>Court-Mandated Treatment Programs</i>	995
VI. CONCLUSION: SOCIETY’S CURRENT “RULE OF THUMB”	999

[†]Associate Professor, School of Law, University of Virginia; Associate Professor of Medical Education, School of Medicine, University of Virginia; University of Nebraska, Ph.D., 1988; University of Nebraska Law School, J.D., 1982. The opinions and views of the author of this Article do not necessarily reflect the positions of the School of Law or the School of Medicine of the University of Virginia. This project was partly supported by Grant 2006-WB-BX-0010, made available through the U.S. Department of Justice, National Institute of Justice. The author thanks Veronika Bath, Ryan Harsch, Joshua Hinckley Porter, Hillary Ruth Hughes, Jessie Kokrda, Patrick J. Mulligan, Kamela Nelan, Bethany Toews, Rebecca Vallas, and the editors of this journal for their insightful comments and invaluable assistance, and Benjamin A. Doherty for his valuable research assistance.

*“I’ll never break my promise or forget my vow,
but God only knows what I can do right now.”¹*

Love. Intimacy. Companionship. These are idyllic terms linked to aspirations that drive most people at some point in time. But the path that leads to anticipated bliss is strewn with relationships that not only disappoint and fail,² but also may be laden with violence.

Intimate partner violence (IPV)³ has received considerable attention over the last half century, which has provided greater insight than ever before into its prevalence, characteristics, dynamics, risk factors, and consequences. For example, the Centers for Disease Control and Prevention (CDC) estimates that 7.7 million intimate-partner rapes and physical assaults occur in the United States annually, with 62.3% of the victims women; this violence results in over 1500 deaths and costs the country more than \$8 billion per year.⁴ The report

1. MEAT LOAF, *Paradise by the Dashboard Light*, on BAT OUT OF HELL (Cleveland International/Epic Records 1977).

2. See, e.g., *Divorce Rate: Divorce Rate in America*, DIVORCERATE.ORG, <http://divorce.rate.org/> (last visited Aug. 17, 2011) (reporting that roughly half of all first-time marriages in the United States will end in divorce, as will two-thirds of second marriages, and three-fourths of third marriages).

3. IPV has also been referred to as domestic abuse, spousal abuse, and domestic violence. For a discussion of the terms and definitions applicable in this context and their impact, see Walter S. DeKeseredy & Martin D. Schwartz, *Definitional Issues*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 23, 23–34 (Claire M. Renzetti et al. eds., 2001). This Article uses the term IPV because the Article focuses on the violence that may occur in sexual relationships between adults (that is, not just between spouses), but does not address the violence involving other family members or intergenerational violence (that is, not domestic relationships in general).

4. NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, UNDERSTANDING INTIMATE PARTNER VIOLENCE: FACT SHEET (2011), available at http://www.cdc.gov/violenceprevention/pdf/IPV_factsheet-a.pdf. Although the focus of this Article is IPV in the United States, IPV is pervasive throughout the world. For accounts of IPV in other countries and societal responses to it, see MINDIE LAZARUS-BLACK, EVERYDAY HARM: DOMESTIC VIOLENCE, COURT RITES, AND CULTURES OF RECONCILIATION 141–42 (2007) (discussing IPV in the Caribbean, Israel, India, and the United States); Zakia Afrin, *Domestic Violence and the Need for an International Legal Response*, in INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 359, 359–60, 365–70 (Manoj Kumar Sinha ed., 2010) (framing domestic violence as an international human rights issue); Barbara Glesner Fines, *Approaches to Protecting Victims of Intimate Partner Violence in the United States and Ireland: People, Property, and Politics*, 79 UMKC L. REV. 395 (2010) (discussing IPV in Ireland); Carolyn Hoyle & Andrew Sanders, *Police Response to Domestic Violence: From Victim Choice to Victim Empowerment?*, 40 BRIT. J. CRIMINOLOGY 14, 28 (2000) (discussing IPV in the U.K.); Rebecca Morley & Audrey Mullender, *Hype or Hope? The Importation of Pro-Arrest Policies and Batterers’ Programmes from North America to Britain as Key Measures for Preventing Violence Against Women in the Home*, 6 INT’L J.L. & FAM. 265, 276 (1992) (discussing the impact of pro-arrest policies for female IPV victims); Montserrat Sagot, *The Critical Path of Women Affected by Family Violence in Latin America: Case Studies from 10 Countries*, 11 VIOLENCE AGAINST WOMEN 1292, 1298–1303 (2005) (documenting accounts of domestic and sexual abuse in Latin American countries).

that provided the basis for these estimates also determined that approximately 2.6 million of these incidents resulted in injury to the victim, and over 600,000 of them required some type of medical treatment.⁵ Further, research indicates that injuries related to IPV comprise anywhere from two to twelve percent of all emergency room visits by women, although these figures do not encompass the increased risk of other illnesses and injuries associated with IPV that may also require medical treatment.⁶ Notwithstanding the increased recognition of its existence, IPV continues to be pervasive and a matter of considerable concern with enormous adverse consequences.

Women are more likely to bear the brunt of IPV;⁷ between 2001 and 2005 approximately twenty-two percent of the violent victimizations of females involved IPV, whereas only four percent of similar attacks on men involved

5. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at v (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

6. Carolyn Snider et al., *Intimate Partner Violence: Development of a Brief Risk Assessment for the Emergency Department*, 16 ACAD. EMERGENCY MED. 1208, 1208 (2009). Being a victim of IPV has been shown to markedly increase the risk of developing several psychiatric disorders, such as alcohol dependence, anxiety disorder, and post-traumatic stress disorder. Mayumi Okuda et al., *Mental Health of Victims of Intimate Partner Violence: Results from a National Epidemiologic Survey*, 62 PSYCHIATRIC SERV. 959, 960–62 (2011).

7. The issue of “gender symmetry” in IPV has been the subject of considerable debate. Some studies have indicated that IPV is perpetrated by women in heterosexual relationships as often as by males. See, e.g., John Archer, *Sex Differences in Physically Aggressive Acts Between Heterosexual Partners: A Meta-analytical Review*, 7 AGGRESSION & VIOLENT BEHAV. 313, 313 (2002); Donald G. Dutton, *Female Intimate Partner Violence and Developmental Trajectories of Abusive Females*, 6 INT'L J. MEN'S HEALTH 54, 54 (2007). These studies, however, have been challenged on several grounds, including their methodology, terminology, and decontextualization of abuse. Jacquelyn Allen-Collinson, *A Marked Man: Female-Perpetrated Intimate Partner Abuse*, 8 INT'L J. MEN'S HEALTH 22, 23 (2009). For example, studies examining “more serious assaults” have found that women experience higher rates of IPV than men. *Measuring Intimate Partner (Domestic) Violence*, NAT'L INST. JUST. (May 12, 2010), <http://www.ojp.usdoj.gov/nij/topics/crime/intimate-partner-violence/measuring.htm> (last updated May 12, 2010); see also TJADEN & THOENNES, *supra* note 5, at 9 ex.1, 17 (summarizing results of a national survey, which found that “women were significantly more likely than men to report being victimized by an intimate partner . . . whether the type of violence was rape, physical assault, or stalking”); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, at iv (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf> (finding that 7.4% of the men surveyed had been victims of IPV, contrasted to 22.1% of women); Tara D. Warner, *Violent Acts and Injurious Consequences: An Examination of Competing Hypotheses About Intimate Partner Violence Using Agency-Based Data*, 24 J. FAM. VIOLENCE 183, 191 (2010) (finding that “[f]emale victims had over four times greater odds than males of experiencing violence from an intimate partner”). Further, women generally suffer the majority of physical and mental health injuries that result from IPV. Paige Hall Smith et al., *A Population-Based Study of the Prevalence and Distinctiveness of Battering, Physical Assault, and Sexual Assault in Intimate Relationships*, 8 VIOLENCE AGAINST WOMEN 1208, 1208–09 (2002).

IPV.⁸ It is estimated that at least one out of every four women will experience some form of IPV during their lifetimes,⁹ and that one-third of all homicides of women are perpetrated by intimate partners.¹⁰ Most IPV against women occurs in private homes,¹¹ with “simple assault” accounting for sixty-eight percent of all IPV.¹²

IPV often goes unreported. One study found that between 1994 and 2005, only fifty-eight percent of female and about fifty-two percent of male IPV victims reported their attacks to the police, and some studies indicate that rates of non-reporting may be even higher.¹³ Similarly, estimates based on hospital

8. SHANNAN CATALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf>; see also LEE H. BOWKER, BEATING WIFE-BEATING 2 (1983) (“Most of the[] [reported] domestic assaults (76 percent) [in Edinburgh and Glasgow, Scotland, in 1984] were committed against wives by their husbands, while only 1 percent were committed against husbands by wives.”); TJADEN & THOENNES, *supra* note 5, at iv (“[W]omen are at significantly greater risk of intimate partner violence than men.”); Harvey Wallace & Anne Seymour, *Chapter 8: Domestic Violence*, in OFFICE FOR VICTIMS OF CRIME, 1999 NATIONAL VICTIM ASSISTANCE ACADEMY (Grace Coleman et al. eds., 1999), available at http://www.ncjrs.gov/ovc_archives/nvaa99/chap8.htm (“Intimate violence is primarily a crime against women.”).

9. Patricia Mahoney, Linda M. Williams & Carolyn M. West, *Violence Against Women by Intimate Relationship Partners*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 3, at 143, 143, 150; see also Kathryn E. Litchman, *Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct*, 38 LOY. U. CHI. L.J. 765, 767 (2007) (“Domestic violence continues to be a problem of epic proportion. Despite nationwide state-based legislative reform over the last three decades, nearly one in three American women reports having been exposed to domestic violence by a partner at some point in her life.” (footnotes omitted)); Robert S. Thompson et al., *Intimate Partner Violence: Prevalence, Types, and Chronicity in Adult Women*, 30 AM. J. PREVENTIVE MED. 447, 447 (2006) (“Intimate partner violence (IPV) is widespread, with 25% to 54% of women reporting exposure in their adult lifetime”). For a discussion of the disparities in governmental research findings regarding the lifetime prevalence of IPV, see TJADEN & THOENNES, *supra* note 5, at 13–14, 19–24.

10. Mahoney et al., *supra* note 9, at 143.

11. Wallace & Seymour, *supra* note 8.

12. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993–2001 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf> (documenting findings from a survey in which a representative sample of households were contacted and inquiries were made about the occurrence of rape, sexual assault, robbery, aggravated assault, and simple assault). Minor assault is generally defined as nonsexual assault—other than robbery—that is not aggravated. See U.S. SENTENCING GUIDELINES MANUAL § 2A2.3 cmt. n.1 (2004). In contrast, aggravated assault is an assault involving “a dangerous weapon with intent to cause bodily injury . . . with that weapon” or “an intent to commit another felony.” *Id.* § 2A2.2 cmt. n.1. Simple assault includes actions such as “slapping, pushing, shoving, grabbing, [and] throwing objects at the victim,” but does not include “kicking, biting, hitting with a fist or object, beating up, or using a weapon,” which constitute severe assault. DONALD G. DUTTON, RETHINKING DOMESTIC VIOLENCE 3–4 (2006).

13. TJADEN & THOENNES, *supra* note 5, at v (“Approximately one-fifth of all rapes,

data suggest that the number of people treated in emergency rooms for IPV is four times higher than the officially reported number.¹⁴ The most common reason victims provide for not reporting an IPV incident to the police is that the matter is private or personal; other rationales include fear of retaliation, a desire to shield the offender, and police ineffectiveness.¹⁵

Although IPV occurs across all socioeconomic levels, races and ethnicities, genders, and age groups, the typical victim is an impoverished woman between the ages of nineteen and twenty-nine.¹⁶ Often, the victims of IPV are isolated from potential support systems, suffer from low self-esteem, fear leaving their partners, and blame themselves for the abuse.¹⁷ Studies have documented a correlation between victimization by an intimate partner and an increased risk for a wide range of medical and psychosocial diagnoses, including substance abuse, family and social problems, sexually transmitted diseases, and depression.¹⁸ IPV also has negative effects on job productivity and employment.¹⁹

one-quarter of all physical assaults, and one-half of all stalkings perpetrated against female respondents by intimates were reported to the police.”); Wallace & Seymour, *supra* note 8; *see also* CATALANO, *supra* note 8.

14. Wallace & Seymour, *supra* note 8 (comparing hospital estimates to the 1997 National Crime Victimization Survey of the Office of Justice Programs). The Bureau of Justice Statistics utilized the National Crime Victimization Survey in its Crime Data Brief on IPV. RENNISON, *supra* note 12.

15. CATALANO, *supra* note 8.

16. Wallace & Seymour, *supra* note 8 (“Women in families with incomes below \$10,000 were more likely . . . to be victims of violence by an intimate partner.” (citation omitted)); *see also* Thompson et al., *supra* note 9, at 452.

17. Wallace & Seymour, *supra* note 8; *see also* DENISE A. HINES & KATHLEEN MALLEY-MORRISON, FAMILY VIOLENCE IN THE UNITED STATES: DEFINING, UNDERSTANDING, AND COMBATING ABUSE 163 (2005) (suggesting that social isolation contributes to abuse); Esperanza Bosch Fiol & Victoria A. Ferrer Pérez, *Battered Women: Analysis of Demographic, Relationship and Domestic Violence Characteristics*, 8 PSYCHOL. SPAIN 3, 8, 10–11, 13 (2004) (finding that abused women have difficulty leaving abusers or reporting abuse because they fear more harm or blame themselves). *But see* LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 218 (2d ed. 2000) (reporting that battered women do not believe they have low self-esteem).

18. Amy E. Bonomi et al., *Medical and Psychosocial Diagnoses in Women with a History of Intimate Partner Violence*, 169 ARCHIVES INTERNAL MED. 1692, 1694–96, 1695 tbl.2 (2009) (finding an increased risk for a number of specific medical and psychosocial diagnoses among women with a history of IPV); *see also* Tracie O. Afifi et al., *Mental Health Correlates of Intimate Partner Violence in Marital Relationships in a Nationally Representative Sample of Males and Females*, 24 J. INTERPERSONAL VIOLENCE 1398, 1409 tbl.3b (2009) (observing that IPV in females is associated with increased odds of having anxiety disorders, disruptive behavior disorders, substance abuse disorders, and suicidal thoughts); Maureen A. Walton et al., *Correlates of Intimate Partner Violence Among Men and Women in an Inner City Emergency Department*, 28 J. ADDICTIVE DISEASES 366, 372 tbl.1 (2009) (finding that patients who reported IPV

Typically, abusive individuals are male, misuse alcohol and other substances, have a criminal record, experienced family violence during their childhood, and tend to be jealous or possessive; however, they are found among all age groups, races, and ethnicities.²⁰ Many abusers have weak ties to their families, have a history of unstable employment and relationships, and view the prevailing culture as condoning and even encouraging abuse.²¹

A particularly tragic consequence of IPV is its effect on children. Over thirty-five percent of IPV incidents occurred while at least one child resided in the home.²² Children in homes where IPV is present are themselves far more likely to be psychologically and physically abused than children in homes where IPV does not occur.²³ One study found that “[e]ight times as many women report using physical discipline on their children while with their

victimization were more likely to exhibit signs of depression and were in the lowest quartile for composite mental health).

19. Jennifer E. Swanberg, TK Logan & Caroline Macke, *Intimate Partner Violence, Employment, and the Workplace: Consequences and Future Directions*, 6 TRAUMA, VIOLENCE, & ABUSE 286, 286 (2005).

20. Terrie Moffitt, Avshalom Caspi & Phil A. Silva, *Findings About Partner Violence from the Dunedin Multidisciplinary Health and Development Study*, in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 39, 39 (1998), available at <http://www.ncjrs.gov/pdffiles/171666.pdf>; see also HINES & MALLEY-MORRISON, *supra* note 17, at 165–66 (finding substance abuse and a history of family violence to be prevalent in batterers); Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 569 (2007) (suggesting that abusers are commonly jealous and possessive); Carol B. Cunradi et al., *Problem Drinking, Unemployment, and Intimate Partner Violence Among a Sample of Construction Industry Workers and Their Partners*, 24 J. FAM. VIOLENCE 66, 69–70 (2009) (finding that male partners who experienced alcohol-related problems and unemployment were more likely to abuse intimate partners); Patrick Tolan, Deborah Gorman-Smith & David Henry, *Family Violence*, 57 ANN. REV. PSYCHOL. 557, 567–72 (2006) (discussing risk factors for abuse, including a history of crime or violence, current and past alcohol and drug use, and a dysfunctional family background); Jennifer Waltz et al., *Testing a Typology of Batterers*, 68 J. CONSULTING & CLINICAL PSYCHOL. 658, 659 (2000) (positing that the most violent pathological abusers tend to have histories of family violence and jealous personalities).

21. Wallace & Seymour, *supra* note 8; see also Christine E. Cox, Jonathan Kotch & Mark D. Everson, *A Longitudinal Study of Modifying Influences in the Relationship Between Domestic Violence and Child Maltreatment*, 18 J. FAM. VIOLENCE 5, 6, 12 tbl.1 (2003) (finding that low income is a significant risk factor and identifying a correlation between low social support and domestic violence); Alan Rosenbaum & Penny A. Leisring, *Beyond Power and Control: Towards an Understanding of Partner Abusive Men*, 34 J. COMP. FAM. STUD. 7, 7–8 (2003) (explaining how a history of abuse and exposure to family violence increases the risk of using violence in future relationships); Tolan et al., *supra* note 19, at 568 (suggesting that poverty and low income are risk factors for abuse). *But see* WALKER, *supra* note 17, at 18–19 (“There [is] no direct link between unemployment and violent behavior . . .”).

22. CATALANO, *supra* note 8.

23. WALKER, *supra* note 17, at 216.

batterers than when living alone or in a nonbattering relationship.”²⁴ Furthermore, children from homes where domestic violence was recurrent are at an increased risk of becoming IPV abusers or victims.²⁵ Children growing up in violent homes are also at an increased risk for depression, attempted suicide, sexually transmitted diseases, obesity, substance abuse, and poor physical health in later life.²⁶

This Article begins by providing in Part I a historical overview of society’s response to IPV, and then surveys the different faces of IPV and the varying perspectives on how to address IPV legislatively in Part II. The Article in Part III surveys how the fifty states and the District of Columbia define IPV. In Part IV, the Article examines the mandatory-reporting approach to IPV, including who must report IPV, when suspected IPV must be reported, the penalties for a failure to report, who should receive the reports, and the response system to filed reports. Part IV concludes by evaluating the arguments in favor of and against mandatory IPV-reporting legislation. In Part V, the Article reviews other efforts to combat IPV, including penal provisions and the involvement of the criminal justice system, the removal of “marital rape” immunity, the enactment of stalking statutes, mandatory-arrest laws, “no-drop” prosecution provisions, the availability of civil protection orders, creation of specialized IPV courts, the allowance of private lawsuits, and court-mandated treatment programs.

In conclusion, this Article emphasizes the importance of distinguishing among the various types of IPV and maintaining a flexible and multi-faceted approach for responding to the varying needs of the victims of IPV. Society should keep in mind the different types of IPV in determining how best to

24. *Id.* at 217.

25. EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 12, 20 (2d ed. 1996) (“[B]attered women were found to be 6 times as likely to have been subjected to violence as a child than other women . . . and sons who witnessed battering were 10 times as likely to become abusive to their domestic partners.” (citations omitted)); WALKER, *supra* note 17, at 215–16 (reporting that four-fifths of IPV-abusive individuals come from homes in which IPV occurred); Elizabeth A. Cannon et al., *The Intergenerational Transmission of Witnessing Intimate Partner Violence*, 163 *ARCHIVES PEDIATRICS & ADOLESCENT MED.* 706, 707 (2009) (finding that children of women who witnessed IPV during childhood were 1.29 times more likely to witness IPV themselves); Amy A. Ernst et al., *Adult Intimate Partner Violence Perpetrators Are Significantly More Likely to Have Witnessed Intimate Partner Violence as a Child than Nonperpetrators*, 27 *AM. J. EMERGENCY MED.* 641, 645 (2009); David Russell, Kristen W. Springer & Emily A. Greenfield, *Witnessing Domestic Abuse in Childhood as an Independent Risk Factor for Depressive Symptoms in Young Adulthood*, 34 *CHILD ABUSE & NEGLECT* 448, 452 (2010) (“[F]requently witnessing domestic abuse in childhood is an independent risk factor for depressive symptoms in young adulthood.”).

26. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 *AM. J. PREVENTIVE MED.* 245, 249–50 (1998).

balance the punishment of IPV perpetrators and the needs of victims, including the autonomy and respect to which victims are generally entitled.

I. CHRONICLING SOCIETY'S RESPONSE TO IPV THROUGH THE LAW

Like other forms of family violence, including child abuse,²⁷ IPV has occurred from time immemorial²⁸ and has primarily targeted women.²⁹ The traditional institution of marriage subsumed a woman's legal identity within her husband's; this patriarchal structure permitted the husband to discipline his wife as he wished, so long as he did not cause permanent physical damage.³⁰ William Blackstone reasoned that because a husband was legally responsible for his wife's misbehavior, he should be legally entrusted—within reasonable bounds—with the power to “restrain[] her, by domestic chastisement.”³¹ Blackstone endorsed the view that private acts are subject only to moral, rather than legal, disapproval; therefore, because family relations are private in nature, they are not subject to legal review or legislation.³²

This view was so deeply engrained that even leaders of the first organized feminist movement in the 1800s did not directly challenge the husband's authority to physically “discipline” his wife, although they recognized and expressed concern about the occurrence of wife battering.³³ Instead, they promoted social reforms, such as temperance, which were viewed as likely measures to decrease *excessive* wife battering.³⁴ Indeed, for hundreds of years the legal system focused on merely limiting the *amount* of harm a husband

27. Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 830 (2010).

28. See OLA BARNETT, CINDY L. MILLER-PERRIN & ROBIN D. PERRIN, *FAMILY VIOLENCE ACROSS THE LIFESPAN: AN INTRODUCTION* xxiii (2d ed. 2005) (“Family violence . . . has probably existed since the beginning of time.”).

29. TJADEN & THOENNES, *supra* note 5, at 17.

30. BUZAWA & BUZAWA, *supra* note 25, at 22; ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 13 (2000); see, e.g., *Joyner v. Joyner*, 59 N.C. (1 Jones Eq.) 322, 325 (1862) (“[T]he law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place.”).

31. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 432 (Univ. of Chi. Press 1979) (1765). For example, under English common law, a man could “beat his wife with a rod no bigger than his thumb” (a so-called “rule of thumb”). DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 21 (2001); see also Linda Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 557 (1999) (stating that several states had adopted this “rule of thumb” practice).

32. DUTTON, *supra* note 12, at 9.

33. SCHNEIDER, *supra* note 30, at 15–16.

34. *Id.* at 16.

inflicted on his wife, rather than prohibiting or imposing sanctions for such behavior.³⁵

An American appellate court first ruled that husbands do not have a right to physically abuse their wives in 1871.³⁶ The Alabama Supreme Court declared that “the privilege, ancient though it may be, to beat [a wife] with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not *now* acknowledged by our law.”³⁷ Other states soon followed suit³⁸: Massachusetts abrogated the legality of spousal abuse in 1871,³⁹ and Maryland enacted the first law criminalizing spousal abuse in 1883.⁴⁰ During this time, the public’s attitude shifted; marriage increasingly became viewed as a mechanism to enhance companionship—rather than as a hierarchical, authority-based structure—and judges and legal commentators no longer readily defended husbands’ legal prerogative to beat their wives.⁴¹ Additionally, calls for greater public morality, including temperance, during this period also seemingly spurred disapproval of this abuse.⁴²

Nonetheless, although most states effectively criminalized wife battering by the late nineteenth century,⁴³ most wives—particularly those within the lower socioeconomic strata—still had little recourse against abusive husbands, as courts were generally unwilling to enter into and examine the domestic sphere.⁴⁴ Furthermore, although a battered wife could ostensibly seek divorce, she faced various legal, financial, and psychological obstacles and often was

35. See DAWN BRADLEY BERRY, *THE DOMESTIC VIOLENCE SOURCEBOOK* 23 (3d ed. 2000).

36. *Fulgham v. State*, 46 Ala. 143, 146–47 (1871).

37. *Id.* (emphasis added).

38. BERRY, *supra* note 35, at 21 (summarizing the *Fulgham* decision and subsequent reactions of Alabama, Maryland, and Massachusetts); SCHNEIDER, *supra* note 30, at 16 (noting that three states established corporal punishment for wife abuse); see also BUZAWA & BUZAWA, *supra* note 25, at 24 (describing how the feminist movement and sociologists like Gelles, Steinmetz, and Strauss helped ignite the social and legal changes regarding domestic abuse).

39. *Commonwealth v. McAfee*, 108 Mass. 458, 461 (1871); SCHNEIDER, *supra* note 30, at 16.

40. BERRY, *supra* note 35, at 21; Pat Campbell, *Adult Abuse in Missouri: The Beating Continues*, 58 UMKC L. REV. 257, 259 (1990) (identifying the legislation “passed in Maryland in 1882 which made wife beating punishable by forty lashes or a year in jail”).

41. SCHNEIDER, *supra* note 30, at 16–17.

42. See DUTTON, *supra* note 12, at 10 (discussing how temperance laws lessened spousal abuse).

43. *Id.*; see also Campbell, *supra* note 40, at 259 (discussing the movement that led to the illegality of wife beating).

44. SCHNEIDER, *supra* note 30, at 17 (noting the “judicial rationales of privacy and immunity for non-intervention”); see also BUZAWA & BUZAWA, *supra* note 25, at 30 (noting that in the early 1800s courts generally dismissed domestic violence charges, probably because the enforcement of morality in the private sphere was deemed improper).

dissuaded from dissolving her marriage by the risk of significant economic deprivation and the social stigma associated with divorce.⁴⁵

Spousal abuse was rarely discussed during the twentieth century until a second feminist wave revived the issue in the 1970s.⁴⁶ Until this revival, society generally continued to embrace traditional notions of familial privacy, which resulted in what has been characterized as the “Age of Denial” regarding IPV.⁴⁷ Raising concerns about, or even suggesting the possible existence of, domestic violence within a family was considered unacceptable; police by and large did not respond to such complaints.⁴⁸ Legislators and judges typically trumpeted the promotion and preservation of the family and discouraged separation and divorce, while emphasizing their concern for the well being of children raised without both parents.⁴⁹ If a battered woman did file a formal complaint, she often was not afforded physical protection from the batterer.⁵⁰ Some judges even encouraged the woman to withdraw the complaint and resolve the matter privately, or referred her complaint to agencies that provided social services to help the woman solve her problem.⁵¹ Most women who sought a legal remedy focused their complaints on their husbands’ failure to provide economic support, rather than on any physical abuse they may have experienced.⁵²

Thus, although the first wave of the women’s rights movement during the nineteenth century helped to promote the status of married women,⁵³ few legal instruments for relief were available to battered spouses.⁵⁴ Throughout the first half of the twentieth century, the options available to abused women were essentially limited to self-help, the assistance of friends or relatives, or the aid of child-welfare agencies from which victims of abuse might receive some subsidiary assistance designed to protect their children.⁵⁵

45. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2130–32, 2141 (1996).

46. SCHNEIDER, *supra* note 30, at 20.

47. DUTTON, *supra* note 12, at 11; Siegel, *supra* note 45, at 2119–20.

48. DUTTON, *supra* note 12, at 11.

49. ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 125–26, 128–29, 138 (1987); SCHNEIDER, *supra* note 30, at 18.

50. SCHNEIDER, *supra* note 30, at 18.

51. *Id.*

52. *Id.* at 19.

53. BARNETT, MILLER-PERRIN & PERRIN, *supra* note 28, at 10 (noting that the movement focused mainly on women’s suffrage and political and economic opportunities).

54. *Id.*

55. SCHNEIDER, *supra* note 30, at 20.

The rebirth of feminism in the 1960s led to a grassroots movement in the 1970s that focused on IPV—particularly wife battering.⁵⁶ Activists established shelters for battered women in a number of cities,⁵⁷ demanded that law-enforcement officials take action against abusive spouses, and pushed for legislation addressing domestic violence.⁵⁸ In 1979, President Jimmy Carter established the Office of Domestic Violence in the U.S. Department of Justice to disseminate information about spousal abuse.⁵⁹ As public awareness of IPV began to grow dramatically during this time, so did victims' efforts to obtain help. Police officials estimated that domestic-violence calls comprised fifteen to forty percent of all calls requesting police assistance during the 1970s.⁶⁰

Nevertheless, the response by the criminal justice system to reports of IPV was still frequently inadequate. A study during the early 1970s revealed that sentencing for domestic violence was very lenient, for the criminal justice system widely embraced the view that women provoked abuse by creating marital stress or through incendiary behavior.⁶¹ One study noted that only nine out of twenty-three men arrested for severely beating their wives received jail time as a sanction.⁶²

Leniency similarly pervaded the front end of the criminal justice system, as it was often difficult to convince law-enforcement officials to intercede in what they characterized as mere domestic disputes. One particularly egregious and widely publicized account illustrated the failure of law enforcement at the time to respond to and address IPV adequately.⁶³ In October of 1982, a woman who suffered two years of escalating abuse by her husband took her young son and

56. *Id.* Initially, wife abuse received little attention during this revival of feminism in the 1960s, although concerns were expressed about the subrogation of women and inequality in marital relationships. BARNETT, MILLER-PERRIN & PERRIN, *supra* note 28, at 10.

57. BERRY, *supra* note 35, at 23; HINES & MALLEY-MORRISON, *supra* note 17, at 159–60. Interestingly, the first shelters for women were mainly intended for wives of alcoholics and were partially funded by Al-Anon, indicating that concerns about temperance may again have been related to the attention given to wife beating. LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 264 (1988).

58. PLECK, *supra* note 49, at 182; *see also* BARNETT, MILLER-PERRIN & PERRIN, *supra* note 28, at 10–11 (indicating that these changes occurred due to an increase in national attention). The first domestic violence hotline and the first shelter for battered women were established in St. Paul, Minnesota, and Pasadena, California, respectively, in 1972. Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 *DRAKE L. REV.* 295, 307 (2004).

59. Mordini, *supra* note 58, at 307.

60. Campbell, *supra* note 40, at 260.

61. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 *HOUS. L. REV.* 237, 255 (2005).

