

# Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee

*On average, three or more women are murdered by their intimate partners in the United States every day. Despite the now well-known correlation between coercive control—the strategic use of oppressive behavior to control primarily female partners—and intimate partner homicide, most states continue to focus their criminal domestic violence laws solely on physical violence. As a result, state laws often fail to protect victims from future and escalating violence. Focusing on Tennessee law and drawing from the work of Evan Stark as well as the United Kingdom’s Serious Crime Act of 2015, this Note proposes adapting the preexisting crime of false imprisonment to create the first comprehensive criminal coercive control statute in the United States.*

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## INTRODUCTION: A FATAL FLAW IN DOMESTIC VIOLENCE LAW

On July 23, 2016, Megan Short, a wife and mother of three children living in Pennsylvania, read and commented on an article posted on Facebook titled *He Didn't Hit Me. It Was Still Abuse*.<sup>1</sup> She had already told the police the previous week, after reporting a domestic dispute to 911, that she was afraid of her husband; but short of advising her how to apply for a protective order, there was nothing they could do for her without evidence of physical injuries.<sup>2</sup> “It really does a number on your mental health for sure,” she said in response to the kind of psychological pain outlined in the article, and later announced in her Facebook post that it was the reason she would be leaving her marriage after sixteen years.<sup>3</sup> Two weeks later, her husband, Mark, would prevent her from leaving forever. On August 6, the day she planned to move out, he shot and killed Megan, their three children, their dog, and then himself.<sup>4</sup>

Tragic stories like Megan's happen in the United States, and around the world, every day.<sup>5</sup> The common responses to these stories

1. Steven Henshaw & Anthony Orozco, *A Young Family's Final Anguish*, READING EAGLE (Aug. 8, 2016, 12:01 AM), <http://www.readingeagle.com/news/article/a-young-family-s-final-anguish> [<https://perma.cc/PV62-N74Q>]; Melissa Jeltsen, *She Was Leaving Her Emotionally Abusive Husband. Now the Whole Family Is Dead.*, HUFFINGTON POST (Aug. 22, 2016, 2:01 PM), [http://www.huffingtonpost.com/entry/megan-short-domestic-violence\\_us\\_57bb20dfe4b03d51368996cf](http://www.huffingtonpost.com/entry/megan-short-domestic-violence_us_57bb20dfe4b03d51368996cf) [<https://perma.cc/HK5S-E439>]; Leigh Stein, *He Didn't Hit Me. It Was Still Abuse.*, WASH. POST (July 15, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/07/15/he-didnt-hit-me-it-was-still-abuse/?utm\\_term=.a0dab9e297c0](https://www.washingtonpost.com/posteverything/wp/2016/07/15/he-didnt-hit-me-it-was-still-abuse/?utm_term=.a0dab9e297c0) [<https://perma.cc/R78V-JL48>].

2. Jeltsen, *supra* note 1.

3. Henshaw & Orozco, *supra* note 1.

4. *Id.*

5. Studies show that an average of three or more women are murdered by a male partner in the United States every day. *Intimate Partner Violence*, AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/violence/intimate-partner-violence.pdf> (last visited Oct. 14, 2017) [<https://perma.cc/C5H5-K93E>]. In a study examining female homicide victims globally in 2012, an estimated half were found to have been killed by an intimate partner or family member. *Global Study on Homicide*, U.N. OFF. ON DRUGS & CRIME 14 (2013), [https://www.unodc.org/documents/gsh/pdfs/2014\\_GLOBAL\\_HOMICIDE\\_BOOK\\_web.pdf](https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf) [<https://perma.cc/3WFV-UGU8>].

inevitably start with: “Why?” and “How?”. Why didn’t she leave?<sup>6</sup> How could this happen? How can we prevent this from happening again? The problem is that it does happen again. And again.

Despite significant research demonstrating that emotional and psychological abuse often accompanies and forecasts physical domestic violence,<sup>7</sup> few legal remedies exist to prevent, punish, or otherwise address this aspect of domestic abuse. Some states do incorporate aspects of what is known as “coercive control” into their laws outlining qualifications for a civil order of protection,<sup>8</sup> but most states’ criminal domestic violence laws are limited to physical violence or assault.<sup>9</sup> This definition of abusive relationships not only perpetuates a false narrative of what “abuse” looks like to society, but also limits the legal remedies for those women who do understand the cycle they are stuck in.

The state of Tennessee, which will serve as the geographic focus of this Note, is no different in this regard. Tennessee’s criminal code defines domestic assault as simple assault, requiring infliction of bodily injury or causing another to fear that bodily injury is imminent, perpetrated against cohabitants, family members, or intimate partners.<sup>10</sup> Analyzing Tennessee’s domestic violence laws is appropriate for a few reasons. First, for the past seven years, Tennessee has ranked among the top ten states for the number of women murdered by men, most of whom are killed by a current or former intimate partner.<sup>11</sup> Despite this dismal ranking, other indicators

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6. Recognizing that not all victims of domestic violence are women, this Note will focus on female victims and use gendered pronouns given statistics demonstrating that women do comprise a majority of those affected by intimate partner abuse, particularly the kind involving coercive control.

7. See, e.g., Christopher M. Murphy & Daniel K. O’Leary, *Psychological Aggression Predicts Physical Aggression in Early Marriage*, 57 J. CONSULTING & CLINICAL PSYCHOL. 579 (1989), <http://psycnet.apa.org/?&fa=main.doiLanding&doi=10.1037/0022-006X.57.5.579> [<https://perma.cc/7UWJ-DVXP>]; *Warning Signs and Red Flags*, NAT’L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/is-this-abuse/abuse-defined/> (last visited Oct. 14, 2017) [<https://perma.cc/C7KM-E646>] [hereinafter *Warning Signs*].

8. See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1133–34 (2009); Kristy Candela, Note, *Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes*, 54 FAM. CT. REV. 112, 113 (2016).

9. See *50 State Statutory Surveys: Criminal Law: Crimes: Domestic Violence*, 0030 Surveys (Thomson Reuters) 7 (Oct. 2017) [hereinafter *Domestic Violence Statutory Survey*] (listing approximately twenty-six states as requiring only physical injury or threat/fear thereof).

10. TENN. CODE ANN. §§ 39-13-101, -111(b) (2017).

11. Anita Wadhvani, *Tennessee, Again, Ranks High in Women Killed by Men*, TENNESSEAN (Sept. 20, 2016, 3:36 PM), <http://www.tennessean.com/story/news/crime/2016/09/20/tennessee-again-ranks-high-women-killed-men/90741480/> [<https://perma.cc/62JD-6QKF>]; *When Men Murder Women: An Analysis of 2014 Homicide Data*, VIOLENCE POLY CTR. 19 (Sept. 2016), <http://www.vpc.org/studies/wmmw2016.pdf> [<https://perma.cc/NPP7-6D44>].

suggest that Tennessee is a comparatively progressive state in terms of enacting protective domestic violence laws and policies. For example, Tennessee ranks relatively well compared to other states in its legislative efforts to bar gun possession by domestic abusers.<sup>12</sup> Nashville, its capital, also sets a good example with its specialized general sessions court and investigative division dedicated to domestic violence cases.<sup>13</sup> These, among other factors, demonstrate that Tennessee is generally cognizant of domestic violence as an issue deserving of attention.

This Note seeks to improve Tennessee's criminal domestic violence laws by drawing from preexisting Tennessee laws to better address nonviolent behaviors typically associated with domestic abuse. Part I provides an overview of domestic violence law in the United States and Tennessee and explains the correlation between the modern understanding of domestic violence and the need to criminalize coercive control. Part II outlines recent legal developments in the United Kingdom with the Serious Crime Act of 2015, which can provide a basis for reform in Tennessee.

Just as many state criminal domestic violence statutes have been adapted from traditional crimes of assault and battery, Part III suggests adapting Tennessee's preexisting crime of false imprisonment to criminalize nonphysical domestic abuse. Using false imprisonment as a foundation would, first, frame coercive control in a way that is already familiar to law enforcement, prosecutors, and the judiciary, abating some of the issues that could arise from criminalizing a relatively new and complex concept. Second, it allows policymakers to target a variety of systematic behaviors with one statute rather than a combination of many. Last, false imprisonment frames coercive control as primarily a crime against liberty, reflecting the current understanding of domestic abuse as a technique to exert power and

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12. See Arkadi Gerney & Chelsea Parsons, *Women Under the Gun*, CTR. AM. PROGRESS 32–33 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolencereport.pdf> [<https://perma.cc/2HBF-A55C>] (demonstrating in Appendix A that Tennessee actually ranks relatively well compared to other states in terms of laws that bar gun possession by domestic abusers).

13. See *Domestic Violence*, OFF. DISTRICT ATT'Y NASHVILLE, <http://da.nashville.gov/domestic-violence/> (last visited Oct. 14, 2017) [<https://perma.cc/K7JV-BG8D>]; *Domestic Violence Court*, GEN. SESSIONS CT., <http://gscourt.nashville.gov/domestic-violence-court/> (last visited Oct. 14, 2017) [<https://perma.cc/Z6Z7-QGWN>]. Former Nashville Mayor Karl Dean also undertook the Domestic Violence Safety and Accountability Assessment in 2013, which laid the foundation for creating the Jean Crowe Advocacy Center for domestic violence victims. *About Jean Crowe*, NASHVILLE.GOV, <http://www.nashville.gov/Office-of-Family-Safety/About-Jean-Crowe.aspx> (last visited Oct. 20, 2017) [<https://perma.cc/2YWB-TKYM>]. Tennessee has also implemented the Lethality Assessment Program (discussed *infra*) to guide domestic violence case investigations. See *infra* note 59 and accompanying text.

control over victims and, ultimately, to “entrap” them in their own lives.<sup>14</sup>

## I. DOMESTIC VIOLENCE: HISTORY AND DEVELOPMENTS

Our understanding of the mechanics of domestic violence, and the laws borne out of that understanding, has changed significantly over time. To track this evolution, Section I.A provides a brief history of domestic violence law in the United States. Section I.B then explains the modern conceptualization of domestic violence as a cycle of power and control exercised by the abuser. Finally, Section I.C explains why criminalizing coercive control is necessary to bring the law in line with this modern understanding.

