CRIMINALIZING COERCIVE CONTROL WITHIN THE LIMITS OF DUE PROCESS

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ABSTRACT

The sociological literature on domestic abuse shows that it is more complex than a series of physical assaults. Abusers use "coercive control" to subjugate their partners through a web of threats, humiliation, isolation, and demands. The presence of coercive control is highly predictive of future physical violence and is, in and of itself, also a violation of the victim's liberty and dignity. In response to these new understandings the United Kingdom has recently criminalized nonviolent coercive control, making it illegal to, on two or more occasions, cause "serious alarm or distress" to an intimate partner that has a "substantial effect" on their "day-to-day activities." Such a vaguely drafted criminal statute would raise insurmountable due process problems under the U.S. Constitution.

Should the states wish to address the gravity of the harms of coercive control, however, this Article proposes an alternative statutory approach. It argues that a state legislature could combine the due process limits of traditionally enterprise-related offenses such as fraud and conspiracy with the goals of domestic abuse prevention to create a new offense based upon the fraud-like nature of coercively controlling behavior. It argues that the most useful legal framework for defining coercive control is similar to that of common law fraud, and that legislatures should adapt the scienter requirements of fraud to the actus reus of coercive control. In so doing, this Article also argues that it is risky for legislatures to punish gender-correlated offenses with specialized legal solutions, rather than recognizing the interrelationship between such offenses and other well-established crimes.

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INTRODUCTION

In 2010, British mother Sally Challen killed her husband Richard with a hammer.[1] After a trial in which the prosecution depicted her as a jealous wife, angry over his extramarital affairs, Sally was convicted of murder.[2] But the couple's son David had an entirely different perspective on their marriage. Richard, David said, "bullied and humiliated" Sally, "isolated her from her friends and family, controlled who she could socialise with, controlled her money, restricted her movement and created a culture of fear and dependency."[3] Richard convinced Sally that the abuse she was suffering was normal.[4] Furthermore, while tightly restricting his wife's behavior, Richard had repeated affairs, visited brothels, and, when Sally challenged him, "he would gaslight her, make her question her sanity" and tell the couple's children she was "mad."[5]

Eventually, a judge agreed with David. After Sally had served eight years of her murder sentence, a court quashed her conviction on the grounds that at the time of the offense Sally was suffering from a psychological "adjustment disorder" brought on by the forty years of mental abuse and control Richard had inflicted on her.[6] She pleaded guilty to manslaughter and was sentenced to time served.[7]

Sally's release coincides with a moment of intense British legal and cultural attention to the form of interpersonal abuse known as "coercive control." Popularized by American forensic social worker Evan Stark, the term "coercive control" refers to a pattern of abusive behavior perpetrated against intimate partners through threats, rage, orders, and demands to gradually strip away their autonomy, isolate

1. Ciara Nugent, *'Abuse Is a Pattern.' Why These Nations Took the Lead in Criminalizing Controlling Behavior in Relationships*, TIME (June 21, 2019, 5:00 AM), https://time.com5610016/coercive-control-domestic-violence [https://perma.cc/5MNF-5YT4].

2. *Id.*

3. David Challen, *My Mother, Sally Challen, Was Branded a Cold-Blooded Killer. At Last She Has Justice*, GUARDIAN (June 8, 2019, 11:17 AM), https://www.theguardian.com/society/2019/jun/08/my-mother-sally-challen-killed-my-father-finally-justice [https://perma.cc/2VPM-AEVM].

4. *See id.*

5. *Id.*

6. *See* Nugent, *supra* note 1 (citing the cause of Challen's "adjustment disorder" as "decades of coercive control by her husband").

7. *See id.*

them from systems of social support, and microregulate the day-to-day affairs of their lives.[8]

Stark, who testified on Sally Challen's behalf, argues that the effort made in the 1990s by social workers, advocates, lawyers, and legislatures to recognize domestic violence as a crime, as opposed to merely a personal matter, missed part of the point.[9] "From the first woman we had in our [Connecticut] shelter, they were telling us violence wasn't the worst part," Stark told *Time* magazine, "but all we could think to say [in order to obtain restraining orders] was 'Tell people about the violence' . . . . It took us 30 years to realize there was another way."[10] Thus, he argues, the now-widely recognized phenomenon of Battered Woman Syndrome only tells part of the story. Domestic abuse may, in fact, be more like kidnapping or indentured

8. *See generally* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5 (2007) ("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."). Stark's field-creating study focuses on male-on-female abuse, and this Article will sometimes refer to abusers and the abused in those gendered terms because of the available underlying sociological literature and the fact that available evidence suggests women are more likely than men to be victims of domestic abuse. *See* JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUST., NONFATAL DOMESTIC VIOLENCE, 2003–2012, at 1 (2014), https://www.bjs.gov/content/pub/pdf/ndv0312.pdf [https://perma.cc/P2DV-3XTC] (suggesting that 76 percent of domestic violence is committed against women). However, it is important to remember that not only does female-on-male domestic violence occur, it may in fact be underreported. Rob Whitley, *Domestic Violence Against Men: No Laughing Matter*, PSYCH. TODAY (Nov. 19, 2019), https://www.psychologytoday.com/us/blog/talking-about-men/201911/domestic-violence-against-men-no-laughing-matter [https://perma.cc/58NS-5NAM] (collecting international data suggesting that domestic violence against men is far more widespread than the reported cases suggest). Furthermore, evidence suggests that LGBTQ-identifying people are even more likely to be the victims of domestic violence than straight-identifying people: the American Centers for Disease Control and Prevention has found that from a sample of 16,000 U.S. adults, 26 percent of homosexual men, 37.3 percent of bisexual men, and 29 percent of heterosexual men had been a victim of interpersonal violence, compared to 43.8 percent of lesbian women, 61.1 percent of bisexual women and 35 percent of heterosexual women. MIKEL L. WALTERS, JIERU CHEN & MATTHEW J. BREIDING, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 1–2 (2013), https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf [https://perma.cc/RPC4-66BF]. Finally, 54 percent of trans-identifying people report experiencing intimate partner abuse, including physical harm and coercive control. NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY 13 (2017), https://www.transequality.org/sites/default/files/docs/usts/Executive%20Summary%20-%20FINAL%201.6.17.pdf [https://perma.cc/9YDV-AML8]. Thus, the ideas developed in this Article are intended to apply to all abusive relationships between intimate partners, regardless of the genders and sexualities of the parties involved.