62. *Id.*

63. *See* *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1525–26 (D. Conn. 1984); Patricia Brennan, 'A Cry for Help': *The Victim's Own Story*, *WASH. POST*, Oct. 1, 1989, at Y8 (noting that a movie recounts the *Thurman* case).

left their home to stay with friends.⁶⁴ Shortly thereafter, her husband tracked her down and attacked her.⁶⁵ Although the police received a formal complaint, they did not take any action against the husband.⁶⁶ A few weeks later, her husband returned, took the child, and threatened to kill his wife if she called the police.⁶⁷ Although the police were called three times that night, they failed to respond.⁶⁸

Days later, the husband was finally arrested after a police officer witnessed him break the windshield of his wife's car with his fist as she sat in the vehicle.⁶⁹ The child was then returned to the wife, and her husband was given a six-month prison sentence; however, his sentence was suspended on the condition that he leave his wife alone.⁷⁰ Despite this condition, he continued to harass her over the next six months and told his coworkers that he planned to kill her.⁷¹

In May of 1983, the woman obtained a judicially issued restraining order mandating that her husband stay away from her.⁷² The husband again ignored the court's order; he went to where she was staying and demanded to see her.⁷³ Although she called the police, they failed to arrive before her husband had dragged her by her hair into the backyard and stabbed her thirteen times in front of several witnesses.⁷⁴ A police officer—who arrived twenty-five minutes after the woman's call—watched as the man stomped on his wife's head until her neck broke.⁷⁵ The man then went inside, grabbed the child, and told the child that he had "killed [his] [expletive] mother."⁷⁶ The police officer radioed for backup and an ambulance, but even after twenty-seven minutes, the officer still had not arrested the man, who had begun kicking his wife in the head again.⁷⁷ Five officers helped the woman into the ambulance, but still did not subdue the husband.⁷⁸ When the husband began to approach the woman's stretcher in an attempt to attack her yet again, the police finally wrestled him to

64. Brennan, *supra* note 63, at Y8.

65. Thurman, 595 F. Supp. at 1524.

66. *Id.*

67. *Id.*; see Brennan, *supra* note 63, at Y8.

68. Thurman, 595 F. Supp. at 1524–25.

69. *Id.*

70. *Id.* at 1525.

71. *Id.* at 1525–26.

72. *Id.* at 1525.

73. *Id.*

74. *Id.* at 1525–26; see Brennan, *supra* note 63, at Y9.

75. Thurman, 595 F. Supp. at 1524–25; see Brennan, *supra* note 63, at Y9.

76. See Brennan, *supra* note 63, at Y9.

77. *Id.*

78. *Id.*

the ground and arrested him.⁷⁹ This account is often cited as highlighting society's failure to protect victims of IPV during this era, and it is also believed to have prompted some improvement in the legal system's response to IPV.⁸⁰

Ten years later, however, another widely publicized IPV incident called into question this purported progress: the 1994 double murder of Nicole Brown Simpson, the ex-wife of football star O.J. Simpson, and Ronald Goldman, Nicole's friend.⁸¹ This event once again directed the nation's attention to the continuing problem of IPV and triggered another round of calls to improve society's response to it.⁸² Although a jury acquitted O.J. Simpson of these crimes in a subsequent murder trial, the explosion of media reports documenting his abusive behavior and his ex-wife's fruitless attempts to gain law-enforcement assistance led many to reassert that existing societal responses to IPV were insufficient to protect battered women.⁸³ Moreover, some commentators expressed concern that the frequency and severity of the domestic violence that permeated their relationship was downplayed during the murder trial, even though the prosecution played a tape of a prior 911 call made by Simpson's ex-wife.⁸⁴ Despite the public outcry after Simpson was acquitted, his acquittal reinforced the view that most IPV abusers are not held legally accountable for their acts of violence.⁸⁵ Additionally, the defense's portrayal of his ex-wife as immoral, irresponsible, and dependent on him

79. *Id.* The husband received a fifteen-year sentence, and the woman spent eight months in a wheelchair, had a badly scarred face and back, and was left partially paralyzed. *Id.* at Y8–9. In a landmark suit, she won a judgment of \$2.3 million against the police department due to their negligence in responding to her reports. *Id.* at Y8 (noting that she later settled for \$1.9 million).

80. See KAREL KURST-SWANGER & JACQUELINE L. PETCOSKY, *VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES* 92–93, 95 (2003).

81. Stacey L. McKinley, *The Violence Against Women Act After United States v. Lopez: Will Domestic Violence Jurisdiction Be Returned to the States?*, 44 CLEV. ST. L. REV. 345, 345–46 (1996).

82. SCHNEIDER, *supra* note 30, at 201.

83. McKinley, *supra* note 81, at 345–46.

84. Patricia Edmonds, *Messages Mixed on Domestic Violence*, USA TODAY, Oct. 18, 1996, <http://www.usatoday.com/news/index/nns091.htm>; see also SCHNEIDER, *supra* note 30, at 202–06. There are multiple reasons given to explain why the IPV element was downplayed during this so-called trial of the century. First, for the jury to understand the relationship between IPV and homicide, it needs to be heavily educated about IPV and given access to the complete history of IPV in the particular relationship—both of which are complex strategic and evidentiary undertakings. SCHNEIDER, *supra* note 30, at 202–03. Second, prosecutors admitted after the trial that they did not fully appreciate the relevance of IPV in this case and did not recognize that this was a classic case of IPV that metamorphosed into murder. *Id.* at 203. Third, one attorney noted that jurors may view the presentation of evidence of domestic violence with “uncomprehending disdain,” and this may have made the prosecution reluctant to pursue this aspect at trial. *Id.* at 205.

85. Edmonds, *supra* note 84; see also SCHNEIDER, *supra* note 30, at 206 (quoting one battered woman who was upset about the acquittal because it sends “a message that violence is ok”).

reinforced the flawed, yet widely held belief that battered women “deserve” their abuse.⁸⁶

In 1997, a jury found Simpson civilly liable for the deaths of his ex-wife and Ronald Goldman.⁸⁷ During this civil trial, the presence of IPV played a greater role; Simpson’s assertion that he never abused his ex-wife severely damaged his credibility given the substantial evidence of past abuse.⁸⁸

Despite his acquittal, some credit Simpson’s criminal trial as an impetus for the passage of state legislation specifically targeting IPV.⁸⁹ Numerous fatality review commissions on domestic violence were also subsequently established,⁹⁰ drawing on models for reviewing child fatalities and adverse medical events in healthcare facilities.⁹¹ These commissions investigate IPV, coordinate agency responses, enhance community awareness of IPV, and promote related legislation in an effort to reduce abuse.⁹² Their coordinated efforts and findings can be quite valuable in determining how best to prevent and respond to IPV.

The Simpson trial also contributed to an increased awareness of “femicide” (homicides in which the victim is a woman) and led to additional reforms

86. Evelyn Boswell, *O.J. Simpson Trial Demonstrates the Power of Language*, MONT. ST. U. COMMS. SERVICES (June 9, 1999), <http://www.montana.edu/cpa/news/wwwpbarchives/univ/simpson.html>; see also Nancy S. Ehrenreich, *O.J. Simpson & the Myth of Gender/Race Conflict*, 67 U. COLO. L. REV. 931, 933 (1996) (“Attempts by the Simpson defense to paint Nicole as a partying drug user are part of a time-worn tradition of depicting victims of male violence as bad girls who deserved it.”).

87. *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 497 (Cal. Ct. App. 2001).

88. See SCHNEIDER, *supra* note 30, at 207 (detailing the additional evidence admitted during the civil trial).

89. Miccio, *supra* note 61, at 238.

90. SCHNEIDER, *supra* note 30, at 208.

91. Neil Websdale, Maureen Sheeran & Byron Johnson, *Reviewing Domestic Violence Fatalities: Fatality Review Team Philosophies*, VAWOR, <http://www.vaw.umn.edu/documents/fatality/fatality.html> (last visited Aug. 17, 2011). Child fatality review teams, established in almost every state, investigate children’s deaths. See Hafemeister, *supra* note 27, at 892. They are typically multidisciplinary in nature, with representatives from law enforcement, protective services, health agencies, and other relevant bodies. *Id.* Their goal is to reduce the number of preventable child deaths and improve the recognition and obstruction of child abuse by investigating the causes of the deaths of children. *Id.* at 892, 894; see, e.g., *Texas Child Fatality Review*, TEX. DEPARTMENT ST. HEALTH SERVICES, http://www.dshs.state.tx.us/mch/child_fatality_review.shtm (last visited Aug. 17, 2011) (discussing the structure and purpose of the review team). Medical review teams are an integral component of most healthcare facilities and typically investigate serious adverse events. See Maxine M. Harrington, *Revisiting Medical Error: Five Years After the IOM Report, Have Reporting Systems Made a Measurable Difference?*, 15 HEALTH MATRIX 329, 359–60 (2005) (discussing voluntary medical reporting systems).

92. See Neil Websdale, *R&B: Violence Against Women: A Conversation Between a Researcher and a Battered Woman About Domestic Violence Fatality Review*, 11 VIOLENCE AGAINST WOMEN 1186, 1186–87 (2005).

designed to facilitate the prosecution of these and other IPV cases.⁹³ For instance, in California—where the Simpson trial took place—new hearsay provisions and a no-drop prosecution law were enacted shortly after the trial, and many other states soon followed suit.⁹⁴

In 1994, partly in response to the Simpson trial,⁹⁵ Congress passed the Violence Against Women Act (VAWA),⁹⁶ which made certain acts of domestic violence federal crimes, mandated interstate enforcement of civil protection orders, and provided funding for legal services and training for prosecutors and police to enhance their responses to this type of violence.⁹⁷ The bill had languished in Congress for four years, but it was passed just two months after the murder of Nicole Brown Simpson.⁹⁸ VAWA imposed affirmative obligations on the government to prevent and redress domestic violence, and it represented a significant shift away from the historical approach that required women to handle abuse on their own.⁹⁹

However, VAWA was immersed in controversy from its inception. Many congressional members opposed the civil rights remedy contained in Title III of the legislation, which authorized monetary damage awards to victims of gender-motivated violence.¹⁰⁰ Opponents raised federalism concerns and argued that a federal remedy infringed on an area of the law traditionally regulated by and reserved for the states.¹⁰¹ Although Congress enacted the civil-remedy provision, which was available through the federal courts, the U.S. Supreme Court struck it down in *United States v. Morrison*.¹⁰² The Court determined that this enactment exceeded the authority granted to Congress by the Commerce Clause.¹⁰³ Some commentators suggested that the

93. SCHNEIDER, *supra* note 30, at 208–09.

94. *Id.* at 209. For a more extensive description of these state laws, see *infra* Part V.

95. Brief of Rita Gluzman as Amica Curiae Supporting Respondents at 21–25, *United States v. Morrison*, 529 U.S. 598 (2000) (No. 99-5); see also Dan Hasenstab, *Is Hate a Form of Commerce? The Questionable Constitutionality of Federal 'Hate Crime' Legislation*, 45 ST. LOUIS U. L.J. 973, 992 n.167 (2001) (noting that the Simpson trial impacted VAWA's passage).

96. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (codified as amended in scattered sections of 8, 18, 20, 28, and 42 U.S.C.).

97. See Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 502–03 (2003).

98. McKinley, *supra* note 81, at 346.

99. Tülin D. Açikalın, Comment, *Debunking the Dichotomy of Nonintervention: The Role of the State in Regulating Domestic Violence*, 74 TUL. L. REV. 1045, 1057 (2000).

100. Siegel, *supra* note 45, at 2196.

101. *Id.*

102. 529 U.S. 598, 625–26 (2000). For a discussion of *United States v. Morrison*, see Roberta L. Valente et al., *The Violence Against Women Act of 1994*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 3, at 279, 298–99.

103. *Morrison*, 529 U.S. at 613–15.

federalism-based objection harkened back to the common law tradition in which familial privacy was paramount and legal intervention was limited—the very tradition, ironically, VAWA was intended to reverse.¹⁰⁴ Since the passage of VAWA (notwithstanding the striking of the civil remedy provision), non-fatal incidents of IPV have declined by sixty-three percent in the United States, and the reporting of domestic violence has increased by fifty-one percent.¹⁰⁵

Although IPV may have decreased, criticisms of the legal system's response to IPV persist. Notably, in May 1999, a Colorado woman involved in divorce proceedings obtained a restraining order that prohibited her husband from molesting or disturbing her or their children and directed him to remain at least 100 yards away from the family home.¹⁰⁶ One month later, in clear violation of this order, the husband came to the family home unannounced and abducted his three daughters, who were playing outside.¹⁰⁷ When the woman discovered her children were missing, she contacted the police and, when they responded, showed them the restraining order.¹⁰⁸ Despite this protective order, her requests for help, and information that she provided about her husband's involvement and whereabouts, the officers said there was nothing they could do.¹⁰⁹ At 3:20 the next morning, the husband "arrived at the police station and opened fire with a semiautomatic handgun."¹¹⁰ The police returned fire and

104. Siegel, *supra* note 45, at 2199–2206.

105. *The Violence Against Women Act of 2005: Summary of Provisions*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/docs/Policy/VAWA2005FactSheet.pdf> (last visited Aug. 17, 2011) [hereinafter *Summary of Provisions*]. Though VAWA may have impacted domestic violence, it should be noted that overall violent crime rates have dropped since 1993, indicating that VAWA was not the sole source of the decline. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1999: CHANGES 1998–99 WITH TRENDS 1993–99 1 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv99.pdf> (2000); see also PATSY KLAUS, U.S. DEP'T OF JUSTICE, CRIME AND THE NATION'S HOUSEHOLDS 1–2 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cnh05.pdf> (reviewing the decline in overall violent household crimes from 1994 to 2005). Whether the prevalence of IPV in the United States has indeed decreased in recent years is controversial. Richard J. Gelles, *Estimating the Incidence and Prevalence of Violence Against Women: National Data Systems and Sources*, 6 VIOLENCE AGAINST WOMEN 784, 785 (2000); see also Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 as Revealed By Two National Surveys*, 48 J. MARRIAGE & FAMILY 465, 472 (1986) (identifying a report showing a sharp decrease in homicide, child abuse, and wife beatings, but cautioning against reliance on these figures due to the many factors that figure into such statistics). However, the reporting of domestic violence by victims has increased significantly and continues to increase. *Intimate Partner Violence in the U.S.*, U.S. DEPARTMENT JUST., <http://bjs.ojp.usdoj.gov/content/intimate/table/repgen.cfm> (last updated July 27, 2011).

106. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751 (2005).

107. *Id.* at 753.

108. *Id.*

109. *Id.* at 753–54.

110. *Id.* at 754.

killed him.¹¹¹ Inside his pickup truck, police found the bodies of his three previously murdered daughters.¹¹²

Ultimately, the Supreme Court held that the woman could not bring a federal civil rights action for damages against the municipality and its police officers for failing to adequately enforce the restraining order.¹¹³ The Court determined that Colorado law did not mandate police enforcement of domestic-abuse restraining orders; thus, as the woman did not have a right to have her restraining order enforced, the police's failure to enforce that order did not constitute a violation of her federal civil rights or give rise to a related claim for damages.¹¹⁴

In light of the continuing prevalence of IPV and related concerns, Congress reauthorized VAWA on the eve of its expiration with the passage of the Violence Against Women Act of 2000 (VAWA II), a part of the Victims of Trafficking and Violence Protection Act of 2000.¹¹⁵ Some may find the level of support for VAWA II surprising; it passed the House by a 371 to 1 vote and the Senate by a 95 to 0 vote.¹¹⁶ VAWA II focused on strengthening prior efforts to combat IPV, provided continuing funding for VAWA programs, and buttressed efforts to promote access to civil protection orders and other civil remedies.¹¹⁷ It also established block grants to be awarded to states for

111. *Id.*

112. *Id.*

113. *Id.* at 766.

114. *Id.* at 765–66.

115. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1001, 114 Stat. 1464, 1491 (codified as amended at 42 U.S.C. § 13701 (2006)).

116. *Violence Against Women Act of 2000*, NAT'L CONF. ST. LEGISLATURES (Nov. 14, 2000), <http://www.ncsl.org/default.aspx?tabid=13094>. The original VAWA was passed as part of the Violent Crime Control and Law Enforcement Act of 1994, receiving a 235-195 vote in the House and a 95-4 vote in the Senate. *The Violent Crime Control and Law Enforcement Act of 1994*, OFF. CLERK, U.S. HOUSE OF REPRESENTATIVES (Aug. 21, 1994), <http://artandhistory.house.gov/highlights.aspx?action=view&intid=38>; *U.S. Senate Roll Call Votes 103rd Congress – 2nd Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=2&vote=00125 (last visited Aug. 17, 2011). VAWA I, though a definite step in the right direction, provided a somewhat limited and primarily criminal-justice-centered response system for domestic violence, which may be the reason why VAWA II's more multi-faceted approach garnered more support in Congress. KRISTEN J. ROE, NAT'L ALLIANCE TO END SEXUAL VIOLENCE, *THE VIOLENCE AGAINST WOMEN ACT AND ITS IMPACT ON SEXUAL VIOLENCE PUBLIC POLICY: LOOKING BACK AND LOOKING FORWARD 3–4* (2004), available at http://new.vawnet.org/Assoc_Files_VAWnet/VAWA-SVPubPol.pdf.

117. Murphy, *supra* note 97, at 502–03; see also Press Release, Violence Against Women Office, U.S. Dep't of Justice, Justice Department Awards over \$23 Million for Civil Legal Assistance to Victims of Domestic Violence (Oct. 19, 2000), available at <http://www.ojp.usdoj.gov/archives/pressreleases/2000/ojp000114.html> (discussing civil legal-assistance funds). Significant support was also provided to legal services programs. ALAN

“Services, Training, Officers, [and] Prosecutors” (STOP grants), which sought to increase the ability of battered spouses to obtain and enforce protection orders.¹¹⁸

Congress reauthorized VAWA again in 2005.¹¹⁹ The 2005 Act also provided funding for direct services for sexual-assault victims;¹²⁰ education, training, and service programs that address violence against older victims (those of age fifty and older);¹²¹ transitional and long-term housing resources for victims;¹²² and programs to address violence committed against children and youth.¹²³ In 2011, Congress granted about \$418 million for DOJ-conducted violence-against-women programs and \$133 million for HHS-conducted programs.¹²⁴ VAWA is currently scheduled for reauthorization in 2011.¹²⁵

W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 41 (2003).

118. Murphy, *supra* note 97, at 503 (internal quotation marks omitted). VAWA II also expanded protection to two other IPV-vulnerable groups of individuals: the elderly and women with disabilities. NAT’L COAL. AGAINST DOMESTIC VIOLENCE, COMPARISON OF VAWA 1994, VAWA 2000, AND VAWA 2005 REAUTHORIZATION BILL 7 (2006), available at http://www.ncadv.org/files/VAWA_94_00_05.pdf. For example, VAWA II authorized five million dollars in grants to prosecutors, law-enforcement officials, and others for educational programs regarding the recognition, investigation, and prosecution of “elder abuse, neglect, and exploitation.” *Id.*

119. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1, 119 Stat. 2960, 2960 (2006) (codified as amended at 42 U.S.C. § 13701 (2006)). The 2005 Act reauthorized VAWA through the 2009 fiscal year. *Id.*

120. *Id.* § 202, 119 Stat. at 2994.

121. *Id.* § 205, 119 Stat. at 3002.

122. *Id.* §§ 601–06, 119 Stat. at 3030–42.

123. *Id.* § 303, 119 Stat. at 3004. For an overview of changes in the 2005 VAWA, see NAT’L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN, THE VIOLENCE AGAINST WOMEN AND DEPARTMENT OF JUSTICE REAUTHORIZATION ACT OF 2005 H.R. 3402 (2005), available at <http://www.ncadv.org/files/VAWAIIISectionbySectionSummary.pdf>, and *Summary of Provisions*, *supra* note 105.

124. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 11-833-T, DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING: NATIONAL DATA COLLECTION EFFORTS UNDERWAY TO ADDRESS SOME INFORMATION GAPS, TESTIMONY BEFORE THE COMMITTEE OF THE JUDICIARY, U.S. SENATE 1 (2011) [hereinafter GAO DV EFFORTS], available at <http://www.gao.gov/new.items/d11833t.pdf>. Additionally, President Barack Obama declared October 2010 to be National Domestic Violence Awareness Month and the Department of Defense has established programs to prevent IPV among service members. See Press Release, White House, Presidential Proclamation—National Domestic Violence Awareness Month (Oct. 1, 2010) [hereinafter Presidential Press Release, Domestic Violence Awareness Month]; Donna Miles, *Military Launches Domestic Violence Awareness Campaign*, DEPARTMENT DEF. (Oct. 4, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=61131> [hereinafter *Domestic Violence Awareness Campaign*].

125. See Cheryl Wetzstein, *Senate Panel Is Urged to Renew Domestic Violence Law*, WASH. TIMES, July 13, 2011, <http://washingtontimes.com/news/2011/jul/13/senate-panel-is>

Despite these continuing federal legislative efforts,¹²⁶ the problem of IPV remains significant. Although the rate of reported nonfatal IPV has declined from approximately 5.8 incidents (per 1000 people ages 12 or older) in 1993 to 2.3 incidents in 2005,¹²⁷ other figures indicate the problems that IPV continues to pose: over 7 million intimate partner rapes and physical assaults occur per year in the United States; 2.6 million result in injury to the victim, over 600,000 require some type of medical treatment, and over 1500 result in the death of the victim.¹²⁸ Further, studies suggest that the recent economic crisis¹²⁹ may have lasting psychological and emotional effects on families, potentially resulting in increased conflict and violence.¹³⁰ Lending credence to these predictions, a 2009 nationwide survey of domestic-violence shelters showed a notable increase in the number of women seeking help since the economic downturn began.¹³¹ Economic challenges have also adversely impacted many domestic-violence service providers due to faltering state

-urged-to-renew-domestic-violence-l/#0_undefined,0_.

126. For a discussion of state efforts to redress IPV, see *infra* Parts V–VI.

127. CATALANO, *supra* note 8. As noted, it is sharply debated whether the prevalence of IPV in the United States has in actuality decreased in recent years. See *supra* note 105.

128. See *supra* notes 4–5 and accompanying text.

129. As of January 2010, the U.S. Department of Labor estimated that 16.1% of American workers are unemployed but trying to find a job, working part time when they would rather be working full time, or have stopped looking for work. Bureau of Labor Statistics, *Alternative Measures of Labor Underutilization*, U.S. DEPARTMENT LAB., <http://www.bls.gov/news.release/empsit.t15.htm> (last updated June 3, 2011).

130. See Michael Luo, *Job Woes Exacting a Heavy Toll on Family Life*, N.Y. TIMES, Nov. 12, 2009, at A1, A12 (offering stress, effect on male self-image, and increased family contact as potential explanations for intrafamilial conflict after parental job loss); see also Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003) (“[W]e found that unemployment was the most important demographic risk factor for acts of intimate partner femicide. In fact, abuser’s lack of employment was the only demographic risk factor that significantly predicted femicide risks after we controlled for a comprehensive list of more proximate risk factors, increasing risks 4-fold . . .”). But see WALKER, *supra* note 17, at 18 (“There was no direct link between unemployment and violent behavior for our sample.”).

131. Editorial, *An Advocate for Women*, N.Y. TIMES, July 1, 2009, at A32.

budgets,¹³² and questions continue to arise regarding the legal system's response to IPV.¹³³

132. See Jesse McKinley, *Abuse Shelters Are Limiting Their Services or Closing*, N.Y. TIMES, Sept. 26, 2009, at A10; see also Marie Crandall et al., *Illinois Trauma Centers and Intimate Partner Violence: Are We Doing Our Share?*, 24 J. INTERPERSONAL VIOLENCE 2096, 2101 (2009) (reporting that twenty-two percent of trauma centers felt that their IPV services were inadequate and noting that many blame insufficient financial resources); Radha Iyengar & Lindsay Sabik, *The Dangerous Shortage of Domestic Violence Services*, 28 HEALTH AFFAIRS 1052, 1057 (2009) (documenting 5000 unmet requests for domestic-violence services in a single twenty-four-hour period).

133. See Litchman, *supra* note 9, at 765–66 (discussing a prominently reported case and tragic IPV compounded by inadequate societal responses to that IPV); see also Roger Alford & Bruce Schreiner, *Police: Ky. Politician Said He 'Wanted Revenge'*, TPM NEWS (Sept. 15, 2009), http://talkingpointsmemo.com/news/2009/09/police_ky_politician_said_he_wanted_revenge.php; Christine Armario & Jonathan M. Katz, *Fla. Mom Slain with Her 5 Children Endured Abuse*, BREITBART.COM (Sept. 21, 2009), http://breitbart.com/article.php?id=D9ARV0LO0&show_article1. A relatively recent case demonstrates the continuing questions regarding the legal system's response to IPV. See Stacy Moore, *Family Says Courts Shut Down Restraining Orders*, HI-DESERT STAR (Feb. 3, 2010), <http://www.hidesertstar.com/articles/2010/02/03/news/doc4b69381ed5e05699313614.txt>. In August of 2009, California resident Katie Tagle ended an abusive two-year relationship with Stephen Garcia, the father of her child, after he allegedly punched her in the face and knocked her unconscious. *Id.* When Garcia discovered that there was another man in her life in December of 2009, he reportedly “wiggged out” during a child custody exchange, and he also knocked her to the ground after she refused to marry him. *Id.* After receiving a series of threatening text messages from Garcia, Tagle requested an emergency restraining order. *Id.* However, because Tagle could not produce the text messages during her hearing, the judge denied the emergency order and set a hearing date instead. *Id.* At the hearing, Garcia admitted to slapping Tagle, but asserted it was only because Tagle had continually pushed him to react. *Id.* This second judge denied Tagle's restraining order request, concluding that Garcia did not pose a threat to Tagle and suggesting that she may have falsely alleged abuse to gain custody of their son. *Id.* The day after the hearing, Garcia emailed Tagle a story entitled “Necessary Evil” with a “Tragic Ending,” in which a man murders his son and commits suicide after the boy's mother refused to return to a relationship with him. *Id.* Tagle read the story and immediately called 911, and the responding deputy got her an emergency restraining order. *Id.* But just a week later, a third judge refused to uphold the order, directed Tagle to deliver their son to Garcia for his scheduled visitation, and warned her about the consequences of lying. *Id.* “[D]iscouraged and frightened by her last appearance in court, she did not seek another restraining order or custody change,” even when Garcia missed a custody transfer. *Id.* On January 31, 2010, two weeks after his last court appearance, Garcia and the nine-month-old son were found dead in an alleged murder-suicide. Kealan Oliver, *Murder-Suicide Note Posted on Facebook: Could Father, Son Deaths Have Been Stopped?*, CBS NEWS (Feb. 4, 2010), <http://www.cbsnews.com/blogs/2010/02/03/crimesider/entry6170670.shtml?tag=contentMain;contentBody>.

Despite the federal government's efforts to reduce IPV,¹³⁴ substantive legislation directly responding to IPV has been controversial, particularly at the all-important state level.¹³⁵ Instead, there has been widespread disagreement as to how, and in some cases whether, society should respond.¹³⁶ This can be attributed, in part, to the diverse views regarding what causes IPV and how best to redress it. Before turning to the various responses instituted by the states, this Article will provide a brief overview of these views and their potential impact on IPV legislation.

II. THE DIFFERENT FACES OF IPV

Advocates whose beliefs can be traced to the women's rights movement of the 1960s and 1970s argue that the inequitable roles of men and women in society need to be dramatically altered before IPV can be effectively reduced.¹³⁷ They view IPV as the result of a social paradigm that promotes the domination of men over women through "gender role socialization; social and economic discrimination in education, the workplace, and the home; and lack of access to child care."¹³⁸ They argue that IPV should be redressed by "promoting self-determination, self-organization, and democratic participation" among women, and by encouraging all segments of society to think differently about relationships between men and women.¹³⁹ Supporters of this perspective may resist mandatory reporting and arrest legislation, as

134. See, e.g., GAO DV EFFORTS, *supra* note 124; Presidential Press Release, Domestic Violence Awareness Month, *supra* note 124; *Domestic Violence Awareness Campaign*, *supra* note 124; *Understanding Intimate Partner Violence: Fact Sheet*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/ViolencePrevention/pdf/IPV_factsheet-a.pdf (last visited Aug. 27, 2011).

135. See Gelles, *supra* note 105, at 788 (explaining that only a few states have enacted mandatory reporting laws for domestic violence). The dichotomy between federal and state responses to IPV stand in stark contrast to child abuse. *Id.* In contrast to IPV, when child abuse first gained widespread national notoriety and publicity in the 1960s, virtually every state launched legislation to promote the reporting of child abuse and to facilitate and enhance societal responses to this abuse. *Id.*; see also Hafemeister, *supra* note 27, at 839–41 (reviewing the legislative responses to child abuse, particularly mandatory reporting laws).

136. See Açıkalın, *supra* note 99, at 1053.

137. See SCHNEIDER, *supra* note 30, at 22; see also Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283, 284 (1995) ("[T]he emphasis [of feminists] has been upon historical traditions of the patriarchal family, contemporary constructions of masculinity and femininity, and structural constraints that make escape difficult for women who are systematically beaten.").

138. SCHNEIDER, *supra* note 30, at 22.

139. *Id.*

these responses are perceived to further disempower women by removing their control over the response to the IPV that they experience.¹⁴⁰

An alternative approach focuses primarily on the perceived pathology, dependency, and vulnerability of battered spouses, particularly those who remain in their relationships.¹⁴¹ Psychologist Lenore E.A. Walker's seminal book *The Battered Woman Syndrome* documents the presence of these characteristics in the battered women she studied.¹⁴² She argues that the trauma caused by battering can develop into a "learned helplessness" that makes it very difficult for a woman to leave an abusive relationship.¹⁴³ Such findings have been used to promote a more proactive societal response to IPV, based on the view that victims may be unable to protect themselves or their own interests.¹⁴⁴ Proponents contend that society should more routinely and directly intervene in cases of IPV by utilizing the mechanisms of mandatory reporting, investigation, arrest, prosecution, and sentencing—even over objections from victims who assert that they neither want nor need assistance.¹⁴⁵

A third perspective focuses on how familial structures and dynamics may permit, encourage, or perpetuate violence among family members; this approach frames IPV as gender neutral and promotes the relatively controversial view that women are as violent as men.¹⁴⁶ Rejecting the notion that IPV is primarily gender violence, this viewpoint posits that all forms of family violence—be it child abuse, intimate partner violence, or elder abuse—are attributable to similar root problems, such as substance abuse, stress, and

140. Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 175 (2003); Miccio, *supra* note 61, at 242.

141. See SCHNEIDER, *supra* note 30, at 23.

142. See WALKER, *supra* note 17, at 117–18.

143. *Id.* at 116–17.

144. See Miccio, *supra* note 61, at 303–06.

145. See *id.* at 294 (criticizing this viewpoint for usurping women's autonomy). Some opponents of this position assert that it inappropriately characterizes abused women as "irrational beings . . . incapable of maturing into autonomous persons," rather than empowering them to combat IPV. *Id.* at 311. This perspective has also been criticized for characterizing victims of IPV as "unreasonable, incompetent, suffering from psychological impairment or just plain crazy." Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 23 U. CHI. LEGAL F. 23, 38 (1989).