### A. A Brief History of American Domestic Violence Law

Having brought with them European opinions of women and family, early American settlers enacted laws that “explicitly permitted wife-beating for correctional purposes.”<sup>15</sup> The well-known “rule of thumb” was borne out of the common law doctrine, which permitted a husband to hit his wife as long as he used a rod smaller than the circumference of his thumb.<sup>16</sup> Although the doctrine limited the liberties a husband could take in the corporal punishment of his wife, states and courts did not begin explicitly declaring such abuse illegal until the mid-to-late nineteenth century.<sup>17</sup>

Indeed, some historians credit Tennessee as the first state to outlaw “wife-beating” in 1850.<sup>18</sup> Still, it took courts in other states two decades to begin doing the same. In 1871, the Supreme Court of Alabama in *Fulgham v. State* held that husbands in Alabama could no longer beat their wives “for her moderate correction.”<sup>19</sup> The opinion went on to say that “the privilege, ancient though it be, to beat her 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.”<sup>20</sup> Other courts followed suit, but many retained their

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14. See generally EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007).

15. DEL MARTIN, BATTERED WIVES 31 (1981).

16. *Id.*

17. *Id.* at 31–32. This excludes the laws enacted by the Massachusetts Bay Colony (1641) and Plymouth Colony (1672) prohibiting wife beating and spousal abuse. Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640-1980*, 11 CRIME & JUST. 19, 22 (1989).

18. Pleck, *supra* note 17, at 29.

19. 46 Ala. 143, 146–47 (1871).

20. *Id.*

reservations regarding government interference with domestic relations. For example, the Supreme Court of North Carolina officially renounced the “rule of thumb” in 1874, holding that “the husband has no right to chastise his wife, under any circumstances.”<sup>21</sup> Yet, in the same breath, it qualified its ruling by saying, “If no permanent injury is inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”<sup>22</sup>

This traditional hesitance by states to get involved in familial disputes has often been cited as a primary reason for the historically dismal response to domestic violence, particularly by law enforcement.<sup>23</sup> Up until the early 1980s, “[p]olice traditionally responded to domestic violence with indifference.”<sup>24</sup> Officers “ignored domestic violence calls; intentionally delayed responding; attempted to mediate cases of violence with the parties; dealt with violence by telling the abuser to take a ‘time out’ . . . ; and admonished the victim to be a better wife.”<sup>25</sup> Because domestic disputes often occur inside the home, “[p]olice rationalized their refusal to intervene on the ground that domestic violence was a private matter.”<sup>26</sup> While our understanding of domestic violence has undoubtedly improved over time, police failure or inability to respond to domestic disputes still persists to this day.<sup>27</sup>

The failure of police to respond, in turn, eventually became one of the rationales for creating a separate crime of domestic abuse, as opposed to relying on traditional crimes like assault and battery.<sup>28</sup> Intuitively, one can see the benefit in this: creating a separate crime signals to police that domestic violence is not just a “lesser” form of another crime that can, and should be, dealt with privately between the parties.<sup>29</sup> Instead, it tells police, and arguably society, that domestic

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21. *State v. Oliver*, 70 N.C. 60, 61 (1874).

22. *Id.*

23. *See, e.g.*, D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 332 (6th ed. 2016).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 748 (2005). The respondent filed a civil rights action against her town and its police officers for their failure to enforce her restraining order against her ex-husband after he took their three children in violation of the order. *Id.* After an approximate eight-hour delay, the ex-husband murdered the children and opened fire at the police station with a semiautomatic weapon. *Id.* at 753–54.

28. *See* STARK, *supra* note 14, at 383–84 (“The rationale for crafting distinct domestic violence statutes was to fix attention on a class of victims and perpetrators that had received an inappropriate response from law enforcement.”).

29. The criticism of such laws actually argues the opposite, i.e., that “establishing a separate offense of domestic assault may, in fact, create the impression that domestic violence is a lesser crime.” *Sample National Domestic Violence Laws*, MINN. ADVOCS. FOR HUM. RTS.,

violence is a crime deserving of independent recognition and should be dealt with appropriately by adequately punishing offenders and protecting victims from further abuse.<sup>30</sup> Furthermore, creating a separate crime of domestic violence acknowledges that it is, in fact, a different *kind* of crime than your traditional barroom brawl. It recognizes that there are elements specific to domestic abuse that may be “difficult to prosecute under the rubric of general assault and battery statutes.”<sup>31</sup> It is this distinction in kind, however, that our current laws fail to fully recognize. It is one thing to treat domestic violence as a separate crime, but another entirely to truly capture the full picture of what makes it distinct in the first place.<sup>32</sup> The following Section will paint that picture as one, not of short tempers or violent propensities, but of domination and control.

### *B. The Modern View: A Cycle of Power and Control*

The modern understanding and definition of domestic violence is less about physical violence than it is about the intent of the abuser. The National Coalition Against Domestic Violence, like many other organizations and scholars, defines domestic violence as “a systematic pattern of power and control perpetrated by one intimate partner against another.”<sup>33</sup> In line with this definition, the “warning signs” of abuse focus far more on nonphysical behaviors employed by abusers. These include, among others: jealousy and possessiveness; verbal abuse, including insulting, demeaning, and shaming remarks; isolation from friends and family; exerting extreme control over finances; preventing the victim from working or attending school; and generally controlling the victim’s associations, movements, and activities.<sup>34</sup> All of this combines to create what is now commonly known as “coercive

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<http://hrlibrary.umn.edu/svaw/domestic/laws/samplelaws.htm> (last visited Oct. 14, 2017) [<https://perma.cc/9Y7Q-DE7R>]. It is difficult, however, to imagine how such an impression could be created so long as the domestic violence laws in place are being prosecuted with the same voracity as other violent crimes.

30. See, e.g., *id.*

31. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 111 (2003).

32. See Heather Douglas, *Do We Need a Specific Domestic Violence Offence?*, 39 MELB. U. L. REV. 434, 447 (2015) (“[I]n effect, the essence of domestic violence remains ‘uncriminalised’ [in the United States] because non-physical methods of power and control are still not criminalised.”).

33. *What Is Domestic Violence?*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <http://ncadv.org/learn-more/what-is-domestic-violence> (last visited Oct. 2, 2017) [<https://perma.cc/2R3V-MKUG>].

34. *Signs of an Abusive Partner*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <http://ncadv.org/learn-more/what-is-domestic-violence/abusive-partner-signs> (last visited Oct. 2, 2017) [<https://perma.cc/AEL4-HCQR>]; *Warning Signs*, *supra* note 7.

control,” a conceptualization of domestic violence that sees victims as captives in a cycle of emotional and psychological abuse in addition to physical and sexual violence.<sup>35</sup> This cycle makes domestic violence categorically different from other violent crimes, in part because it subjects the same victim to repeated abuse over time rather than occurring in an isolated incident.

Despite this clear picture of domestic abuse recognized by academics in this field, the law has yet to catch up. Most states, including Tennessee, limit criminal domestic violence charges to physical violence or assault.<sup>36</sup> There has been some movement in the civil context toward recognizing elements of coercive control as abuse for purposes of obtaining an order of protection.<sup>37</sup> However, no state has incorporated a prohibition on coercive control in its entirety, and two-thirds of states still require that the victim prove actual physical violence or threats of violence to be eligible for a protective order.<sup>38</sup>

While recognizing the legal improvements that have been made in recent decades, one need only look at the current domestic violence statistics in the United States and around the world to acknowledge that more work needs to be done. According to the Centers for Disease Control and Prevention, twenty people per minute are victims of intimate partner violence in the United States.<sup>39</sup> If this alone were not appalling enough, current laws fail to protect this large group of victims from *additional* and *escalating* abuse. Three or more women are murdered by a male intimate partner in this country every day, and a study examining female homicide victims globally in 2012 found that an estimated half were killed by an intimate partner or family member.<sup>40</sup> Furthermore, a study analyzing mass shootings in the last five years where at least four people were killed found that the shooter targeted a family member or intimate partner in fifty-seven percent of

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35. See STARK, *supra* note 14, at 203–05 (outlining the theory of coercive control). See generally JILL CORY & KAREN MCANDLESS-DAVIS, *WHEN LOVE HURTS: A WOMAN’S GUIDE TO UNDERSTANDING ABUSE IN RELATIONSHIPS* (2005) (describing the cycle of abuse, as well as the different types of abuse outlined in the “Power and Control Wheel,” which includes emotional, financial, psychological, spiritual, and social abuse, in addition to physical and sexual abuse); LISA ARONSON FONTES, *INVISIBLE CHAINS: OVERCOMING COERCIVE CONTROL IN YOUR INTIMATE RELATIONSHIP* (2015); *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <http://www.theduluthmodel.org/pdf/PowerandControl.pdf> (last visited Oct. 20, 2017) [<https://perma.cc/G6UK-WEMK>].

36. See *Domestic Violence Statutory Survey*, *supra* note 9.

37. Candela, *supra* note 8, at 117–18.

38. *Id.* at 113.

39. *Facts Everyone Should Know About Intimate Partner Violence, Sexual Violence & Stalking*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/pdf/nisvs-infographic.pdf> (last visited Oct. 2, 2017) [<https://perma.cc/3E2S-256U>].

40. See *supra* note 5.

cases.<sup>41</sup> As the following Section will make clear, coercive control is central to this lethal type of domestic violence in particular.<sup>42</sup> Thus, targeting it is key to protecting the hundreds of women who die in this country every year at the hands of their intimate partners.

### *C. The Need to Criminalize Coercive Control*

Based on our current understanding of the realities of domestic violence, it is clear that incorporating into our laws some form of restrictions on coercive control, or at least recognizing some nonphysical behaviors associated with it, is the next logical step. First, laws that restrict the definition of domestic abuse to physical violence or threats thereof ignore a significant portion of the abuse that victims experience, as well as the serious impact that emotional and psychological abuse alone can have on victims.<sup>43</sup> Numerous empirical studies have shown that psychological abuse is as detrimental to women's health, if not more so, than physical abuse.<sup>44</sup> Psychological abuse has been found to correlate with a host of physical ailments,<sup>45</sup> in addition to feelings of isolation and low self-esteem.<sup>46</sup> It has also been linked to serious mental illness, including depression, post-traumatic stress disorder, and anxiety.<sup>47</sup>

The story of a woman named Joanne illustrates this linkage well. In the past, if Joanne questioned the authority of her husband,

41. Melissa Jeltsen, *We're Missing the Big Picture on Mass Shootings*, HUFFINGTON POST (Aug. 25, 2015, 1:44 PM), [http://www.huffingtonpost.com/entry/mass-shootings-domestic-violence-women\\_us\\_55d3806ce4b07addcb44542a](http://www.huffingtonpost.com/entry/mass-shootings-domestic-violence-women_us_55d3806ce4b07addcb44542a) [<https://perma.cc/56XB-8U64>].

42. See *infra* notes 55–60 and accompanying text.

43. See NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 30 (2009), <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf> [<https://perma.cc/BE57-XZYE>] (“Studies have found up to 88 percent of battered women in shelters suffer from post-traumatic stress disorder (PTSD). Other studies have found that as many as 72 percent of abuse victims experience depression and 75 percent experience severe anxiety.” (citations omitted)).