9. *See* Nugent, *supra* note 1.

10. *Id.*

servitude than assault.[11] As criminal behavioralist Laura Richards puts it, "Abuse is a pattern, a war of attrition that wears a person down."[12]

Due in large part to the activism of researchers such as Stark and Richards, the Parliament of the United Kingdom has recently passed legislation that affirmatively criminalizes coercive control in England and Wales.[13] The new statute aims to capture the broad patterns of subjugating interpersonal behavior that do not fall into the categories of any existing crimes of physical violence. Section 76 of the United Kingdom's Serious Crime Act 2015 criminalizes causing someone to fear that violence will be used against them on at least two occasions *or* generating "serious alarm or distress" that has a "substantial adverse effect" on their "usual day-to-day activities."[14] As the director of public prosecutions put it at the time, coercive control

> can limit victims' basic human rights, such as their freedom of movement and their independence . . . . Being subjected to repeated humiliation, intimidation or subordination can be as harmful as physical abuse, with many victims stating that trauma from psychological abuse had a more lasting impact than physical abuse.[15]

In one of the earliest convictions under this law, Essex woman Natalie Curtis's husband received two years in prison for a pattern of conduct that included calling her thirty to forty times a day, throwing her belongings into her neighbor's yard, breaking into irrational, unpredictable rages, banging things on surfaces, and smashing up the kitchen.[16]

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11. *See* STARK, *supra* note 8, at 5–6, 11–12, 14–15.

12. Nugent, *supra* note 1.

13. *See* Sandra Walklate, *The Sally Challen Case: Landmark Ruling or More of the Same?*, UNIV. LIVERPOOL NEWS (Mar. 5, 2019), https://news.liverpool.ac.uk/2019/03/05/the-sally-challen-case-landmark-ruling-or-more-of-the-same [https://perma.cc/462W-P8ZR] ("Sally Challen's defence team, and much of the press coverage . . . have made significant play of the presence of this offence and its utility in cases . . . where there is evidence . . . that the defendant was living in a coercive and controlling relationship as mitigation for their acts of violence in response.").

14. Serious Crime Act 2015, c. 9, § 76 (UK).

15. Owen Bowcott, *Controlling or Coercive Domestic Abuse To Risk Five-Year Prison Term*, GUARDIAN (Dec. 28, 2015), https://www.theguardian.com/society/2015/dec/29/domestic-abuse-law-controlling-coercive-behaviour [https://perma.cc/XFZ7-DU6Q].

16. *See* Jamie Grierson, *'This Is Not Love': Victim of Coercive Control Says She Saw Red Flags from the Start*, GUARDIAN (Jan. 20, 2019), https://www.theguardian.com/society/2019/jan/21/this-is-not-love-victim-of-coercive-control-says-she-saw-red-flags-from-start [https://perma.cc/PGQ5-BYA4].

Due to research showing that coercive control both imposes devastating harm on victims[17] *and* predicts future physical violence, it is not surprising that some scholars of domestic abuse have called for American jurisdictions to address it—with a few states taking up the call.[18] Indeed, Scotland, Ireland, and France have all adopted legislation similar to the U.K. statute.[19] Furthermore, emerging evidence suggests the global COVID-19 lockdown, which has trapped domestic partners in their homes together for an extended part of the day, has led to an increase in the incidence and severity of domestic violence, creating an even more urgent and pressing need to address these escalating trends of abuse.[20] Although excessive state interference into intimate relations carries enormous risks to liberty and privacy, those cannot be the sole considerations. The law's longstanding emphasis on privacy allowed even physically violent abusers to escape prosecution until relatively recently.[21] That said, any

17. This Article intentionally uses the term "victim" instead of "survivor" to describe those affected by coercive control because it implicates both survivors and victims who eventually die as a result of the abuse they experience. Indeed, the predictive nature of coercive control with respect to murder is one of the primary arguments for legal intervention.

18. Hawaii has a coercive control offense and California a statute that allows evidence of coercive control to be used as evidence of domestic violence in family court. *See* Melena Ryzik & Katie Benner, *What Defines Domestic Abuse? Survivors Say It's More than Assault*, N.Y. TIMES (Jan. 26, 2021), https://www.nytimes.com/2021/01/22/us/cori-bush-fka-twigs-coercive-control.html [https://perma.cc/ZFU3-H82K]. New York and Connecticut have also introduced coercive control offenses. *Id.*; *see also* Kristy Candela, *Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes*, 54 FAM. CT. REV. 112, 112–14 (2016); Claire Wright, *Torture at Home: Borrowing from the Torture Convention To Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 461 (2013) (making the related, though narrower, argument that states should adopt a definition of "domestic violence" in child custody cases that includes mental harm); Alexandra Michelle Ortiz, Note, *Invisible Bars: Adapting the Crime of False Imprisonment To Better Address Coercive Control and Domestic Violence in Tennessee*, 71 VAND. L. REV. 681, 703 (2018) (proposing the crime of false imprisonment be expanded to include situations of coercive control).