146. SCHNEIDER, *supra* note 30, at 24. The assertion that IPV harms women and men equally has been much debated and sharply criticized. See Johnson, *supra* note 137, at 285 (noting that some researchers have analogized female violence to male battering, and others have found that "women [are] evidently as likely to utilize violence in response to couple conflict as [are] men," determinations that have been challenged by feminist scholars).

the normative acceptance of violence within the family and society.¹⁴⁷ Adherents to this view often challenge the conventional belief that women have an exclusive or even primary need for related services.¹⁴⁸ One potential benefit of this perspective is that it treats IPV much like other forms of interpersonal violence, rather than as a distinct, unique, and relatively unimportant problem—an approach embraced by the 1984 U.S. Attorney General's Task Force on Family Violence, which approached family violence from a criminal-justice perspective and promoted initiatives that treated IPV like other forms of interpersonal violence.¹⁴⁹ The task force found that “the solution . . . was arrest, prosecution, and incarceration” of IPV perpetrators, regardless of whether the violence occurred in a familial context.¹⁵⁰

A fourth viewpoint, perhaps harkening back to the common law tradition, generally opposes IPV responses that increase state intervention into the private family sphere.¹⁵¹ Proponents of this view are more willing to embrace intervention in cases of child abuse because children have no source of protection other than the state when endangered at home.¹⁵² Spouses, however, are considered to be autonomous adults possessed of free will, who are capable of making their own choices.¹⁵³ Rejecting the feminist perspective, proponents of this view tend to assert that some spouses intentionally assume a subordinate role and that doing so is their prerogative.¹⁵⁴ Advocates of this view generally seek to limit both legislation and law-enforcement efforts that intrude into family matters, particularly when assistance has not been sought.¹⁵⁵

147. See *id.* at 284 (“[T]he focus has been largely on commonalities among the various forms of family violence, such as the surprising frequency of violence, the instigating role of stress, and public adherence to norms accepting the use of some violence within the family context.”).

148. SCHNEIDER, *supra* note 30, at 71–73.

149. Miccio, *supra* note 61, at 288–90. The report was criticized by those who perceived IPV more as a social issue; although critics recognized the need for criminal-justice intervention, they found that this report did not adequately “address the material, social, and economic concerns of women survivors . . . including relocation, long-term housing, job training, and education.” *Id.* at 290.

150. *Id.* at 289–90.

151. Açıkalın, *supra* note 99, at 1053.

152. Cf. Mia M. McFarlane, *Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INT. L.J. 1, 26 (1999).

153. *Id.* Although traditional feminists share a similar antipathy toward unrequested governmental intervention, they are likely to advocate increased governmental services to assist battered women and for public education to prevent abuse. Açıkalın, *supra* note 99, at 1055.

154. See LARRY L. TIFFT, *BATTERING OF WOMEN: THE FAILURE OF INTERVENTION AND THE CASE FOR PREVENTION* 4–5 (1993); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991) (noting the blame women often receive for failing to leave an abusive relationship).

155. Açıkalın, *supra* note 99, at 1054. For example, initial federal attempts “in 1978 and 1979 to provide grant money to domestic violence shelters” were defeated by critics who argued

The almost dizzying array of current societal responses to IPV may be attributed to the divergence and virtual intransigence among these basic positions. Scholars who have researched IPV similarly diverge as to the nature of the problem, its contributing factors, and how to ameliorate it.¹⁵⁶ However, this divergence may be caused in part by a mistaken tendency to address IPV as a monolithic phenomenon, when in actuality there exists two relatively distinct forms of IPV that require different societal responses.¹⁵⁷ A distinction can be made between “patriarchal terrorism,” characterized by the systematic use of violence to maintain patriarchal control, and “common couple violence,” characterized by intermittent milder outbursts of violence by both partners.¹⁵⁸ Although the former tends to dominate headlines and therefore shape legislative responses, the latter occurs more frequently.¹⁵⁹ State intervention is particularly appropriate for cases of “patriarchal terrorism,” as the victim is more likely to be at risk and less able to seek help or escape the abuse.¹⁶⁰ “Common couple violence,” in contrast, typically “does not escalate into more serious forms of violence.”¹⁶¹ It can be argued that conflating these two types of IPV has resulted in misguided societal responses to IPV.¹⁶²

that such efforts constitute an inappropriate state interference into private family matters. *Id.* at 1053.

156. *See* Johnson, *supra* note 137, at 283–84.

157. *Id.* at 283 (“This article argues that there are, in fact, two distinct forms of couple violence taking place in American households.”). Professor Michael P. Johnson attributes this divergence to two relatively independent “major streams of sociological work on couple violence in families, one that is generally referred to as the *family violence perspective*, and the other of which may be called the *feminist perspective*.” *Id.* (emphasis in original) (citation omitted). He adds that “[t]he findings of the two literatures . . . lead to strikingly different conclusions regarding a number of the central features of family violence” and suggests that the two viewpoints “are in fact studying two distinctly different phenomena.” *Id.* at 284.

158. *Id.* at 283, 286 (noting that “common couple violence . . . is in fact gender balanced, and is a product of a violence-prone culture and the privatized setting of most U.S. households,” whereas “patriarchal terrorism . . . is a pattern perpetrated almost exclusively by men, and rooted deeply in the patriarchal traditions of the Western family”).

159. *See id.* at 283 (“We are all too familiar with stories of women who are finally murdered by husbands who have terrorized them for years.”).

160. *See id.* at 284–85, 287 (comparing patriarchal terrorism, “a product of patriarchal traditions of men’s right to control ‘their’ women . . . that involves the systematic use of not only violence, but economic subordination, threats, isolation, and other control tactics,” and common couple violence, described as less patriarchal in nature with less aggressive violence involved).

161. *Id.* at 286.

162. *Id.* at 291–93. A growing number of other IPV subtypes have also been generated, along with different proposed societal responses for each subtype. Thus, recent studies have begun to recognize that discrete programs tailored toward these various subsets of batterers may be more successful than employing a one-size-fits-all approach. *See, e.g.,* Nicola Graham-Kevan & Joan Archer, *Intimate Terrorism and Common Couple Violence: A Test of Johnson’s Predictions in Four British Samples*, 18 J. INTERPERSONAL VIOLENCE 1247, 1254–61 (2003); Amy Holtzworth-Munroe & Jeffrey C. Meehan, *Typologies of Men Who Are Maritally Violent:*

Scientific and Clinical Implications, 19 J. INTERPERSONAL VIOLENCE 1369, 1370–71 (2004) (noting that one study identified fifteen types of abusers); Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAMILY 948 (2000); Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 477 (2008) (identifying four different types of intimate partner violence, including coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence); Mary Z. Silverzweig, *Domestic Terrorism: The Debate and Gender Divides*, 12 J.L. & FAM. STUD. 251, 254–55 (2010) (differentiating between “intimate terrorism,” “violent resistance,” “situational couple violence,” and “mutual violent control”).

One study identified three dimensions for grouping perpetrators of IPV: “severity of violence, focus of violence, and psychopathology or personality linked to violence.” See Elizabeth Gilchrist, *Implicit Thinking About Implicit Theories in Intimate Partner Violence*, 15 PSYCHOL., CRIME & L. 131, 132 (2009). Another study differentiated three types of batterers—“sociopathic” (seven percent of all abusers), “antisocial” (forty-one percent), and “typical” (fifty-two percent)—and recommended that any intervention be tailored to the type of batterer, with the most extensive interventions reserved for the most violent abusers. Edward W. Gondolf, *Who Are Those Guys? Toward a Behavioral Typology of Batterers*, 3 VIOLENCE & VICTIMS 187, 196–97, 200 (1988). “Typical” batterers, compared to the other two types, are less violent, less likely to use weapons, and have lower arrest rates; therefore, their victims are more inclined to maintain or resume a relationship with them. *Id.* at 197. For sociopathic and antisocial batterers, coordinated interventions and programs that focus on continuous restraint, such as “intensive residential treatment approximating detoxification programs and long-term outpatient treatment,” rather than counseling or other conventional treatment programs that may do more harm than good by giving victims false hope. *Id.* at 200.

A third set of researchers categorized abusers by determining whether their violent tendencies were only intrafamilial. Nancy M. Shields, George J. McCall & Christine R. Hanneke, *Patterns of Family and Nonfamily Violence: Violent Husbands and Violent Men*, 3 VIOLENCE & VICTIMS 83, 87–89 (1988). Abusers who are generally aggressive, rather than limiting their abuse to intrafamilial settings, are more violent, more likely to abuse illegal drugs, and feel more justified in using violence. *Id.*

One social scientist classified abusive individuals into three treatment categories: “family-only aggressors” (fifty-two percent of their sample), “generally violent aggressors” (twenty-nine percent), and “emotionally volatile aggressors” (nineteen percent). See Daniel G. Saunders, *A Typology of Men Who Batter: Three Types Derived from Cluster Analysis*, 62 AM. J. ORTHOPSYCHIATRY 264, 270 (1992). “Family-only” abusers were less violent outside the household, seemed to suppress their emotions, and were susceptible to the triggers of alcohol or stress. *Id.* at 270, 273. The “generalized aggressors” were the most likely to demonstrate violent behavior in public, reported more frequent alcohol consumption, used more severe violence, and were more likely to have been abused as children. *Id.* at 270. The “emotionally volatile” batterers were less violent than the “generalized aggressors,” but were more psychologically abusive. *Id.* The study concluded that family-only aggressors would benefit the most from “assertiveness training” and were the best candidates for couples counseling. *Id.* at 273. The generally violent aggressor needed the most extensive intervention to begin “uncovering and healing his psychic wounds,” whereas the emotionally volatile abuser would benefit from “systematic desensitization and cognitive restructuring.” *Id.* However, the author noted that emotionally volatile abusers were unlikely to appreciate the potentially criminal nature of their actions. See *id.* at 274.

Finally, some have argued that successful interventions must identify the etiological basis for the risk factors typically associated with IPV. For example, one model identified three interactive

In any case, the four different perspectives discussed above tend to generate distinct legislative responses to IPV, and significant debate persists as to which is the best approach.¹⁶³ Because most legislative action on IPV in recent years has occurred at the state level, where differences readily propagate, these divergent views have resulted in a patchwork of laws and policies aimed at addressing IPV, with little uniformity in the employed approaches.¹⁶⁴

Before turning to the specific components of the approaches currently used by the various states to combat IPV, it is important to note that the most influential model law regarding IPV is the *Model Code on Domestic and Family Violence*, crafted between 1991 and 1994 by the National Council of Juvenile and Family Court Judges.¹⁶⁵ Perhaps recognizing the divergent views on how to address IPV, the drafters of this document emphasized developing a “model code,” not a “uniform code,” and stated that “each chapter and section can be independently assessed and accepted or modified.”¹⁶⁶ This *Code* has been particularly instrumental in triggering legislative changes to policies regarding the assignment of child custody after domestic violence occurs,¹⁶⁷ as well as shaping the duration of protective orders.¹⁶⁸ Other provisions have been more controversial and have received less support, including mandatory reporting by law-enforcement officers who respond to domestic or family violence calls,¹⁶⁹ mandatory or presumptive warrantless arrests of perpetrators of domestic or family violence,¹⁷⁰ and the prohibition of “mutual orders of protection,” wherein both spouses obtain protective orders against one

factors that result in family crisis and lead to IPV, which include “A: the stressor event, B: resources available to the individual and/or the family, and C: the perception or assigned meaning of the individual and/or family.” Emily S. Rolling & Matthew W. Brosi, *A Multi-leveled and Integrated Approach to Assessment and Intervention of Intimate Partner Violence*, 25 J. FAM. VIOLENCE 229, 230 (2010). Alternatively, some posit that prevention and intervention efforts must recognize the relationship of IPV to post-traumatic stress disorder and hyperarousal. Kathryn M. Bell & Holly K. Orcutt, *Posttraumatic Stress Disorder and Male Perpetrated Intimate Partner Violence*, 302 J. AM. MED. ASS’N 562, 562 (2009).

163. Han, *supra* note 140, at 161.

164. See Açıkalın, *supra* note 99, at 1053–54. In contrast, the federal government has asserted a more dominant role in directing state responses to child abuse. See Hafemeister, *supra* note 27, at 842–44.

165. MODEL CODE ON DOMESTIC & FAMILY VIOLENCE, at v (1994), available at http://www.ncjfcj.org/images/stories/dept/fvd/pdf/modecode_fin_printable.pdf.

166. *Id.*

167. Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 81, 91 (2005).

168. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 283–84 (2004).

169. MODEL CODE ON DOMESTIC & FAMILY VIOLENCE § 205(A)–(B) (1994).

170. *Id.* After reviewing mandatory and presumptive arrest research, the drafters offered two alternative sections instead. See *id.* §§ 205(A)–(B) cmt.

another.¹⁷¹ The *Code* does not contain provisions for “no-drop” prosecutions—mandatory prosecution of IPV perpetrators even when the victim does not wish to press charges, or mandatory IPV reporting by healthcare professionals. In addition to this model code, the National Institute of Justice (NIJ) proposed a model anti-stalking law in 1993, and by 1999, all fifty states had enacted anti-stalking legislation in some form, with many following the NIJ model.¹⁷²

III. DEFINING IPV

Intimate partner violence is generally thought to encompass a number of specific behaviors, including intimidation, isolation, threats of violence, and economic control, as well as physical violence such as hitting, kicking, choking, and rape.¹⁷³ However, legal definitions of IPV and the societal response vary widely by state, reflecting divergent views regarding who should or must be afforded assistance and support, and under what circumstances.¹⁷⁴

VAWA defined domestic violence as

felony or misdemeanor crimes of violence committed by [1] a current or former spouse of the victim, [2] by a person with whom the victim shares a child in common, [3] by a person who is cohabitating with or has cohabitated with the victim as a spouse, [4]

171. *Id.* § 310.

172. Jeremy Travis, Director, Nat'l Inst. of Justice, Address at the National Center for Women and Policing Conference, Stalking: Lessons from Recent Research (Apr. 14, 1999), available at <http://www.nij.gov/nij/about/speeches/past-directors/stalk.htm>.

173. See ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 2, 7–8 (2d ed. 2008); see also Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. (forthcoming 2012) (discussing the role of financial abuse in domestic-violence relationships). At the same time, attempting to define violence in general and IPV in particular has plagued researchers attempting to estimate the prevalence of IPV. As one well-known researcher has noted,

The definitional question has been debated for more than three decades and has been contentious. On one hand, one definition is that *violence* is any act that is harmful to the victim. This broad definition of violence includes physical attacks, threatened physical attacks, psychological or emotional aggression and abuse, sexual assaults or threatened sexual assaults, and neglectful behavior. On the other hand, a narrower definition is confined to only acts of physical violence. For example, Gelles and Straus (1979) defined violence as any act that has the intention of harming the other individual—harm can range from slight pain to severe injury or death. Even here, there are variations in the definition of violence. Physical violence can range from relatively minor physical contact—such as a grab or a push, to severe acts that cause serious injury or death. Acts of physical violence may or may not produce an injury, and the injury can range from a bruise to a fatality. Furthermore, an act of violence may be accidental or intentional.

Gelles, *supra* note 105, at 785–86.

174. See *infra* text accompanying notes 176–82.

by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction or (5) any victim protected by the jurisdiction's domestic or family violence laws.¹⁷⁵

Despite this federal definition, the language employed in states' IPV laws varies widely. Half of the states target "domestic violence,"¹⁷⁶ sixteen use the arguably broader term "domestic abuse,"¹⁷⁷ and the remainder use a variety of phrases as limited as "family violence," "family abuse," or "family assault," and as expansive as "abuse" or "assault."¹⁷⁸ No state law uses the phrase

175. 42 U.S.C. § 13925(6) (2006). This definition includes same-sex couples if they are also protected under their jurisdictions' domestic-violence laws. Jennifer Heintz, *Safe at Home Base? A Look at the Military's New Approach to Dealing with Domestic Violence on Military Installations*, 48 ST. LOUIS U. L.J. 277, 280 (2003).

176. See ALA. CODE §§ 30-5-1, 30-6-1 (1989 & Supp. 2010) (defining domestic violence and abuse); ALASKA STAT. § 18.66.990 (2010); ARIZ. REV. STAT. ANN. § 13-3601 (2010); CAL. FAM. CODE § 6211 (West 2004 & Supp. 2011); COLO. REV. STAT. § 18-6-800.3 (2010); DEL. CODE ANN. tit. 10, § 1041 (1999 & Supp. 2010) (domestic violence, abuse); FLA. STAT. ANN. § 741.28 (West 2010); IDAHO CODE ANN. § 39-6303 (2002 & Supp. 2010); 750 ILL. COMP. STAT. ANN. 60/103 (West 2009 & Supp. 2010) (domestic violence, abuse); IND. CODE ANN. § 34-6-2-34.5 (LexisNexis 2008 & Supp. 2010) (domestic or family violence); KAN. STAT. ANN. § 60-3101 (2005 & Supp. 2009); KY. REV. STAT. ANN. § 403.720 (LexisNexis 2010) (domestic violence and abuse); MICH. COMP. LAWS ANN. § 400.1501 (West 2008 & Supp. 2010); NEV. REV. STAT. ANN. § 33.018 (LexisNexis 2006 & Supp. 2009); N.H. REV. STAT. ANN. § 173-B:1 (LexisNexis 2010) (domestic violence, abuse); N.J. STAT. ANN. § 2C:25-17 (West 2005 & Supp. 2010); N.Y. SOC. SERV. LAW § 459-a (McKinney 2003 & Supp. 2011); N.C. GEN. STAT. § 50B-1 (2009 & Supp. 2010); N.D. CENT. CODE § 14-07.1-01 (2009); OHIO REV. CODE ANN. § 3113.31 (LexisNexis 2008 & Supp. 2010); R.I. GEN. LAWS §§ 12-29-2, 15-15-1 (2003 & Supp. 2010) (defining domestic violence in 12-29-2 and domestic abuse in 15-15-1); UTAH CODE ANN. § 77-36-1 (LexisNexis 2008 & Supp. 2010); WASH. REV. CODE ANN. § 26.50.010 (West 2005 & Supp. 2011); W. VA. CODE ANN. § 48-27-202 (LexisNexis 2009 & Supp. 2010) (defining domestic violence or abuse); WYO. STAT. ANN. § 35-21-102 (2009) (domestic violence, domestic abuse).

177. ARK. CODE ANN. § 9-15-103 (2009); HAW. REV. STAT. ANN. § 586-1 (LexisNexis 2010); IOWA CODE ANN. § 236.2 (West 2008 & Supp. 2010); LA. REV. STAT. ANN. § 46:2132 (2010 & Supp. 2011); ME. REV. STAT. ANN. tit. 19-A, § 4001 (1998 & Supp. 2010); MINN. STAT. ANN. § 518B.01 (West 2006 & Supp. 2011); MISS. CODE ANN. § 93-21-1 (West 2007 & Supp. 2010); NEB. REV. STAT. ANN. § 42-901 (LexisNexis 2005); N.M. STAT. ANN. § 40-13-2 (2006 & Supp. 2010) (domestic abuse, family violence); OKLA. STAT. ANN. tit. 22, § 60.1 (West 2003 & Supp. 2011); R.I. GEN. LAWS §§ 12-29-2, 15-15-1 (2003 & Supp. 2010) (domestic violence, domestic abuse); S.C. CODE ANN. § 20-4-10 (1985 & Supp. 2010); S.D. CODIFIED LAWS § 25-10-1 (2004 & Supp. 2010); TENN. CODE ANN. § 36-3-601(4) (2010); WIS. STAT. ANN. § 813.12 (West 2007 & Supp. 2010); WYO. STAT. ANN. §§ 35-21-102 (domestic violence, domestic abuse).

178. ALA. CODE § 30-5-1 (abuse); CONN. GEN. STAT. ANN. § 46b-38a (West 2009 & Supp. 2010) (family violence); D.C. CODE § 16-1001(9) (2001 & Supp. 2010) ("intrafamily violence"); GA. CODE ANN. § 19-13-1 (2010) (family violence); IND. CODE ANN. § 34-6-2-34.5 ("domestic or family violence"); MD. CODE ANN., FAM. LAW § 4-501 (LexisNexis 2006 & Supp. 2010) ("domestic violence"); MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2007 & Supp. 2010) (abuse); MO. ANN. STAT. § 455.010 (West 2003 & Supp. 2011) (abuse); MONT. CODE ANN.

“intimate partner” (although Montana’s statute does encompass the broader phenomenon of “partner abuse”), perhaps because state legislatures intend to limit these statutes to family¹⁷⁹ or what are perceived to be more traditional domestic settings.¹⁸⁰ Some states, however, have extended their laws to reach persons who are dating¹⁸¹ or who otherwise have an “affinity” to the victim.¹⁸²

Most state statutes do not indicate whether they apply to same-sex relationships.¹⁸³ Although research suggests that same-sex domestic violence occurs at the same rate as violence in heterosexual relationships,¹⁸⁴ and has

§ 40-15-101 (2009) (partner and family member assault); N.H. REV. STAT. ANN. § 173-B:1 (domestic violence, abuse); N.M. STAT. ANN. § 40-13-2 (family violence, domestic abuse); OR. REV. STAT. ANN. § 107.705 (West 2003 & Supp. 2010) (defining abuse under the subtitle “family abuse”); 23 PA. CONS. STAT. ANN. § 6102 (West 2010) (abuse); TEX. FAM. CODE ANN. §§ 71.0021, 71.004 (West 2000 & Supp. 2010) (defining dating violence and family violence); VT. STAT. ANN. tit. 15, § 1101 (2010) (abuse); VA. CODE ANN. § 16.1-228 (2010) (family abuse). The words “family” and “domestic” are often used interchangeably. Compare DEL. CODE ANN. tit. 10, § 1041, and FLA. STAT. ANN. § 741.28, with CONN. GEN. STAT. ANN. § 46b-38a. In some states, “violence” and “abuse” are also used relatively interchangeably, with both defined as any violation of the relevant criminal code. Compare DEL. CODE ANN. tit. 10, § 1041, and FLA. STAT. ANN. § 741.28, with LA. REV. STAT. § 46:2132.

179. See, e.g., CONN. GEN. STAT. ANN. § 46b-38a; FLA. STAT. ANN. § 741.28; N.Y. SOC. SERV. LAW § 459-a.

180. See, e.g., CAL. FAM. CODE § 6211; CONN. GEN. STAT. ANN. § 46B-38a; FLA. STAT. ANN. § 741.28; GA. CODE ANN. § 19-13-1; MASS. GEN. LAWS ANN. ch. 209A, § 1; N.Y. SOC. SERV. LAW § 459-a; N.C. GEN. STAT. § 50B-1; OHIO REV. CODE ANN. § 3113.31.

181. See, e.g., MASS. GEN. LAWS ANN. ch. 209A, § 1; N.C. GEN. STAT. § 50B-1; TEX. FAM. CODE ANN. §§ 71.0021, .004.

182. See, e.g., CONN. GEN. STAT. ANN. § 46b-38a; MASS. GEN. LAWS ANN. ch. 209A, § 1.

183. See NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER DOMESTIC VIOLENCE IN 2001, at 13–17 (2002) [hereinafter NCAVP REPORT], available at <http://www.avp.org/publications/reports/2001ncavpdrvpt.pdf>. Only four states, however, specify that a victim must be of the opposite sex to be protected under domestic violence statutes. See LA. REV. STAT. ANN. § 46:2132 (2010 & Supp. 2011); MONT. CODE ANN. § 45-5-206(2)(b) (2009); N.C. GEN. STAT. § 50B-1(b)(2) (2009 & Supp. 2010); S.C. CODE ANN. § 20-4-20(b)(iv) (1985 & Supp. 2010). The Virginia statute protects all persons who have been cohabitating, VA. CODE ANN. § 16.1-228 (2010), but a Virginia Attorney General opinion defines “cohabit” to exclude gay and lesbian couples, 1994 Op. Va. Att’y Gen. 60. Notably, initial federal attempts to provide funds for abused women’s shelters in 1978 and 1979 were defeated because of concerns that governmental protection and services would be afforded to, and implicitly endorse, nontraditional relationships—particularly same-sex relationships. See Açıkalın, *supra* note 99, at 1053.

184. Joanna Bunker Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44 FAM. CT. REV. 287, 287 (2006). Approximately eleven percent of men and women in gay or lesbian relationships report IPV. Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN’S L.J. 259, 260 (2008).

similarly negative effects on health and quality of life,¹⁸⁵ a 2001 survey determined that only six states have laws that affirmatively permit protective orders for gay and lesbian victims.¹⁸⁶ The survey concluded that the vast majority of jurisdictions (thirty-seven states as well as the District of Columbia and Puerto Rico) have relationship-neutral laws, while seven states actually *prohibit* protective orders for victims of same-sex IPV, either explicitly or in effect.¹⁸⁷ In some states, statutes protecting victims of dating violence provide the best available means for a victim of same-sex IPV to obtain help.¹⁸⁸ The 2003 Supreme Court decision in *Lawrence v. Texas*, which effectively invalidated anti-sodomy laws, may embolden future efforts to curtail same-sex IPV.¹⁸⁹ At the same time, other barriers or misperceptions of the abuse as “just fighting,” the fear of being “outed” as gay or lesbian, inadequate responses from law-enforcement officers, and lack of access to family courts may dissuade victims of same-sex IPV from seeking protection and thus effectively limit the scope of these statutes.¹⁹⁰

State IPV laws also vary with regard to the type of violence or abuse targeted, which may include physical violence, sexual violence, psychological or emotional abuse,¹⁹¹ stalking,¹⁹² or some combination of these.¹⁹³ The

185. John R. Blosnich & Robert M. Bossarte, *Comparisons of Intimate Partner Violence Among Partners in Same-Sex and Opposite-Sex Relationships in the United States*, 99 AM. J. PUB. HEALTH 2182, 2183–84 (2009).

186. NCAVP REPORT, *supra* note 183, at 16–17 (noting the states are Hawaii, Illinois, Kentucky, New Jersey, Ohio, and Pennsylvania).

187. *Id.* at 13–17.

188. *Id.* at 14 (noting the option exists under Mississippi law).

189. See 539 U.S. 558, 564 (2003); Michelle Aulivola, Note, *Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162, 165 (2004) (discussing how the decision will impact gay rights); see also Tara R. Pfeifer, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN ST. L. REV. 1251, 1271–77 (2005) (describing the decision as a “tremendous step” for equal rights for same-sex couples).

190. NCAVP REPORT, *supra* note 183, at 10–12; Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 281–92 (1993); Aulivola, *supra* note 189, at 164.

191. See *supra* notes 177–78 and accompanying text.

192. Nineteen states specifically include stalking in their definition of IPV or domestic violence. See ALA. CODE § 30-5-2 (a)(1)(m) (1989 & Supp. 2010); CAL. FAM. CODE § 6203(d) (West 2009 & Supp. 2011) (stating the Court may enjoin acts under § 6320, which lists stalking); FLA. STAT. ANN. § 741.28 (West 2010); GA. CODE ANN. § 19-13-1(2) (2010); IND. CODE ANN. § 34-6-2-34.5 (LexisNexis 2008 & Supp. 2010); ME. REV. STAT. ANN. tit. 19-A, § 4002(1)(F) (1998 & Supp. 2010); MD. CODE ANN., FAM. LAW § 4-501(b)(vi) (LexisNexis 2006 & Supp. 2010); MO. ANN. STAT. § 455.010(d) (West 2003 & Supp. 2009)); NEV. REV. STAT. ANN. § 33.018(1)(e)(1) (LexisNexis 2006); N.J. REV. STAT. ANN. § 2C:25-19(a)(14) (LexisNexis 2006 & Supp. 2009); N.M. STAT. ANN. § 40-13-2(D)(1) (2006 & Supp. 2010); N.C. GEN. STAT. § 50B-1(a)(2) (2009 & Supp. 2010) (citing § 14-277.3A); OHIO REV. CODE ANN.

Centers for Disease Control and Prevention (CDC) identified these four categories of behavior as the predominant manifestations of IPV.¹⁹⁴ Additionally, VAWA addresses all four types of violence as well, although it stresses that each state's definition is controlling.¹⁹⁵

IV. MANDATORY REPORTING

Unlike mandatory reporting of child abuse,¹⁹⁶ mandatory reporting of IPV has been a relatively recent and sporadic addition to state laws.¹⁹⁷ Support for mandatory reporting of IPV has been much more tepid than the relatively strong support for mandatory reporting of child abuse,¹⁹⁸ possibly due to how the victims are perceived.¹⁹⁹ Children are viewed as vulnerable, innocent, and less able to protect themselves from abuse, whereas adult IPV victims are perceived as able to avoid or escape abuse, more capable of making their own choices, and more autonomous.²⁰⁰ As a result, many policy-makers believe there is less need or justification for establishing mechanisms, such as

§ 3113.31(A)(1)(b) (LexisNexis 2008 & Supp. 2010) (citing § 2903.211); OKLA. STAT. ANN. tit. 22, § 60.1(2) (West 2003 & Supp. 2011); 23 PA. CONS. STAT. ANN. § 6102(a)(5) (West 2010); TENN. CODE ANN. § 36-3-601(11) (2010); UTAH CODE ANN. § 77-36-1(4)(i) (LexisNexis 2008 & Supp. 2010); VT. STAT. ANN. tit. 15, § 1101(1)(D) (2010); WASH. REV. CODE ANN. § 26.50.010(1)(c) (West 2005 & Supp. 2011). VAWA also includes stalking in its definitions. See 42 U.S.C. § 13925(24) (2006).

193. See, e.g., LA. REV. STAT. ANN. § 46:2132 (2010 & Supp. 2011) (including physical and sexual abuse as domestic abuse); MD. CODE ANN., FAM. LAW § 4-501 (LexisNexis 2006 & Supp. 2010) (including physical violence, sexual violence, and stalking); N.M. STAT. ANN. § 40-13-2(D) (2006 & Supp. 2010) (including all four categories of abuse).

194. Ctrs. for Disease Control & Prevention, *Intimate Partner Violence: Definitions*, DEPARTMENT HEALTH & HUM. SERVS., <http://www.cdc.gov/ViolencePrevention/intimatepartner-violence/definitions.html> (last updated Sept. 20, 2010).

195. 42 U.S.C. § 13925.

196. See Hafemeister, *supra* note 27, at 851–54.

197. Mills, *supra* note 31, at 562.

198. See *supra* note 164.

199. See Heidi Bauer et al., *California's Mandatory Reporting of Domestic Violence Injuries: Does the Law Go Too Far or Not Far Enough?*, 171 W. J. MED. 118, 118–24 (1999) (series of articles debating mandatory reporting of domestic violence injuries).