44. E.g., Ann L. Coker et al., *Physical Health Consequences of Physical and Psychological Intimate Partner Violence*, 9 ARCHIVES FAM. MED. 451, 456 (2000) (“We found that psychological violence was associated with many of the same health outcomes as was physical IPV.”); Maria A. Pico-Alfonso et al., *The Impact of Physical, Psychological, and Sexual Intimate Male Partner Violence on Women's Mental Health: Depressive Symptoms, Posttraumatic Stress Disorder, State Anxiety, and Suicide*, 15 J. WOMEN'S HEALTH 599, 609 (2006):

[P]sychological IPV is . . . as detrimental to women's mental health as is physical violence, having independent effects on depressive and anxiety symptoms and being the only factor contributing to PTSD . . . Thus, psychological IPV . . . should be considered a major type of violence that deserves the full attention of researchers, clinicians, lawyers, and policymakers.

45. Coker et al., *supra* note 44, at 455 tbl.4.

46. Pico-Alfonso et al., *supra* note 44, at 609.

47. *Id.*

Carl, he would respond by choking her.<sup>48</sup> However, after participating in group psychotherapy, Carl learned to curb his violent tendencies.<sup>49</sup> Still, as Carl improved, Joanne seemed to deteriorate, becoming increasingly depressed, isolated, and angry.<sup>50</sup> His group facilitators realized that, far from learning to relinquish his control over his wife, Carl merely learned to control her without violence—for example, by putting himself in harm’s way to coerce her into doing what he wanted.<sup>51</sup> Joanne was more intimidated and isolated than ever, but no longer had an obvious reason for her feelings.<sup>52</sup>

Research suggests that, apart from their effects on women’s health in isolation, psychological and emotional abuse can also be predictive of future, and escalating, physical violence.<sup>53</sup> One study on the psychological effects of partner abuse on women found that, while some subjects experienced only psychological abuse, all women who experienced physical abuse were also subjected to some form of psychological abuse.<sup>54</sup> This indicates that the two forms of abuse are inexorably linked.

Furthermore, nonphysical abusive behaviors can actually be seen as more dangerous, in the sense that they are often predictive of not just physical violence but also lethal violence.<sup>55</sup> For example, one author identified “obsessive possessiveness or morbid jealousy” as a red flag that “the research literature consistently identifies . . . as central to intimate partner homicides.”<sup>56</sup> Another found that, based on a national study, “partner control over the victim’s daily activities” in an intimate relationship more than quintupled the odds of homicide.<sup>57</sup> Both of these behaviors are listed as common “warning signs” of an abusive relationship by the National Coalition Against Domestic Violence.<sup>58</sup> The Lethality Assessment Program (“LAP”), which some states—including Tennessee—have employed as a method of assessing

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48. STARK, *supra* note 14, at 73.

49. *Id.*

50. *Id.*

51. *Id.* (describing an instance in which Carl took a “time out” and walked home from a restaurant on the interstate after becoming upset that Joanne was spending time with a friend he did not like).

52. *Id.*

53. See Murphy & O’Leary, *supra* note 7, at 579 (finding that psychological aggression by a partner can be predictive of future physical violence).

54. Pico-Alfonso et al., *supra* note 44, at 602.

55. See STARK, *supra* note 14, at 276 (“Not only is coercive control the most common context in which women are abused, it is also the most dangerous.”).

56. Neil Websdale, *Assessing Risk in Domestic Violence Cases*, in *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 38, 40 (Nicky Ali Jackson ed., 2007).

57. NAT’L INST. OF JUSTICE, *supra* note 43, at 27.

58. See *supra* note 34 and accompanying text.

victims' risk of homicide by their intimate partner, also provides further support for the link between nonphysical abuse and lethal violence.<sup>59</sup> The LAP's website warns that "physical violence isn't necessarily the most accurate predictor of homicide" and, thus, "first responders need to also look for other, non-physical tactics that abusers use . . . that could indicate the victim is in danger of being killed."<sup>60</sup>

In limiting legal remedies for domestic violence to situations that already involve physical abuse, the law effectively leaves behind a significant portion of women suffering under the control of their intimate partners.<sup>61</sup> As such, these women are left unprotected and without recourse until *after* the abuse has escalated to physical violence. All too often, in cases like Megan Short's, this help can arrive too late.<sup>62</sup>

Lastly, to the extent we as a society look to the law as a behavioral guide, the law as it currently stands perpetuates a fundamental misconception about what constitutes domestic abuse. This, in turn, propagates a false impression that emotionally and psychologically abusive behaviors by intimate partners are acceptable.<sup>63</sup> In situations like Joanne's, this misunderstanding of abuse can work significant harm on victims' mental health by depriving them of a framework to explain and justify their feelings.<sup>64</sup> And, to the extent that victims themselves often must be the ones to step forward and report their abusers, this false impression is a disservice to every current and future victim looking for a sign that that reads "this is not okay." Criminalizing coercive control sends that message to victims and abusers alike.

## II. BREAKING THE INVISIBLE BARS: WHAT TENNESSEE CAN LEARN FROM THE UNITED KINGDOM

Acknowledging the need for improvements to domestic violence law, some countries *have* targeted aspects of coercive control or

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59. *Talking Points*, LETHALITY ASSESSMENT PROGRAM, <https://lethalityassessmentprogram.org/about-lap/talking-points/> (last visited Oct. 2, 2017) [<https://perma.cc/Q43N-UNFP>].

60. *Id.*

61. See Coker et al., *supra* note 44, at 456 ("If we had not included psychological IPV, we would have missed 25% of women who had ever experienced IPV.").

62. See *supra* Introduction.

63. See *Women and Violence: Legislation to Reduce the Growing Problem of Violent Crime Against Women: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 2 (1990) (statement of Sen. Joseph Biden, Chairman, S. Comm. on the Judiciary) ("I know of no circumstance under which the Nation has concluded that there is a serious problem where that problem has not been reflected in legislative form.").

64. See *supra* notes 48–52 and accompanying text.

psychological abuse more generally. Section II.A outlines the reforms enacted in the United Kingdom, the first country to enact a comprehensive criminal coercive control statute. Section II.B addresses the debate surrounding the U.K. law and the issues that have arisen with its implementation and effectiveness. Section II.C questions the wisdom of following the U.K.'s approach in the United States, and explores potential alternatives as applied to Tennessee law. Finally, Section II.D examines Tennessee's current criminal false imprisonment law as a possible starting point.

### *A. The U.K.'s Initiative Against Coercive Control*

Unlike many states in this country, the United Kingdom did not previously have a separate criminal offense for domestic violence, but instead prosecuted most domestic abuse as common assault.<sup>65</sup> Recognizing that more needed to be done, the Home Office<sup>66</sup> implemented a reform in 2009 called the Domestic Violence Disclosure Scheme, which allowed law enforcement to disclose an abuser's past violent offenses to victims who report abuse by that offender.<sup>67</sup> The Home Office announced the scheme in response to the murder of a woman named Clare Wood by a man she had met on an internet dating site, who had a hidden history of violence. Assessment of the police response to her case revealed that she had contacted police in the months before her murder, alleging the man had caused criminal damage, harassed her, threatened her, and sexually assaulted her.<sup>68</sup> He was arrested a week before her death for breaking down her front door but was subsequently released, leaving Clare unprotected.<sup>69</sup>

In 2014, leaders began pushing for more reforms to provide greater protection to domestic violence victims, looking specifically at the possibility of creating a separate criminal offense to deal with domestic violence.<sup>70</sup> The Law Commission, an independent body

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65. *The Briefing: Policing Domestic Abuse*, POLICE FOUND. 5–6 (Oct. 2014), [http://www.police-foundation.org.uk/uploads/holding/projects/policing\\_domestic\\_abuse.pdf](http://www.police-foundation.org.uk/uploads/holding/projects/policing_domestic_abuse.pdf) [<https://perma.cc/SHL7-XMBM>] [hereinafter *The Briefing*].

66. The Home Office is the leading government department in the United Kingdom for immigration, drug policy, crime, fire, counterterrorism, and police. *About Us*, HOME OFF., <https://www.gov.uk/government/organisations/home-office> (last visited Oct. 4, 2017) [<https://perma.cc/VSW8-X82Q>].

67. *The Briefing*, *supra* note 65, at 6.

68. *Id.*

69. *Salford Murder Victim Clare Wood "Was Not Protected,"* BBC NEWS (May 23, 2011), <http://www.bbc.com/news/uk-england-manchester-13506721> [<https://perma.cc/8JBB-9EFR>].

70. See Owen Bowcott, *Should Domestic Violence Be a Specific Criminal Offense, Asks Law Commission?*, GUARDIAN (Nov. 11, 2014, 19.01 EST), <https://www.theguardian.com/society/2014/>

charged with reviewing the laws of England and Wales and making recommendations for reforms,<sup>71</sup> indicated that part of the impetus for reform was the “widespread concern that domestic violence [was] not being effectively policed.”<sup>72</sup> It also recognized the distinct harm of domestic abuse compared to other crimes, and noted that prosecution of such offenses had “a part to play in correcting the power imbalance between the sexes.”<sup>73</sup>

This reform came to pass with the Serious Crime Act of 2015. Far from enacting a simple domestic assault law like the one in Tennessee, section 76 of the Act makes it a crime, punishable by up to five years in prison, to “repeatedly or continuously [engage] in behavior towards another person that is controlling or coercive.”<sup>74</sup> The behavior must be directed at a person with whom the perpetrator has a “personal connection,” which includes by definition a current or former intimate partner or family member, but excludes minor, dependent children.<sup>75</sup> Further, the coercive or controlling behavior must have “a serious effect” upon the victim, and the perpetrator must have known, or should have known, that such an effect would result.<sup>76</sup> Such behavior has “a serious effect” if the victim has been in fear of violence on at least two occasions or if it causes the victim serious alarm or distress that adversely affects his or her usual day-to-day activities.<sup>77</sup>

While the law itself does not define what precisely constitutes “controlling or coercive” behavior, the statutory guidance provided by the Home Office sheds some light on the types of behavior targeted by the law.<sup>78</sup> First, it is generally categorized as “a purposeful pattern of behavior” designed “to exert power, control or coercion over another.”<sup>79</sup> Controlling behavior is described as that which is designed to make a person subordinate and/or dependent through isolation, exploitation,

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nov/12/domestic-violence-specific-criminal-offence-law-commission [https://perma.cc/PWC2-MASZ].