19. Domestic Violence Act 2018 (Act No. 6 2018) (Ir.); Domestic Abuse (Scotland) Act 2018 (ASP 5); *Psychological Violence a Criminal Offence in France*, BBC NEWS (June 30, 2010), https://www.bbc.com/news/10459906 [https://perma.cc/U799-GJKM] (defining psychological violence as "repeated acts which could be constituted by words or other machinations, to degrade one's quality of life and cause a change to one's mental or physical state").

20. *See, e.g.*, Babina Gosangi, Hyesun Park, Richard Thomas, Rahul Gujrathi, Camden P. Bay, Ali S. Raja, Steven E. Seltzer, Marta Chadwick Balcom, Meghan L. McDonald, Dennis P. Orgill, Mitchel B. Harris, Giles W. Boland, Kathryn Rexrode & Bharti Khurana, *Exacerbation of Physical Intimate Partner Violence During COVID-19 Lockdown*, RADIOLOGY 1, 4–7 (Aug. 13, 2020), https://pubs.rsna.org/doi/pdf/10.1148/radiol.2020202866 [https://perma.cc/8ZU7-8NLD].

21. *See, e.g.*, D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 332 (6th ed. 2020).

attempt to use the criminal law to address domestic abuse—like any application of the criminal law—also creates the risk of racially asymmetric enforcement, overincarceration, and disproportionate impact on communities of color.[22] Criminalizing coercive control would therefore require, as a precondition, a substantially reformed enforcement and sentencing environment.

Beyond the problems with enforcement, there are also numerous constitutional and legal problems attendant to criminally punishing someone for creating "serious alarm or distress" that has a "substantial effect"[23] on the victim. As Professor Jonathan Turley notes, the ambiguity of the U.K. statutory terms "allows for a disturbing level of discretion of prosecutors in picking marriages and relationships deemed coercive" and, in cases where the victim is not physically prevented from leaving, "the question is how to criminalize conduct that can be highly subjective or interpretive."[24] Existing American vagueness, overbreadth, and First Amendment jurisprudence would seem to make this sort of effort unconstitutional. Administrability concerns would seem to make it, at least, unadvisable.

This Article makes the first attempt to harmonize the goals motivating § 76 of the United Kingdom's Serious Crime Act 2015 with principles of American criminal constitutional law. The purpose here is not to advocate directly for immediate legislation. To avoid doing more harm than good, legislation would have to accompany reforms to the current law enforcement response to physical domestic violence, which some domestic violence experts criticize as being culture-blind and ineffective.[25] The extensive research on policing and restorative justice necessary to propose such a mechanism is beyond the scope of this Article. It does, however, make the argument that a state legislature could, consistent with well-established principles of criminal law, draft an offense that punishes the nonviolent coercive control of an intimate partner without resorting to the open-ended, potentially

22. *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 805–07 (2007).

23. Serious Crime Act 2015, c. 9, § 76 (UK).

24. Jonathan Turley, *English Law Allows for Five Years in Prison for Spouses Who Engage in "Coercive and Controlling Behavior,"* JONATHAN TURLEY (Dec. 29, 2015), https://jonathanturley.org/2015/12/29/english-law-allows-for-five-years-in-prison-for-spouses-who-engage-in-coercive-and-controlling-behavior [https://perma.cc/7VY7-ZVED].

25. *See, e.g.*, Robert L. Hampton, Jaslean J. LaTaillade, Alicia Dacey & J.R. Marghi, *Evaluating Domestic Violence Interventions for Black Women*, 16 J. AGGRESSION MALTREATMENT & TRAUMA 330, 330–33 (2008).

unconstitutional language adopted by the United Kingdom. As well, this Article makes the broader claim that borrowing from other areas of criminal law will produce a more robust and innovative solution than the more compartmentalized approach often taken by reformers such as those in the United Kingdom.

As I have noted elsewhere, courts and scholars have largely developed the jurisprudential framework for corporate and commercial criminal law separately from the law governing bodily crimes, particularly gendered crimes such as sexual offenses.[26] Here, I argue that a state legislature could integrate the due process limits to traditionally enterprise-related offenses, such as fraud and conspiracy, with the goals of domestic abuse prevention to create a new offense based upon the fraud-like nature of coercively controlling behavior. Like criminal conspiracy, coercive control seeks to transform individually legal—and even constitutionally protected—thoughts and words into crimes based on sociological evidence that the context in which they arise is uniquely dangerous. Like criminal fraud, coercive control requires legislatures and courts to decide where, across the spectrum of an individual's potentially immoral behavior toward another party, such behavior should become criminal. In fraud, that line has to do with specific intent to use deceit to deprive the victim of something of value. That the U.K. statute fails to draw an analogous line is its major, though not only, failing.