200. McFarlane, *supra* note 152, at 25–29; Michael A. Rodriguez et al., *Mandatory Reporting of Domestic Violence Injuries to the Police: What Do Emergency Department Patients Think?*, 286 J. AM. MED. ASS'N 580, 580 (2001) (“Mandatory reporting is controversial among clinicians, patients, and domestic violence prevention advocates. Supporters of the policy argue that it will facilitate the prosecution of batterers, encourage healthcare clinicians to identify domestic violence, and improve data collection. Opponents believe it may increase violence by the perpetrators, diminish patients’ autonomy, and compromise patient-clinician confidentiality.” (footnotes omitted)).

mandatory reporting of IPV, that effectively insert the state into associated domestic disputes, even when abuse is involved.²⁰¹

The recent trend toward enacting mandatory reporting of IPV began when California first enacted a specific reporting requirement.²⁰² The California statute requires health practitioners to file a report with local law enforcement when they know or reasonably suspect that a patient is suffering from wounds or physical injuries caused by assaultive or abusive conduct.²⁰³ When California enacted this change, healthcare providers already had to report certain types of injuries—such as those inflicted by a knife, firearm, or other deadly weapon—under existing statutes.²⁰⁴ The revision, however, specifically encompassed “[a]buse of [a] spouse or cohabitant,” as well as “[e]lder abuse,” “[c]hild abuse or endangerment,” and a number of other assaultive or abusive actions.²⁰⁵ Like most child-abuse reporting statutes, this law imposes penalties for failing to report abuse and provides individuals with immunity from liability if they comply with the law by filing such a report.²⁰⁶

The enactment of this controversial statute sparked opposition from members of the medical community, but received strong support from many law-enforcement groups.²⁰⁷ The California Medical Association (CMA) voiced concern that the statute, by requiring documentation and reporting of potential domestic violence, placed a significant burden on physicians.²⁰⁸ The CMA further expressed its view that the statute’s immunity clause for medical providers afforded less protection than is generally conferred by child-abuse reporting laws.²⁰⁹

When initially proposed, the bill stated that it was not meant to duplicate existing child- and elder-abuse reporting statutes and that an additional report

201. McFarlane, *supra* note 152, at 20–32.

202. CAL. PENAL CODE § 11150 (West 2000 & Supp. 2011); Anne Rouseve, *Domestic Violence and the States*, 6 GEO. J. GENDER & L. 431, 448–49 (2005).

203. CAL. PENAL CODE § 11160(a)(2). As discussed, some credit the O.J. Simpson case in 1994 as influential in getting states, such as California, to adopt laws targeting domestic violence in general. See *supra* note 89 and accompanying text.

204. Former CAL. PENAL CODE § 11160, added by Stats.1953, c. 34, § 1, amended by Stats.1971, c. 1805, § 1, relating to reports of injury by deadly weapon or criminal act, was repealed by Stats.1993, c. 992 (A.B.1652), § 2. As amended in 1994, these reports were limited to wounds or other physical injuries inflicted by a firearm. CAL. PENAL CODE § 11160(a).

205. CAL. PENAL CODE § 11160(d).

206. Rouseve, *supra* note 202, at 448–49; see also Hafemeister, *supra* note 27, at 860–66 (discussing child abuse reporting statutes).

207. McFarlane, *supra* note 152, at 13–14; see also Rouseve, *supra* note 202, at 448–49 (highlighting California as the first state to require mandatory reporting for healthcare professionals and reviewing the arguments in favor of and against such legislation).

208. McFarlane, *supra* note 152, at 14 n.71.

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

was not required if one was already mandated under existing law.²¹⁰ When enacted, however, the language of the statute was less explicit on this point, only obliquely referring to other mandatory reporting statutes when it stated that “it is the Legislature’s intent to avoid duplication of information.”²¹¹

Similar laws soon followed in Kentucky, Rhode Island, and Colorado.²¹² Notably though, Rhode Island’s law only requires such reports for statistical and training purposes and precludes the reporter from including the victim’s name.²¹³ The New York legislature considered similar bills in 1997 and 1999, which required medical professionals to report suspected domestic violence if they had reasonable cause.²¹⁴ Ultimately, the legislature did not enact either bill, possibly because of the American Medical Association’s (AMA) opposition to mandated physician reporting.²¹⁵ Currently, twenty-one states and the District of Columbia explicitly require some type of mandatory reporting of domestic violence.²¹⁶

A. Who Must Report

Notwithstanding explicit recognition of the harmful effects of IPV and of the widely held view that the problem requires some societal mechanism to address it (whether through law-enforcement responses or victim protection and support services), mandatory reporting of IPV has enjoyed limited support at best. In contrast to most child-abuse reporting statutes, the range of

210. *Id.*

211. CAL. PENAL CODE § 11160(h).

212. McFarlane, *supra* note 152, at 13; *see, e.g.*, COLO. REV. STAT. § 12-36-135 (2010); KY. REV. STAT. ANN. § 209A.030(2) (LexisNexis 2010); R.I. GEN. LAWS § 12-29-9 (2002 & Supp. 2010).

213. R.I. GEN. LAWS § 12-29-9(a)(2).

214. *See* A. 4586, 220th Ann. Leg. Sess. (N.Y. 1997); A. 5788, 222d Ann. Leg. Sess. (N.Y. 1999).

215. McFarlane, *supra* note 152, at 21. Like a number of states, New York does require medical personnel to report injuries caused by firearms, stab wounds, or severe burns. *See* N.Y. PENAL LAW §§ 265.25–26 (McKinney 2008).

216. CAL. PENAL CODE § 11160 (West 2000 & Supp. 2011); COLO. REV. STAT. § 12-36-135 (2010); D.C. CODE § 16-1032 (2001 & Supp. 2011); FLA. STAT. ANN. § 741.29 (West 2010); GA. CODE ANN. § 17-4-20.1 (2010); 750 ILL. COMP. STAT. ANN. 60/303 (West 2009 & Supp. 2010); KY. REV. STAT. ANN. § 209A.030 (LexisNexis 2007 & Supp. 2010); LA. REV. STAT. ANN. § 46:2141 (2010); ME. REV. STAT. ANN. tit. 19-A, § 4012 (1998); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 2007 & Supp. 2010); NEV. REV. STAT. § 171.1227 (LexisNexis 2009 & Supp. 2010) (reports forwarded to the central repository for Nevada records of criminal history); N.J. STAT. ANN. § 2C:25-24 (West 2005); N.D. CENT. CODE § 14-07.1-12 (West 2005); OHIO REV. CODE ANN. § 2935.032(D) (LexisNexis 2002); OKLA. STAT. ANN. tit. 22, § 40.6 (West 2003); 23 PA. CONS. STAT. ANN. § 6105 (West 2010); R.I. GEN. LAWS § 12-29-8 (2002 & Supp. 2010); TENN. CODE ANN. § 36-3-619(e) (2010); UTAH CODE ANN. § 77-36-2.2 (2008); WASH. REV. CODE § 10.99.030 (LexisNexis 2009); W. VA. CODE ANN. § 48-27-801 (LexisNexis 2009); WIS. STAT. § 968.075 (West 2007).

professionals legally required to report IPV is typically quite limited.²¹⁷ Although many states require law-enforcement personnel to file certain reports when they respond to domestic violence calls,²¹⁸ only four states directly require physicians or other medical personnel to file a report when they suspect domestic abuse.²¹⁹ Only Kentucky currently requires IPV reports from “any person” or from a range of professionals beyond medical providers, as is frequently required with child abuse.²²⁰ However, nearly all states have separate laws requiring doctors to report patients’ injuries that they suspect are the result of violent or criminal conduct, which tends to encompass the more egregious IPV cases because they often necessitate medical care.²²¹

Medical personnel are frequently singled out as mandated reporters because of studies suggesting that victims of IPV are more likely to seek medical treatment than to call the police after incidents of domestic violence.²²² Proponents of IPV-reporting statutes thus argue that requiring medical providers to report suspected IPV is the best means to ensure early intervention

217. Compare Hafemeister, *supra* note 27, at 851–54, with *infra* notes 219–20 and accompanying text.

218. D.C. CODE § 16-1032 (2001); FLA. STAT. ANN. § 741.29(2) (West 2010); GA. CODE ANN. § 17-4-20.1(c) (2008); 750 ILL. COMP. STAT. ANN. 60/303 (West 2009); KY. REV. STAT. ANN. § 209A.030 (LexisNexis 2007); LA. REV. STAT. ANN. § 46:2141 (2010); ME. REV. STAT. ANN. tit. 19-A, § 4012 (1998); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 2007); NEV. REV. STAT. ANN. § 171.1227 (LexisNexis 2006) (reports must be forwarded to the central repository for Nevada records of criminal history); N.J. STAT. ANN. § 2C:25-24 (West 2005); N.D. CENT. CODE § 14-07.1-12 (2009); OHIO REV. CODE ANN. § 2935.032(D) (LexisNexis 2010); OKLA. STAT. ANN. tit. 22, § 40.6 (West 2003); 23 PA. CONS. STAT. § 6105(c) (West 2010); R.I. GEN. LAWS § 12-29-8 (2002); TENN. CODE ANN. § 36-3-619(e) (2010); UTAH CODE ANN. § 77-36-2.2(5)–(6) (LexisNexis 2008); WASH. REV. CODE ANN. § 10.99.030(6)(b) (West 2002); W. VA. CODE ANN. § 48-27-801 (LexisNexis 2009); WIS. STAT. § 968.075 (2007).

219. See CAL. PENAL CODE § 11160; COLO. REV. STAT. § 12-36-135; KY. REV. STAT. ANN. § 209A.030; R.I. GEN. LAWS § 12-29-9 (stating that reports should be made for statistical purposes only, without any identifying information about the victim). In Tennessee, physicians are “encouraged to report” suspicions of domestic abuse to the Department of Health. TENN. CODE ANN. § 36-3-621 (2010).

220. KY. REV. STAT. ANN. § 209A.030 (requiring reporting by “[a]ny person, including but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, mental health professional, alternate care facility employee, or caretaker” who suspects spousal abuse); Hafemeister, *supra* note 27, at 851–52 (noting that all states and the District of Columbia have enacted mandatory child-abuse reporting laws applicable to “medical personnel, teachers/school officials, and social workers,” while most also require police officers and clergy members to report child abuse and some “require all citizens to report suspected child abuse” (footnotes omitted)).

221. See *infra* text accompanying notes 229–34. Oklahoma specifically exempts domestic abuse from the mandatory reporting required of healthcare professionals, except when the victim is incapacitated or under eighteen. OKLA. STAT. ANN. tit. 22, § 58 (West 2003 & Supp. 2011).

222. Mordini, *supra* note 58, at 325.

by law-enforcement or other officials.²²³ However, critics respond that the mandatory filing of IPV reports by medical providers may discourage victims from seeking necessary medical treatment, as victims may not desire police involvement.²²⁴ Furthermore, concerns have been raised that such requirements may adversely impact the doctor-patient relationship.²²⁵ For instance, in one study, most doctors surveyed indicated that they would be reluctant to file a report if their patient objected, due to concerns about confidentiality and the integrity of the patient-physician relationship.²²⁶ Indeed, the AMA opposes mandatory reporting of IPV, arguing that it violates both the patient's rights and the physician's ethical duties to protect the patient's health.²²⁷ This stance is consistent with the AMA's position on mandatory reporting of child abuse, which it opposes because parents might choose not to seek needed medical care for their abused child.²²⁸

B. When to Report

Mandatory IPV reporting laws also differ from child-abuse reporting laws by the indirect means they use to identify abuse. Child-abuse reporting laws explicitly state that "child abuse" must be reported.²²⁹ In contrast, the IPV-reporting laws of only four states (California, Colorado, Kentucky, and Rhode Island) require medical personnel to file a report when they have treated a victim of IPV.²³⁰ Most other state reporting laws target IPV only indirectly

223. *Id.*; see also Mills, *supra* note 31, at 562 (contending that mandatory reporting laws for medical personnel "ensures state intervention in a violent relationship at the earliest possible point").

224. Mordini, *supra* note 58, at 325.

225. Michael A. Rodriguez et al., *Mandatory Reporting of Intimate Partner Violence to Police: Views of Physicians in California*, 89 AM. J. PUB. HEALTH 575, 578 (1999).

226. *Id.* at 577.

227. Am. Med. Ass'n [AMA], *House of Delegates Resolution: 610 (A-07)*, at 2, AMA Pol. H-515 (May 16, 2011), available at <http://www.amaassn.org/ama1/pub/upload/mm/467/610.doc>; see *supra* note 216 and accompanying text.

228. John B. Reinhart & Elizabeth Elmer, *The Abused Child: Mandatory Reporting Legislation*, 188 J. AM. MED. ASS'N 358, 361 (1964); see also Hafemeister, *supra* note 27, at 840 ("The AMA model . . . rejected mandatory reporting in general because of concerns that abusive parents would be deterred from seeking medical care for their children . . .").

229. Hafemeister, *supra* note 27, at 851.

230. CAL. PENAL CODE § 11160 (West 2000 & Supp. 2011); COLO. REV. STAT. § 12-36-135 (2010); KY. REV. STAT. ANN. § 209A.030 (LexisNexis 2007); R.I. GEN. LAWS § 12-29-9 (LexisNexis 2002) (requiring reports for statistical purposes only, without any identifying information about the victim). North Dakota's statute implies the reporting duty includes domestic violence, as it states that when a domestic violence report is made "as required by this section," the victim must also be given information on domestic-violence assistance programs or organizations. N.D. CENT. CODE § 43-17-41(3) (2009). Although Ohio and Texas do not directly require healthcare providers to file a report when they treat a victim of domestic abuse, these two states do require healthcare providers to note any suspected domestic violence in the

by requiring medical personnel to report nonaccidental or intentional injuries;²³¹ those caused by criminal conduct,²³² violence,²³³ firearms, knives, or other sharp instruments or weapons,²³⁴ or burn injuries;²³⁵ or “suspicious”

patient’s records. OHIO REV. CODE ANN. § 2921.22(F)(1) (LexisNexis 2010); TEX. FAM. CODE ANN. § 91.003 (West 2008). Tennessee encourages—but does not require—healthcare providers to report domestic violence. TENN. CODE ANN. § 36-3-621 (2010).

231. ALASKA STAT. § 08.64.369 (2010) (limiting mandated reports to injuries likely to cause death); ARK. CODE ANN. § 12-12-602 (2009); FLA. STAT. ANN. § 790.24 (West 2007) (limiting mandated reports to life-threatening injuries); GA. CODE ANN. § 31-7-9 (2009); MICH. COMP. LAWS ANN. § 750.411 (West 2004); NEV. REV. STAT. ANN. § 629.041 (LexisNexis 2008); OHIO REV. CODE ANN. § 2921.22; OR. REV. STAT. ANN. § 146.750 (West 2003 & Supp. 2010); 18 PA. CONS. STAT. ANN. § 5106 (West 1983 & Supp. 2010) (limiting mandated reports to serious bodily injuries or injuries caused by a deadly weapon). Colorado, in addition to requiring medical personnel to report when they have reason to believe an injury resulted from domestic violence, also requires a report filing when they treat injuries that are reasonably believed to have been intentionally inflicted. COLO. REV. STAT. § 12-36-135(1).

232. ARIZ. REV. STAT. ANN. § 13-3806 (2010) (requiring reports of injuries that may have resulted from an unlawful act); D.C. CODE § 7-2601 (2008); IDAHO CODE ANN. § 39-1390 (2002) (requiring reports of injuries indicating a criminal offense); 20 ILL. COMP. STAT. ANN. § 2630/3.2 (West 2008 & Supp. 2010); IOWA CODE ANN. § 147.111 (West 2005) (requiring reports of injuries that appear “to have been received in connection with the commission of a criminal offense”); MASS. GEN. LAWS ANN. ch. 112, § 12A1/2 (West 2003) (requiring reporting of rape or sexual assault, but prohibiting disclosure of the victim’s identity); NEB. REV. STAT. ANN. § 28-902 (LexisNexis 2009) (requiring reports of injuries that “appear[] to have been received in connection with the commission of a criminal offense”); N.H. REV. STAT. ANN. § 631:6 (LexisNexis 2007); N.C. GEN. STAT. § 90-21.20 (2009); N.D. CENT. CODE § 43-17-41 (2009); OHIO REV. CODE ANN. § 2921.22; 18 PA. CONS. STAT. ANN. § 5106 (West 2009 & Supp. 2010); TENN. CODE ANN. § 38-1-101 (2010); UTAH CODE ANN. § 26-23a-1 (LexisNexis 2007); W. VA. CODE ANN. § 61-2-27 (LexisNexis 2010); WIS. STAT. ANN. § 255.40 (West 2010). Colorado also requires medical personnel to file a report when they treat injuries that they have reason to believe involved a criminal act. COLO. REV. STAT. § 12-36-135(1).

233. HAW. REV. STAT. ANN. § 453-14 (LexisNexis 2005 & Supp. 2010) (“[A]ny injury that would seriously maim, produce death, or has rendered the injured person unconscious, caused by the use of violence . . .”).

234. ALASKA STAT. § 08.64.369 (firearms, stab wounds); ARIZ. REV. STAT. ANN. § 13-3806 (firearms, stab wounds); ARK. CODE ANN. § 12-12-602 (firearms, stab wounds); CAL. PENAL CODE § 11160(a)(1) (firearms); COLO. REV. STAT. § 12-36-135(1) (firearms, knives, and other sharp instruments); CONN. GEN. STAT. ANN. § 19a-490f (West 2003) (firearms); DEL. CODE ANN. tit. 24, § 1762 (2005) (firearms, stab wounds); D.C. CODE § 7-2601 (firearms, dangerous weapon); FLA. STAT. ANN. § 790.24 (firearms); HAW. REV. STAT. ANN. § 453-14 (firearms, stab wounds); IDAHO CODE ANN. § 39-1390 (firearms); 20 ILL. COMP. STAT. ANN. § 2630/3.2 (firearms); IND. CODE ANN. § 35-47-7-1 (LexisNexis 2009) (firearms, stab wounds); IOWA CODE ANN. § 147.111 (firearms, stab wounds); KAN. STAT. ANN. § 21-4213 (2007) (firearms, stab wounds); LA. REV. STAT. ANN. § 14:403.5 (2004) (firearms); ME. REV. STAT. ANN. tit. 17-A, § 512 (2006 & Supp. 2010) (firearms); MD. CODE ANN., HEALTH-GEN. § 20-703 (LexisNexis 2009) (firearms); MASS. GEN. LAWS ANN. ch. 112, § 12A (firearms, stab wounds); MICH. COMP. LAWS ANN. § 750.411 (firearms, stab wounds, deadly weapon); MINN. STAT. ANN. § 626.52 (West 2009) (firearms, dangerous weapon); MISS. CODE ANN. § 45-9-31 (West 2009 & Supp. 2010) (firearms, stab wounds); MO. ANN. STAT. § 578.350 (West 2003) (firearms); MONT. CODE

wounds.²³⁶ These types of injuries often result from incidents of domestic violence; therefore, mandating these reports has the effect of flagging possible IPV without requiring medical personnel to make the subjective and often difficult determination of whether the injury was actually a product of domestic violence. However, this indirect approach is potentially both over-inclusive, as these types of injuries may have other causes unrelated to IPV, and under-inclusive, as cases of IPV without physical injury, like psychological harm, will remain undetected.²³⁷ Further, unlike child abuse, four states (Alabama, New Mexico, Washington, and Wyoming) do not even require mandatory reporting through indirect means.²³⁸

IPV laws, however, do share a common characteristic with child abuse laws: various levels of certainty are required to trigger a healthcare provider's obligation to report.²³⁹ A few states limit mandated reports to situations where

ANN. § 37-2-302 (2009) (firearms, stab wounds); NEV. REV. STAT. ANN. § 629.041 (firearms, stab wounds); N.H. REV. STAT. ANN. § 631:6 (firearms); N.J. STAT. ANN. § 2C:58-8 (West 2005) (firearms, explosives, weapons); N.Y. PENAL LAW § 265.25 (McKinney 2010) (firearms, stab wounds); N.C. GEN. STAT. § 90-21.20 (firearms, stab wounds); N.D. CENT. CODE § 43-17-41 (firearms, stab wounds); OHIO REV. CODE ANN. § 2921.22 (firearms, stab wounds); OR. REV. STAT. ANN. § 146.750 (firearms, stab wounds); 18 PA. CONS. STAT. ANN. § 5106 (firearms); R.I. GEN. LAWS § 11-47-48 (firearms); S.C. CODE ANN. § 16-3-1072 (2003) (firearms); S.D. CODIFIED LAWS § 23-13-10 (2006) (firearms); TENN. CODE ANN. § 38-1-101 (firearms, stab wounds, poisons, suffocation, other deadly weapons); TEX. HEALTH & SAFETY CODE ANN. § 161.041 (West 2009) (firearms); UTAH CODE ANN. §§ 26-23a-1, -2 (firearms, stab wounds, deadly weapons); VT. STAT. ANN. tit. 13, § 4012 (2009) (firearms); VA. CODE ANN. § 54.1-2967 (2009) (firearms, stab wounds); W. VA. CODE ANN. § 61-2-27 (firearms, stab wounds); WIS. STAT. ANN. § 255.40 (firearms).

235. ALASKA STAT. § 08.64.369; IND. CODE ANN. § 35-47-7-3; LA. REV. STAT. ANN. § 14:403.4; MASS. GEN. LAWS ANN. ch. 112, § 12A; MINN. STAT. ANN. § 626.52; NEV. REV. STAT. ANN. § 629.045; N.J. STAT. ANN. § 2C:58-8; OHIO REV. CODE ANN. § 2921.22; WIS. STAT. ANN. § 255.40.

236. HAW. REV. STAT. ANN. § 453-14; MINN. STAT. ANN. § 626.52.

237. The Minnesota statute mandates reports for one of the broadest ranges of potential IPV and resulting injuries, with reports required for "all bullet wounds, gunshot wounds, powder burns, or any other injury arising from, or caused by the discharge of any gun, pistol, or any other firearm, which wound the health professional is called upon to treat, dress, or bandage," and "a burn injury or wound that the professional is called upon to treat, dress, or bandage, if the victim has sustained second- or third-degree burns to five percent or more of the body, the victim has sustained burns to the upper respiratory tract or sustained laryngeal edema from inhaling superheated air, or the victim has sustained a burn injury or wound that may result in the victim's death." See MINN. STAT. ANN. § 626.52(2)–(3).

238. See TERESA P. SCALZO, RAPE AND SEXUAL ASSAULT REPORTING REQUIREMENTS FOR COMPETENT ADULT VICTIMS 15, 97, 154, 164 (2006), available at <http://ncdsv.org/images/Rape%20and%20SA%20Reporting%20Requirements%20%20%20Scalzo%206.15.06.pdf>; Table 1: *State Codes on Intimate Partner Violence Victimization Reporting Requirements for Health Care Providers*, FUTURES WITHOUT VIOLENCE (2004), http://www.futureswithoutviolence.org/userfiles/file/HealthCare/mandatory_reporting_tables1.pdf.

239. See Hafemeister, *supra* note 27, at 854–56 (discussing child abuse laws).

the healthcare provider personally believes that IPV has occurred.²⁴⁰ For example, healthcare providers in New Hampshire must “believe” that the injury was caused by a criminal act.²⁴¹ A number of states, however, require less certainty and mandate reports whenever the provider “suspects” that the requisite criteria are present.²⁴² Regardless of the level of certainty required, most states provide some degree of latitude by requiring reports from mandated persons only when there is a reasonable basis for the belief or suspicion.²⁴³ Some states take another approach and require a report when a “reasonable person” would believe that the criteria have been met.²⁴⁴ This objective standard can be construed broadly, if one expects colleagues to be proactive in filing reports, or narrowly, if one expects colleagues to be relatively selective in their reporting.

C. Penalties for Failure to Report and Immunity from Liability

Like child-abuse reporting laws,²⁴⁵ IPV reporting laws generally impose penalties for a failure to comply with reporting requirements, which include fines, misdemeanor convictions, or both.²⁴⁶ However, roughly half of the states with direct or indirect mandatory IPV reporting requirements provide immunity from civil liability to mandated reporters who file a report.²⁴⁷ Such

240. See N.H. REV. STAT. ANN. § 631:6 (LexisNexis 2007); COLO. REV. STAT. § 12-36-135 (2010) (has reason to believe); GA. CODE ANN. § 31-7-9 (2009) (cause to believe).

241. N.H. REV. STAT. ANN. § 631:6.

242. See, e.g., CAL. PENAL CODE § 11160 (West 2000 & Supp. 2011) (mandating report filing when a health practitioner “knows or reasonably suspects” that the criteria for filing a report have been met).

243. CAL. PENAL CODE § 11160(a) (“knows or reasonably suspects”); 20 ILL. COMP. STAT. ANN. § 2630/3.2 (West 2008) (“reasonably appears”); KY. REV. STAT. ANN. § 209A.030 (LexisNexis 2007) (“reasonable cause to suspect”); MINN. STAT. ANN. § 626.52 (West 2009) (“reasonable cause to believe”); N.C. GEN. STAT. § 90-21.20 (2009) (“if it appears”); N.D. CENT. CODE § 43-17-41 (2007) (“reasonable cause to suspect”); OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2010) (“reasonable cause to believe”); WIS. STAT. ANN. § 255.40 (West 2010) (“reasonable cause to believe”).

244. See, e.g., W. VA. CODE ANN. § 61-2-27 (LexisNexis 2010) (“lead a reasonable person to believe”).

245. See Hafemeister, *supra* note 27, at 854–56 (discussing child abuse laws).

246. James T.R. Jones, *Battered Spouses’ Damage Actions Against Non-Reporting Physicians*, 45 DEPAUL L. REV. 191, 201–03 (1996); see, e.g., ARIZ. REV. STAT. ANN. § 13-3806 (2010) (stating that failure to report constitutes a misdemeanor); DEL. CODE ANN. tit. 24, § 1762 (2005) (imposing a fine for failure to report).

247. ALASKA STAT. § 08.64.369 (2010) (requiring a report to be filed in good faith); CAL. PENAL CODE § 11160 (protecting reporters from any sanctions related to the filing of a report); COLO. REV. STAT. § 12-36-135 (2010) (requiring a report to be filed in good faith); DEL. CODE ANN. tit. 24, § 1762 (requiring a report to be filed in good faith); GA. CODE ANN. § 31-7-9 (2009) (requiring a report to be filed in good faith); IDAHO CODE ANN. § 39-1390(3) (2002) (providing immunity from any liability as long as the reporter acted in “reasonable

protection is similar to that provided to child abuse reporters.²⁴⁸ Fifteen of these states require that the report be filed in “good faith” before affording immunity,²⁴⁹ but four of the fifteen have adopted a presumption of good faith.²⁵⁰ Only North Dakota provides good-faith immunity for both filing and *not* filing a report—the other states provide immunity only for the filing of a report or for compliance with the law.²⁵¹ Finally, several states whose laws lack an explicit good-faith safe-harbor provision employ alternate protective language, such as: “any person . . . shall be held harmless from any civil liability for his *reasonable compliance*” with the reporting law.²⁵²

D. To Whom to Report

Whereas child abuse reporting requirements typically mandate that reports be directed to Child Protective Services (CPS) or a comparable social-service

compliance” with the statute); 20 ILL. COMP. STAT. ANN. 2630/3.2 (LexisNexis 2009) (providing immunity as long as the reporter acted in “reasonable compliance” with the statute); KY. REV. STAT. ANN. § 209.050 (requiring a report to be filed in good faith); LA. REV. STAT. ANN. § 46:2142 (2004) (requiring a report to be filed in good faith); MICH. COMP. LAWS ANN. § 750.411 (West 2004) (requiring a report to be filed in good faith); MINN. STAT. ANN. § 626.52 (requiring a report to be filed in good faith); MISS. CODE ANN. § 45-9-31 (West 2009 & Supp. 2010); MONT. CODE ANN. § 37-2-303 (2009) (adopting a presumption of good faith); N.C. GEN. STAT. § 90-21.20 (requiring a report to be filed in good faith); N.D. CENT. CODE § 43-17-41 (requiring a report to be filed in good faith); OHIO REV. CODE ANN. § 2921.22(e)(5) (providing immunity from any liability related to the filing of a report); OR. REV. STAT. ANN. § 146.760 (West 2003) (requiring a report to be filed in good faith); 18 PA. CONS. STAT. ANN. § 5106 (West 1983 & Supp. 2010); S.C. CODE ANN. § 16-3-1072 (2003) (adopting a presumption of good faith); S.D. CODIFIED LAWS § 23-13-12 (2006) (absolving a reporter from any liability related to the filing of a report); TENN. CODE ANN. § 36-3-621 (2010) (adopting a presumption of good faith); UTAH CODE ANN. § 26-23a-2 (LexisNexis 2007) (providing immunity from civil or criminal liability); VA. CODE ANN. § 54.1-2967 (2009) (providing immunity from any liability related to the filing of a report); W. VA. CODE ANN. § 61-2-27 (LexisNexis 2010) (requiring a report to be filed in good faith); WIS. STAT. ANN. § 255.40 (adopting a presumption of good faith).

248. Hafemeister, *supra* note 27, at 860. Virtually all states, however, only provide this immunity following a good-faith report of child abuse. *Id.*

249. *See supra* note 247 (noting that the fifteen states are Alaska, Colorado, Delaware, Georgia, Louisiana, Michigan, Minnesota, Montana, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, West Virginia, and Wisconsin).

250. *See supra* note 247 (identifying the four states as Montana, South Carolina, Tennessee, and Wisconsin). Although Virginia has no explicit good-faith requirement, its statute establishes that reporters will be immune absent a showing of bad faith or malicious intent. VA. CODE ANN. § 54.1-2967.

251. *See* N.D. CENT. CODE § 43-17-41(6).

252. IDAHO CODE ANN. § 39-1390(3) (emphasis added); *see also* 20 ILL. COMP. STAT. ANN. § 2630/3.2 (reasonable compliance); KY. REV. STAT. ANN. § 209.050 (providing immunity from liability if acting upon reasonable cause in the making of a report).

agency charged with responding to child abuse and neglect,²⁵³ almost all IPV-related reports must be filed with a law-enforcement agency.²⁵⁴ Reliance on the criminal-justice system, rather than a network of social service providers, is likely explained by three central characteristics that distinguish IPV and child abuse: (1) required reports of IPV are typically triggered by injuries that strongly suggest a criminal act without the parental immunity provisions that often shield child abuse from criminal prosecution; (2) IPV reporting laws primarily target the apprehension of perpetrators, rather than the delivery of protective assistance to indisputably dependent and vulnerable victims (children); and (3) social-service agencies are considered comparatively less well-equipped than law enforcement to directly respond to violent behavior between adults.