71. LAW COMMISSION, <http://www.lawcom.gov.uk> (last visited Oct. 4, 2017) [https://perma.cc/V4QJ-NVP4].

72. Bowcott, *supra* note 70.

73. *Id.*

74. Serious Crime Act 2015, c. 9, § 76 (U.K.), <http://www.legislation.gov.uk/ukpga/2015/9/part/5/crossheading/domestic-abuse/enacted> [https://perma.cc/Q6WX-JLF3].

75. *Id.*

76. *Id.*

77. *Id.*

78. *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework*, HOME OFF. 3–4 (Dec. 2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482528/Controlling\\_g\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_g_or_coercive_behaviour_-_statutory_guidance.pdf) [https://perma.cc/P79V-ZD5A] [hereinafter *Statutory Guidance*].

79. *Id.* at 3.

deprivation, and regulation of daily behavior.<sup>80</sup> Coercive behavior involves “acts of assault, threats and intimidation or other abuse that is used to harm, punish, or frighten” the victim.<sup>81</sup> Examples of such behavior may include isolating a person from friends and family; monitoring and controlling their time, movements, or communications; exercising control over financial resources; and depriving them of access to medical or support services.<sup>82</sup> As the first of its kind, this law provides ample opportunity to examine how best to address the nonphysical behaviors associated with domestic violence.

### *B. The U.K. Law: Debate on Policy and Effectiveness*

The U.K. law making coercive control a crime has received mixed reviews since its enactment. One domestic abuse advocacy group, which had campaigned for the law’s implementation, lauded the effort as “a landmark moment in the U.K.’s approach to domestic abuse.”<sup>83</sup> Some expressed optimism about the law in practice as well, with a police officer in one area commenting that the law now allows responders to better support victims and identify mentally abusive behaviors before the abuse escalates to physical violence.<sup>84</sup>

In contrast, another domestic violence advocacy group opposed the law for a number of reasons.<sup>85</sup> The chief executive saw the effort as futile, expressing skepticism that enacting more laws was the appropriate solution and advocating instead for improved police implementation of laws already in place.<sup>86</sup> She expressed further concern about the evidentiary challenges in detecting such subtle behavior and proving it in satisfaction of criminal evidentiary standards, as well as potential unintended consequences, like treating the new law as a separate, less serious category of domestic abuse.<sup>87</sup>

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80. *Id.*

81. *Id.*

82. *Id.* at 4.

83. *Women’s Aid Welcomes Coercive Control Law*, WOMEN’S AID (Dec. 29, 2015), <https://www.womensaid.org.uk/womens-aid-welcomes-coercive-control-law/> [https://perma.cc/3U58-7N7T].

84. Jonathan Humphries, “*Obsession, Control and Violence*”—*How New Laws Protect Domestic Abuse Victims in Merseyside*, ECHO (Dec. 28, 2016, 11:00 AM), <http://www.liverpoolecho.co.uk/news/liverpool-news/obsession-control-violence-how-new-12375796> [https://perma.cc/F6QZ-VYJL].

85. *Refuge Opposes Criminalisation of Coercive Control*, REFUGE (Dec. 18, 2014), <http://www.refuge.org.uk/2014/12/18/refuge-opposes-criminalisation-of-coercive-control/> [https://perma.cc/P6LH-UCSN]. Refuge, like Women’s Aid, also seeks to protect women and children from domestic violence and empower them for the future. *Who We Are*, REFUGE, <http://www.refuge.org.uk/who-we-are/> (last visited Oct. 4, 2017) [https://perma.cc/55N5-4YV9].

86. *Refuge Opposes Criminalisation of Coercive Control*, *supra* note 85.

87. *Id.*

Similar concerns have been cited elsewhere in opposition to the idea of having a separate crime of domestic violence in general.<sup>88</sup>

The law's effectiveness since its enactment remains unclear. Police only used the law sixty-two times in the first six months of it going into effect, with eight out of twenty-two police forces in England and Wales failing to charge anyone with the offense.<sup>89</sup> As of October 1, 2016, seven police forces had still not charged anyone.<sup>90</sup> Because the majority of charging decisions in the United Kingdom are made by police forces rather than prosecutors, law enforcement receives most of the criticism that the law is not being used to its full potential.<sup>91</sup> One possible barrier to this law's success is the police force's historical ambivalence to domestic violence,<sup>92</sup> as well as the aforementioned advocacy group's criticism that police were not adequately enforcing preexisting criminal laws.<sup>93</sup> Coercive control is also a relatively new theory, such that both police and victims may fail to recognize and identify it. For this reason, some have advocated for "more dedicated training" to ensure police forces fully understand the importance and scope of the new law.<sup>94</sup>

Another problem is proof.<sup>95</sup> Unlike physical abuse, which leaves bruises and broken bones, the psychological trauma caused by coercive and controlling behavior is often invisible, making it difficult to prove

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88. See Bowcott, *supra* note 70 (fearing that a separate offense would "create a misleading impression that domestic violence is primarily an offence against family relationships, to be distinguished from 'real' violence"); *Sample National Domestic Violence Laws*, *supra* note 29 (noting that establishing a separate offense could create the impression that domestic violence is actually a lesser crime).

89. Amelia Hill, *Police Failing to Use New Law Against Coercive Domestic Abuse*, *GUARDIAN* (Aug. 31, 2016, 11:34 AM), <https://www.theguardian.com/society/2016/aug/31/police-failing-to-use-new-law-against-coercive-domestic-abuse> [https://perma.cc/Y5C9-HZE5].

90. *No-one Charged Under New Domestic Violence Laws*, *STRATFORD OBSERVER* (Oct. 1, 2016), <http://stratfordobserver.co.uk/news/no-one-charged-new-domestic-violence-laws/> [https://perma.cc/CCU7-L8FL] (quoting a detective who explained that "[g]athering evidence for these offences can be complex and only incidents occurring from the date coercive or controlling abuse became a crime can be taken into account").

91. In contrast to the United States, approximately seventy-two percent of charging decisions in the United Kingdom are made by police forces, while the Crown Prosecution Service ("CPS") is the primary public prosecuting agency. CPS "determines the appropriate charges in more serious or complex cases." *Charging and CPS Direct*, *CROWN PROSECUTION SERV.*, <http://www.cps.gov.uk/about/charging.html> (last visited Oct. 4, 2017) [https://perma.cc/ULD5-KEUX].

92. See *supra* notes 23–27 and accompanying text.

93. See *supra* notes 85–86 and accompanying text.

94. See Hill, *supra* note 89.

95. Grace Earl, *Avon and Somerset Constabulary: Domestic Abuse "Will Not be Tolerated,"* *MERCURY* (Jan. 7, 2017, 10:00 AM), [http://www.thewestonmercury.co.uk/news/avon\\_and\\_somerset\\_constabulary\\_domestic\\_abuse\\_will\\_not\\_be\\_tolerated\\_1\\_4838087](http://www.thewestonmercury.co.uk/news/avon_and_somerset_constabulary_domestic_abuse_will_not_be_tolerated_1_4838087) [https://perma.cc/V37R-JQGM] (citing one police officer who conceded that "this type of crime could be difficult to prove").

without the victim's testimony. To make matters more difficult, domestic violence victims are often notoriously hesitant to report abuse and cooperate in their abuser's prosecution, even when physical abuse is obvious to police.<sup>96</sup> These evidentiary hurdles are likely further compounded by the breadth of the coercive control definition. Even with the Home Office's guidance, the volume of behavior covered by "coercive control" could be overwhelming to juries. As one BBC correspondent asked, "Where do the normal power dynamics of a relationship end and 'coercive or controlling' behaviour begin?"<sup>97</sup>

It is also unclear whether abusers who have been charged are being sentenced appropriately, again bearing on the law's effectiveness. Exercising coercive control over a partner makes an abuser eligible for punishment of up to five years in prison;<sup>98</sup> however, even when abusers were charged with multiple crimes, including coercive control, their sentences were insubstantial.<sup>99</sup> Of the four specific cases reported in which defendants were charged with coercive control, the longest sentence was twenty-one months.<sup>100</sup> In that case, the abuser not only forbade his twenty-one-year-old girlfriend from wearing or doing certain things, but he also physically assaulted her on a "daily basis," culminating in an attack in which he poured beer on her and hit her so hard that she went deaf in one ear.<sup>101</sup> The case with the shortest sentence involved physical and psychological assaults on a mother *and* her child, which the detective described as "dreadful attack[s]" and acts of "degrading" control.<sup>102</sup> Still, the court ultimately ordered the abuser to pay just £300 in compensation to the victim, do forty hours of

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96. See NAT'L INST. OF JUSTICE, *supra* note 43, at 5, 43.

97. *New Domestic Abuse Law Comes into Force*, BBC NEWS (Dec. 29, 2015), <http://www.bbc.com/news/uk-35192256> [<https://perma.cc/6MC8-RNT4>].

98. Serious Crime Act 2015, c. 9, § 76(11)(a) (U.K.), <http://www.legislation.gov.uk/ukpga/2015/9/part/5/crossheading/domestic-abuse/enacted> [<https://perma.cc/Q6WX-JLF3>].

99. Based on those arrests and convictions that have been publicized by various news sources.

100. Keiligh Baker, *Controlling Boyfriend, 24, Who Assaulted Woman "On a Daily Basis" Leaving Her Deaf in One Ear Is First to Be Jailed Without Evidence from His Victim*, DAILY MAIL (Sept. 9, 2016, 11:05 AM), <http://www.dailymail.co.uk/news/article-3781918/Man-jailed-coercive-control-offences-new-law.html> [<https://perma.cc/X3BG-CY25>] (twenty-one months); Humphries, *supra* note 84 (twenty-six week sentence where the defendant repeatedly held his partner down, threatened to punch her, isolated her from family, and took away her cell phone); *Man Convicted of Controlling Ex-Partner*, NEWS & STAR (Oct. 6, 2016, 2:22 PM), <http://www.newsandstar.co.uk/news/latest/Man-convicted-of-controlling-ex-partner-efdccc1-2087-4023-9d58-b389429a5c78-ds> [<https://perma.cc/DK5C-8VDL>] (ninety-day suspended sentence); Carl Stroud, *Man Who Repeatedly Threatened to Kill Himself if Partner Dumped Him Jailed Under New Law to Combat Emotional Blackmail*, SUN (Aug. 8, 2016, 11:36 AM), <https://www.thesun.co.uk/news/1571968/man-who-repeatedly-threatened-to-kill-himself-if-partner-dumped-him-jailed-under-new-law-to-combat-emotional-blackmail/> [<https://perma.cc/L7N8-YKRL>] (fifteen months in prison despite an astounding 288 prior criminal convictions).