This Article proceeds in four parts. Part I gathers the sociological and criminological data on coercive control to demonstrate the legally cognizable harms it causes and then summarizes the United Kingdom's legislative solution. Part II lays out the constitutional, evidentiary, and policy problems with the United Kingdom's coercive control law. Part III argues that we can find solutions to these problems in the jurisprudence of other substantive offenses that are based on inherently criminal speech and communicative conduct. It argues that a well-drafted coercive control offense should consider the constitutional problems and existing case law of child and elder abuse, stalking, false imprisonment, blackmail, conspiracy, and fraud. Part IV integrates these solutions into a model coercive control statute. It argues, perhaps counterintuitively, that the most useful criminal-law framework for thinking about coercive control is that of common law

26. *See e.g.*, Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773, 802–09 (2019) (arguing that existing principles of corporate criminal liability logically allow for prosecution of corporations for sexual assault under certain circumstances).

fraud, and that an equivalent to the scienter requirement of fraud can and should apply to coercive control. Finally, it notes the remaining policy questions a legislature should grapple with before criminalizing coercive control. The Article concludes by arguing that it is risky for legislatures to create a *sui generis* legal remedy for harmful "gendered" conduct like coercive control, as opposed to harmonizing a new offense with other, well-established crimes.

I. COERCIVE CONTROL AND THE HARMS IT CAUSES

Like the Sally Challen case did in the United Kingdom, the popular *Dirty John* podcast (and subsequent television adaptation on the Bravo network) introduced American audiences to the horrors of unchecked coercive control. In *Dirty John*, *Los Angeles Times* reporter Christopher Goffard tells the true story of John Meehan, a charming con man who uses tactics of gaslighting, isolation, and manipulation to slowly gain financial and physical control over his girlfriend Debra Newell—a situation that becomes violent when Debra finally leaves him and Meehan attempts to murder her daughter.[27] Though these stories surely resonate emotionally, the underlying psychological dynamic of coercive control is complex and not necessarily intuitive to a general public. This Part will provide a more precise definition of the social problem being addressed by recognizing coercive control as a crime and a summary of the new British legal framework designed to confront it.

A. Definitions of Coercive Control

Anti–domestic violence advocates have long recognized the relationship between physical violence and the background conditions of psychological control that give rise to it. For example, the National Domestic Violence Hotline defines domestic violence as "a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship."[28] This definition explicitly

27. *See* Haylee Barber, *'Coercive Control' Potential Factor in 'Dirty John' Case of Psychological Abuse*, NBC NEWS (Jan. 12, 2018, 6:39 PM), https://www.nbcnews.com/dateline/coercive-control-potential-factor-dirty-john-case-psychological-abuse-n837361 [https://perma.cc/8FHS-K2PQ]; Christopher Goffard, *Dirty John, Part One: The Real Thing*, L.A. TIMES (Oct. 1, 2017), https://www.latimes.com/projects/la-me-dirty-john [https://perma.cc/J3KN-LDYE].

28. *Understand Relationship Abuse*, NAT'L DOMESTIC VIOLENCE HOTLINE (May 14, 2017), https://www.thehotline.org/is-this-abuse/abuse-defined [https://perma.cc/KUV4-Z88J].

lacks reference to a component of physical contact, focusing instead on the abuser's intent: maintaining power over another party. Stark, the sociologist who popularized the concept of coercive control to capture the systematic nature of domestic abuse, states that "the main means used to establish control is the microregulation of everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually."[29] From this definition, one can see that a pattern of coercive control may arise from myriad routine interactions, each of which on its own may seem like run-of-the-mill nagging within a romantic relationship.

British legal scholar Vanessa Bettinson, a longtime advocate of the new offense, summarizes the key aspects of coercive control as "reflecting extreme examples of accepted male behaviours such as the control of financial resources; the use of credible threats which may or may not involve threats of physical violence; a victim feeling in need of the dominator; damaged psychological well-being of the victim and a high risk of suicide."[30] The complex dynamic of coercive control contributes both to the harms it causes and the difficulty of capturing it using the traditional tools of the criminal law.[31]

B. Identifying the Harms of Coercive Control

A core function of criminal law is to redress harm.[32] Retributivists urge that those who inflict harm on society should be punished to a degree morally commensurate with that harm.[33] Expressivists caution that, should the justice system fail to punish harm, it risks sending a message to victims and offenders that we, as a society, morally tolerate those harms.[34] Utilitarians care less about abstract morality and more

29. STARK, *supra* note 8, at 5.

30. Vanessa Bettinson, *Aligning Partial Defences to Murder with the Offence of Coercive or Controlling Behaviour*, 83 J. CRIM. L. 71, 74 (2019).

31. As discussed in *supra* note 8, while the sociological literature on coercive control has, up to this point, focused heavily on male-on-female abuse, the data on domestic violence generally shows that abusive relationships arise between partners of all genders and sexualities.

32. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *2–3 (describing "*public wrongs*" as "breach[es] and violation[s] of public rights and duties, which affect the whole community, considered as a community" and stating that they "are distinguished by the harsher appellation of *crimes* and *misdemesnors* [sic]").

33. *See, e.g.*, Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 479 (1968).

34. *See, e.g.*, JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98–100 (1970); Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1, 19–21 (Wesley Cragg

about deterring future harms, therefore arguing that the law should only punish to the degree necessary to achieve optimal deterrence.[35] Regardless of the theory of punishment one adopts, however, it is clear that the legislature must identify the kind and severity of harm caused by a behavior before it justifiably criminalizes it.

The question presented in the case of coercive control is, then, what harms result from coercive behavior, short of physical violence that is already criminal, between intimate parties? For most of history, the law deemed even physical violence between domestic partners to be a private matter, not harmful enough to warrant the attention of criminal law.[36] By publicly articulating the harms of domestic violence, reformers in the 1970s and 1980s largely succeeded in prompting courts, prosecutors, and legislators to recognize it as the criminal battery it is.[37] Many psychologists, sociologists, criminologists, and anti–domestic violence advocates make similar arguments today about the harms of coercive control. These harms fall into two general categories: intrinsic harms and predicted harms.