E. Responses to Filed Reports

Unlike child-abuse reporting laws, IPV-related, mandated reporting statutes rarely include a timetable for initiating and completing an investigation of reported IPV.²⁵⁵ Instead, law-enforcement agencies receiving these reports typically enjoy broad discretion regarding their response.²⁵⁶ This latitude may reflect lawmakers' greater confidence that a law-enforcement agency, as opposed to a social-services agency, will respond to such reports in a timely manner. However, a recurrent complaint is that law-enforcement officials fail to either take IPV reports seriously or respond promptly.²⁵⁷ Some officers

253. Hafemeister, *supra* note 27, at 858–59.

254. Mordini, *supra* note 58, at 324–25; *see, e.g.*, COLO. REV. STAT. § 12-36-135(1)(a) (2010) (stating that a healthcare provider must “report the injury at once to the police of the city, town, or city and county or the sheriff of the county in which the licensee is located”); *see also* CAL. PENAL CODE § 11160 (West 2000 & Supp. 2011); IDAHO CODE ANN. § 39-1390; MICH. COMP. LAWS ANN. § 750.311 (West 2004); MINN. STAT. ANN. § 750.411 (West 2004); N.H. REV. STAT. ANN. § 631:6 (LexisNexis 2000); N.Y. PENAL LAW § 265.25 (McKinney 2008); N.D. CENT. CODE § 43-17-41(3); OHIO REV. CODE ANN. § 2921.22(F)(1) (LexisNexis 2010); VT. STAT. ANN. tit. 13, § 4012 (2009); WIS. STAT. ANN. § 255.40 (West 2010).

255. Hafemeister, *supra* note 27, at 869–70.

256. *See, e.g.*, CAL. PENAL CODE § 11160; CONN. GEN. STAT. § 19a-490f (West 2009); N.J. STAT. ANN. § 2C:58-8 (West 2005).

257. *See, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751–74 (2005) (describing a father's kidnapping and murder of his three children after police failed to adequately enforce the mother's restraining order against him); *see also* Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 887 (2006) (“Historically, police have been slow to react to domestic calls.”); Litchman, *supra* note 9, at 767 (“[D]omestic violence is the single most frequent form of violence that police encounter on the job. However, despite the frequency with which police officers encounter domestic violence, the effectiveness of their response is often inadequate.” (footnotes omitted)). Police responses to domestic violence are often criticized for being insufficient. Sara R. Benson, *Failure to Arrest: A Pilot Study of Police Response to Domestic Violence in Rural Illinois*, 17 AM. U. J. GENDER SOC. POL'Y & L. 685, 687 (2009); Ariella Hyman, Dean Schillinger & Bernard Lo, *Laws Mandating*

have asserted that they do not receive sufficient training to prepare them to respond appropriately when they encounter domestic violence.²⁵⁸

Highlighting this problem, one study examined police manuals and found that they generally contain little guidance or established procedures for handling domestic violence cases or for responding to and enforcing protective orders.²⁵⁹ Instead, the manuals tend to advise police officers to respond with caution, including waiting until backup arrives before proceeding with an investigation.²⁶⁰ In addition to minimal training and guidance, officers are provided little incentive to respond vigorously to domestic violence cases. Promotions in law enforcement are purportedly based on the number of felony arrests made; therefore, spending time responding to domestic calls properly may effectively discourage police officer involvement—particularly when the call does not suggest felonious behavior—because doing so reduces the amount of time officers have to pursue more prestigious arrests to bolster their record.²⁶¹

F. Critique of Mandatory IPV Reporting

Those opposed to IPV reporting laws argue that they may generate frivolous reports (when filing criteria are too broad or the penalties for failing to file are too great) or spurious reports (when reports are used to obtain revenge or leverage following the dissolution of a relationship).²⁶² Although such concerns seem to be raised less frequently in the context of IPV than in the context of child abuse,²⁶³ inappropriate reporting of IPV does occur. One survey of Missouri judges found that over seventy-percent of them had “personally been involved in an adult abuse proceeding when an order of protection [had] been used for a purpose other than that stated in the

Reporting of Domestic Violence: Do They Promote Patient Well-Being?, 273 J. AM. MED. ASS'N. 1781, 1784 (1995). However, many years of training and an emphasis on the harmful consequences of IPV may be having an effect. See Angela R. Gover et al., *Law Enforcement Officers' Attitudes About Domestic Violence*, 17 VIOLENCE AGAINST WOMEN 619, 630 (2011) (reporting a recent exploratory survey of a large urban police department that found that police officers were well versed in the handling of IPV incidents and “supported treating domestic violence as a violent crime,” although they were concerned about their limited discretion when responding to domestic violence calls).

258. Litchman, *supra* note 9, at 781.

259. BUZAWA & BUZAWA, *supra* note 25, at 71.

260. *Id.* at 72.

261. *See id.* at 40.

262. *See* RESPECTING ACCURACY IN DOMESTIC ABUSE REPORTING, WITHOUT RESTRAINT: THE USE AND ABUSE OF DOMESTIC RESTRAINING ORDERS 2, 3, 6 (2008), available at <http://www.mediaradar.org/docs/RADARreport-VAWA-Restraining-Orders.pdf>.

263. *See* Hafemeister, *supra* note 27, at 890 (noting concerns that child-abuse reports are sometimes filed as a means to obtain child custody).

statute.”²⁶⁴ Judges have observed domestic partners misuse IPV reporting in an attempt to obtain custody of children, to generate sympathy during a divorce settlement, or even to retaliate against a partner’s prior filing of an IPV report.²⁶⁵

A second, more frequent criticism of mandatory IPV reporting is that it disempowers victims by limiting their ability to choose how to respond to the abuse.²⁶⁶ Critics note that women have endured a long history of paternalistic subjugation by a society that presumes them to be incompetent to make their own decisions, and such critics contend that mandatory IPV-reporting laws similarly categorize women as incompetent to decide how to respond to their IPV experiences.²⁶⁷ They maintain that victims of IPV are not analogous to abused children, who are highly dependent and vulnerable, lack decision-making capacity as a matter of law, and need proactive intervention to ensure prompt delivery of protective services.²⁶⁸ These critics maintain that IPV constitutes a complex social dynamic, wherein any number of viable reasons could result in victims not seeking intervention;²⁶⁹ furthermore, they note that a societal response in some instances may actually be harmful to the victims.²⁷⁰ Although the critics believe protective and social services should be made readily available to IPV victims, they typically oppose the imposition of automatic societal responses, such as mandatory reporting, and favor allowing the victim to direct what response, if any, occurs.²⁷¹ Some states have embraced this critique and attempt to provide IPV victims greater control over these situations by allowing them to block otherwise mandatory IPV

264. David H. Dunlap, *The Adult Abuse Act: Theory vs. Practice*, 64 UMKC L. REV. 681, 687 (1996) (internal quotation marks omitted).

265. BUZAWA & BUZAWA, *supra* note 25, at 197; Eve Buzawa, Gerald Hotaling & Andrew Klein, *The Response to Domestic Violence in a Model Court: Some Initial Findings and Implications*, 16 BEHAV. SCI. & LAW 185, 190 (1998).

266. Açıkalın, *supra* note 99, at 1059; Han, *supra* note 140, at 175; Miccio, *supra* note 61, at 242.

267. See *supra* notes 30–35 and accompanying text.

268. McFarlane, *supra* note 152, at 25–26.

269. Mordini, *supra* note 58, at 316 (noting that a victim of IPV may not want intervention if the victim is financially dependant on his or her abuser, if the victim has children who could witness a potential arrest, or if an arrest would be particularly stigmatizing in the victim’s community).

270. McFarlane, *supra* note 152, at 17.

271. See Gelles, *supra* note 105, at 788 (“[T]he prevailing sentiment, especially among advocates, is that . . . mandatory reporting systems are not appropriate in the case of violence against women.”); McFarlane, *supra* note 152, at 22–23, 27–29 (contending that the state is in a poor position to protect victims from retaliation after a report is made, and that victims will be discouraged from seeking medical treatment if they fear retaliation).

reports²⁷² or by requiring their affirmative consent before reports can be filed.²⁷³

Although not as widely expressed, another criticism of mandatory IPV-reporting laws is that the generated reports may be a relatively ineffective means of redressing IPV because assessing which party instigated the violence can be a difficult (if not impossible) task.²⁷⁴ Although one partner may have suffered a greater physical injury, which may have triggered a call for intervention, violence between the partners may have been occurring for an extended period of time, with both partners contributing to and bearing some responsibility for the violence in their relationship.²⁷⁵ The assessment of responsibility is complicated by the abused partner's refusal in some cases to confirm the occurrence of the abusive incident, which may even cross over into an affirmative defense of the abuser.²⁷⁶ Further, a negative interaction with law-enforcement officials may realign the victim with the abusive partner, making the victim resistant to intervention and perhaps less willing to call for assistance in the future.²⁷⁷ A mandatory IPV-reporting requirement may therefore fail to target the abusive party, exacerbate an already volatile situation, and place responding law-enforcement officials in a difficult and potentially counterproductive role.

272. See, e.g., N.H. REV. STAT. ANN. § 631:6(II) (2007) ("A person who has rendered treatment or assistance is excepted from the reporting provisions . . . if the person seeking or receiving treatment or other assistance: (a) is 18 years of age or older, (b) has been a victim of a sexual assault offense or abuse as defined in RSA 173-B:1, and (c) objects to the release of any information to law enforcement officials. This exception shall not apply if the sexual assault or abuse victim is also being treated for a gunshot wound or other serious bodily injury.").

273. See, e.g., OKLA. STAT. ANN. tit. 22, § 58C (West 2003 & Supp. 2011); 18 PA. CONS. STAT. ANN. § 5106 (West 1983 & Supp. 2010).

274. Lynn D. Wardle, *Marriage and Domestic Violence in the United States: New Perspectives About Legal Strategies to Combat Domestic Violence*, 15 ST. THOMAS L. REV. 791, 799 (2003). One consequence of the difficulty in assessing which party instigated the violence is that both parties may be arrested, which may only further compound the IPV victim's dilemma. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1680–81 (2004); Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613, 623 (2007); *supra* notes 411–18 and accompanying text.

275. Johnson, *supra* note 137, at 285 ("One of the surprising findings of Straus and his colleagues' national surveys was that women were evidently as likely to utilize violence in response to couple conflict as were men."). *But see* Lenore E. A. Walker, *Current Perspectives on Men Who Batter Women—Implications for Intervention and Treatment to Stop Violence Against Women: Comment on Gottman et al. (1995)*, 9 J. FAM. PSYCHOL. 264, 265 (1995) ("[M]ost battered women use violence in reaction to the abuse they experienced . . .").

276. See Richard B. Felson et al., *Reasons for Reporting and Not Reporting Domestic Violence to the Police*, 40 CRIMINOLOGY 617, 640 (2002) ("[T]hree factors inhibit victims from calling the police . . . : the desire for privacy, the desire to protect the offender, and . . . the fear of reprisal. Privacy is by far the most important factor inhibiting reporting an incident.").

277. See Mills, *supra* note 31, at 595.

Another critique of mandatory IPV-reporting laws, particularly those that target physicians, is that mandatory reports may lead abusive partners to prevent their victims from obtaining needed medical assistance.²⁷⁸ Alternatively, victims themselves may avoid seeking medical treatment out of fear that it will result in an IPV report, which may cause them embarrassment, lead to retaliation by their abusive partner, or have other negative effects.²⁷⁹

These laws may also adversely impact doctor-patient confidentiality.²⁸⁰ The AMA's ethical guidelines advocate for complete doctor-patient confidentiality, although they do provide an exception when the law requires disclosure of confidential information.²⁸¹ Not surprisingly, a study in California found that fifty-nine percent of primary care and emergency physicians "might not comply with the mandatory reporting law if a patient objected."²⁸² Some commentators argue that physicians can provide greater assistance to abuse victims by instead encouraging and empowering them to take affirmative steps on their own.²⁸³ A collaborative approach may also enhance victims' trust in their physicians, encouraging them to confide in their doctors.²⁸⁴

Finally, some commentators believe that mandatory reporting of IPV "is potentially the most dangerous" state-mandated intervention.²⁸⁵ One study found that more than half of domestic-violence perpetrators threaten violent retaliation if they are held criminally responsible for their behavior.²⁸⁶ Not surprisingly, fifty-two percent of women in another survey said they feared mandatory reporting would increase their risk of abuse.²⁸⁷ Further, this study determined that sixty-seven percent of women would be less willing to tell their physicians about abuse if they knew of mandatory reporting laws.²⁸⁸

278. Mordini, *supra* note 58, at 326–27.

279. *Id.*

280. ARIELLA HYMAN, FAM. VIOLENCE PREVENTION FUND, MANDATORY REPORTING OF DOMESTIC VIOLENCE BY HEALTH CARE PROVIDERS: A POLICY PAPER 5 (1997), available at http://www.futureswithoutviolence.org/userfiles/file/HealthCare/mandatory_policypaper.pdf.

281. CODE OF MED. ETHICS, Op. 5.05 (Am. Med. Assoc. 2010). These guidelines state that physicians who are legally required to disclose confidential information should notify the patients of the need to disclose, disclose the minimal amount of information possible, and, in some cases, lobby to change the law. *Id.*

282. Rodriguez et al., *supra* note 225, at 577.

283. See McFarlane, *supra* note 152, at 2.

284. See *id.* at 30 (positing that mandatory reporting statutes may dissuade battered women from trusting their doctors, while the absence of mandatory reporting statutes may encourage open communication and trust between doctors and their patients).

285. Mordini, *supra* note 58, at 324.

286. See Hyman, Shillinger & Lo, *supra* note 257, at 1783.

287. Andrea Carlson Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREV. MED. 279, 281 (2000).

288. *Id.*

In addition to the potential danger they pose, mandatory reporting laws may provide little meaningful relief to women in abusive relationships.²⁸⁹ As many as thirty percent of individuals charged with IPV continue to batter their victims while being prosecuted.²⁹⁰ Additionally, in one nationwide study of organizations dedicated to redressing domestic violence, eighty-six percent of the respondents believed that police respond to domestic-violence complaints ineffectively; seventy-one percent stated that domestic-violence cases are rarely prosecuted; and forty-two percent claimed that no perpetrator in their county had ever received a jail sentence for domestic violence.²⁹¹ Further, the authors of this study determined that only twenty-five to thirty percent of all domestic-violence calls receiving a police response had been reported as required by law.²⁹²

Despite the many concerns that critics have voiced about the mandatory reporting of IPV, it still has supporters.²⁹³ Proponents typically note two primary justifications for mandatory reporting laws: to remedy significant under-reporting and to identify otherwise difficult-to-detect and dangerous cases of IPV.²⁹⁴ Whereas the compulsory school enrollment and related mandatory vaccinations of child-abuse victims typically provide opportunities for third parties—such as teachers, other school officials, and doctors—to observe signs of abuse,²⁹⁵ adult victims of IPV are more easily isolated by their abusers, to the point where they no longer have daily or even weekly contact with third parties who can spot indications of abuse.²⁹⁶

Proponents of mandatory reporting maintain that reporting laws promote early intervention and protection of victims,²⁹⁷ offer counseling and other rehabilitative services to abusive partners to help them control their abusive conduct,²⁹⁸ help document a history of abuse in anticipation of future prosecution,²⁹⁹ and enhance data collection and research regarding the nature

289. *See id.*; McFarlane, *supra* note 152, at 22–23.

290. *See* Hyman, Shillinger & Lo, *supra* note 257, at 1783.

291. *Id.* at 1784.

292. *Id.*

293. McFarlane, *supra* note 152, at 32–34; Rodriguez et al., *supra* note 225, at 580.

294. McFarlane, *supra* note 152, at 33; Rousseve, *supra* note 202, at 449.

295. *See* Hafemeister, *supra* note 27, at 840.

296. *See* HINES & MALLEY-MORRISON, *supra* note 17, at 163 (arguing that isolation contributes to spousal abuse); *see also* Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 303 (2007) (explaining that isolation often obstructs a victim's ability to seek help).

297. Mills, *supra* note 31, at 564; Rousseve, *supra* note 202, at 449.

298. *See* Shelly Jackson, *Batterer Intervention Programs*, in BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE? 1, 1 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/195079.pdf>.

299. McFarlane, *supra* note 152, at 33.

and causes of IPV.³⁰⁰ Others argue that mandatory reporting “force[s] state actors to treat crimes against women in the same manner in which they treat other crimes.”³⁰¹

Arguably, assertions of misplaced paternalism may be less compelling to the extent that “battered spouse syndrome,” or an equivalent impairment, has debilitated the person experiencing IPV.³⁰² Indeed, increased manifestation of psychiatric disorders, including depression, is reported among some victims of IPV.³⁰³ These victims may be less capable of protecting themselves or looking out for their own interests.³⁰⁴ As noted, it has been hypothesized that women

300. See *id.*; Walker, *supra* note 275, at 264.

301. Mills, *supra* note 31, at 563.

302. See WALKER, *supra* note 17, at 214–15 (explaining that battered woman syndrome is present when a woman’s behavior focuses on minimizing injuries and preventing death at the hands of her abuser, rather than exiting the relationship). The presence of a mental illness has long justified state intervention in other contexts, notably with regard to the appointment of a guardian or conservator or the initiation of civil commitment. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 370–71 (3d ed. 2007).

303. Ronald C. Kessler et al., *Patterns and Mental Health Predictors of Domestic Violence in the United States: Results from the National Comorbidity Survey*, 24 INT’L J. L. & PSYCHIATRY 487, 487 (2001); see also LORRAINE M. HARTIK, IDENTIFICATION OF PERSONALITY CHARACTERISTICS AND SELF-CONCEPT FACTORS OF BATTERED WIVES 41 (1982) (finding that the battered wives in a study group “appear[ed] to be generally more maladjusted, with higher scores of psychosis, personality disorder, and neurosis factors. The group show[ed] overall less integration of personality when compared with the nonbattered group”); Bo Bergman & Bo Brismar, *A 5-Year Follow-up Study of 117 Battered Women*, 81 AM. J. PUB. HEALTH 1486, 1487 (1991) (examining medical records of battered women treated in a hospital over a fifteen-year period and determining that they were much more likely to seek hospital care for medical, gynecological, psychiatric, and unspecified disorders, in addition to traumatic injuries); Ann L. Coker et al., *Physical and Mental Health Effects of Intimate Partner Violence for Men and Women*, 23 AM. J. PREVENTIVE MED. 260, 260 (2002) (“For both men and women, physical IPV victimization was associated with increased risk of current poor health; depressive symptoms; substance use; and developing a chronic disease, chronic mental illness, and injury.”).

304. See *The Impact of Mental Illness on Society*, NAT’L INST. MENTAL HEALTH, U.S. GOV’T, http://www.masterdocs.com/fact_sheet_files/pdf/mental_illness.pdf (last visited July 14, 2011) (noting that “disability caused by major depression was found to be equivalent to blindness or paraplegia” and that “[m]ajor depression is the leading cause of disability (measured by the number of years lived with a disabling condition) worldwide among persons age 5 and older”); see also Daphna Levinson et al., *Associations of Serious Mental Illness with Earnings: Results from the WHO World Mental Health Surveys*, 197 BRIT. J. PSYCHIATRY 114, 114 (2010) (“Respondents with serious mental illness earned on average a third less than median earnings . . .”). But see ELYN R. SAKS, REFUSING CARE: FORCED TREATMENT AND THE RIGHTS OF THE MENTALLY ILL 10 (2002) (arguing that mental illness can compromise an individual’s capacity to make decisions in one context, but does not necessarily undercut the full range of a person’s decision-making capacities). Saks notes that “giving the impaired patient freedom to choose may bolster her ability to choose well and wisely. The less than fully autonomous agent may become more autonomous when she is treated as though she were autonomous.” *Id.* (emphasis in original). For a discussion of the role of mental illness among IPV victims and the

who experience chronic abuse can develop a condition of “learned helplessness” over time that prevents them from leaving abusive relationships; this condition is commonly referred to as “battered woman syndrome” or, most recently, “battered spouse” or “battered person” syndrome.³⁰⁵ This syndrome is now widely viewed as a type of post-traumatic stress disorder, and its presence has been cited to defend battered spouses (particularly women) who injure or kill their batterer.³⁰⁶ Although somewhat controversial when offered as a criminal defense,³⁰⁷ the presence of an IPV-related disabling psychiatric disorder may provide a stronger rationale for mandatory IPV reporting because it can explain a battered partner’s failure to leave an abusive relationship and the necessity for intervention.³⁰⁸

Relatedly, some argue that the extreme domination some abusive individuals exercise over their victims justifies intervention.³⁰⁹ Proponents of this line of reasoning assert that the battered intimate partner is essentially a hostage who is isolated from ordinary means of obtaining help, particularly when the victim has dependent children living in the home.³¹⁰ Because the abuser may place the victim in a state of helpless isolation by employing extreme isolation measures such as hiding car keys, forcing the victim to remain in the house,

need for caution before assuming they lack decision-making capacity, see Thomas L. Hafemeister & Rebecca Vallas, *Intimate Partner Violence and Victims with a Mental Disorder: What to Do When the Choices You’ve Got Are Bad Ones and Screaming for Help Seems to Make Them Worse* 5–8 (Aug. 3, 2010) (unpublished manuscript) (on file with author).

305. Karyn M. Plumm & Cheryl A. Terrance, *Battered Women Who Kill: The Impact of Expert Testimony and Empathy Induction in the Courtroom*, 15 VIOLENCE AGAINST WOMEN 186, 187 (2009); accord WALKER, *supra* note 17, at 10, 214–15; see *supra* notes 141–42 and accompanying text.

306. Phyllis Goldfarb, *Intimacy and Injury: Legal Interventions for Battered Women*, in THE HANDBOOK OF WOMEN, PSYCHOLOGY, AND THE LAW 212, 221 (Andrea Barnes ed., 2005); Loring Jones, Margaret Hughes & Ulrike Unterstaller, *Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 TRAUMA, VIOLENCE, & ABUSE 99, 99–100 (2001) (explaining that many battered women need treatment for PTSD, not just depression or other psychological disorders); Plumm & Terrance, *supra* note 305, at 187.

307. BARNETT ET AL., *supra* note 28, at 291–93. *But see* Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 131 (2010) (“[Battered spouse syndrome as a] defense may have also received a more sympathetic response from judges and jurors because the defendants in these cases often attacked individuals who had verbally or physically battered them . . .”).

308. *But see* Mills, *supra* note 31, at 595 (“Mandatory interventions [presume] state actors are incapable of distinguishing between battered women who are truly suffering from ‘learned helplessness’ and battered women who are capable of making reasoned decisions about which healing strategies to pursue.”).

309. Karen Tracy, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 487 (1997).

310. *Id.*

and disconnecting the phone line, some believe that reporting laws for IPV are appropriate.³¹¹

In attempting to resolve this debate, it is important to recall the two basic and relatively distinguishable forms of IPV—patriarchal terrorism and common couple violence—discussed earlier.³¹² Social-science research suggests that patriarchal terrorism (more commonly referred to today as “intimate terrorism” or “intimate partner terrorism”)³¹³ is likely to leave victims debilitated, isolated, unable to take steps to protect themselves, and at considerable risk of future harm.³¹⁴ In contrast, common couple violence (more frequently referred to as “situational couple violence” today)³¹⁵ generally does not leave victims highly vulnerable, subject to escalating violence, incapable of seeking assistance, or in need of medical treatment.³¹⁶

For incidents of intimate partner terrorism, state intervention may be particularly appropriate as a means to protect the victims’ well-being.³¹⁷ In these cases, the victims (and any children involved) are at great risk because they are unlikely to be able to escape, avoid violence, or otherwise exercise their autonomy.³¹⁸ Intervention is typically less imperative for situational couple violence and is more likely to be counterproductive and contrary to the victims’ wishes.³¹⁹ For situational couple violence, it will generally be

311. *Id.*; see also Julianne Toohey, *Domestic Violence and Rape*, 92 MED. CLINICS N. AM. 1239, 1247–48 (2008) (noting that it was not until recently that it was mandatory for healthcare providers to report child abuse and that the same laws should be enacted for battered women).

312. See *supra* text accompanying notes 157–62.

313. See Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322, 322–23 (2005). This form of IPV is characterized by “systematic male violence.” Kelsey Hegarty, Mary Sheehan & Cynthia Schonfeld, *A Multidimensional Definition of Partner Abuse: Development and Preliminary Validation of the Composite Abuse Scale*, 14 J. FAM. VIOLENCE 399, 400 (1999). It is also “embedded in a larger context of control tactics.” Johnson, *supra* note 137, at 291; see *supra* text accompanying notes 144–48.

314. See Johnson, *supra* note 137, at 287–88; see also Hegarty, Sheehan & Schonfeld, *supra* note 313, at 401 (“Partner abuse . . . is best understood as a chronic syndrome that is characterized not by the episodes of violence that punctuate the problem, but by the emotional abuse that is used by the perpetrator to maintain control over his partner.” (citation omitted)).

315. See Johnson & Leone, *supra* note 313, at 322–33. This form of IPV is more widespread but less focused on control as it tends to “erupt[] . . . from particular conflicts rather than from a general intent to control one’s partner.” Johnson, *supra* note 137, at 291. It usually consists of sporadic minor violence. Hegarty, Sheehan & Schonfeld, *supra* note 313, at 400; see *supra* text accompanying notes 158–62.

316. See Johnson, *supra* note 137, at 286, 289.

317. See *id.*

318. See *id.* at 284, 287–88 (explaining that a defining feature of patriarchal terrorism is the husband’s desire to exercise control over his wife by any means possible).

319. See Felson et al., *supra* note 276, at 620 (“The incentives for calling the police should vary depending on the seriousness of the assault The incentives should be greater when the assault is more serious, because the desire for protection and retribution should be greater.”)

inappropriate to employ highly proactive reporting laws that set a series of required investigations and responses in motion.³²⁰

Although not perfect, medical injuries can be a relatively reliable indicator of intimate partner terrorism.³²¹ Healthcare providers, particularly those staffing emergency rooms whose medical assistance may be relatively unavoidable, can thus be appropriately charged with reporting this form of IPV.³²² In addition, mental-health professionals may receive relatively reliable evidence of the domination and control associated with intimate partner terrorism in the course of providing their clients with services and may note a victim's inability to take protective measures on his or her own behalf.³²³ Just as these professionals are charged with reporting child abuse,³²⁴ it may be appropriate to require mental-health professionals to report this form of IPV as well.³²⁵ As other professionals are less likely to be presented with relatively reliable evidence of intimate partner terrorism, they should be encouraged to

(internal quotation marks omitted)); Johnson, *supra* note 137, at 292 (“[A]dvice . . . based on a mistaken assumption of impending terrorism may do some women a great disservice.”).

320. Hafemeister, *supra* note 27, at 866–84 (discussing the many agencies and state actors that become involved when child abuse reports are filed). This is not to suggest that this form of IPV is not a concern and that society should not provide services to address it (including readily available counseling and a diverse range of social services to ameliorate the underlying problems and conflicts that may have contributed to this violence), but rather that mandatory reporting laws should instead be focused on detecting intimate partner terrorism.

321. See Johnson, *supra* note 137, at 287 (discussing the frequency of intimate-partner-terrorism beatings, which occur on average more than once a week).

322. See *supra* text accompanying notes 221, 231–36 (discussing how providers are required to file reports in many states for injuries often associated with IPV).

323. See Jones, Hughes & Unterstaller, *supra* note 306, at 113–15 (noting that medical and mental health providers must know “how to intervene” when a victim is experiencing IPV-related harm).

324. Hafemeister, *supra* note 27, at 851–52.

325. Mental health providers are already widely required to engage in assessments of future dangerousness under existing *Tarasoff* doctrines and child-abuse reporting requirements, and are routinely employed to provide assessments of decision-making capacity. See MELTON ET AL., *supra* note 302, at 81–82 (noting that “[e]very state . . . provides that clinicians who observe or suspect child abuse must notify the appropriate agency, even if the information is obtained through a confidential relationship” and that a clinician who fails to warn the agency of the danger faces monetary liability (footnotes omitted)); Barry Rosenfeld, *The Psychology of Competence and Informed Consent: Understanding Decision-Making with Regard to Clinical Research*, 30 *FORDHAM URB. L.J.* 173, 176 (2002) (“[D]ecisions regarding a patient’s decision-making capacity are often heavily influenced by the input and opinions of a psychologist or psychiatrist. Most judges look toward mental health professionals for guidance to determine when an impairment exists and the extent of such an impairment.” (emphasis added) (footnotes omitted)). *But see* Hafemeister, *supra* note 27, at 852 (“One group of professionals for whom designation as a mandated reporter [of child abuse] has proven particularly controversial involves mental health professionals.” (footnote omitted)).

report related suspicions that arise in the course of their duties, but should not be mandated to do so.

The criteria for filing such a report should supplement and generally parallel the criteria regarding various physical injuries that must already be reported in most states.³²⁶ They should encompass specific indicators of intimate partner terrorism, such as non-accidental or intentional injuries, injury caused by the use of violence, or injuries caused by a weapon. Although more controversial due to the subjective nature of the assessment, legislators should also consider including criteria that would mandate reporting when IPV is believed to have occurred and the victim is deemed incapable of taking actions to curb or avoid this abuse. However, because of the intrusive and more speculative nature of these reports, legislators should only require reports when the mandated reporter has a reasonable personal belief (a relatively high standard) that intimate partner terrorism occurred.³²⁷

The development of screening instruments that can readily and reliably detect intimate partner terrorism when placed in the hands of these professionals is a critical component of imposing this latter reporting requirement. Mere supposition is generally not a sufficient basis to interject society into the private affairs of intimate partners, particularly when the purported adult victim has not requested intervention.³²⁸ Fortunately, the development of such instruments has progressed,³²⁹ although they need further refinement before professionals can use them to reliably identify intimate partner terrorism.³³⁰ Only when a sufficiently reliable instrument is available should this reporting requirement of a subjective belief of the occurrence of intimate partner terrorism be imposed.

326. See *supra* text accompanying notes 231–36.

327. See *supra* notes 241, 244 and accompanying text.

328. See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (invalidating a Texas law criminalizing homosexual acts and noting that “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”).

329. See, e.g., Campbell et al., *supra* note 130, at 1089–90 (studying risk factors of IPV); Judy C. Chang et al., *Partner Violence Screening in Mental Health*, 33 GEN. HOSP. PSYCHIATRY 58, 62–64 (2011); Hegarty, Sheehan & Schonfeld, *supra* note 313, at 404–14 (interpreting factors and abuse categories based on a questionnaire); Demetrios N. Kyriacou et al., *Risk Factors for Injury to Women from Domestic Violence*, 341 NEW ENG. J. MED. 1892, 1892–98 (1999); Robert L. Peralta & Michael F. Fleming, *Screening for Intimate Partner Violence in a Primary Care Setting: The Validity of “Feeling Safe at Home” and Prevalence Results*, 16 J. AM. BOARD FAM. PRAC. 525, 525 (2003); Rebecca F. Rabin et al., *Intimate Partner Violence Screening Tools: A Systematic Review*, 36 AM. J. PREVENTIVE MED. 439, 439 (2009); Mieko Yoshihama, *Domestic Violence Against Women of Japanese Descent in Los Angeles: Two Methods of Estimating Prevalence*, 5 VIOLENCE AGAINST WOMEN 869, 875–77 (1999).