101. Baker, *supra* note 100.

102. *Man Convicted of Controlling Ex-Partner*, *supra* note 100.

volunteer work, and participate in a rehabilitation program.<sup>103</sup> These, of course, are just a small sample of the convictions, and leniency for acts of violence against women is a problem that does not apply solely to the U.K.'s coercive control statute. However, to the extent that even physical violence is not being severely punished, it is clear that the new law has not substantially changed the trend.<sup>104</sup> Whether this has to do with the language of the law or the discretion of sentencing judges is unclear. Problems with enforcement, proof, and sentencing are just as applicable in the United States, and are just some of the issues that should be considered in drafting and implementing a coercive control law in Tennessee.

### *C. United Kingdom to United States: How to Proceed*

Regardless of the potential difficulties of implementation that have arisen since coming into force, the U.K. law is undoubtedly a substantial step forward for the many scholars and advocates who have supported incorporating prohibitions of coercive control into domestic violence law. Some have even advocated for the wholesale integration of the language in the Serious Crime Act and corresponding guidance into U.S. law.<sup>105</sup> However, while the U.K. law can undoubtedly serve as a foundation for legislators in the United States, this Note argues that a verbatim reproduction is not the best approach.

In addition to the potential problems with implementation and effectiveness,<sup>106</sup> incorporating the U.K. law as is into state criminal codes in the United States arguably runs the risk of violating the Constitution, particularly the Due Process Clauses of the Fifth and Fourteenth Amendments. Because the Serious Crime Act itself does not define coercive control, it would likely be deemed impermissibly vague if enacted wholesale in the United States. Vagueness doctrine prohibits criminal laws that either do not adequately define the punishable offense or that encourage or authorize its arbitrary enforcement.<sup>107</sup> As stated by the Supreme Court in *Connally v. General Construction Co.*, “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

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103. *Id.*

104. See Louise Tickle, *Why Is Domestic Abuse Still Not Taken Seriously in UK Courts?*, GUARDIAN (Mar. 8, 2016, 5:00 AM), <https://www.theguardian.com/society/2016/mar/08/domestic-abuse-court-female-victims-bbc-documentary> [<https://perma.cc/9QLQ-5435>] (discussing low sentences even with grievous bodily harm).

105. See, e.g., Candela, *supra* note 8, at 119–20.

106. See *supra* Section II.B.

107. *Vagueness Doctrine*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/vagueness\\_doctrine](https://www.law.cornell.edu/wex/vagueness_doctrine) (last visited Jan. 23, 2017) [<https://perma.cc/P4NF-WEDT>].

meaning and differ as to its application violates the first essential of due process of law.”<sup>108</sup> In addition to discouraging discriminatory implementation and ensuring that criminal statutes are sufficiently well defined to allow citizens to conform their behavior accordingly, vagueness doctrine also seeks to avoid criminalizing otherwise innocuous behavior.<sup>109</sup>

Because coercive control is a relatively new concept encompassing a range of behaviors, it arguably does not have a “technical,” “special,” or otherwise “well-settled common-law meaning” to inform its enforcement.<sup>110</sup> As such, simply criminalizing “repeatedly or continuously engag[ing] in behavior towards another person that is controlling or coercive”<sup>111</sup> would likely beg the question of what actions qualify. For example, would incentivizing a spouse to do chores around the house with the promise of a dinner date be “coercive?” Vagueness doctrine seeks to invalidate laws that trigger precisely these lingering questions. Since the United States does not use statutory guidance as a supplement to its criminal laws, coercive control would need to be adequately defined and explained on its own within the criminal statute itself. However, even if constitutionally permissible, incorporating sections of the U.K.’s statutory guidance into the law for definitional purposes, without specific prohibited acts, would likely cause judges, police, attorneys, and juries alike to be confused and overwhelmed, reducing the potential efficacy of the act.<sup>112</sup>

But reinventing the wheel is not necessary either. One need only look at the U.K. statutory guidance to notice similarities between those behaviors listed as being associated with coercive control and preexisting criminal laws already on the books in many states. Indeed, this U.K. guidance acknowledges that coercively controlling behaviors can “constitute . . . criminal offense[s] in their own right.”<sup>113</sup> Of course, prosecutors are not currently limited to charging domestic abuse if other nonphysical crimes have been committed in conjunction. For example, harassment and stalking are two crimes that technically do not involve physical violence, which may be charged in a domestic violence case.<sup>114</sup> In fact, some states explicitly include these crimes in

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108. 269 U.S. 385, 391 (1926).

109. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163–64 (1972).

110. See *Connally*, 269 U.S. at 391.

111. Serious Crime Act 2015, c. 9, § 76 (U.K.), <http://www.legislation.gov.uk/ukpga/2015/9/part/5/crossheading/domestic-abuse/enacted> [<https://perma.cc/Q6WX-JLF3>].

112. See *Statutory Guidance*, *supra* note 78.

113. *Id.* at 4.

114. See, e.g., Kara Apel, *Man Arrested for Domestic Assault, Stalking in Montgomery County*, WSMV 4 (June 27, 2016, 6:27 AM), <http://www.wsmv.com/story/32313064/man-arrested-for->

their definitions of domestic abuse if they are committed against a partner or family member.<sup>115</sup>

Whether the legislature knew it or not, Tennessee's recent amendments to its stalking law are a step in the right direction toward addressing coercive control.<sup>116</sup> At the very least, the amendments demonstrate that the state is mindful of legal and social developments regarding domestic violence crimes and willing to adapt accordingly. Stalking in Tennessee is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel," and does cause the victim to feel, "terrorized, frightened, intimidated, threatened, harassed, or molested."<sup>117</sup> "Harassment" in this context includes "repeated or continuing unconsented conduct" that causes the victim to reasonably suffer emotional distress.<sup>118</sup> The 2016 amendment expanded the definition of "course of conduct" to include "acts in which the defendant directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to a person, or interferes with a person's property."<sup>119</sup>

If used to its full potential, this law could be utilized to address some of the "red flag" behaviors outlined by domestic abuse advocacy organizations and the U.K. guidance.<sup>120</sup> Repeated threats to cause harm or "to reveal or publish private information" would qualify as the requisite course of conduct for harassment, so long as the victim could show she reasonably suffered emotional distress. Similarly, "monitoring a person via online communication tools,"<sup>121</sup> "repeatedly putting them down such as telling them they are worthless,"<sup>122</sup> and, more generally, continued verbal abuse that includes insults, demeaning, or shaming the victim,<sup>123</sup> should all fit into the amended "course of conduct" definition designed to harass and cause emotional

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domestic-assault-stalking-in-montgomery-county [https://perma.cc/UD7A-6LC2] (detailing the arrest of a Clarksville, Tennessee man).

115. See, e.g., ALASKA STAT. § 18.66.990 (2017) (including harassment); ILL. COMP. STAT. § 60/103 (2013) (including harassment and intimidation); N.J. STAT. ANN. § 2C:25-19 (West 2016) (including stalking and harassment).

116. See *Legislative Achievements*, AWAKE, [http://www.awaketn.org/our\\_legislative\\_achievements](http://www.awaketn.org/our_legislative_achievements) (last visited Jan. 27, 2017) [https://perma.cc/B2U9-92WX] (discussing the need to update Tennessee's stalking laws to address third-party contact and technological developments that have enabled stalkers to contact and harass their victims via a greater number of methods).

117. TENN. CODE ANN. § 39-17-315 (2017).

118. *Id.*

119. *Id.*

120. See *supra* notes 34, 82 and accompanying text.

121. *Statutory Guidance*, *supra* note 78, at 4.

122. *Id.*

123. See *supra* note 34.

distress. As a result, this law alone can cover a significant portion of the harassment and scrutiny that victims of coercive control experience. Whether this law is being used to this extent, however, remains to be seen.

Since the primary impetus behind the 2016 amendments was to more clearly cover technological methods of stalking, Tennessee legislators probably did not contemplate that the law could stretch this far.<sup>124</sup> Even if they did, however, Tennessee criminal law would still fail to paint the full picture of, and thus effectively recognize, coercive control. By acknowledging a remedy for emotional distress in the stalking law, Tennessee touches on the emotional and psychological abuse that can be so damaging to victims. However, the stalking and domestic assault<sup>125</sup> laws only include a small subset of abusive behaviors, and both ignore the abuser's intent behind his actions. This is not to say that no mens rea is required for these crimes. Domestic assault, for example, tracks the simple assault statute in requiring the intentional, knowing, or reckless cause of bodily injury or the intentional or knowing cause of fear of bodily injury.<sup>126</sup> But these intent requirements do not reflect the intent to establish power and control, with the result being to trap the victim in the cycle of abuse.<sup>127</sup> In so doing, the current statutes conceal the reasons that men batter women and perpetuate the idea that domestic abuse results from short tempers or inherently volatile relationships. Furthermore, these crimes still do not fully comprehend the damage to the victim and her way of life.

Of course, as with any criminal knowledge requirement, it may be difficult to prove that an abuser specifically intended through his course of conduct toward the victim to establish power and control over her. The purpose behind domestic violence is not necessarily intuitive to an outside observer, let alone the batterer himself. In fact, one goal of many batterer intervention programs is to expose this underlying, subconscious motivation to the abusers so they can better understand the reasons for their behavior in the hopes of changing it.<sup>128</sup> Still, if an

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124. See *supra* note 116.

125. See TENN. CODE ANN. §§ 39-13-101, -111(b) (2017).

126. § 39-13-101.

127. See *supra* notes 33–35 and accompanying text.

128. See, e.g., *Frequently Asked Questions*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <http://www.theduluthmodel.org/about/faqs.html> (last visited Oct. 20, 2017) [<https://perma.cc/UAY2-Z2AY>] (explaining that their program holds batterers accountable “while offering the opportunity for men who batter to examine and change the beliefs they hold that allow them to be violent or controlling of their partners”). Note that the effectiveness of these programs is debated, and will be discussed *infra* note 185 and accompanying text. See *Effectiveness of Batterer's Intervention Programs*, ADVOCS. FOR HUM. RTS., [http://www.stopvaw.org/Effectiveness\\_of\\_Batterers\\_Intervention\\_Programs.html](http://www.stopvaw.org/Effectiveness_of_Batterers_Intervention_Programs.html) (last updated Oct. 17, 2008) [<https://perma.cc/G5WG-SARE>].

*intent* to exert power and control cannot be feasibly criminalized, perhaps the resulting restrictions on the victim’s agency and freedom can be. There is one preexisting crime that lends itself to this approach already: false imprisonment.