1. *Intrinsic Harms.* Physical domestic violence imposes many physical and psychological costs on its victims beyond the immediate wounds themselves: The U.S. Department of Justice's ("DOJ") National Institute of Justice reports that up to 88 percent of battered women in shelters suffer from post-traumatic stress disorder ("PTSD").[38] "[A]s many as 72 percent of abuse victims experience depression . . . and 75 percent experience severe anxiety."[39] And studies show that purely psychological violence is just as detrimental to a victim's mental health as its physical counterpart.[40] A long period of

ed., 1992); JEFFRIE MURPHY, *Forgiveness and Resentment*, *in* FORGIVENESS AND MERCY 14, 25 (1988).

35. *See, e.g.*, JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 19–22, 27–31 (London, Robert Heward 1830); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 36, 39–41 (1968).

36. *See, e.g.*, WEISBERG & APPLETON, *supra* note 21, at 332.

37. *Cf. id.* at 332–33.

38. ANDREW R. KLEIN, U.S. DEP'T OF JUST., NAT'L INST. OF JUST., 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/48QP-3QQ4].

39. *Id.* (citation omitted).

40. *See* Maria A. Pico-Alfonso, M. Isabel Garcia-Linares, Nuria Celda-Navarro, Concepción Blasco-Ros, Enrique Echeburúa & Manuela Martinez, *The Impact of Physical, Psychological, and*

coercive control creates "psychological trauma, making victims vulnerable as the trauma overrides the ability to control their lives and experience feelings of helplessness and terror."[41] Furthermore, research links both physical *and* psychological domestic violence to a range of *physical* harms to the victim, including disability preventing work, arthritis, chronic pain, migraine and other frequent headaches, stammering, sexually transmitted infections, chronic pelvic pain, stomach ulcers, spastic colon, frequent indigestion, diarrhea, constipation, and suicide.[42]

Beyond the empirically measurable medical impacts, a victim of nonviolent coercive control suffers another sort of harm in common with the victim of physical violence: a loss of autonomy.[43] Stark defines coercive control as conduct intended to undermine another person's autonomy, freedom, and integrity.[44] Scholars of coercive control often refer to it, for that reason, as a "liberty crime."[45] As Professors Vanessa Bettinson and Charlotte Bishop put it, arguing for what would become § 76 of the Serious Crime Act 2015, "Whereas many criminal offences protect individuals against 'the reduction of options', domestic abuse involves not only the options of the victim being reduced, but also the options that remain being subject to unwarranted and arbitrary control by another person."[46] Many scholars agree that nonviolent coercive

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).

41. Bettinson, *supra* note 30, at 73.

42. Ann L. Coker, Paige H. Smith, Lesa Bethea, Melissa R. King & Robert E. McKeown, *Physical Health Consequences of Physical and Psychological Intimate Partner Violence*, 9 ARCHIVES FAM. MED. 451, 455–56 (2000) ("We found that psychological violence was associated with many of the same health outcomes as was physical IPV."). Victims of coercive control are also at a greater risk of suicide. *See* RUTH AITKEN & VANESSA E. MUNRO, DOMESTIC ABUSE AND SUICIDE 11 (2018), http://wrap.warwick.ac.uk/103609/1/WRAP-Domestic-abuse-and-suicide-Munro-2018.pdf [https://perma.cc/U8SW-S8RA].

43. *See, e.g.*, Cheryl Hanna, *The Paradox of Progress: Translating Evan Stark's Coercive Control into Legal Doctrine for Abused Women*, 15 VIOLENCE AGAINST WOMEN 1458, 1459–61 (2009).

44. *See* STARK, *supra* note 8, at 15.

45. *See id.* at 380–82; Emma Williamson, *Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control*, 16 VIOLENCE AGAINST WOMEN 1412, 1414 (2010); *see also* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 74–75 (1992) (characterizing domestic violence as a relationship based in coercive control and explaining that this type of relationship imposes "domestic captivity" on women).

46. Vanessa Bettinson & Charlotte Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary To Combat Domestic Violence?*, 66 N. IR. LEGAL Q. 179, 183 (2015).

control, alone or in concert with physical domestic violence, imposes a set of harms unique in their temporal duration and comprehensive scope—the purpose of coercive control is for an abuser indefinitely to dictate all aspects of a victim's life.[47] The case studies with which this Article opened all demonstrate the complexity and duration of the harms suffered by victims of coercive control. As Professor Deborah Tuerkheimer puts it, the "transactional model" of crime—in which the system treats a single action such as a battery as a cognizable offense—misses the reality of domestic abuse as "an ongoing pattern of conduct occurring within a relationship characterized by power and control."[48]

2. *Predicted Harms.* In addition to harming a victim directly through coercive control itself, an individual who engages in it is more likely to become physically violent in the future.[49] A DOJ National Institute of Justice study found that intimate partners who exercised control over their partners' daily activities were more than five times more likely to kill them.[50] When compared with "situational" intimate partner violence, violence arising in coercively controlling

47. *See* Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 746–48 (2005); Donald G. Dutton & Susan Painter, *Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Theory*, 8 VIOLENCE & VICTIMS 105, 107 (1993); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims*, 22 BERKELEY J. GENDER L. & JUST. 2, 2–3 (2007); Victor Tadros, *The Distinctiveness of Domestic Abuse: A Freedom Based Account*, 65 LA. L. REV. 989, 989–94 (2005).

48. Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battery: A Call To Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960–61 (2004); *see also* Margaret E. Johnson, *Redefining Harm, Re-Imagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS. L. REV. 1107, 1112 (2009) (noting the law's inability to address harms of women who are not subjected to distinguishable acts of violence).