330. See Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 574–80 (2010).

Another key question is who should receive mandated reports of intimate partner terrorism. As discussed, almost all IPV-related mandated reports are currently filed with a law-enforcement agency because such agencies can readily target the abusive individual (often by removing this person from the home).³³¹ This is particularly appropriate when mandated reporting is directed at intimate partner terrorism, where the abusive individual tends to be a chronic offender and the victim, albeit at considerable risk, is a relatively self-sufficient adult who will not need to rely on social-service assistance to maintain himself or herself and any dependent children who live in the home.

At the same time, to the extent that local law-enforcement officials have proven incapable of adequately and appropriately handling IPV-related mandated reports, the justification for mandated reporting is considerably diminished.³³² Proponents should give considerable attention to ensuring that these officials have the training and resources needed to handle these sensitive and potentially dangerous situations.

A more difficult issue to address is whether the victim should be allowed to block mandated reporting of IPV-related intimate partner terrorism. As discussed, at least three states allow victims to prevent IPV reports from being filed.³³³ But because victims of intimate partner terrorism may be under considerable pressure from their abusive partner to block these reports and may be otherwise unable to protect themselves,³³⁴ allowing these victims to halt mandated filings may be problematic. However, societal intervention over the objection of the person who is the purported beneficiary carries a considerable risk of harm to the victim, and is generally not permitted, absent procedural checks to respect and protect the person's autonomy and dignity.³³⁵ These

331. See *supra* note 254 and accompanying text.

332. See *supra* notes 258–60 and accompanying text.

333. See *supra* notes 272–73 and accompanying text.

334. See *supra* notes 269–70, 276 and accompanying text.

335. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) (“[O]ur notions of liberty are inextricably entwined with our idea of physical freedom and self-determination”); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (“A finding of ‘mental illness’ alone cannot justify a State’s locking a person up against his will and keeping him indefinitely in simple custodial confinement May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? . . . [T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.”); MELTON ET AL., *supra* note 302, at 368 (noting that “mental disability does not, in and of itself, equate with or even imply incompetency” and that mentally disabled persons also “have the right to self-determination absent compelling reasons to the contrary”); CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISNER, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 924 (5th ed. 2009) (“We value autonomy because we assume people are ordinarily the best judges of their own interests and because, even if they are not, taking away their opportunity to decide would show insufficient respect for the person.”); Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L.

procedural checks are particularly appropriate for victims of IPV and for individuals with a psychiatric disorder—two populations that have historically experienced deprivations of liberty and subjugations of their rights, ostensibly to promote and protect their interests.³³⁶

As a result, it seems appropriate for a mandated reporter to first inform the victim (when possible) that a report of intimate partner terrorism is going to be filed, thereby giving the victim an opportunity to refute what appears to be evidence of this type of IPV. However, because batterers who engage in intimate partner terrorism can effectively deny their victims an opportunity to protect themselves,³³⁷ these victims should not be able to block report filings if a mandated reporter remains convinced that intimate partner terrorism is occurring. Further, the mandated reporter should not be expected to provide this notice to the victim if the reporter does not have a reasonable and timely opportunity to meet with the victim alone, or if circumstances exist that place either the victim or the reporter at risk, such as the abuser being present. It is recognized, however, that this scenario may leave mandated reporters in an uncomfortable and delicate situation that leaves them uncertain whether to file these reports; this scenario is particularly likely if the victim steadfastly denies IPV despite strong evidence to the contrary. As a result, it is imperative to devise appropriate screening mechanisms and to protect mandated reporters with good-faith immunity.³³⁸

REV. 1190, 1231–32 (1974) (“Requiring a competent individual to accept treatment for his own benefit should be viewed as an additional deprivation of liberty rather than as a benefit . . .”).

336. Hafemeister & Vallas, *supra* note 304, at 52 (“Crafting an appropriate societal response to meet the needs of individuals with a mental disorder who suffer IPV is an incredibly challenging and nuanced task. Any response needs to recognize the centuries of discrimination, stigma, and second-class status that individuals with a mental disorder have experienced. It is imperative that the dignity and autonomy of such individuals be respected whenever possible, and that they be encouraged to assume responsibility for their well-being and recovery. They are not the equivalent of children, and although their cognitive, volitional, and emotional capacities may be impaired, unless they have been determined to lack decision-making capacity, their relationship choices should be respected. Like most people, their interpersonal relationships tend to be relatively complex and of great, if not greater, importance to them. Further, respecting the choices they make with regard to these relationships may be integrally linked to their mental health.”); *From Privileges to Rights: People Labeled with Psychiatric Disabilities Speak for Themselves*, NAT’L COUNCIL ON DISABILITY (Jan. 20, 2000), <http://www.ncd.gov/publications/2000/Jan202000> (“People with psychiatric disabilities are routinely deprived of their rights in a way no other disability group has been The testimony [received] pointed to the inescapable fact that people with psychiatric disabilities are systematically and routinely deprived of their rights, and treated as less than full citizens or full human beings.”); *see supra* notes 266–72 and accompanying text.

337. *See supra* notes 309–17 and accompanying text.

338. *See supra* notes 247–52 and accompanying text (discussing good-faith reporting requirements).

Notwithstanding the justifications for implementing mandated reporting of intimate partner terrorism, exclusive reliance on this mechanism in lieu of social services should be avoided. Society, unfortunately, tends to address a range of social ills by relying heavily on law enforcement—a relatively well-funded and preexisting mechanism—notwithstanding that law-enforcement officers and others caution that these extended duties are outside their expertise, may distract them from their established duties, and may leave them unable to accomplish what society expects of them.³³⁹ Mandated IPV reporting to law-enforcement officials should not be viewed as a panacea for combating IPV. Even when officers receive appropriate training for IPV issues, their efforts should be accompanied by a range of services designed to assist the victim, so that responses do not singularly focus on punishing the offender and fail to provide other forms of assistance that may be more productive.³⁴⁰ Finally, the risks and adverse consequences associated with situational couple violence should not be overlooked, with needed services made readily available to these victims as well.

V. OTHER EFFORTS TO COMBAT IPV

Whether the result of mandatory reports or other mechanisms, the involvement of the criminal justice system tends to be the next step in society's

339. See Carolyn Hoyle & Andrew Sanders, *Police Response to Domestic Violence*, 40 BRIT. J. CRIMINOLOGY 14, 27 (2000); Morley & Mullender, *supra* note 4, at 276 (“Only a very small proportion of women see the police as the best means of stopping men’s violence; many more believe provision of shelters and public education to be more desirable.”); Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 262 (1984) (“Police have been typically reluctant to make arrests for domestic violence . . . unless victims demand an arrest, the suspect insults the officer, or other factors are present.” (citations omitted)); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) (“[P]olice are largely indifferent to domestic violence, and . . . attach to it a very low priority.”); see *supra* text accompanying notes 257–60. But see R. Emerson Dobash & Russell P. Dobash, *Evaluating Criminal Justice Interventions for Domestic Violence*, 46 CRIME & DELINQ. 252, 266 (2000) (stating that “[a]ll forms of criminal justice intervention appear to have some effect on the reduction and/or elimination of men’s use of violence in intimate relationships,” but noting that judicially mandated programs are more often “associated with an elimination of violence”).

340. Hoyle & Sanders, *supra* note 339, at 27, 32 (“[A]rrest and prosecution can give victims the confidence to ‘do something’ about violence, . . . but it may have little or no effect unless it is coupled with further, more directly supportive, action.”); see also Larry Bennett et al., *Effectiveness of Hotline, Advocacy, Counseling, and Shelter Services for Victims of Domestic Violence: A Statewide Evaluation*, 19 J. INTERPERSONAL VIOLENCE 815, 817 (2004) (reporting that hotline, counseling, advocacy, and shelter programs all provided positive assistance for domestic-violence victims); Mangai Natarajan, *Women Police Stations as a Dispute Processing System: The Tamil Nadu Experience in Dealing with Dowry-Related Domestic Violence Cases*, 16 J. WOMEN & CRIM. JUST. 87, 104 (2005) (finding that dispute-resolution techniques can help resolve disputes between intimate partners).

response to IPV.³⁴¹ This section describes various roles the criminal justice system has played in conjunction with IPV and evaluates their effectiveness.

A. PENAL PROVISIONS AND GREATER INVOLVEMENT OF THE CRIMINAL JUSTICE SYSTEM

After initially focusing on opening shelters, safe houses, and domestic-violence hotlines, recent efforts to combat IPV have shifted to increase the involvement of the criminal justice system.³⁴² These efforts have included utilizing the criminal law to both punish and deter abusive individuals, as well as to provide protection to abused domestic partners.³⁴³ Supporters seek to employ the criminal justice system's normative function to send a powerful message that IPV is unacceptable, while giving victims access to needed resources.³⁴⁴ Measures include enacting laws to facilitate the prosecution and punishment of domestic violence³⁴⁵ by removing impediments to prosecuting "marital rape,"³⁴⁶ criminalizing stalking,³⁴⁷ enforcing mandatory-arrest laws,³⁴⁸ implementing "no-drop" prosecution policies,³⁴⁹ mandating IPV training and guidelines for prosecutors, police, and judges,³⁵⁰ creating mechanisms to monitor and control sex offenders (such as

341. See *supra* text accompanying notes 196–216.

342. Murphy, *supra* note 97, at 500–01. Some believe that this shift grew as the political and legal clout of women—the most frequent target of IPV—increased. *Id.* at 501; see also Fran S. Danis, *The Criminalization of Domestic Violence: What Social Workers Need to Know*, 48 SOC. WORK 237, 237 (2003) ("During the past 20 years, the social science and criminal justice fields developed interventions designed to deter abuse and rehabilitate abusers so they will not abuse again. Central to these interventions has been the increasing role of the criminal justice system to enforce laws that regard the use of violence against one's intimate partner as a criminal act.").

343. Murphy, *supra* note 97, at 501–02.

344. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1897–98 (1996); Elizabeth L. MacDowell, *When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism*, 21 TEX. J. WOMEN & L. (forthcoming Spring 2011) (manuscript at 10–11).

345. See EVE CLARIAN ZAMORA, BATTERED WOMEN'S JUSTICE PROJECT, ENHANCED PENALTIES FOR DOMESTIC VIOLENCE 1–4 (2005), available at http://www.bwjp.org/files/bwjp/articles/Enhanced_Penalties_2005.pdf (discussing enhanced state penalties for domestic violence offenses as a deterrent to this behavior).

346. See *infra* Part V.B.

347. See *infra* Part V.C.

348. See *infra* Part V.D.

349. See *infra* Part V.E.

350. Murphy, *supra* note 97, at 502–03. Some states require police agencies to create guidelines for arrests and investigations of abuse, whereas others mandate victim assistance and protection. See generally, e.g., N.J. OFFICE OF THE ATTORNEY GEN., DOMESTIC VIOLENCE: GUIDELINES ON POLICE RESPONSE PROCEDURES IN DOMESTIC VIOLENCE CASES (2004), available at <http://www.state.nj.us/lps/dcj/agguide/3dvpolsr.pdf>.

sex-offender registration and notification and sexually violent predator laws),³⁵¹ and enhancing the enforceability of protective orders.³⁵²

These efforts to strengthen the criminal justice system's response to IPV, however, have also raised concerns. Critics have argued that a criminal-justice-based approach will have a disparate impact on offenders in poor and minority communities, who are more likely to be subject to prosecution and conviction in general, notwithstanding the society-wide nature of IPV.³⁵³ Additionally, although strongly disputed, some scholars assert that the increased criminalization of domestic violence is mainly symbolic and unlikely to bring about substantive change, with the basic acts underlying IPV, such as assault and battery, already being illegal.³⁵⁴ More troubling is a lack of

351. See, e.g., N.J. STAT. ANN. § 2C:7-1 (West 2005 & Supp. 2010). In the 1990s, the United States saw a large increase in the number of laws with an emphasis on sex-offender registration, community notification, and sexually violent predator civil commitment. Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U.L. REV. 1203, 1211–12, 1216 (1998); Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 75–76 (2000). These laws have both supporters and detractors. Compare Press Release, Dep't of Justice, Department of Justice Announces Proposed National Guidelines for Sex Offender Registration and Notification, and \$25 Million in Grants (May 17, 2007), available at http://www.justice.gov/opa/pr/2007/May/07_ag_366.html (reviewing the guidelines' direction on the implementation of victim-notification and offender-registration requirements, articulating that the guidelines will help to "strengthen[] law enforcement's ability to track and monitor sex offenders"), with ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 3* (2006) (arguing that legislation such as civil-commitment laws and Megan's law are "well intentioned . . . [but] ill-conceived, bad policy" because such laws are both ineffective and distort society's understanding of sexual violence). The resolution of this debate, however, is beyond the scope of this Article.

352. Murphy, *supra* note 97, at 502.

353. See, e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 801 (2001) ("[P]olice often exercise their power in ways that reinforce . . . the disadvantages experienced by members of poor and minor communities . . ."); see also DAG MACLEOD ET AL., *BATTERER INTERVENTION SYSTEMS IN CALIFORNIA: AN EVALUATION* 54–55 (2009), available at <http://courts.ca.gov/documents/batterer-execsummary.pdf> (finding men sentenced to batterer intervention programs are disproportionately poor and Hispanic); Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 323 (2005) (noting that minorities fear that mandatory-arrest and "no drop" policies will result in "disparate policing, racial profiling, and police brutality").

354. Burke, *supra* note 20, at 561–64; see also Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1415 (2005) (noting that statutory definitions of IPV are inadequate because they do not target aspects other than physical abuse). Supporters of these efforts counter that there is a significant difference between violent acts committed by an intimate partner and those committed by a stranger. See Tuerkheimer, *supra* note 274, at 617–78. They assert that prior to these criminal code additions, existing law only punished isolated incidents of physical violence, such as battery, and failed to adequately address the broad range of other behaviors associated with IPV or its debilitating effects on victims, such as psychological and economic control, intimidation, domination,

evidence that these measures have been effective; one widely cited review asserts that “research and evaluation . . . have generated weak or inconsistent evidence of deterrent effects on either repeat victimization or repeat offending. For every study that shows promising results, one or more show either no effect or even negative results that increase the risks to victims.”³⁵⁵ The ineffectiveness of these measures has been attributed, in part, to the complexity of the underlying behavior, the relationships involved, and the challenge of implementing and applying an appropriate response.³⁵⁶ In general, the criminalization of domestic violence and IPV in particular has engendered considerable debate.

B. Removal of “Marital Rape” Immunity

One IPV-related area of criminal prosecution that has been particularly controversial is marital rape.³⁵⁷ Until only recently, many states did not consider nonconsensual sex within a marriage to be a criminal offense based on the premise that marriage implied an “irrevocable consent to sex” with

isolation, fear, psychological abuse, and coercion. *See id.* at 618; *see also* Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 8–10 (2007).

355. JEFFREY FAGAN, U.S. DEP’T OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 1 (1996), *available at* <http://www.ncjrs.gov/pdffiles/crimdom.pdf>; *see also* Danis, *supra* note 342, at 242 (“Research addressing the effectiveness of the criminalization of domestic violence has yielded inconsistent and inconclusive results.”); *id.* at 239 (“Serious unintended consequences can occur as a result of police interventions, including retaliation against victims by their abusers, dual arrests, and the potential lack of cultural sensitivity to victims and perpetrators.” (citing FAGAN, *supra*)); Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 43, 43 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (“[T]he movement to arrest batterers may be doing more harm than good. Research in six cities testing the ‘arrest works best’ premise in deterring future assaults has produced complex and conflicting results. Police and policymakers are now faced with the dilemma that arrest may help some victims at the expense of others and that arrest may assist the victim in the short term but facilitate further violence in the long term.”).

356. FAGAN, *supra* note 355, at 1 (“Domestic violence and partner assault are complex behaviors. The range of sanctions for offenders has been limited, their deterrent effects mitigated by social and contextual factors, and their implementation constrained by practical operational contingencies.”); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1507 (1998) (“Unless we take a harder look at punishment in domestic violence cases, we fool ourselves into thinking that well-intentioned arrest and prosecution policies alone will sufficiently curb domestic violence.”); Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680, 680 (1992) (finding that arrests did not reduce domestic-violence incidents and questioning their effect on deterrence).

357. *See* Leonard Kerp & Cheryl Kerp, *Beyond the Normal Ebb and Flow . . . Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389, 391 (1994).

one's marital partner, thus rendering marital rape a legal impossibility.³⁵⁸ Due, in part, to reports that "one in seven married or formerly married women [had] been raped by her husband," states began to eliminate the marital rape exception from their criminal laws during the 1980s.³⁵⁹ By 2005, all fifty states had criminalized marital rape.³⁶⁰

However, most states continue to either "criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions."³⁶¹ For example, in South Carolina, unless a married couple lives apart, one partner cannot be guilty of criminal sexual conduct towards the other.³⁶² Other policies adopted by states that weaken their responses to marital rape include establishing shorter statutes of limitations for marital rape³⁶³ and requiring a showing of actual force.³⁶⁴ In short, pursuing a criminal prosecution for marital rape is still difficult in many jurisdictions.³⁶⁵

358. *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1533 (1993) [hereinafter *Developments*].

359. *Id.*

360. Rousseve, *supra* note 202, at 435.

361. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000) (citations omitted); see also *Developments*, *supra* note 358, at 1533–34 (finding that only a few states have really abolished the distinction between marital rape and rape entirely, as most states have lower levels of punishment for marital rape).

362. S.C. CODE ANN. § 16-3-658 (2003 & Supp. 2010). The conduct must also constitute first or second-degree criminal sexual conduct and must be reported within thirty days of its occurrence to an appropriate law-enforcement authority. *Id.*; see also *Developments*, *supra* note 358, at 1534 (noting that in some states marital rape cannot be prosecuted unless the couple is separated); see, e.g., MISS. CODE ANN. § 97-3-99 (West 2005 & Supp. 2009).

363. See, e.g., S.C. CODE ANN. § 16-3-615.

364. See, e.g., MISS. CODE ANN. § 97-3-99. For a summary of the barriers to marital rape prosecution and a listing of state statutes, see Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269, 282–84 (2007).

365. Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 360 (1995) (noting that convictions for marital rape are sparse); see also Woolley, *supra* note 364, at 270 ("[M]arital rape is a unique problem that encompasses both physical violence and the psychological trauma of being raped by someone who has taken marriage vows to love and honor his or her spouse. Thus a comprehensive framework for marital rape must include aspects of the emotional and physical cruelty, as well as the exposure of family privacy, that often accompanies domestic violence. Additionally marital rape laws must include a reassessment of traditional notions that marriage represents implied consent and the unique difficulties of evidentiary proof in prosecuting marital rape.").

C. Stalking Statutes

Another area in which IPV has attracted greater criminal-law attention involves so-called stalking statutes. Some studies have shown that approximately half of the women who leave violent relationships are later stalked by the abusive individual.³⁶⁶ Additionally, ninety percent of all females killed by husbands or boyfriends were stalked for a period of time before they were killed.³⁶⁷ One report revealed that “an estimated 3.4 million persons [in the United States] age 18 or older were victims of stalking” over a twelve-month period, which is 14 of every 1000 adults.³⁶⁸ Almost half of the victims face a minimum of one unwanted contact each week, and eleven percent experience the stalking for five or more years.³⁶⁹ Stalking can be emotionally terrorizing to victims, especially as it is often associated with acts of physical violence.³⁷⁰ As a result, many victims constantly worry that the stalker may be nearby and ready to harm them.³⁷¹ This fear can disrupt the victim’s life and lead him or her to avoid answering phone calls, quit his or her job, or relocate to a different residence.³⁷²

In the 1980s and 1990s, celebrity stalking garnered considerable media attention.³⁷³ The existing legal structure provided little real protection to victims,³⁷⁴ as the burden of obtaining and enforcing a protective order fell largely on the victim.³⁷⁵ Additionally, criminal statutes originally did not permit prosecution until the victim was actually physically assaulted.³⁷⁶ The

366. *Developments, supra* note 358, at 1534.

367. BUZAWA & BUZAWA, *supra* note 25, at 226.

368. KATRINA BAUM ET AL., U.S. DEP’T OF JUSTICE, STALKING VICTIMIZATION IN THE UNITED STATES I (2001), available at <http://www.ovw.usdoj.gov/docs/stalkingvictimization.pdf>.

369. *Id.* Approximately 2.4 million individuals are victims of harassment. *Id.* at 2.

370. *Developments, supra* note 358, at 1534; see also BAUM ET AL., *supra* note 368, at 6–7 & tbl.10 (noting that nine percent of stalking victims feared they would die as a result, twenty-nine percent feared the stalking would never stop, and more than half “feared bodily harm to themselves, their child, or another family member”). Twelve percent of surveyed stalking victims were hit, slapped, or knocked down; six percent had a family member attacked; almost 139,000 victims were attacked with a weapon; and nearly 279,000 victims were injured in an attack, with approximately one in five sustaining serious injuries. *Id.* at 8.

371. Susan Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 525 (1993).

372. *Id.* at 531; see also BAUM ET AL., *supra* note 368, at 6 (finding that 21.6% of stalking victims changed their daily schedules, 18.1% stayed with family members, 16.7% took leave from work or school, 13.4% changed their travel routes, 9.5% left or changed their job or school, and one in seven moved).

373. See Renée Römkens, *Protecting Prosecution: Exploring the Powers of Law in an Intervention Program for Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 160, 162 (2006).

374. Bernstein, *supra* note 371, at 539.

375. *Id.* Furthermore, in some cases the victim is not certain as to the identity of the stalker, which makes it particularly difficult to obtain a protective order. *Id.*

376. *Id.* at 525–26.

first anti-stalking statute to address this issue was enacted in California in 1990 after the 1989 murder of actress Rebecca Schaeffer.³⁷⁷ In an effort to protect stalking victims, a 1992 federal task force advocated that states criminalize stalking as a felony and created a model stalking statute.³⁷⁸ By 1994, thirty-one states had “stalking statutes” that criminalized stalking behavior,³⁷⁹ and ten years later stalking was a crime in all fifty states, as well as a federal crime.³⁸⁰

However, a recent national survey of stalking victims determined that although 41.0% of female victims and 36.8% of male victims reported this behavior to police, nearly 20% said the police did not act on their report.³⁸¹ When asked why they thought the police took no action, 28.6% said they believed it was because the police did not want to get involved, 17.7% said they thought the police had no legal authority to act, 16.2% thought the police were inefficient or ineffective, 13.2% thought the police did not believe them, and 11.2% felt the police did not have enough evidence.³⁸² After first reporting the stalking behavior to the police, 48.9% of the victims said the situation stayed the same and 22.9% said the situation worsened.³⁸³ Charges were filed in 21.0% of the cases.³⁸⁴ Overall, only 45.7% of the victims were satisfied with the criminal-justice outcome.³⁸⁵

377. BUZAWA & BUZAWA, *supra* note 25, at 230.

378. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 874–75 (1993).

379. *Developments*, *supra* note 358, at 1534–35.

380. BAUM ET AL., *supra* note 368, at 1 (“The federal government, all 50 states, the District of Columbia, and U.S. Territories have enacted laws making stalking a criminal act, although the elements defining the acts of stalking differ across states”); *Stalking Fact Sheet*, STALKING RESOURCE CENTER (2004), <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=38733> (last visited July 19, 2011); *see, e.g.*, 18 U.S.C. § 2261A (2006); CAL. PENAL CODE § 646.9 (West 2010); FLA. STAT. ANN. § 784.048 (West 2010); MASS. GEN. LAWS ANN. ch. 256, § 43 (West 2010 & Supp. 2011); N.J. STAT. ANN. § 2C:12-10 (West 2005 & Supp. 2010); N.Y. PENAL LAW § 120.45 (McKinney 2003 & Supp. 2011). The federal government adopted an anti-stalking law because it viewed state laws as often inconsistent and underfunded. Belinda Wiggins, *Stalking Humans: Is There a Need for Federalization of Anti-stalking Laws in Order to Prevent Recidivism in Stalking?*, 50 SYRACUSE L. REV. 1067, 1091 (2000). Stalking statutes have provided police a way to punish offenders and judges a means to detain offenders (by refusing to release them on bail) before they actually harm someone. Bernstein, *supra* note 371, at 545.

381. BAUM ET AL., *supra* note 368, at 9 tbl.14.

382. *Id.* at 14 tbl.16.

383. *Id.* at 15 tbl.17.

384. *Id.* at 15 tbl.18.

385. *Id.* at 15 tbl.19.

D. Mandatory-Arrest Laws

In 1984, researchers Lawrence Sherman and Richard Berk compared the deterrent effects of three different police approaches to IPV in Minneapolis: (1) arrest, (2) mediation, and (3) requiring the batterer to leave the house for at least eight hours.³⁸⁶ The study reported that arrest was the best deterrent of future violence.³⁸⁷ In response to these findings, the U.S. Attorney General urged that arrest be the standard response to domestic assault.³⁸⁸ Eight years later, however, only seven states had enacted mandatory IPV arrest laws.³⁸⁹

It was not until 1994, the year of the much-publicized murder of Nicole Brown Simpson, that many states passed mandatory-arrest laws.³⁹⁰ It was asserted at the time that the acquittal of O.J. Simpson in this case sent a two-fold message: that the criminal justice system offered no protection for victims of domestic violence and that batterers go unpunished.³⁹¹ This perception may have increased the push for mandatory-arrest laws to enhance the punishment of batterers and the protection of IPV victims.³⁹² As one researcher commented, “[w]ith the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the ‘zero tolerance’ bandwagon.”³⁹³

Before mandatory-arrest laws, most state laws already permitted police officers to make an arrest without a warrant when they had probable cause to suspect domestic violence;³⁹⁴ however, mandatory-arrest laws were unique because they removed the officer’s discretion to execute an arrest under these circumstances.³⁹⁵ Currently, twenty-nine states mandate arrest when there is probable cause to believe that the suspect has violated a protective order.³⁹⁶

386. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 261–63 (1984).

387. *Id.* at 261.

388. *Developments, supra* note 358, at 1536.

389. *See* Miccio, *supra* note 61, at 239 n.2 (noting “Connecticut, Maine, New Jersey, North Carolina, Oregon, Utah, and Wisconsin” had passed such legislation).

390. *Id.* at 240.

391. Edmonds, *supra* note 84.

392. *See* Miccio, *supra* note 61, at 238.

393. *Id.*

394. Han, *supra* note 140, at 174.

395. *Id.* (noting officers might otherwise be “reluctant” to make such arrests). *But see* Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–61 (2005) (holding that mandatory-arrest statutes do not prevent officers from declining to arrest an individual).

396. Miccio, *supra* note 61, at 239 n.2; *see, e.g.*, ALASKA STAT. § 18.65.530(a)(2) (2010); CAL. PENAL CODE § 836(c)(1) (West 2008 & Supp. 2011); COLO. REV. STAT. § 18-6-803.5 (2010); KY. REV. STAT. ANN. § 403.760(2) (LexisNexis 2010); LA. REV. STAT. ANN. § 14:79(E) (2004 & Supp. 2011); MD. CODE ANN., FAM. LAW § 4-509(b) (West 2006 & Supp. 2010); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 2007 & Supp. 2010); MICH. COMP. LAWS ANN. § 764.15b (West 2000 & Supp. 2010); MINN. STAT. ANN. § 518B.01 (West 2006 & Supp. 2011);

Twenty-six states and the District of Columbia mandate arrest or have a preferred arrest policy in cases of domestic violence, regardless of whether a protective order has been violated.³⁹⁷

Mandatory-arrest laws have been extremely controversial. Supporters of mandatory-arrest laws contend that such laws force police officers to take IPV seriously³⁹⁸ and undercut stereotypical views that otherwise downplay the gravity of IPV.³⁹⁹ They point to data indicating that these laws have resulted in an increase of IPV arrests⁴⁰⁰ and assert that a mandatory-arrest policy establishes that the IPV victim is the “victim of a crime, not . . . merely another guilty participant in a battling family.”⁴⁰¹ One commentator insists that these laws were enacted because IPV victims were not receiving adequate law-enforcement protection and “[t]here was no other alternative” to ensure that would change.⁴⁰² It has also been asserted that mandating arrest eliminates invidious racial discrimination previously associated with officer discretion, because mandatory-arrest means that every batterer will be treated similarly.⁴⁰³

However, critics of mandatory-arrest laws say that they disempower victims of IPV by taking away their ability to decide whether the batterer should be removed or punished, which implies that victims are too weak, helpless, or

MISS. CODE ANN. § 99-3-7(3)(a) (West 2006 & Supp 2010); MO. ANN. STAT. § 455.085(2) (West 2003 & Supp. 2011); NEB. REV. STAT. ANN. § 42-928 (LexisNexis 2005); NEV. REV. STAT. ANN. § 33.070(1) (LexisNexis 2006 & Supp. 2009); N.H. REV. STAT. ANN. § 173-B:9(I)(a) (LexisNexis 2010); N.J. STAT. ANN. § 2C:25-21(a)(3) (West 2005 & Supp. 2010); N.M. STAT. ANN. § 40-13-6(C) (2006 & Supp. 2010); N.Y. CRIM. PROC. LAW § 140.10(4)(b)(i) (McKinney 2004 & Supp. 2011); N.C. GEN. STAT. § 50B-4.1(b) (2009 & Supp. 2010); N.D. CENT. CODE § 14-07.1-11(1) (2009); OR. REV. STAT. ANN. § 133.310(3)-(4) (West 2003 & Supp. 2010); 23 PA. CONS. STAT. ANN. § 6113(a) (West 2010); R.I. GEN. LAWS § 12-29-3(b)(1)(iv) (2002); S.D. CODIFIED LAWS § 23A-3-2.1(1)-(2) (2004 & Supp. 2010); TENN. CODE ANN. § 36-3-611(a) (2010); TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(3) (West 2005 & Supp. 2010); UTAH CODE ANN. § 77-36-2.4(1) (LexisNexis 2008 & Supp. 2010); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West 2002 & Supp. 2010); W. VA. CODE ANN. § 48-27-1001(a) (LexisNexis 2009); WIS. STAT. ANN. § 813.12(7)(2) (West 2007 & Supp. 2010). Ohio suggests, but does not mandate, arrest in this situation. OHIO REV. CODE ANN. § 2935.03(B)(1) (LexisNexis 2010).

397. Miccio, *supra* note 61, at 239 n.2 (listing the state statutes).

398. Mills, *supra* note 31, at 563 (asserting that IPV by males had been sanctioned by society before mandatory-arrest provisions).

399. See Miccio, *supra* note 61, at 240–41; Mills, *supra* note 31, at 565 (arguing mandatory-arrest laws were embraced by feminists to call attention to state actors who were not sensitive to the needs of battered women).

400. See, e.g., Frances Lawrenz, James F. Lembo & Thomas Schade, *Time Series Analysis of the Effect of a Domestic Violence Directive on the Number of Arrests Per Day*, 16 J. CRIM. JUST. 493, 496 fig.2 (1988); Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 558–59.