#### *D. Criminal False Imprisonment in Tennessee*

Criminal false imprisonment in Tennessee is a Class A misdemeanor. Tennessee Code Annotated Section 39-13-302 defines false imprisonment as “knowingly remov[ing] or confin[ing] another unlawfully so as to substantially interfere with the other’s liberty.”<sup>129</sup> “Unlawful” for purposes of this section is defined as removal or confinement “accomplished by force, threat, or fraud.”<sup>130</sup> Since various levels of kidnapping crimes are merely false imprisonment with aggravating factors,<sup>131</sup> the false imprisonment crime has been logically interpreted by courts to be a precursor to, or lesser included offense of, kidnapping.<sup>132</sup>

Few courts have interpreted Tennessee’s crime of false imprisonment outside the context of an arrest. However, the statute’s text, available cases, and pattern jury instructions suggest that, while physical force is not required, the concept of “liberty” is interpreted to mean restrictions on physical movements alone. Tennessee’s pattern jury instructions for false imprisonment specify that

Although the law requires no specific period of time of confinement or distance of removal, a removal or confinement “interferes substantially” with another’s liberty if the time of confinement is significant or the distance of removal is considerable. . . . [“Force” means compulsion by the use of physical power or violence.] [“Fraud” is defined as the term is used in ordinary conversation and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge.]<sup>133</sup>

In referencing “[significant] time of confinement” and “[considerable] distance of removal,” the instructions suggest a focus on physical restrictions.<sup>134</sup>

The instances in which criminal convictions for false imprisonment have been upheld similarly suggest that the crime

129. TENN. CODE ANN. § 39-13-302.

130. § 39-13-301. Note that this section defines “unlawful” differently “in the case of a person who is under the age of thirteen or incompetent.” *Id.*

131. *See, e.g.*, § 39-13-303 (defining kidnapping as “false imprisonment . . . under circumstances exposing the other person to substantial risk of bodily injury”).

132. *See State v. Cecil*, 409 S.W.3d 599, 604–05 (Tenn. 2013) (describing the history of false imprisonment as “the definitional ‘building block’” of kidnapping offenses).

133. 7 TENNESSEE PATTERN JURY INSTRUCTIONS—CRIMINAL § 8.05 (TENN. JUDICIAL CONFERENCE 2017) (citing *State v. White*, 362 S.W.3d 559, 576–77 (Tenn. 2012); TENN. CODE ANN. § 39-11-106(a)).

134. *Id.*

targets physical imprisonment. For example, in *State v. Holman*, the court upheld the defendant's conviction for false imprisonment where he had threatened the victim with a gun during a robbery of her home and "physically manhandled" her, including pinning her to the ground.<sup>135</sup> The court also upheld a conviction in *State v. Curry*, in which the defendant similarly held the victim at gunpoint, ordered him to the ground, and tied him up with an electrical cord.<sup>136</sup> Of course, confinement in slightly larger spaces also qualifies, as the court held in *State v. Carman-Thacker* where the defendant "locked the victim in a small room for two days with no electricity, light, running water, food, or a working toilet."<sup>137</sup> This interpretation of restriction on physical movements makes sense in light of false imprisonment's association to kidnapping offenses.

Given this focus on physical movement, Tennessee's false imprisonment law as currently written and interpreted is too limited to apply to many of the behaviors that comprise coercive control. While batterers, as discussed, do often place restrictions on a victim's ability to move about freely, in the sense of keeping her from going certain places or seeing certain people, most victims are probably not so confined to one place for the restrictions to qualify as false imprisonment. Instead, the "substantial interference with liberty" can be much more subtle, involving restrictions on everyday actions and choices that most people take for granted.<sup>138</sup>

The story of Terry Traficonda—as recounted by Evan Stark, the sociologist who coined the phrase "coercive control"—is illustrative.<sup>139</sup> Prior to murdering Terry in their home, her husband had locked Terry out of their bedroom and forced her to sleep on the couch, limited her to just one meal a day, refused to provide her with toilet paper, and forbade her to go to work, speak to anyone, or watch TV.<sup>140</sup> This "entrapment of women in personal life,"—as Stark calls it—can be just

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135. No. E2012-01143-CCA-R3-CD, 2014 WL 295610, at \*10 (Tenn. Crim. App. Jan. 27, 2014).

136. No. W2015-01083-CCA-R3-CD, 2016 WL 4357176, at \*9 (Tenn. Crim. App. Aug. 15, 2016).

137. No. M2014-00757-CCA-R3-CD, 2015 WL 1881135, at \*8 (Tenn. Crim. App. Apr. 24, 2015).

138. See STARK, *supra* note 14, at 15:

The entrapment of women in personal life is also hard to discern because many of the rights it violates are so basic—so much a part of the taken-for-granted fabric of the everyday lives we lead as adults, and so embedded in female behaviors that are constrained by their normative consignment to women—that their abridgement passes largely without notice.

139. *Id.* at 1–3.

140. *Id.* at 2.

as debilitating, if not more so, than physical confinement in one place.<sup>141</sup> It is for this reason that, in his book advocating for the criminalization of coercive control, Stark suggests “reframing battering as a liberty crime.”<sup>142</sup> Though his conceptualization of criminalizing coercive control is more comprehensive than merely enacting one statute, with adjustments to criminal false imprisonment laws, Stark’s suggestion can come closer to reality.

### III. SOLUTION: A DOMESTIC FALSE IMPRISONMENT CRIME

This Part suggests establishing a prohibition on coercive and controlling behavior by adapting Tennessee’s crime of false imprisonment. Section III.A begins by explaining why this approach makes sense before suggesting revisions to the current false imprisonment law, incorporating language from both preexisting Tennessee laws and the U.K. Serious Crime Act, to create a new “domestic false imprisonment” crime. Section III.C explains the benefits of this new law and addresses some potential challenges, while Section III.D concludes by acknowledging and responding to potential arguments against this suggested approach.

#### *A. Why False Imprisonment*

In his framing of coercive control as a crime against liberty, Evan Stark spends a significant portion of his book recounting the agonizing stories of victims who became trapped in their own lives by their abusers. He frequently likens their experiences to those of hostages or prisoners, prevented from “freely developing their personhood, utilizing their capacities, or practicing citizenship.”<sup>143</sup> Similarly, many of these women only escape by either killing or being killed.<sup>144</sup> When our criminal justice system must wait to respond until an abusive relationship reaches this point, true justice can never be served.

It is clear that the power and control exerted over victims of coercive control is a restraint on their liberty, and should be treated as

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141. *See id.* at 15 (explaining why this entrapment is so uniquely debilitating).

142. *Id.* at 380.

143. *Id.* at 4. Stark says, “Like hostages, victims of coercive control are frequently deprived of money, food, access to communication or transportation, and other survival resources even as they are cut off from family, friends, and other supports.” *Id.* at 5. He also comments that “it is hard . . . to conceive of a situation outside of prison, a mental hospital, or a POW camp where another adult would control or even care to control [someone’s] everyday routines.” *Id.* at 15.

144. *See id.* at 1–3 (telling the stories of Terry Traficonda and Nicole Brown Simpson); *id.* at ch. 9 (“When Battered Women Kill”).

such. Adapting the crime of false imprisonment can do this, and using a preexisting crime rather than starting from scratch has three primary benefits.<sup>145</sup> First, adapting rather than recreating allows law enforcement and prosecutors to work with laws they should already be familiar with. Effectively analogizing to a preexisting crime establishes a better understanding of a concept that can otherwise be complicated. Second, it immediately frames the newly prohibited behavior as being *worthy* of being a crime given its similarities to preexisting crimes, sending an important signal to both law enforcement and society that it is equally intolerable. Third, some states already associate false imprisonment with domestic violence in their domestic abuse statutes, so, like stalking and harassment, its connection to domestic violence is not far-fetched.<sup>146</sup>

Ideally, while Tennessee's stalking law could *conceivably* cover a range of behaviors listed by the Serious Crime Act guidance and other domestic violence advocacy organizations as indicative of coercive control, an adapted false imprisonment crime would explicitly target such behaviors. These might include, for example: controlling a person's movements, including preventing them from going to work or school; isolating them from friends and family, either through explicit prohibitions or psychological tactics; depriving them of basic needs or access to services, such as medical care, transportation, and other support; maintaining control over and restricting access to finances; and more generally "taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear, and when they can sleep."<sup>147</sup>

While reaching these behaviors via the criminal law may seem sweeping and unrealistic at first glance, some states have already incorporated some of these behaviors into their criminal domestic violence laws. For example, in Missouri, domestic assault in the fourth degree includes knowing attempts to isolate a victim "by unreasonably and substantially restricting or limiting his or her access to other persons, telecommunication devices or transportation for the purpose of isolation."<sup>148</sup> Colorado includes committing a crime or violating a municipal ordinance "when used as a method of coercion" or "control" in

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145. In fact, many current domestic violence statutes already do this by defining the crime in terms of other, preexisting criminal laws, like assault and battery. *See supra* note 10 and accompanying text (describing Tennessee's definition of domestic assault).

146. *See, e.g.*, FLA. STAT. § 741.28 (2017) (defining domestic violence to include false imprisonment); NEV. REV. STAT. § 33.018 (2015) (same); N.J. STAT. ANN. § 2C:25-19 (West 2017) (same).

147. *See Statutory Guidance, supra* note 78, at 4.

148. MO. REV. STAT. § 565.076 (2016).

its criminal domestic violence definition.<sup>149</sup> Minnesota’s domestic abuse statute prohibits “interference with an emergency call.”<sup>150</sup> And Nevada law dictates that, for purposes of obtaining an order of protection, it is an act of domestic violence to “[compel another] by force or threat of force to perform an act from which he has a right to refrain or to refrain from an act which he has a right to perform.”<sup>151</sup> Each of these demonstrates that a crime like the one proposed here is neither impossible nor unrealistic.

As these states have done, it would be possible to criminalize individual manifestations of coercive and controlling behavior; however, this Note argues that such a piecemeal<sup>152</sup> approach is not ideal. In his book, Evan Stark argues for a “single coordinated strategy” rather than a combination of separate charges for a single crime.<sup>153</sup> He asserts that the latter approach is “inadequate” and “reduces what would constitute a Class A felony if charged as a single crime to a potpourri of second-class misdemeanors.”<sup>154</sup> Drafting a host of statutes to target what is truly one comprehensive course of conduct not only runs the risk of leaving out certain behaviors, but also makes prosecution more complicated and less efficient. For these reasons, the following Section will construct one comprehensive law to address coercive control as a whole.