49. *See, e.g.*, STARK, *supra* note 8, at 276 (concluding that coercive control is "the most dangerous" context in which women are abused); Pico-Alfonso et al., *supra* note 40, at 602. *See generally* Christopher M. Murphy & K. Daniel O'Leary, *Psychological Aggression Predicts Physical Aggression in Early Marriage*, 57 J. CONSULTING & CLINICAL PSYCH. 579 (1989) (demonstrating that psychological aggression predicts physical aggression).

50. Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Rebecca Block, Doris Campbell, Mary Ann Curry, Faye Gary, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich & Susan A. Wilt, *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L INST. JUST. J. 14, 17 (2003), https://www.ojp.gov/pdffiles1/jr000250e.pdf [https://perma.cc/4KQ5-LEXL]; *see also* Neil Websdale, *Assessing Risk in Domestic Violence Cases*, *in* ENCYCLOPEDIA OF DOMESTIC VIOLENCE 38, 40 (Nicky Ali Jackson ed., 2007) (citing "obsessive possessiveness or morbid jealousy" as a factor "[t]he research literature consistently identifies . . . as central to intimate partner homicides"); *Signs of an Abusive Partner*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/signs-of-abuse [https://perma.cc/S4T2-7PH5] (identifying numerous nonviolent controlling behaviors as "warning signs" of violence).

relationships tends to be more frequent and more severe.[51] In coercively controlling relationships, acts of severe physical, sexual, and emotional abuse, harassment, coercion, and control are more likely to continue and even escalate after partners separate because abusers subjectively experience separation as a loss of control.[52] Furthermore, coercive controllers pose risks not only to their partners but to their children, particularly in cases of divorce. The Department of Justice of Canada warns that "the risk of lethal violence is particularly high following parental separation" and lists as a risk factor for such violence "[u]sing the child as a weapon . . . to continue to intimidate, harass, or exert control over their ex-spouse."[53]

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51. Nicola Graham-Kevan & John Archer, *Intimate Terrorism and Common Couple Violence. A Test of Johnson's Predictions in Four British Samples*, 18 J. INTERPERSONAL VIOLENCE 1247, 1265 (2003) ("[C]ontrolling behaviors are a risk marker for high frequency, injurious, escalating physical aggression."); Jennifer L. Hardesty, Kimberly A. Crossman, Megan L. Haselschwerdt, Marcela Raffaelli, Brian G. Ogolsky & Michael P. Johnson, *Toward a Standard Approach to Operationalizing Coercive Control and Classifying Violence Types*, 77 J. MARRIAGE FAM. 833, 839 (2015) (finding that the frequency and severity of violent acts were greater for mothers who experienced controlling behaviors); Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322, 335 (2005) (finding that women subjected to nonviolent controlling behaviors experienced more frequent violence); Andy Myhill, *Measuring Coercive Control: What Can We Learn from National Population Surveys?*, 21 VIOLENCE AGAINST WOMEN 355, 366 (2015) ("[R]elationships with coercive control are characterized by more frequent and severe violence . . . ."); Samantha K. Nielsen, Jennifer L. Hardesty & Marcela Raffaelli, *Exploring Variations Within Situational Couple Violence and Comparisons With Coercive Controlling Violence and No Violence/No Control*, 22 VIOLENCE AGAINST WOMEN 206, 215 (2016) (explaining that mothers who are not subjected to control tactics in addition to violence experienced less severe violence than mothers subjected to control tactics); Paige Hall Smith, Gloria E. Thornton, Robert DeVellis, Joanne Earp & Ann L. Coker, *A Population-Based Study of the Prevalence and Distinctiveness of Battering, Physical Assault, and Sexual Assault in Intimate Relationships*, 8 VIOLENCE AGAINST WOMEN 1208, 1216–17 (2002) (finding correlations among different types of violence).

52. *See* Myhill, *supra* note 51, at 368 (identifying separation as a risk factor for intimate partner violence); Petra Ornstein & Johanna Rickne, *When Does Intimate Partner Violence Continue After Separation?*, 19 VIOLENCE AGAINST WOMEN 617, 619–21 (2013).

53. PETER JAFFE, KATREENA SCOTT, ANGELIQUE JENNEY, MYRNA DAWSON, ANNA-LEE STRAATMAN & MARCIE CAMPBELL, DEP'T OF JUST. OF CAN., RISK FACTORS FOR CHILDREN IN SITUATIONS OF FAMILY VIOLENCE IN THE CONTEXT OF SEPARATION AND DIVORCE 19 (2014), https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rfcsfv-freevf/rfcsfv-freevf.pdf [https://perma.cc/9KR7-N3LJ]. Abusive partners also frequently use the divorce court system as a means of coercively controlling their partners once they no longer have physical access to them after a separation. *See, e.g.*, Heather Douglas, *Legal Systems Abuse and Coercive Control*, 18 CRIM. & CRIM. JUST. 84, 85–86 (2018); Susan L. Miller & Nicole L. Smolter, *'Paper Abuse': When All Else Fails, Batterers Use Procedural Stalking*, 17 VIOLENCE AGAINST WOMEN 637, 637–38 (2011); Brittany E. Hayes, *Abusive Men's Indirect Control of their Partner During the Process of Separation*, 27 J. FAM. VIOLENCE 333, 334 (2012).