401. BUZAWA & BUZAWA, *supra* note 25, at 143.

402. Miccio, *supra* note 61, at 279.

403. Mills, *supra* note 31, at 564.

incapable to make these decisions themselves.⁴⁰⁴ Hence, some commentators assert that mandatory-arrest laws are more likely to undercut a victim's situation than to strengthen it.⁴⁰⁵ Furthermore, mandatory arrests may actually increase the incidence of violence experienced by the victims of IPV,⁴⁰⁶ as mandatory arrests may trigger retaliation by the batterer or cause victims to become reluctant to seek help in the future, thereby perpetuating the cycle of violence.⁴⁰⁷ Additionally, documenting the existence of violence within the family pursuant to a mandatory arrest may result in child protective services removing children from the home, which could add to the anguish of IPV victims and make them even more reluctant to report abuse.⁴⁰⁸

Critics also argue that mandatory-arrest policies harm victims in other ways. For example, they have resulted in a dramatic increase in the number of women arrested.⁴⁰⁹ Women currently account for up to twenty-five percent of IPV arrests nationally,⁴¹⁰ but it is estimated that these women were the primary

404. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 823–24 (2007) (proposing that feminists stop advocating for mandatory policies because it leads to the objectification of women); Han, *supra* note 140, at 175 (“By removing choice from the victim, . . . the state replicates the control wielded by the batterer.”).

405. See Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85, 88–89 (2009); Miccio, *supra* note 61, at 242.

406. Mills, *supra* note 31, at 565–67 (citing LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 3 (1992)). But see Matthew J. Carlson, Susan D. Harris & George W. Holden, *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 218 (1999) (“[N]either arrest nor permanent [protective order] status were significantly related to the risk of post-[protective order] abuse.”).

407. BUZAWA & BUZAWA, *supra* note 25, at 163 (explaining that after a more aggressive arrest policy was instituted, there were significantly fewer calls made to the police).

408. Han, *supra* note 140, at 176. Mandatory arrest may also result in the removal of the person who has been providing critical financial support for the family, providing an additional basis for the removal of the children from the home. *Id.* The presence of children may also exacerbate the likelihood of abuse reoccurring after law-enforcement intervention. Carlson, Harris & Holden, *supra* note 406, at 217–18 (“The odds of re-abuse for women who have biological children with their abusive partner was nearly four times higher than for other couples . . .”).

409. See Carol Bohmer et al., *Domestic Violence Law Reforms: Reactions from the Trenches*, 29 J. SOC. & SOC. WELFARE 71, 78 (2002) (“One Ohio study indicates that, while arrest rates in general have risen 142% in the year since the implementation of preferred arrest policies, the increase in arrests of women has been 428%.” (citation omitted)); see also David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 256, 259–61 (2007) (finding higher dual arrest rates in states employing mandatory-arrest laws).

410. Brian Renauer & Kris Henning, *Investigating Intersections Between Gender and Intimate Partner Violence Recidivism*, 41 J. OFFENDER REHABILITATION 99, 102–03 (2006).

aggressors in only thirteen percent of these cases.⁴¹¹ Mandatory arrest often leads to dual arrests because police cannot identify who the initial or primary aggressor was, a situation that is particularly likely when the woman acted out of self-defense.⁴¹² Ironically, victims who most fear for their safety or the safety of their children are the most likely to respond to IPV in a way that increases the likelihood of a dual arrest.⁴¹³

The arrest of a victim may have a number of negative consequences, including ineligibility for future services and support, disempowerment, and re-victimization.⁴¹⁴ The potential of a dual arrest may further make victims of IPV reluctant to call the police for fear that, after both parents are arrested, their children will be left without support and forced to enter foster care.⁴¹⁵ In fact, one study conducted after a mandatory-arrest law was implemented found that 68.4% of women interviewed would not call law enforcement as a result of this law.⁴¹⁶

In general, critics of mandatory-arrest policies assert that the costs of this approach outweigh its benefits.⁴¹⁷ They claim that the original Minneapolis study was flawed,⁴¹⁸ contending that attempts to replicate this study yield

411. See MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 13 (2005), available at <http://dsusa02.degreesearchusa.com/t.pl/000000A/http/bjs.ojp.usdoj.gov/content/pub/pdf/fvs02.pdf>.

412. Dennis M. Cullinane, *Offender-Victim Body Mass Ratio and the Decision to Arrest in Cases of Intimate Partner Violence*, 49 MED. SCI. L. 200, 201 (2009); Wanless, *supra* note 400, at 565 (explaining some police officers become confused when identifying the initial aggressor); see also Peter S. Hovmand et al., *Victims Arrested for Domestic Violence: Unintended Consequences of Arrest Policies*, 25 SYS. DYNAMICS REV. 161, 172 (2009) (suggesting that having victims teach and work with police officers may help the officers to differentiate between self-defense and the initiating aggression).

413. Hovmand et al., *supra* note 412, at 172.

414. *Id.* at 166.

415. *Id.* (noting that once arrested, IPV victims often risk losing child custody).

416. GIGI STAFNE, WIS. COAL. AGAINST DOMESTIC VIOLENCE, THE WISCONSIN MANDATORY ARREST MONITORING PROJECT: FINAL REPORT 38 (1989).

417. BUZAWA & BUZAWA, *supra* note 25, at 161–65.

418. Richard J. Gelles, *Constraints Against Family Violence: How Well Do They Work?*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?*, *supra* note 355, at 34–35 (asserting that the study may not have been based on a random assignment of officers, that the results came from a few officers in only two precincts, and that there was a substantial amount of missing data). Indeed, five subsequent studies, conducted shortly thereafter and intended to replicate the Minneapolis study, reached conflicting results. *Developments*, *supra* note 358, at 1539. Two of the studies confirmed the results of the Minneapolis study, whereas the other three found that arrest correlated with an increase in subsequent violence. *Id.* Moreover, despite their intent to provide replications, the experimental designs of these five studies actually varied considerably from the Minneapolis study, which may help explain the different results. *Id.*

much lower or no correlation between arrest and deterrence,⁴¹⁹ and that mandatory arrest can be counterproductive by actually increasing the rate of violence.⁴²⁰ Police officers themselves are hesitant to adopt new policies, such as mandatory arrest, when they do not conform with their own beliefs.⁴²¹ Other commentary suggests that a policy of presumptive, rather than mandatory, arrest provides a better vehicle.⁴²² Presumptive arrest policies generally require a law-enforcement official who responds to a domestic violence call to make an arrest, unless the victim expressly states that an arrest is not desired and the officer determines that the victim is safe.⁴²³ This alternative ensures that law enforcement can exercise needed discretion by allowing an officer to consider the victim's desire while reaching his or her final decision.⁴²⁴

E. No-Drop Prosecutions

As jurisdictions increasingly implemented mandatory-arrest policies, "prosecutors [began] to use a policy . . . referred to as 'mandatory or no-drop prosecution,'" which requires prosecutors to pursue domestic-violence cases even if the victim opposes prosecution.⁴²⁵ These laws were crafted in response to prosecutors' discretionary power and tendency to not pursue domestic-violence cases⁴²⁶ and judges' propensity to minimize and dismiss them.⁴²⁷ Many prosecutors fail to prosecute these cases because they believe

419. See Franklyn W. Dunford, *The Measurement of Recidivism in Cases of Spouse Assault*, 83 J. CRIM. L. & CRIMINOLOGY 120, 122 (1992) ("[T]he differences [in the Omaha Experiment] were counter to those found for the Minneapolis Experiment."); Gelles, *supra* note 418, at 35 (explaining that the results from experiments in Charlotte, Milwaukee, and Omaha all found that arrest was not a deterrent, unlike the Minneapolis study); see also Richard A. Berk et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170, 182-84 (comparing the Milwaukee, Omaha, and Colorado Springs experiments, finding little difference in the effect of arrest versus no arrest in most cases).

420. Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 138-39 (1992) ("[D]omestic violence . . . arrests with brief custody increase the frequency of domestic violence in the long run among offenders in general").

421. BUZAWA & BUZAWA, *supra* note 25, at 158-59.

422. Han, *supra* note 140, at 185-86 (explaining how presumptive arrest is an appropriate "compromise among the various conflicting theories of arrest in cases of domestic violence").

423. *Id.* at 186.

424. *Id.* (noting that "discretion is held by the police officer, who makes the final decision").

425. Mills, *supra* note 31, at 561 (stating that the prosecution policy was a "natural extension" of mandatory-arrest policy).

426. See Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 865-67 (1994). In jurisdictions without no-drop policies, "prosecutors dispose of approximately fifty to eighty percent of cases by dropping the charges," whereas jurisdictions with no-drop policies report case dismissal rates of only ten to thirty-four percent. *Id.* at 857.

that the violence was difficult to prove or trivial, “that victims are somehow to blame,” or that “the victim will ultimately change her mind about prosecution.”⁴²⁸ Indeed, many victims of IPV choose not to prosecute for various reasons, including the prospect of reconciling with their assailant.⁴²⁹ Proponents of a no-drop prosecution policy argue that prosecution should continue regardless of the victim’s desire or willingness to cooperate,⁴³⁰ as “domestic violence should be considered as a crime against the public order of the state,” and that without punishment, these batterers are likely to strike again, towards either the same victim or another.⁴³¹

“Hard” and “soft” no-drop policies are the two basic types of mandatory prosecution policies.⁴³² Hard no-drop policies “require prosecutors to pursue cases regardless of the victim’s recantations or protestations and some require victims to testify by issuing subpoenas” or other coercive measures.⁴³³ Soft no-drop policies encourage prosecution and victim participation, but allow prosecutors more discretion regarding whether to pursue a case and the extent of victim participation required.⁴³⁴ Although victims of IPV have greater decision-making authority under a soft policy regarding their level of participation, the decision to proceed with a case remains with the prosecutor, who acts on behalf of the state and its need for public order.⁴³⁵ As of 2003, twenty-six percent of prosecutors’ offices in major urban areas had adopted some type of no-drop policy.⁴³⁶

Mandatory-arrest laws and no-drop prosecution policies are supported by similar arguments.⁴³⁷ Proponents argue that such policies are necessary for public safety,⁴³⁸ for protecting the victims,⁴³⁹ and for preventing the batterer

427. BUZAWA & BUZAWA, *supra* note 25, at 96.

428. Corsilles, *supra* note 426, at 867.

429. *Id.* at 865.

430. Bohmer et al., *supra* note 409, at 75–77 (also explaining that “[a] recognition of the behavior as criminal is an important part of obtaining the [victim’s] cooperation in the prosecution”).

431. BUZAWA & BUZAWA, *supra* note 25, at 177–78.

432. Mordini, *supra* note 58, at 318.

433. *Id.* (stating that “the victim’s decision-making ability ends” once the charges are filed).

434. *Id.*

435. Han, *supra* note 140, at 187–88.

436. Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 373–74 (2003).

437. Compare Mordini, *supra* note 58, at 315–16 (describing proponents’ arguments in favor of *mandatory arrest*, which include providing notification to the offender that society will not tolerate abuse and indicating to the victim that society is a support system for him or her in finding an end to the abuse), with *id.* at 319 (reviewing arguments in favor of *mandatory prosecution*, which include establishing that abuse is a social issue, not just a personal issue, and indicating that society will help the victim in finding an end to the abuse).

438. *Id.* at 319.

from pressuring the victim to drop the complaint.⁴⁴⁰ Additionally, proponents assert that no-drop policies inform society and notify batterers that IPV is in fact a serious crime and that batterers will be punished for their actions.⁴⁴¹

No-drop policies have also been supported because they “close the gap between the statutory promise of protection for battered [victims] and the justice they receive.”⁴⁴² Finally, some advocates contend that no-drop policies allow victims to disclaim responsibility for prosecution, which may convince some batterers to quit harassing and coercing their victims as they do not have the ability to drop the charges.⁴⁴³

Critics of no-drop policies, however, believe they disempower victims by removing their decision-making autonomy,⁴⁴⁴ coercing their participation,⁴⁴⁵ and impeding their emotional recovery.⁴⁴⁶ Further, critics contend that victims who perceive that they have little control over what happens in court are likely to be less satisfied with the outcome and may avoid calling for help in the future when the need for intervention may be more acute.⁴⁴⁷ Critics also

439. Han, *supra* note 140, at 186 (arguing that in reality, no-drop prosecution policies do little to protect the victim).

440. SCHNEIDER, *supra* note 30, at 186.

441. Corsilles, *supra* note 426, at 874.

442. *Id.* at 881.

443. *Id.* at 874; Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 217–18 (1999) (explaining that victims are often relieved that they do not have to make the choice to testify and “batterers . . . stop harassing their victims about the process once they realize that the victims are not responsible for the case going forward”).

444. Hanna, *supra* note 344, at 1855–56 (stating that mandated participation may be paternalistic or revictimizing); Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 240–42 (2008) (noting such policies might convey that system actors “are more capable of making these decisions for the victims”) (emphasis in the original)); Kuennen, *supra* note 354, at 6 (explaining that such policies limit “victim’s fundamental rights of freedom, choice, and autonomy”); Mordini, *supra* note 58, at 318–19 (stating that no-drop policies relegate the victim to the role of a witness).

445. Lauren Bennett Cattaneo et al., *The Victim-Informed Prosecution Project: A Quasi-Experimental Test of a Collaborative Model for Cases of Intimate Partner Violence*, 15 VIOLENCE AGAINST WOMEN 1227, 1229 (2009); Han, *supra* note 140, at 185; Mills, *supra* note 31, at 556.

446. Mills, *supra* note 31, at 556.

447. GERALD T. HOTALING & EVE S. BUZAWA, U.S. DEP’T OF JUSTICE, FORGOING CRIMINAL JUSTICE ASSISTANCE: THE NON-REPORTING OF NEW INCIDENTS OF ABUSE IN A COURT SAMPLE OF DOMESTIC VIOLENCE VICTIMS 26 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/19566>

7.pdf (finding that women who “said they had no voice or rights with criminal officials” were less likely to report future abuse); Cattaneo et al., *supra* note 445, at 1229–30; Ruth E. Fleury-Steiner et al., *Contextual Factors Impacting Battered Women’s Intentions to Reuse the Criminal Legal System*, 34 J. COMMUNITY PSYCHOL. 327, 338–39 (2006) (exploring future willingness to use the

question whether such policies protect the victim, as the batterer may retaliate against the victim regardless of the victim's role in the prosecution.⁴⁴⁸ Additionally, no-drop prosecution policies may substantially deplete already-limited prosecutorial and judicial resources,⁴⁴⁹ thereby limiting the prosecution of other crimes.⁴⁵⁰ For example, from 1993 to 1996, after the adoption of no-drop policies, the filings of domestic-violence cases increased by 699 percent in the New York State Family Court system, which some judges contended caused a "breakdown of the system."⁴⁵¹ Furthermore, the Supreme Court's holding in *Crawford v. Washington*—that cross-examination is generally required to admit prior testimonial statements of unavailable witnesses under the Confrontation Clause of the Sixth Amendment⁴⁵²—has "frustrated prosecutors' efforts to present victims' statements through other witnesses."⁴⁵³

One set of researchers, who reviewed over one thousand misdemeanor IPV cases, suggested that the benefits associated with no-drop policies may not outweigh their costs, and that prosecution of an abusive individual had no effect on the likelihood of recidivism over a period of six months.⁴⁵⁴ Similarly, another study found that whether a prosecutor accepted a case did not change the amount of violence committed in the aftermath of the original crime.⁴⁵⁵

F. Civil Protection Orders

Driven in part by concerns that the criminal justice system provides an inadequate response to IPV, all fifty states enacted legislation between 1976

criminal justice system based on whether victims were satisfied with the outcome after their first encounter with the legal system).

448. See Mordini, *supra* note 58, at 321 (noting that the state cannot guarantee the victim's future safety).

449. BUZAWA & BUZAWA, *supra* note 25, at 178–79.

450. Corsilles, *supra* note 426, at 873–74 (noting that "prosecutors' efforts could have been better used in cases in which convictions were easier to secure").

451. BUZAWA & BUZAWA, *supra* note 25, at 84.

452. 541 U.S. 36, 68–69 (2004).

453. Jean Ferguson, *Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation*, 4 CRIM. L. BRIEF 3, 7 (2009). A study conducted before *Crawford* found that over fifty percent of prosecutors' offices employed victims' statements to police, 911 operators, or other witnesses as evidence when the victims themselves were unwilling to testify—a practice now typically impermissible. Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 355, at 186.

454. Robert C. Davis, Barbara E. Smith & Laura B. Nickles, *The Deterrent Effect of Prosecuting Domestic Violence Misdemeanors*, 44 CRIME & DELINQUENCY 434, 434, 440–41 (1998).

455. See *id.* at 434–35.

and 1992 to make civil protection orders (CPOs) available.⁴⁵⁶ Some commentators attribute this legislation to a combination of a “heightened social awareness” of IPV during the 1960s and 1970s, emerging research documenting the impact of being a victim of IPV, such as the battered spouse syndrome,⁴⁵⁷ and several prominent class action suits in the 1970s that exposed law enforcement’s failures to arrest individuals who battered their domestic partners.⁴⁵⁸

456. Murphy, *supra* note 97, at 502.

457. Campbell, *supra* note 40, at 264.

458. SCHNEIDER, *supra* note 30, at 44; *see also* NAT’L RESEARCH COUNCIL, VIOLENCE IN FAMILIES: ASSESSING PREVENTION AND TREATMENT PROGRAMS 172 (Rosemary Chalk & Patricia A. King eds., 1998) (citing *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984); *Bruno v. Codd*, 393 N.E.2d 976 (N.Y. 1979)).

Regardless of the cause, CPO laws remain widely in effect today.⁴⁵⁹ Protective orders are generally available to victims of domestic violence as either emergency or temporary ex parte orders, or as permanent orders following a court hearing, and impose legally binding restrictions on an abuser's future conduct.⁴⁶⁰ Such orders may be based on evidence of abuse, threats or attempts to harm, reckless endangerment, sexual assaults (including marital rape), interference with personal liberty, property damage, and, in some states, harassment or other forms of emotional abuse.⁴⁶¹ They may require the subject of the order to refrain from specific actions, such as harming the victim

459. ALA. CODE §§ 30-5-1 to 30-5-08 (1989 & Supp. 2010); ALASKA STAT. §§ 18.66.100–.180 (2010); ARIZ. REV. STAT. ANN. § 13-3602 (2010); ARK. CODE ANN. §§ 9-15-201 to -217 (2009); CAL. FAM. CODE §§ 6200–6389 (West 2009 & Supp. 2011); COLO. REV. STAT. §§ 13-14-101 to -104 (2010); CONN. GEN. STAT. ANN. § 46b-15 (West 2009 & Supp. 2010); DEL. CODE ANN. tit. 10, §§ 1041–1048 (1999 & Supp. 2010); D.C. CODE §§ 16-1003 to -1006 (2001 & Supp. 2010); FLA. STAT. ANN. § 741.30 (West 2010); GA. CODE ANN. §§ 19-13-3, -4 (2010); HAW. REV. STAT. ANN. §§ 586-1 to -11 (LexisNexis 2010); IDAHO CODE ANN. §§ 39-6306 to -6308 (2002 & Supp. 2010); 750 ILL. COMP. STAT. ANN. 60/201–227 (West 2009 & Supp. 2010); IND. CODE ANN. §§ 34-26-5-1 to -19 (LexisNexis 2008 & Supp. 2010); IOWA CODE ANN. §§ 236.4–.8 (West 2008 & Supp. 2010); KAN. STAT. ANN. §§ 60-3102 to -3112 (2005 & Supp. 2009); KY. REV. STAT. ANN. §§ 403.740–.785 (LexisNexis 2010); LA. REV. STAT. ANN. §§ 46:2131–:2143 (2010 & Supp. 2011); ME. REV. STAT. ANN. tit. 19-A, §§ 4001–4014 (1998 & Supp. 2010); MD. CODE ANN., FAM. LAW §§ 4-505, -506 (LexisNexis 2006 & Supp. 2010); MASS. GEN. LAWS ANN. ch. 209A, §§ 3–4 (West 2007 & Supp. 2010); MICH. COMP. LAWS ANN. §§ 600.2950–2950a (West 2010); MINN. STAT. ANN. § 518B.01 (West 2006 & Supp. 2011); MISS. CODE ANN. §§ 93-21-1 to -29 (West 2007 & Supp. 2010); MO. ANN. STAT. §§ 455.010–.090 (West 2003 & Supp. 2011); MONT. CODE ANN. §§ 40-15-201, -204 (2009); NEB. REV. STAT. ANN. §§ 42-924 to -928 (LexisNexis 2005 & Supp. 2010); NEV. REV. STAT. ANN. §§ 33.020–.100 (LexisNexis 2006 & Supp. 2009); N.H. REV. STAT. ANN. §§ 173-B:1 to :25 (LexisNexis 2010); N.J. STAT. ANN. § 2C:25-28 (West 2005 & Supp. 2010); N.M. STAT. ANN. §§ 40-13-3 to -6 (2006 & Supp. 2010); N.Y. FAM. CT. ACT §§ 828, 842-847 (McKinney 2010 & Supp. 2011); N.C. GEN. STAT. §§ 50B-2, B-3.1 (2009 & Supp. 2010); N.D. CENT. CODE ANN. §§ 14-07.1-02 to .1-03 (West 2009); OHIO REV. CODE ANN. § 3113.31 (LexisNexis 2008 & Supp. 2010); OKLA. STAT. ANN. tit. 22, §§ 60–60.18 (West 2003 & Supp. 2010); OR. REV. STAT. ANN. §§ 107.716, .718 (West 2003 & Supp. 2010); 23 PA. CONS. STAT. ANN. §§ 6107–6108 (West 2010); R.I. GEN. LAWS §§ 15-15-3 to -4 (2003); S.C. CODE ANN. §§ 20-4-10 to 160 (1995 & Supp. 2010); S.D. CODIFIED LAWS §§ 25-10-1 to -13 (2004 & Supp. 2010); TENN. CODE ANN. §§ 36-3-601 to -624 (2010); TEX. FAM. CODE ANN. §§ 81.001–.009 (West 2008 & Supp. 2010); UTAH CODE ANN. §§ 78B-7-102 to -116 (LexisNexis 2008 & Supp. 2010); VT. STAT. ANN. tit. 15, §§ 1101–1115 (2010); VA. CODE ANN. §§ 16.1-251 to -253.4, -279.1 (2010); WASH. REV. CODE ANN. §§ 26.50.060–.070 (West 2005 & Supp. 2010); W. VA. CODE ANN. §§ 48-27-203, 48-27-501 to -511, 48-28-1 to -10 (LexisNexis 2009 & Supp. 2010); WIS. STAT. ANN. § 813.122 (West 2007 & Supp. 2010) (specifically for children); WYO. STAT. ANN. §§ 35-21-101 to -111 (2009 & Supp. 2010).

460. See BUZAWA & BUZAWA, *supra* note 25, at 109. Protective orders are similarly available to halt child abuse. Hafemeister, *supra* note 27, at 844.

461. See Klein & Ordloff, *supra* note 378, at 849–74.

or coming within a specified distance of the victim's residence.⁴⁶² The order may also require the subject to take certain affirmative steps, such as relinquishing firearms, providing child support, or entering a treatment program.⁴⁶³

CPO legislation has been popular because it affords individuals who have been subjected to IPV an opportunity to shape the protections they receive, backed by the power and resources of the criminal justice system.⁴⁶⁴ CPO hearings may also aid victims by simply providing a forum where they can tell and validate their experiences.⁴⁶⁵ Further, it has been argued that this approach empowers victims of IPV by allowing them to initiate and direct the intervention, rather than remaining a passive victim subject to the whims of responding law-enforcement officials.⁴⁶⁶ Protective orders are also embraced because they can provide financially dependent victims economic benefits that they may miss if their abuser is jailed.⁴⁶⁷ Additionally, CPOs may be issued more quickly (as opposed to a lengthy criminal prosecution), and they may prevent abusive conduct from occurring or escalating by enabling early intervention before a crime occurs.⁴⁶⁸ Further, CPOs may facilitate a victim's future access to the criminal justice system, as police officers are often more willing to arrest an abusive individual if a protective order already exists.⁴⁶⁹

462. See Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L. Q. 43, 44 (1989) (discussing types of "stay away" remedies).

463. See, e.g., MD. CODE ANN., FAM. LAW §§ 4-506(d), (f) (LexisNexis 2006 & Supp. 2010).

464. Murphy, *supra* note 97, at 504, 514.

465. Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1111 (2009).

466. Murphy, *supra* note 97, at 504.

467. Sessa Kethineni & Dawn Beichner, *A Comparison of Civil and Criminal Orders of Protection as Remedies for Domestic Violence Victims in a Midwestern County*, 24 J. FAM. VIOLENCE 311, 320 (2009) (finding the preservation of a perpetrator's earning power, which would otherwise be compromised if arrested and jailed, is an advantage of CPOs).

468. A CPO may be issued in response to acts that are not crimes, such as harassment, and may also be available for minor offenses that would be unlikely to result in meaningful penalties in the criminal system or where evidentiary problems would limit the likelihood of a criminal conviction. See Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1508–09 (2008); see also Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1405 (1991) (noting a lower standard of proof required to obtain a civil protection order).

469. See PETER FINN & SARAH COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 2 (1990).

Despite these benefits, protective orders have also received much criticism.⁴⁷⁰ Some victims have reported that the process of obtaining a CPO is too confusing and time consuming, which discourages them from obtaining these orders.⁴⁷¹ Critics have asserted that protective orders are “soft” on IPV because haphazard enforcement, coupled with relatively light sanctions for violation, fail to adequately deter the underlying abusive conduct.⁴⁷² Similarly, they contend that the presence of dual civil and criminal remedies for IPV leads to a fragmented system, inconsistent responses, and delayed or inadequate assistance for victims.⁴⁷³ Critics have also argued that these orders are “frequently violated” and “often fail to prevent further violence.”⁴⁷⁴ One study reported that sixty percent of protective orders are violated,⁴⁷⁵ yet only eighteen percent of the violators of these orders were jailed.⁴⁷⁶ This has been attributed, in part, to police officers who respond to a call for assistance being unaware that a protective order exists.⁴⁷⁷ Responding officers may not have ready access to central databases containing information regarding protective

470. See, e.g., *id.* at 3 (noting that potential concerns do exist, including lack of due process during protective-order proceedings, the perception that protective orders may not adequately deter violence, and general non-enforcement); see also Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L. J. 303 (2011) (advocating the “Stages of Change” model to reform civil protection orders).

471. See ADELE HARRELL, BARBARA SMITH & LISA NEWMARK, *THE URBAN INST., COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS* 31–32 (1993).

472. *Developments*, *supra* note 358, at 1510–11; see also Goldfarb, *supra* note 468, at 1511–12, 1516 (suggesting that divergent estimated rates of compliance with protective orders may be partially explained by inconsistent enforcement).

473. See, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 21–23 (1999); see also Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 637 (2004) (“Lack of communication among various systems impedes batterer accountability.”).

474. *Developments*, *supra* note 358, at 1510. CPO restrictions on gun purchase and possession by alleged batterers, however, attract little criticism, possibly because some estimates show that 3.5 individuals are killed each day by their domestic partners. See Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 313 (2006). However, states that restrict gun purchases by individuals subject to protective orders have evinced a ten percent decrease in intimate-partner homicides, compared to the period before these restrictions were enacted. *Id.* at 315, 333. Additionally, these restrictions may decrease the immediate physical threat faced by IPV victims and embolden them to leave abusive relationships. See *id.* at 321–22.

475. Thueson, *supra* note 168, at 276.

476. Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?*, *supra* note 355, at 208–09.

477. See BUZAWA & BUZAWA, *supra* note 25, at 190–91.

orders,⁴⁷⁸ precluding them from detaining potential violators, unless the victim can readily produce a copy of the order—a relatively infrequent event.⁴⁷⁹

Mutual orders of protection, in particular, have been strongly criticized.⁴⁸⁰ These orders impose limitations on both parties⁴⁸¹ and are often issued as a quick alternative to conducting a hearing to assign blame,⁴⁸² even when there is no evidence of mutual violence.⁴⁸³ Thus, they are highly controversial because they may be issued hastily and without evidence, or may restrict parties who were merely violent in self-defense.⁴⁸⁴ Critics also assert that mutual orders “undermine the purpose and strength of domestic violence” statutes because they punish the victim, rather than focus on the individual responsible for the violence.⁴⁸⁵ The National Council of Juvenile and Family Court Judges opposes mutual protection orders because of due-process concerns, noting that they may be issued without substantiating evidence of mutual violence; furthermore, they create enforcement problems for police, as they give no indication which party is the aggressor, and may reflect gender bias in their issuance.⁴⁸⁶ As a result, many states refuse to issue them without a requesting petition and significant substantiating evidence of abuse by both parties.⁴⁸⁷

Furthermore, as alluded to earlier, the effectiveness of protective orders has been seriously questioned following the Supreme Court’s 2005 decision *Town of Castle Rock v. Gonzales*, because victims may no longer be able to rely on

478. *Id.* at 196.

479. See Kerry Campbell, *Chapter 631: Increasing the Effectiveness of Domestic Violence Protective Orders*, 37 MCGEORGE L. REV. 217, 219 (2006). Some studies suggest that even if CPOs are not enforced, simply having a CPO issued may reduce incidents of re-abuse, as abusers with “high stakes in conformity” may be adequately deterred by the fear of future arrest. See Kethineni & Beichner, *supra* note 467, at 319 (finding that re-abuse was less likely when CPOs were issued against violent partners without a criminal history, or offenders with a higher “stake[] in conformity” than an abuser with a prior conviction); Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of “Efficacy”*, 11 S. CAL. INTERDISC. L.J. 361, 390 (2002) (theorizing that restraining orders are only effective when “reinforced by informal social controls” under the “stakes in conformity” theory).

480. See *infra* text accompanying notes 482–87.

481. Karen Morao, *Domestic Violence and the State*, 7 GEO. J. GENDER & L. 787, 803 (2006).

482. See Janice A. Drye, *The Silent Victims of Domestic Violence: Children Forgotten by the Judicial System*, 34 GONZ. L. REV. 229, 244 (1999).

483. See Klein & Ordloff, *supra* note 378, at 1074.

484. See *id.* at 1074–75 (noting that researchers and members of the judiciary have condemned mutual protective orders issued quickly and without a determination of which party was the primary aggressor).

485. *Id.* at 1074.

486. *Id.* at 1075; see also Philip Trompeter, *Gender Bias Task Force: Comments on Family Law Issues*, 58 WASH. & LEE L. REV. 1089, 1090 (2001) (suggesting that judges may issue unrequested mutual protection orders inappropriately to abusive males).