### *B. The Nuts and Bolts: Reimagining Tennessee Code Section 39-13-302*

To ensure that the crime of false imprisonment adequately addresses coercive control, this Note proposes several concrete changes to the language of Tennessee’s current law. Section 39-13-302 of the Tennessee Criminal Code provides, “A person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other’s liberty.”<sup>155</sup> To adapt this to encompass coercive control, what currently seems to be a discrete act should be changed into a “course-of-conduct” crime. This tracks suggestions made by Evan Stark, and more accurately reflects the nature of coercive control as a pattern of behavior rather than a few

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149. COLO. REV. STAT. § 18-6-800.3 (2017).

150. MINN. STAT. § 518B.01 (2016).

151. NEV. REV. STAT. § 33.018.

152. By “piecemeal,” I refer to a criminal code that would use many statutes to criminalize many behaviors that could be considered coercively controlling, rather than one statute that could conceivably cover them all.

153. STARK, *supra* note 14, at 383.

154. *Id.*

155. TENN. CODE ANN. § 39-13-302 (2017).

discrete acts.<sup>156</sup> For continuity and uniformity, the law should retain the definition of “course of conduct” set forth in Tennessee’s stalking statute.<sup>157</sup>

Next, in order to specify this as a crime of domestic violence, the act must be directed toward a specific class of persons. Here, the language found in the U.K.’s Serious Crime Act could be used. The Act prohibits coercive control directed toward a person with whom the perpetrator has a “personal connection,” which by definition includes a current or former intimate partner or family member, but excludes minor, dependent children.<sup>158</sup> Excluding children for whom the actor is responsible is very important in this context, since many of the behaviors criminalized here between adults could reasonably and justifiably occur in a guardian/child relationship.

For the reasons mentioned *supra* in Section II.C regarding the potential difficulties in proving a batterer’s intent with respect to his coercive and controlling behaviors, the intent language should be changed from “knowingly” to “negligently.”<sup>159</sup> This way, the batterer need not necessarily intend to restrict the victim’s liberties through his actions, although the requisite mental state would also be established if the batterer acted intentionally, knowingly, or recklessly.<sup>160</sup> At a minimum, criminal negligence only requires that the actor *should have been aware* of a “substantial and unjustifiable risk that the circumstances exist *or* the result [i.e. restrictions on liberty] will occur.”<sup>161</sup> This would include batterers who do not themselves understand the reason behind their actions, but whose actions could nonetheless be understood as tactics of control. This language is also more realistic and provides more protection than a strict liability statute, while still maintaining enough flexibility to avoid disqualifying many batterers from prosecution.

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156. See STARK, *supra* note 14, at 382 (“At a minimum, the new statutes would define coercive control as a course-of-conduct crime much like harassment, stalking, or kidnapping, rather than as a discrete act, and highlight its effects on liberty and autonomy.”).

157. TENN. CODE ANN. § 39-17-315:

[A] pattern of conduct composed of a series of two (2) or more separate, noncontinuous acts evidencing a continuity of purpose, including, but not limited to, acts in which the defendant directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to a person, or interferes with a person’s property.

158. Serious Crime Act 2015, c. 9, § 76 (U.K.), <http://www.legislation.gov.uk/ukpga/2015/9/part/5/crossheading/domestic-abuse/enacted> [<https://perma.cc/Q6WX-JLF3>].

159. See TENN. CODE ANN. § 39-11-302 (defining the various states of mental culpability).

160. See § 39-11-301 (“When the law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly or recklessly.”).

161. § 39-11-302 (emphasis added).

Because “remove or confine” have already been interpreted and understood to mean restrictions on physical movements alone, this language could be replaced with some of the tactics of coercive control outlined by Stark in his book. Namely, harassment, intimidation, exploitation, humiliation, isolation, and/or control should be included.<sup>162</sup> While harassment, exploitation, and humiliation are either already defined by law or commonly understood terms, expanding upon intimidation, isolation, and control would be beneficial. Again, Stark is helpful in this. He describes the purpose of intimidation as instilling “fear, secrecy, dependence, compliance, loyalty, and shame,” induced through three primary ways: “threats, surveillance, and degradation.”<sup>163</sup> The inclusion of surveillance in particular is important, not just because some types of unauthorized surveillance are already illegal<sup>164</sup> or because this is another typical “warning sign” of abuse and control. Surveillance and monitoring in their own right substantially interfere with victims’ liberty. Stark illustrates this in saying:

Persons subjected to constant or visible surveillance become isolated from outside support or isolate themselves and severely curtail their coming or going; where, how, or whether they work or attend school; what they say to neighbors, friends, family members, or strangers; whom they see; and what they do when they are alone.<sup>165</sup>

Such monitoring is already dealt with to a great extent by the criminal stalking law. However, referencing it in this new law would additionally recognize stalking’s behavior-constraining effects on victims beyond causing them to feel frightened or harassed.

Isolation is used by batterers to “prevent disclosure, instill dependence, express exclusive possession, monopolize [victims’] skills and resources, and keep them from getting help or support.”<sup>166</sup> Lastly, control involves “an array of tactics that directly install women’s subordination to an abusive partner.”<sup>167</sup> Control tactics deprive victims of “the means needed for autonomy or escape” and regulate behavior “to conform with stereotypic gender roles,” which in turn “constrains the sphere where independent action is possible.”<sup>168</sup>

After all of this, we are left with a comprehensive definition of the crime of domestic false imprisonment: A course of conduct involving

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162. See STARK, *supra* note 14, at 228–88, 382 (describing the tactics used in coercive control and advocating for their inclusion in statutes).

163. *Id.* at 249.

164. See TENN. CODE ANN. § 39-13-601 (wiretapping and electronic surveillance); § 39-13-604 (recording or dissemination of phone communications); § 39-13-606 (electronic tracking of a motor vehicle).

165. STARK, *supra* note 14, at 255.

166. *Id.* at 262.

167. *Id.* at 271.

168. *Id.*

intentional, knowing, reckless, or negligent repeated or continuing harassment, intimidation, exploitation, humiliation, isolation, and/or control, directed toward a person with whom the perpetrator has a personal connection, which interferes substantially with that person's liberty and autonomy. It would be made clear that "liberty" in this context is not limited merely to restrictions of physical movements to a finite, confined space, but may extend to freedoms such as, but not limited to, liberty of association, movement, labor, personal finance, and access to services.<sup>169</sup> "Autonomy" is included to reflect the freedom to make personal decisions on a day-to-day basis, including but not limited to choices most people take for granted, such as who to see, what to wear, where to go, what to eat, and when to sleep. Lastly, the word "substantially" ensures that a complete deprivation of liberty, such that a victim would even be prevented from reporting her abuse to police, is not required for the statute to be applicable.

Just as ordinary false imprisonment can rise to various levels of kidnapping depending on the circumstances and the severity of the actions,<sup>170</sup> this type of false imprisonment could be "aggravated" by placing someone in fear of or actually inflicting bodily injury and/or sexual assault. The aggravation could increase additionally depending on the severity of the injury sustained. Having a baseline crime that does not require physical violence permits intervention before the coercive control escalates to cause the victim physical injury. Providing for aggravation in the case of physical harm further allows this one crime to deal with both psychological and physical harm and signals that coercive control is often a precursor to physical violence.

Lastly, despite this Note's use of gendered pronouns in the above explanations, it would be important for the language of this crime to remain gender neutral. It is true that most victims of domestic violence are women, particularly in the coercive control arena.<sup>171</sup> However, using gender-neutral pronouns for both batterer and victim allows for no ambiguity as to the law's applicability in the rare cases in which the traditional roles are reversed. It would also ensure that the statute

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169. By way of comparison, Tennessee's crime of involuntary servitude addresses such restraints on liberty to some extent. See § 39-13-307 (tactics for subjecting another to forced labor include threats of violence to control a person's movements, confiscation of identification documents, and threats of financial harm to exercise financial control).

170. *Supra* notes 131–132 and accompanying text.

171. See STARK, *supra* note 14, at 5–6:

Numerous studies in the United States indicate that women of all ages assault male and female partners in large numbers and for many of the same reasons and with much the same consequences as men. However, there is no counterpart in men's lives to women's entrapment by men in personal life due to coercive control.

applied to all types of relationships, regardless of the parties' sexuality or gender identity.

### *C. The Benefits, Revisited*

First, enacting a law such as the one proposed in this Note would give victims a remedy for the emotional and psychological injuries they sustain and would recognize the severity of this harm on its own. It would provide victims an avenue for escape before the abuse turns physically violent or before preexisting violence escalates to cause serious injury or death. More broadly, passage of such a law would demonstrate that our government is committed to protecting women, not just from physical and potentially lethal violence but also from those who would deprive them of the liberties to which all humans should be entitled.<sup>172</sup> Consequently, society's understanding of domestic violence would appropriately "expand to comprehend the fundamental human rights violations inherent in batterer tactics of coercive control."<sup>173</sup>

In addition to these, another obvious benefit to adding to the criminal domestic violence law arsenal is the ability to impose greater sentences on batterers. Domestic assault in Tennessee is a Class A misdemeanor, punishable by incarceration for no more than one year.<sup>174</sup> Even if combined with stalking and harassment charges, these crimes are also Class A misdemeanors barring any predetermined aggravating factors and, as such, would impose the same length of incarceration, assuming the defendant receives a concurrent sentence.<sup>175</sup> Ideally, domestic false imprisonment could be classified as a felony, eligible for a more severe sentence on its own. This classification would not necessarily be unprecedented in the United States, as some states already classify some forms of domestic violence as felonies.<sup>176</sup> However, even if it were not, perhaps the additional crime could persuade a judge to sentence consecutively rather than concurrently, depending on the

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172. See Barbara Hart, *DV and the Law*, 21 Nat'l Bull. on Domestic Violence Prevention (Quinlan) para. 13 (Nov. 2015) ("Passage [of a coercive control crime] would provide evidence of the strength of the political commitment of legislators and governors to ending the impunity of batterers in depriving battered women of their liberty and agency.").

173. *Id.*

174. TENN. CODE ANN. §§ 39-13-111, 40-35-111.

175. §§ 39-17-308, -315.

176. See, e.g., IDAHO CODE § 18-918 (2017) (classifying a battery which inflicts "traumatic injury" upon a household member as a felony, where "traumatic injury" is defined as a minor or serious wound or injury caused by physical force). Given what we know about the severity of the trauma caused by coercive control even absent physical harm, it seems plausible to punish these acts the same way a state punishes "minor" physical injuries. See *supra* notes 44-46 and accompanying text.

severity of the situation.<sup>177</sup> Longer sentences would again serve to signal the seriousness of and harm caused by coercive control.