This particular risk of coercive control came to national attention in Canada after forty-one-year-old father Andrew Berry stabbed his four- and six-year-old little girls to death on Christmas Day 2017.[54] Berry had partial custody after a court had determined—consistent with the background presumptions of the governing law—that a husband's controlling behavior against his wife should not affect a custody determination so long as he has never been violent toward the children themselves, because contact with a father is presumptively considered to be in the best interest of a child.[55] Due in large part to the complex relationship between coercive control and physical violence, one can set aside the direct psychological harms caused by the controlling behavior and nonetheless identify the *future* physical harm to victims and their children posed by such behavior. It should also be noted that—as in the case of Sally Challen—coercive control predicts violent behavior by the abused party as well as the abuser.[56] In her qualitative study of the transcripts of trials of women who had killed their batterers, Professor Elizabeth Sheehy found that coercive control factors are "more predictive of intimate homicide than the severity or frequency of . . . physical violence."[57]

C. The U.K. Legislative Response

In the face of a growing understanding of the harms of coercive control, § 76 of the United Kingdom's Serious Crime Act 2015 now criminalizes coercive or controlling behavior in an intimate or family relationship. Public support for the bill derived in part from a report released by Her Majesty's Inspectorate of Constabulary ("HMIC"), which highlighted the inadequacies of police response to domestic violence.[58] The report found that, despite improvements in

54. Louise Dickson, *Trial of Oak Bay Man Accused of Killing His Two Daughters Begins in Vancouver*, TIMES-COLONIST (Apr. 16, 2019), https://www.timescolonist.com/news/local/trial-of-oak-bay-man-accused-of-killing-his-two-daughters-begins-in-vancouver-1.23793283 [https://perma.cc/QH5E-PWLW].

55. Lori Chambers, Deb Zweep & Nadia Verrelli, *Paternal Filicide and Coercive Control: Reviewing the Evidence in* Cotton v. Berry, 51 UBC L. REV. 671, 674 (2018).

56. *See supra* notes 1–7.

57. ELIZABETH A. SHEEHY, DEFENDING BATTERED WOMEN ON TRIAL: LESSONS FROM THE TRANSCRIPTS 235 (2014).

58. HER MAJESTY'S INSPECTORATE OF CONSTABULARY, EVERYONE'S BUSINESS: IMPROVING THE POLICE RESPONSE TO DOMESTIC ABUSE 50 (2014), https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/2014/04/improving-the-police-response-to-domestic-abuse.pdf [https://perma.cc/L4QT-MBZG].

prosecutorial practices surrounding domestic violence itself, police struggled to understand the nature of coercive control, which is a defining feature of many domestic violence cases.[59] Eventually, the Home Office concluded there was a gap in the existing substantive legal framework's focus on isolated incidents of physical violence, which failed to capture the ongoing nature of domestic abuse.[60]

The new § 76 states:

> (1) A person (A) commits an offence if—
>
> a. A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
>
> b. at the time of the behaviour, A and B are personally connected,
>
> c. the behaviour has a serious effect on B, and
>
> d. A knows or ought to know that the behaviour will have a serious effect on B.[61]

Commentators observe that the requirement that the behavior be "repeated" or "continuous" avoids criminalizing the benign everyday power struggles in intimate relationships.[62] However, the statute provides no definition of what "controlling or coercive" means under subsection (1)a. Bettinson suggests that courts look to the Home Office's definitions in its guidance manual on domestic violence and abuse, which describes "controlling" behavior as: "a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour."[63] The manual defines "coercive" behavior as "an act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim."[64]

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59. *Id.* at 30.

60. Bettinson & Bishop, *supra* note 46, at 185.

61. Serious Crime Act 2015, c. 9, § 76 (UK).

62. Bettinson & Bishop, *supra* note 46, at 191.

63. *Id.* at 180 (citing HOME OFF., GUIDANCE: DOMESTIC VIOLENCE AND ABUSE (2013) [hereinafter HOME OFF. GUIDANCE]).

64. *Id.* (citing HOME OFF. GUIDANCE, *supra* note 63).

Though other statutory terms are more precise, some raise additional interpretive problems. The statute elsewhere specifies that "personally connected" means that A and B have an "intimate" or "family relationship."[65] The requisite "serious effect on B" occurs when either "it causes B to fear, on at least two occasions, that violence will be used against B" or "it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities."[66] Commentators note that the text of the statute does not make it clear whether a subjective or objective standard should be applied to the question of whether B experiences fear or alarm—in other words, whether the jury would need to find that such alarm was reasonable or merely honestly felt.[67] Finally, the objective mens rea standard requires only that the defendant "knows or ought to know" that his conduct would cause fear or alarm,[68] which precludes the defense that he did not intend to cause such fear. As commentators observed of the harassment statutes on which the mens rea element of the coercive control offense is based, "for the victim, the behaviour is 'no less harmful because it is unintentional.'"[69]

To date, U.K. enforcement of this offense has been spotty. By the end of 2016, 155 people had been prosecuted under the statute, but many of those cases involved coercive control in addition to some form of physical violence.[70] One example of a case of purely nonviolent control was that of Bexhill man Paul Playle, who was convicted for psychological tactics such as stalking his wife online by sending messages to people from her online accounts, telling her that her prior partner was responsible, and then comforting her in her distress.[71] He was sentenced to three years and six months in prison.[72] Though the U.K. experience with criminalizing coercive control remains, itself, a work in progress, evaluating the offense as a hypothetical in the American legal context poses even more challenges.

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65. Serious Crime Act 2015, c. 9, § 76(2) (UK).

66. *Id.* § 76(4).

67. Bettinson & Bishop, *supra* note 46, at 194.

68. Serious Crime Act 2015, c. 9, § 76(1)(d), (5) (UK).

69. Bettinson & Bishop, *supra* note 46, at 195 (citing Emily Finch, *The Perfect Stalking Law: An Evaluation of the Efficacy of the Protection from Harassment Act 1997*, 2002 CRIM. L. REV. 704).