487. Klein & Orloff, *supra* note 378, at 1076–77, 1077 n.1717.

the state to enforce these orders with any certainty.⁴⁸⁸ In dismissing the mother's federal civil rights action, the Court determined, in part, that because of limited resources and the sheer impossibility of enforcing all protective orders, the mandate to enforce all protective orders could not be taken literally.⁴⁸⁹

Critics claim this ruling significantly undercuts the strength and value of protective orders, as it allows police officers to enforce the orders—or not—at their own discretion,⁴⁹⁰ it leaves victims of IPV with little legal recourse when they are not enforced, it perpetuates and condones law enforcement's indifference to IPV calls, and it conveys to both abusive individuals and their victims that IPV will be tolerated by society.⁴⁹¹ Critics further contend that the Court's ruling in *Town of Castle Rock* demonstrates that although laws have been written to condemn IPV, it is nevertheless condoned in practice.⁴⁹²

G. Specialized Courts

Finding the traditional judicial response to IPV lacking in coordination and enforcement, an increasing number of jurisdictions have established specialized courts—sometimes referred to as “dedicated” or “problem-solving” courts—offering a more comprehensive and integrated approach to IPV, although the structure of these courts varies considerably.⁴⁹³ Because a single instance of IPV may result in multiple interactions with the court

488. See *supra* notes 106–14 and accompanying text.

489. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–62 (2005). The Court also held that the nature of the wife's interest in having the police enforce her restraining order was not sufficient to constitute “property” or to trigger Due Process protections. *Id.* at 768. The Court also noted that police generally enjoy discretion in deciding whether to arrest someone, even when operating under mandatory-arrest statutes, but did indicate that state laws may be crafted to hold police departments financially responsible for crimes that could have been prevented. *Id.* at 760, 768–69; see also Vi T. Vu, Note, *Town of Castle Rock v. Gonzales: A Hindrance in Domestic Violence Policy Reform and Victory for the Institution of Male Dominance*, 9 SCHOLAR 87, 90–91 (2006) (noting that police discretion to deny the “benefit” of enforcement prevented the Court from holding that this benefit is a constitutionally protected property interest).

490. Nicole M. Quester, Note, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court's Decision in Town of Castle Rock v. Gonzales Continues to Deny Domestic Violence Victims Meaningful Recourse*, 40 AKRON L. REV. 391, 411–12 (2007) (“[The Court] rendered civil protection orders meaningless in the context of domestic violence.” (footnote omitted)).

491. Zanita E. Fenton, *State Enabled Violence: The Story of Town of Castle Rock v. Gonzales*, in *WOMEN AND THE LAW STORIES* 379, 408 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011); Vu, *supra* note 489, at 110–11.

492. Vu, *supra* note 489, at 101.

493. Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 208 (2008) (noting that the first such court was purportedly established in Brooklyn in 1976); The Advocates for Human Rights, *Specialized Domestic Violence Court Systems*, STOP VIOLENCE AGAINST WOMEN, <http://www.stopvaw.org>

system—including obtaining a CPO, pursuing criminal prosecution, mandated treatment, and seeking a divorce—many jurisdictions determined that their courts inconsistently tracked and responded to IPV cases and lacked coordination with law enforcement and community service providers.⁴⁹⁴ As a result, domestic-violence courts were established with the ability to hear both criminal and civil matters and address a variety of issues, such as misdemeanor or felony criminal charges, restraining orders, child-custody issues, and other IPV-related legal matters.⁴⁹⁵ In specialized domestic-violence courts, judges may exclusively or predominantly hear IPV cases; therefore, they can arguably develop greater expertise and consistency in their dispositions, and hold offenders more accountable.⁴⁹⁶ They may also be better equipped to address issues underlying the IPV and bring to bear needed services, such as counseling or substance abuse treatment, in an effort to reduce future violence.⁴⁹⁷

Although some studies have addressed the effectiveness of such specialized domestic-violence courts, results have been inconsistent.⁴⁹⁸ Supporters of such programs assert that a “successful” court should not only be measured in terms of IPV reduction, but also by the speed with which decisions are reached,

/Specialized_Domestic_Violence_Court_Systems.html (last updated Feb. 10, 2009) (“Some jurisdictions have created courts that handle only domestic violence cases; others have altered court processes to ensure more effective processing of domestic violence matters; yet others have specialized staff that provide support to victims.”). There are currently more than 300 courts in the United States that offer a specialized domestic-violence program, including courts in California, Colorado, Delaware, Florida, Illinois, Iowa, Minnesota, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Texas, Washington, and Wisconsin. SUSAN KEILITZ, NAT’L CRIMINAL JUSTICE REFERENCE SERV., SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY 3, 11 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/186192.pdf>.

494. Maytal, *supra* note 493, at 208; see also Amy Karan, Susan Keilitz & Sharon Denaro, *Domestic Violence Courts: What Are They and How Should We Manage Them?*, 50 JUV. & FAM. CT. J. 75, 75 (1999).

495. Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. CENTER FOR FAMILIES, CHILD. & CTS. 23, 23–24 (2000).

496. Julie A. Helling, *Specialized Criminal Domestic Violence Courts: Violence Against Women Online Resources*, VAWOR, <http://www.vaw.umn.edu/documents/helling/helling.html#id431979> (last visited Aug. 28, 2011).

497. Gerald Lebovits & Michael V. Gervasi, *The Integrated Domestic Violence Court*, 8 RICHMOND COUNTY BAR ASS’N J. 7 (2008); Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981, 994–95 (2004).

498. Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1309–10 (2000). See generally BUZAWA & BUZAWA, *supra* note 25, at 181–85 (detailing the outcomes of various domestic-violence court programs).

consistency in the application of the law, and victim satisfaction with the legal process.⁴⁹⁹

Despite the apparent advantages of specialization, there has also been strong opposition to the development of domestic-violence courts. Critics point out that hearing all IPV cases in a single court increases the effects of “judicial tyranny” or incompetence.⁵⁰⁰ The risk of this “all eggs in one basket” approach, they argue, is that if the system does not work, victims have no other legal recourse.⁵⁰¹ Others argue that combining civil and criminal jurisdictions into a single court poses significant problems, which include exposing judges and prosecutors to factors and evidence typically irrelevant to criminal cases and, thus, potentially violating the constitutional rights of the purported batterers.⁵⁰² For example, whereas a criminal defendant has a Fifth Amendment right against self-incrimination, no such right attaches in a civil matter.⁵⁰³ Therefore, a court with both criminal and civil jurisdiction may be forced to either allow an accused batterer to remain silent throughout a proceeding, quickly derailing it or undercutting its effectiveness, or risk violating the individual’s constitutional rights.⁵⁰⁴ Further, domestic-violence courts have faced opposition from those charged with their implementation.⁵⁰⁵ Judges, attorneys, and court staff have noted that IPV cases are both effort and resource intensive, and that supporting such programs can pose significant challenges for courts and systems with limited resources and other competing worthwhile needs,⁵⁰⁶ a challenge that can be quite significant in the current financial climate.⁵⁰⁷

499. Helling, *supra* note 496.

500. *Id.* (discussing some of the disadvantages to specialized domestic-violence courts).

501. *Id.* (explaining that a court may start out well-staffed and led by a judge, but end up malfunctioning).

502. Maytal, *supra* note 494, at 231.

503. *Id.*

504. *Id.*

505. Helling, *supra* note 496 (discussing the problems that specialized courts pose to attorneys, judges, and court personnel).

506. *Id.*

507. Joseph Goldstein, *After Budget Cuts, Defendants' Wait to See a Judge Often Exceeds 24 Hours*, N.Y. TIMES, July 20, 2011, at A22; Bob Drogin, *Trials Halted to Save Money*, L.A. TIMES, Dec. 22, 2008, <http://articles.latimes.com/2008/dec/22/nation/na-courts22> (“At least [20] . . . states, including California, have slashed court budgets and other government services as their economies have tanked”); Paul Elias, *San Francisco Court Closure: 200 Employees and 25 Courtrooms Gone*, HUFFPOST S.F. (July 18, 2011), http://www.huffingtonpost.com/2011/07/18/san-francisco-courtroom-closure_n_902097.html; Lloyd Mann, *California Financial Crisis Hits Los Angeles Courts Hard*, EXAMINER (L.A.), July 7, 2009, <http://www.examiner.com/legal-profession-in-los-angeles/california-financial-crisis-hits-los-angeles-courts-hard> (“As a result of the severe financial crisis in California, Los Angeles Courtrooms will be going out of business for one day this month, followed by one day each month until further notice.”); Kristen Wyatt, *State Budget Cuts Decimate Mental Health Services*, WASH. POST, Mar. 9, 2011, <http://www>.

H. Private Lawsuits

Although not as widely discussed, private lawsuits might be a useful legal mechanism to combat IPV. These suits can result in the recovery of damages for injuries that an individual incurred as the result of IPV, thereby compensating victims for their losses and deterring future IPV.⁵⁰⁸ In 1989, a Georgia jury awarded Louise Catlett \$30,000 in compensatory and punitive damages after her former husband admitted to hitting her, restraining her on multiple occasions, and “dragg[ing] her down a stairway by her feet because he thought it was comical.”⁵⁰⁹ Catlett claimed that her husband committed three intentional torts: assault, battery, and false imprisonment.⁵¹⁰ Similar suits have obtained awards for intentional (or reckless) infliction of emotional distress, intentional interference with custody, defamation, and invasion of privacy.⁵¹¹ In the past, inter-spousal tort immunity—based on the rationale that a wife and husband became one person at marriage and thus could not sue one another—prohibited many such suits.⁵¹² As of 2006, however, this doctrine has been abolished in all but two states.⁵¹³

In the 1970s, the American Bar Association contended that law-enforcement officers should use arrest as a last resort when responding to a domestic violence call, arguing that civil suits can provide a more effective remedy because they do not remove from the household—at times over the objection of the battered individual—a person providing needed financial support.⁵¹⁴

washingtonpost.com/wp-dyn/content/article/2011/03/09/AR2011030900507.html (“[Thirty-two] states and Washington, D.C., cut funding just as economic stressors such as layoffs and home foreclosures boosted demand for services. . . . In many states, the picture is likely to get uglier.”).

508. See *infra* notes 511–18 and accompanying text.

509. *Catlett v. Catlett*, 388 S.E.2d 14, 15 (Ga. Ct. App. 1989).

510. *Id.*

511. Rousseve, *supra* note 202, at 457; Heather Tonsing, *Battered Women Syndrome as a Tort Cause of Action*, 12 J.L. & HEALTH 407, 426–27, 432 (1998). Infliction of emotional distress is usually defined as an action so extreme that it is considered “intolerable in a civilized community.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. D (1965). For an example of a lawsuit in which a wife successfully pursued such a claim for abusive conduct in conjunction with a divorce action, see *Massey v. Massey*, 807 S.W.2d 391, 395, 399–400 (Tex. Ct. App. 1991). For an example of a lawsuit where damages for intentional interference with parental custody were recovered, see *Plante v. Engel*, 469 A.2d 1299, 1300, 1302 (N.H. 1983). For an example of a domestic-violence-related defamation suit, as well as claims of malicious harassment, outrage, assault and battery, and the tort of domestic violence, see *Ziegler v. Ziegler*, 28 F. Supp. 2d 601, 605 (E.D. Wash. 1998). For an example of a domestic-violence-related claim for the making of “terroristic threats and harassment,” see *Cesare v. Cesare*, 713 A.2d 390, 391 (N.J. 1998).

512. *Developments, supra* note 358, at 1530.

513. *Morao, supra* note 481 at 811.

514. *Mordini, supra* note 58, at 311–12 (citing AM. BAR ASSOC., PROJECT ON STANDARDS FOR CRIMINAL JUSTICE STANDARDS FOR URBAN POLICE FUNCTION 12 (1973)). The American

However, civil lawsuits have not been widely employed in response to IPV for many reasons.⁵¹⁵ For one, the abusive individual involved may be relatively judgment-proof because of their limited assets and income, with insurance or other third-party payers unavailable to cover any compensation award.⁵¹⁶ In addition, because the statute of limitations is generally short for intentional torts, an abused person in a complex personal relationship may fail to file a suit until after this deadline has passed.⁵¹⁷ Third, these lawsuits can be ineffective because of their lengthy proceedings, the delayed and unpredictable judicial response, and the “lack [of] social condemnation” usually seen in criminal cases.⁵¹⁸ Lastly, civil suits “provide an incomplete remedy” because they are relatively unlikely to address more immediate needs for protection and safety, may fail to deter future violent acts, and may be relatively inaccessible for a victim without the resources needed to pursue this remedy.⁵¹⁹

I. Court-Mandated Treatment Programs

Batterer intervention programs were developed in the 1970s⁵²⁰ as a way to provide abusive domestic partners with the skills and motivation needed to abandon or resist violent tendencies.⁵²¹ In the mid-1980s, as arrests and prosecutions of batterers increased, support for and use of these programs became widespread.⁵²² Courts may mandate such programs in conjunction with: (1) a pretrial diversion where an abuser, typically a first-time offender, agrees to obtain treatment in exchange for a no-prosecution agreement; (2) a

Bar Association now advocates that local and federal governments take an active role when responding to domestic violence calls. AMERICAN BAR ASSOCIATION, RECOMMENDATION (Aug. 7–8, 2006), available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredten.doc>.

515. See *infra* notes 516–19. A victim may also file a lawsuit against a governmental entity, such as a local police department, for failing to take adequate steps to protect the victim of IPV; however, such a suit faces various impediments following the U.S. Supreme Court ruling in *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005). See *supra* notes 488–92 and accompanying text.

516. See Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL’Y & L. 139, 155–56 (2005).

517. *Id.* at 155.

518. See *Developments*, *supra* note 358, at 1533.

519. See *id.* at 1532–33.

520. Larry W. Bennett & Oliver J. Williams, *Intervention Programs for Men Who Batter*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 3, at 216, 216.

521. WALKER, *supra* note 17, at 183.

522. David Adams, *Treatment Programs for Batterers*, 5 CLINICS FAM. PRAC. 159, 160–61 (2003) (noting that the 1985 Boston-based program “EMERGE” was the first batterer intervention program to be the focus of a court referral); Juliet B. Austin & Juergen Dankwort, *Standards for Batterer Programs: A Review and Analysis*, 14 J. INTERPERSONAL VIOLENCE 152, 152 (1999).

plea bargain; or (3) a condition for receiving a reduced bond or sentence.⁵²³ In addition, enrollment in such a program is frequently attached to an assignment of probation and is a key component of specialized IPV courts.⁵²⁴ One study found that over one-third of all men charged with spouse abuse are ordered to attend treatment programs.⁵²⁵

The goals of these treatment programs are rehabilitation and victim safety.⁵²⁶ To meet these goals, the programs use a variety of techniques and treatment plans to curb abusive behavior.⁵²⁷ For example, they seek to make batterers realize the consequences of their actions and overcome their denial that such consequences are serious.⁵²⁸ These programs also aim to teach batterers the precipitants or warning signs of abusive behavior so that in the future they can remove themselves from situations where abuse may occur.⁵²⁹ Treatment programs seek to get batterers to take responsibility for their abuse, rather than to blame abuse on exogenous forces, and to realize that they can control their actions.⁵³⁰ These programs also attempt to change domineering attitudes, which are often commonly associated with IPV.⁵³¹ Finally, they seek to reduce batterers' dependence on their partners in order to reduce jealousy and allow abusers to recognize that their partners can lead lives of their own, and they attempt to teach better communication and interaction skills.⁵³² Depending on the thematic approach of the program and the typology of the batterer, different programs utilize different combinations of these features.⁵³³ Reformed abusers often take fault for past violence, recognize the legitimacy of their partner's fears, reduce dependence on their partner, and learn relevant communication skills.⁵³⁴ These accomplishments are usually achieved through a combination

523. Edward W. Gondolf, *Batterer Programs: What We Know and Need to Know*, 12 J. INTERPERSONAL VIOLENCE 86, 86 (1997).

524. See Bennett & Williams, *supra* note 520, at 263.

525. Katreena L. Scott & David A. Wolfe, *Change Among Batterers: Examining Men's Success Stories*, 15 J. INTERPERSONAL VIOLENCE 827, 827 (2000).

526. Bennett & Williams, *supra* note 520, at 263.

527. See *id.*

528. Donald G. Dutton & Barbara M. S. McGregor, *The Symbiosis of Arrest and Treatment for Wife Assault: The Case for Combined Intervention*, in WOMAN BATTERING: POLICY RESPONSES 131, 132 (Michael Steinman ed., 1991).

529. *Id.* at 133.

530. *Id.* at 133–34.

531. See Goodmark, *supra* note 473, at 645–46 (suggesting that batterers who changed their disposition toward women had lower re-assault rates).

532. See *id.* at 646; see also Scott & Wolfe, *supra* note 525, at 836–37 (attributing change to a reduction in dependency, recognition of their partner's autonomy, and improvement in communication skills).

533. See Scott & Wolfe, *supra* note 525, at 828 (describing theories that can be used to help identify processes to make a program successful).

534. *Id.* at 834–37.

of group therapy, individualized programming, and post-program maintenance.⁵³⁵

As batterers' programs emerged in the 1980s, attention focused on ensuring their adequacy, effectiveness, and inclusion of key components; this eventually led to the creation of state and local standards germane to them.⁵³⁶ Currently, forty-five states have adopted standards for batterer intervention programs.⁵³⁷ In some states, the standards are voluntary and serve only as a model for these programs.⁵³⁸ Other states make the standards mandatory, although the sources of these standards vary.⁵³⁹ In both cases, the standards seek to enhance the quality and consistency of the approach to the treatment of batterers,⁵⁴⁰ and they are relatively similar across the states.⁵⁴¹ Most of these standards dictate the qualifications of staff, the content, goals, and techniques of the programs,

535. See Bennett & Williams, *supra* note 520, at 263–64.

536. See Austin & Dankwort, *supra* note 522, at 152.

537. *State Standards Listing By State*, BATTERER INTERVENTION SERVS. COALITION MICH., http://www.biscmi.org/other_resources/state_standards.html (last visited Sept. 3, 2010). This website provides a link to all existing state standards and indicates that the five states without standards are Arkansas, Connecticut, Mississippi, South Dakota, and Wyoming. *Id.*

538. See, e.g., N.D. COUNSEL ON ABUSED WOMEN'S SERVS., NORTH DAKOTA ADULT BATTERER'S TREATMENT STANDARDS (1997), available at http://www.ndcaws.org/what_we_do/projects.html/title/batterers-treatment-forum; R.I. COALITION AGAINST DOMESTIC VIOLENCE, SUGGESTED GUIDELINES FOR BATTERER'S PROGRAM STANDARDS: FINAL DRAFT (1994), available at http://www.biscmi.org/other_resources/docs/rhode_island.html.

539. For example, Maine, Tennessee, and Washington all provide statutory support for their guidelines, while the states of Alabama and South Carolina have mandatory standards but they are not the direct result of legislation. Compare DEP'T OF CORR., 03-021, BATTERER INTERVENTION PROGRAM CERTIFICATION, available at www.maine.gov/corrections/VictimServices/BatIntervent2.htm (explaining the standards and procedures applicable to these programs), and RULES OF DOMESTIC VIOLENCE STATE COORDINATING COUNCIL: RULES FOR BATTERER'S INTERVENTION PROGRAMS ¶ 0490-1.01-.02 (1999), available at <http://www.state.tn.us/sos/rules/0490/0490-01.pdf> (providing both statutory and administrative underpinnings for the rules), and WASH. ST. LEG., WAC 388-60, DOMESTIC VIOLENCE PERPETRATOR TREATMENT PROGRAM STANDARDS, available at <http://apps.leg.wa.gov/WAC/default.aspx?cite=388-60> (last updated Mar. 30, 2001) (providing the statutory authority for each subsection of the chapter), with ALABAMA CERTIFICATION STANDARDS FOR DOMESTIC VIOLENCE PERPETRATOR INTERVENTION PROGRAMS [hereinafter ALABAMA CERTIFICATION STANDARDS], available at http://www.biscmi.org/other_resources/docs/alabama.doc (lacking any indication of statutory authority for the guidelines), and S.C. DEP'T OF SOC. SERVS., STANDARDS OF CARE FOR BATTERERS TREATMENT (2005), available at <http://www.state.sc.us/dss/dv/scbt.pdf> (lacking any indication of statutory authority for the guidelines).

540. Kristina C. Evans, *Can a Leopard Change His Spots?: Child Custody and Batterer's Intervention*, 11 DUKE J. GENDER L. & POL'Y 121, 129 (2004).

541. Larry Bennett & Marianne Piet, *Standards for Batterer Intervention Programs: In Whose Interest?*, 5 VIOLENCE AGAINST WOMEN 6, 7 (1999) (asserting that the various state standards are similar because they all share a foundation in the battered women's movement).

their length, their discharge procedures, and procedures for notifying the victims of the batterers who participate in these programs.⁵⁴²

Assessment of program effectiveness remains difficult for several reasons: a lack of comparative studies with alternative criminal-justice responses, a lack of data about the re-offense rate of batterers who participate in these programs, varying definitions of re-offense, the failure of many offenders to complete their treatment programs, and the unrepresentative makeup of the treatment groups studied, which included self-selection by treatment programs that refused to accept offenders they thought would fail.⁵⁴³ One of the better studies of treatment programs—which examined police, wife, and husband response and matched for prior violence—found that the forty percent re-arrest rate for non-treated offenders dropped to four percent among those who completed the targeted treatment program.⁵⁴⁴ Most other studies report more modest but still positive results from these programs.⁵⁴⁵

Nevertheless, these programs and the state standards that govern them have many critics.⁵⁴⁶ Some contend that the programs are basically ineffective at preventing future violence.⁵⁴⁷ Others suggest that because these programs are based on philosophical beliefs—such as IPV is the result of pervasive gender disparity—rather than empirical evidence, there is no certainty that the programs represent the best approaches for remedying these problems.⁵⁴⁸ Some researchers conclude that treatment is not effective for all types of

542. Bennett & Williams, *supra* note 520, at 270; Evans, *supra* note 540, at 130–31; *see, e.g.*, ALABAMA CERTIFICATION STANDARDS, *supra* note 539.

543. Evans, *supra* note 540, at 133.

544. Dutton & McGregor, *supra* note 528, at 148–49.

545. Julia C. Babcock, Charles E. Green & Chet Robie, *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 CLINICAL PSYCHOL. REV. 1023, 1043–44 (2002) (finding that the reduction in recidivism rates due to treatment remains small); Goodmark, *supra* note 473, at 644–45 (noting that according to victim reports in four studies, recidivism rates were twenty-six percent and nine percent, respectively, according to official reports). *But see* Dutton & McGregor, *supra* note 528, at 144–45 (noting other studies with much higher re-arrest rates for those who completed a treatment program).

546. *See infra* notes 547–50 and accompanying text.

547. *See, e.g.*, MELISSA LABRIOLA, MICHAEL REMPEL & ROBERT C. DAVIS, TESTING THE EFFECTIVENESS OF BATTERER PROGRAMS AND JUDICIAL MONITORING: RESULTS FROM A RANDOMIZED TRIAL AT THE BRONX MISDEMEANOR DOMESTIC VIOLENCE COURT 61 (2005), available at <http://www.courtinnovation.org/uploads/documents/battererprogramseffectiveness.pdf> (“The preponderance of evidence now accumulated in the field calls into serious question the efficacy of batterer programs based on the most prevalent national models. The main findings from our randomized trial are consistent with those of other recent trials, . . . none of which found that mandating offenders to a batterer program produces lower rates of re-abuse.”); Kenneth Corvo, Donald Dutton & Wan-Yi Chen, *Do Duluth Model Interventions with Perpetrators of Domestic Violence Violate Mental Health Professional Ethics?*, 19 ETHICS & BEHAV. 323, 325 (2009) (stating that some studies found little resulting effects for treatment programs).

548. *See* Bennett & Piet, *supra* note 541, at 12–13.

offenders, thus making it critical to better identify how and under what circumstances an offenders' behavior is likely to change before assigning individuals to various programs.⁵⁴⁹ Others contend that IPV is a societal problem and that greater attention must be given to social change through education and reduction of gender discrimination, rather than just targeting individual batterers for therapy.⁵⁵⁰

VI. CONCLUSION: SOCIETY'S CURRENT "RULE OF THUMB"⁵⁵¹

After millennia of condoning and even encouraging IPV, the past few decades appropriately witnessed the increased condemnation of this violence and the adoption of multiple measures—most of them involving the criminal justice system—to limit, control, and remediate this abuse. Considerable resources have been devoted to this effort, but the success of these programs is mixed at best. Although the overall prevalence of IPV has diminished, this likely can be attributed more to society's somewhat improved attitudes regarding this violence, rather than to the direct impact of these measures.⁵⁵²

549. See Goodmark, *supra* note 473, at 649–51 (suggesting that some types of batterers are more likely than others to change as a result of treatment). As discussed, a number of distinct types of IPV have been identified—including “patriarchal terrorism” as opposed to “common couple violence”—that tend to be characterized by different forms of violence. It is likely that the batterers associated with these various types of IPV have different motivations, mindsets, and learned behaviors and will need different treatment programs to help change their actions. See *supra* notes 157–62, 312–20 and accompanying text.

550. See, e.g., WALKER, *supra* note 17, at 188 (arguing that psychotherapy alone will not reduce violent behavior and that attitudes and gender discrimination must also be changed); Austin & Dankwort, *supra* note 522, at 166 (explaining that spousal abuse is a societal problem that requires social change beyond individual therapy).

551. Although perhaps apocryphal, some report that the prevailing social policy under English common law allowed a man to beat his wife as long as he used a rod no thicker than his thumb—a so-called rule of thumb. *Rule of Thumb*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/rule-of-thumb.html> (last visited Mar. 2, 2011). But see Robert Sheaffer, *The “Rule-of-Thumb for Wife Beating” Hoax*, <http://www.debunker.com/texts/ruleofthumb.html> (last visited Mar. 2, 2011) (citing CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM?: HOW WOMEN HAVE BETRAYED WOMEN 203 (1994)) (asserting that the “rule of thumb” with regard to wife beating is a myth developed to promote a feminist agenda).

552. See EVA S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 61–62 (3d ed., 2003) (“Until at least the 1970s, American pop culture often trivialized domestic violence. Consider television programs such as *I Love Lucy*, in which Ricky Ricardo regularly ‘spanked’ Lucille Ball, resulting in considerable audience laughter, or the *Honeymooners*, in which Jackie Gleason’s arguments with his wife, Alice, typically ended with his catch phrase, “One of these days, Alice . . . pow, zoom, right to the moon.” John Wayne movies similarly used spanking as a staple strategy to “tame” and “win over” independent, strong women, typically in front of the entire town, and such taming did not stop until the woman stopped struggling. Although the spanking may have been seen as trivial, and no injuries ever resulted from them on camera, in effect women were seen to encourage “moderate” violence by taunting the male until he gave her the beating she tacitly appeared to desire. The reality or

The number of individuals suffering from IPV and the magnitude of its adverse consequences continue to remain staggering.⁵⁵³

Critics of society's response to IPV often argue that various provisions of domestic-violence laws, such as mandatory reporting, mandatory arrest, and no-drop policies, have led to an "over-reliance on criminal strategies."⁵⁵⁴ Moreover, the adoption of these measures has been driven by a few widely publicized cases in which culpability and the appropriate response seemed obvious.⁵⁵⁵ However, too great a focus on so few cases has resulted in what tends to be a one-size-fits-all approach that fails to adequately address the complexity of IPV and the range of factors and behaviors associated with it.

This societal response can be counterproductive if it fails to adequately distinguish among various types of IPV or does not provide sufficient latitude, flexibility, and nuance for responding to the different needs, desires, and circumstances of the victims. For example, exclusive reliance on a traditional criminal-justice approach, without also empowering the victim, can diminish the victim's feelings of self-worth and increase the victim's isolation, dependence, and vulnerability.⁵⁵⁶ This is not to say, however, that traditional criminal-justice remedies have no place. Certainly, when injured victims are rendered isolated, dependent, or otherwise unable to exercise their autonomy as a result of IPV,⁵⁵⁷ the protection and safety that can be afforded by the criminal justice system should be readily available. Additionally, the nature of the abuse and the characteristics and motivations of the abuser should be taken into account. Mandatory criminal-justice intervention is generally appropriate when the abuse reflects a systematic, terrorizing violence that is perpetrated to

potential for serious domestic violence was simply never addressed."). *But see* NANCY BERNS, FRAMING THE VICTIM: DOMESTIC VIOLENCE, MEDIA, AND SOCIAL PROBLEMS 19–21 (2004) (suggesting that the acceptance of violence is deeply engrained in society).

553. *See supra* notes 127–28.

554. Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 431 (2003).

555. For an analogous discussion regarding sex offenders, see JANUS, *supra* note 351, at 3–4; for one regarding child abuse, see Hafemeister, *supra* note 27, at 822.

556. *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 133 (1992) ("No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest."). Similarly, a need to balance safety concerns and the autonomy of victims also dominates recent debates on how best to respond to elder abuse. *See* Thomas L. Hafemeister, *Financial Abuse of the Elderly in Domestic Settings*, in ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 418, 427 (Richard J. Bonnie & Robert B. Wallace eds., 2003) (suggesting that although guardianship or other assistance may protect an elder-abuse victim, it may consequently disempower a victim).

557. Caution must be exercised lest the mere presence of a psychiatric disorder be viewed as grounds for concluding that a victim lacks decision-making capacity. *See* Hafemeister and Vallas, *supra* note 304, at 5–8.

maintain control over the victim. However, an alternative victim-directed approach tends to be better suited in cases when the IPV involves a relatively isolated outburst of mild violence under circumstances that are relatively unlikely to be repeated or can be readily avoided.⁵⁵⁸

In general, more emphasis needs to be placed on assessing the nature and causes of a given case of IPV and the characteristics of the parties involved. For example, before deciding whether the autonomy or the safety of the victim should take priority, an assessment should be made regarding whether the victim understands their predicament, whether they are unable to exercise their autonomy because of isolation or dependence, and whether they have access to adequate remedial options. This approach empowers victims whenever possible to make their own choices about whether to invoke society's assistance, educates them about the services that are available, and acknowledges that cases of IPV vary considerably and require an individualized response, while still providing protection to victims unable to help themselves.

Once this assessment is completed, there should be a range of programs from which to select—including a greater number of education, treatment, and rehabilitation programs—that better respond to the particular needs and risks of the individuals involved.⁵⁵⁹ A failure to respond appropriately to such disputes can overlook significant dangers, but can also solidify conflict and convert what could have been a temporary disagreement into a relatively intransigent one from which long-term adverse consequences result. For some cases of IPV, a more graduated, measured, inclusive, and individualized approach may better defuse an otherwise explosive situation and avoid many of the adverse short- and long-term consequences that can otherwise result.

In crafting the societal response to IPV, it should be recognized that IPV is a complex phenomenon for which the most appropriate and effective response can vary considerably. Although IPV should under no circumstances be condoned, a more enlightened understanding of IPV and the factors that contribute to it can lead to a more rational, nuanced, and efficient use of society's resources to combat it.

558. *See supra* notes 157–62 and accompanying text.

559. Similar calls for reforming society's response to child abuse and elder abuse have been made. *See, e.g.,* Hafemeister, *supra* note 27, at 904–08.