#### *D. Addressing Concerns*

##### 1. Promoting Enforcement Through Education and Incentives

As mentioned *supra* in Section II.B regarding the issues with the U.K.'s Serious Crime Act, regardless of the maximum sentence available by law, appropriate charging and sentencing is contingent upon law enforcement, prosecutors, and judges understanding the crime, taking it seriously, and sentencing accordingly. The historical ambivalence by police toward domestic violence and the ongoing concerns about judges sentencing too leniently for crimes of violence against women could continue to pose obstacles for the enforcement and effectiveness of domestic false imprisonment. First, coercive control is a relatively new legal idea, and judges may not want to impose too heavy a sentence for something that has not traditionally been considered a crime in the first place. Second, the impulse to think that psychological and emotional abuse is less harmful than physical violence may be reflected in sentencing without proper guidance. Consequently, a new addition to criminal domestic violence law such as domestic false imprisonment should be accompanied by a corresponding education program to ensure an appropriate, coordinated response by law enforcement, prosecutors, and the judiciary. Financial incentives to train and incentivize police officers and prosecutors to successfully investigate, enforce, and prosecute this crime would also help to alleviate enforcement concerns.<sup>178</sup>

##### 2. A Gradual Approach to Criminal Domestic Violence Law

Although this Note uses much of Evan Stark's research and observations to develop this domestic false imprisonment law, his book

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177. Unless otherwise specified by statute, judges generally have discretion in deciding whether to impose consecutive or concurrent sentences. Although concurrent is the norm, the federal sentencing guidelines advise that "[i]f the sentence imposed on the count carrying the highest statutory maximum is less than [what is adequate to achieve] the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively . . . ." U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d) (U.S. SENTENCING COMM'N 2016).

178. This practice has been used to implement other crime initiatives, such as those to combat human trafficking. *See, e.g.*, Press Release, Dep't of Justice, \$1.5 Million Grant Will Establish Human Trafficking Task Force to Be Led by U.S. Attorney's Office and L.A. County Sheriff's Department (Sept. 24, 2015), <https://www.justice.gov/usao-cdca/pr/15-million-grant-will-establish-human-trafficking-task-force-be-led-us-attorney-s> [<https://perma.cc/P38D-AZ2Y>] (describing the adoption of a comprehensive approach to combating trafficking).

argues for a “single coordinated strategy” rather than a combination of separate domestic violence charges.<sup>179</sup> Additionally, he reasons that the “particularity of coercive control also makes [subsuming it under existing course of conduct crimes] less desirable.”<sup>180</sup> In line with those suggestions, this Note advocates for one “coercive control” crime as opposed to using an amalgamation of crimes like harassment, stalking, and assault, and creates a new course of conduct crime modeled after false imprisonment rather than “subsuming” it in a preexisting law. However, Stark’s suggested approach is more akin to completely reimagining domestic violence law as we know it, and it is in this respect that this Note deviates. This deviation may lead some to argue that this Note’s approach does not go far enough.

Stark’s vision is an admirable and ambitious one. However, the fact that we have not seen such sweeping reforms of criminal domestic violence laws in the ten years since he published his book speaks to the difficulty of, and perhaps resistance to, such a large-scale undertaking, at least in this country. While perhaps not the most effective way to criminalize coercive control once and for all, gradually changing preexisting laws to point in that direction lays a preliminary foundation and allows law enforcement and society to develop a firm understanding of the concept as a crime. This gradual approach also allows states time to test new methods of targeting domestic violence to determine what is ultimately the most effective.

### 3. More Crimes and Higher Sentences in a State of Mass Incarceration

At a time when many are calling for criminal justice reform in the United States, primarily as a result of our country’s rate of mass incarceration, proposing further criminal penalties or the imposition of higher sentences for crimes can be an unpopular notion. However, domestic abuse, unlike other crimes such as the minor drug offenses typically characterized as carrying unfairly harsh sentences, is neither victimless nor nonviolent. The main purposes of criminal law and criminal punishments are retribution, deterrence, incapacitation, and rehabilitation.<sup>181</sup> The wisdom of retribution in a state of mass incarceration is debatable. However, at a time when violence against women is still a serious problem, and when our own president wants to

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179. STARK, *supra* note 14, at 383.

180. *Id.*

181. See Hugo Adam Bedau & Erin Kelly, *Punishment*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2010), <https://plato.stanford.edu/archives/spr2010/entries/punishment/> [https://perma.cc/9PXD-22Z2].

cut funding from the Violence Against Women Act,<sup>182</sup> appropriate retribution for such crimes would continue to send a signal to society that such crimes are not to be tolerated.

If one accepts deterrence as a legitimate justification for punishment, the public safety benefits of general deterrence of violence against women are obvious. Similarly, few would likely object to the individual incapacitation of violent offenders to prevent them from continuing their current abuse, reoffending against other women, or worse, escalating their abuse to murder. Because domestic violence by its nature is cyclical and repetitive—marked by continued violence by the same offender—these concerns are perhaps more relevant in the domestic violence context than many other crimes, making the case for incarceration in this context particularly strong.<sup>183</sup> Incarceration also allows a victim adequate time to escape safely, both physically and mentally. In short, incarceration is the best way to ensure that the abuse stops, contributing significantly to the goal of saving women's lives.<sup>184</sup>

As for rehabilitation, there has been some debate about the effectiveness of rehabilitative efforts for domestic abusers such as anger management classes or batterer intervention programs.<sup>185</sup> On the one hand, studies by the National Institute of Justice indicate that domestic violence intervention programs have “little to no impact on reoffending,” “do not change batterers’ attitudes,” and in some cases “actually seem to make abusers more likely to abuse.”<sup>186</sup> However,

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182. See Melanie Carlson, *How Will President Trump Handle Violence Against Women?*, HILL (Jan. 21, 2017, 8:00 AM), <http://thehill.com/blogs/pundits-blog/the-administration/315427-how-will-president-trump-handle-violence-against-women> [https://perma.cc/AUY9-5X4C] (noting that cuts to Violence Against Women Act (“VAWA”) grants were highlighted as part of a reduction in federal spending).

183. See CAROL E. JORDAN, *VIOLENCE AGAINST WOMEN IN KENTUCKY: A HISTORY OF U.S. AND STATE LEGISLATIVE REFORM* 115–16 (2014) (noting that “domestic violence is a crime of pattern and recidivism”); STARK, *supra* note 14, at 367 (“[T]he fact that [domestic violence] entails the repeated use of violence against a single person gives it a cumulative significance that justifies treating it more seriously . . .”).

184. See *supra* notes 40–42 and accompanying text (detailing the violence rates of abusers who remain free).

185. See *Effectiveness of Batterer’s Intervention Programs*, *supra* note 128 (explaining that “the extent of behavioural change brought about by such programmes is modest”).

186. Tony Dokoupil, *Why Domestic Violence Prevention Programs Don’t Work*, NBC NEWS (Oct. 4, 2014, 6:47 PM), <http://www.nbcnews.com/storyline/nfl-controversy/why-domestic-violence-prevention-programs-dont-work-n217346> [https://perma.cc/8SUK-JPLZ] (quoting the director of the nation’s first reform program for abusive men as saying, “Jail takes a bigger bite out of recidivism than even the good batterers intervention programs do”); see also SHELLY JACKSON ET AL., U.S. DEP’T OF JUSTICE, NCJ 195079, *BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE?* 20 (2003), <https://www.ncjrs.gov/pdffiles1/nij/195079.pdf> [https://perma.cc/VE7R-U79H] (recognizing that the study results do not indicate that treatment leads to lasting changes in behavior).

programs that *have* claimed to be effective often involve a combination of rehabilitative efforts and criminal sanctions.<sup>187</sup> For example, The Duluth Model approach to domestic abuse intervention claims that “68% of men who pass through the criminal justice system response and are sent to [their] men’s nonviolence classes have not reappeared in the criminal justice system over a course of eight years.”<sup>188</sup> Its proponents note, however, that “[t]he criminal justice system is the first step in holding men who batter accountable,” and that their classes “continue the accountability while offering the opportunity for men who batter to examine and change the beliefs they hold that allow them to be violent or controlling of their partners.”<sup>189</sup> Additionally, part of the recognized problem with such programs is that many batterers fail to complete the course.<sup>190</sup> As such, combining incarceration with a program could increase the rehabilitative effect by ensuring batterers’ participation and reinforcing the batterer’s accountability for his actions.<sup>191</sup>

## CONCLUSION

Given the number of women still dying at the hands of their intimate partners every day in the United States and around the world,<sup>192</sup> improvements to domestic violence laws are clearly required. Criminalizing coercive control would recognize abuse before it turns violent, and bring the law in line with our current understanding of the

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187. See *Frequently Asked Questions*, *supra* note 128 (explaining that a consistent criminal justice system response combined with men’s nonviolence classes has shown great success).

188. *Id.*

189. *Id.*

190. See, e.g., JACKSON ET AL., *supra* note 186, at 23 (“Those who continue to batter are not likely to participate in intervention programs; if they participate in the beginning, they are likely to drop out.”).

191. I recognize the potential tension between a coercive control crime as formulated in this Note and certain religious practices that seek to enforce traditional gender roles upon women. On the one hand, the First Amendment guarantees that “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I. On the other hand, U.S. law prohibits a variety of practices, such as child marriage and female genital mutilation, that are sometimes done in the name of religion. Furthermore, the Religious Freedom Restoration Act (“RFRA”) provides that the federal government “may substantially burden a person’s free exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1 (2012), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding the RFRA unconstitutional as applied to state and local governments). A number of states have enacted similar laws. See, e.g., IND. CODE § 34-13-9-8(b) (2017). How this and similar state provisions could apply to the potential tension between a state coercive control crime and religious practices is an important and interesting issue, but is beyond the scope of this Note.

192. See *supra* notes 40–41 and accompanying text (estimating that three or more women are murdered by a male intimate partner in the United States every day).

mechanics of domestic violence. Using the law of false imprisonment to accomplish this would aid law enforcement in understanding and recognizing this admittedly complex and new crime by drawing on their understanding of preexisting criminal laws. In so doing, the hope would be to protect more victims, save more lives, and perhaps influence society's understanding of violence against women in the process.

For all the possible legal remedies to domestic violence, social science suggests that crimes of violence against women at their core result from societal sexism, including a perpetuating view that women are lesser to men, and thus objects of male control.<sup>193</sup> Consequentially, social change is an important tool in lessening the attitudes that precipitate violence against women, preventing boys and men from becoming offenders in the future, and thus reducing the need for criminal sanctions at all. This goal is, unfortunately, a long-term one, and as the recent women's marches around the world have made evident, there is still a long way to go. But through the slow recognition and criminalization of coercive control, states can reframe domestic violence as not just a women's issue or a criminal issue, but a human rights issue. And that is a good place to start.

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193. See, e.g., Dokoupil, *supra* note 186 (describing abuse as a fundamental consequence of a society still espousing masculinity).

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