70. Bettinson, *supra* note 30, at 77–78.

71. *Id.*

72. *Id.*

II. PROBLEMS WITH CRIMINALIZING COERCIVE CONTROL

This Part considers the problems the U.K. version of coercive control would create under American criminal, constitutional, and evidentiary laws, as well as the policy questions it would raise.

A. Substantive Problems

The most significant problem with a coercive control offense like § 76 of the Serious Crime Act 2015 is that it probably violates the Due Process Clause of the Fifth and Fourteenth Amendments. Specifically, it creates problems of vagueness and overbreadth and may impermissibly criminalize thought.

1. *Vagueness.* A statute that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning" violates the Due Process Clauses.[73] Such a statute fails to put a person on sufficient notice of the content of the criminal law for him to conform his behavior to it.[74] It also encourages arbitrary or discriminatory enforcement by the government and constitutes an impermissible delegation of legislative authority to law enforcement.[75]

Several well-known Supreme Court vagueness cases have involved vagrancy statutes. In *Kolender v. Lawson*,[76] the Court struck down a California statute requiring persons loitering on the streets to provide "credible and reliable" identification whenever requested by the police.[77] The statute was unconstitutionally vague because it failed to define what "credible and reliable" identification meant.[78] More recently, in *Chicago v. Morales*,[79] the Court invalidated a Chicago ordinance intended to prevent "criminal street gang members" from loitering in public places."[80] The ordinance defined "loiter" as "to remain in any one place with no apparent purpose,"[81] a definition that

73. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

74. Smith v. Goguen, 415 U.S. 566, 572 (1974).

75. Kolender v. Lawson, 461 U.S. 352, 358 (1983); *see also Smith*, 415 U.S. at 578 (criticizing the unfettered latitude vague statutes give to law enforcement officials).

76. Kolender v. Lawson, 461 U.S. 352 (1983).

77. *Id.* at 353–54.

78. *Id.*

79. Chicago v. Morales, 527 U.S. 41 (1999).

80. *Id.* at 46–47.

81. *Id.* at 56.

the Court deemed unconstitutionally vague.[82] The Court found that "the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member," and therefore "the vagueness that dooms [the] ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not."[83]

The vagueness doctrine proved to be alive and well in a recent high-profile case: the prosecution of Jeff Skilling, former CEO of the Enron Corporation, for his role in his company's famous accounting fraud scandal in 2003.[84] The U.S. government charged Skilling with (among many other things) honest services fraud under 18 U.S.C. § 1346 for misrepresenting Enron's financial health by concealing the corporation's losses in separate trusts off of Enron's books. The government asserted that he thereby defrauded shareholders by profiting from their losses when he earned enormous, undeserved executive bonuses tied to certain quarterly earnings-per-share targets.[85] Skilling's vagueness challenge to his honest services fraud conviction turned on what it means to defraud someone of "the intangible right of honest services," which the government urged the Court to construe as including any instance of "undisclosed self-dealing."[86] Declining to read the offense this broadly, the Court noted that the "core application" of honest services fraud historically had consisted of cases involving specifically bribes and kickbacks.[87] The Court thus cited the need to avoid a potential vagueness problem in holding that honest services fraud under § 1346 "does not encompass conduct more wide ranging than the paradigmatic cases of bribes and kickbacks" and "resist[ed] the Government's less constrained construction absent Congress' clear instruction otherwise."[88]

These cases suggest that a coercive control statute with language like that adopted in the United Kingdom would likely fail to pass constitutional muster on vagueness grounds.[89] Most notably, the U.K. statute's failure to define what constitutes "controlling or coercive"

82. *See id.* at 60 (explaining that the ordinance's failure to specify a standard of conduct dooms it as unconstitutionally vague).

83. *Id.* at 57.

84. Skilling v. United States, 561 U.S. 358, 369 (2010).

85. *Id.* at 367–69.

86. *Id.* at 409.

87. *Id.* at 410.

88. *Id.* at 411.

89. *See* Ortiz, *supra* note 18, at 698 (making note of this problem).

conduct would require courts to make an arguably even more open-ended determination than previously invalidated statutory determinations, such as the risk-of-injury determination required by the invalidated clause of the Armed Career Criminal Act. Unlike the U.K. statute, this clause at least required the government to show that a crime had been committed at all before the court was forced to evaluate the risk of injury such a crime would pose in the abstract. In the same way that the Court concluded in *Morales* that the city of Chicago could not have intended to criminalize every instance of a person standing on a street in the company of a gang member, it would seem unlikely that any legislature motivated to criminalize coercive control would do so by criminalizing every single action toward an intimate partner that could be considered "controlling." A standard dictionary definition of the verb "control" is "exercise restraining or directing influence over."[90] In such a world, nagging one's partner to take out the garbage—clearly a form of directing influence!—could be a criminal offense.

The element of the offense requiring that the coercive control has a "serious effect" on the victim may also be unconstitutionally vague. Parliament does provide more precise guidance on this prong, defining "serious effect" as either causing the victim to fear physical violence on at least two occasions or causing her[91] "serious alarm or distress which has a substantial adverse effect on [her] usual day-to-day activities."[92] The second category of "substantial adverse effect" would seem to raise questions as to what conduct is actually prohibited: If a person is in a bad mood throughout her work day due to a fight her husband picked in the morning does that become criminal coercive control? As with the loitering provision in *Morales*, it seems unlikely that any legislature could intend every set of facts fitting that definition to constitute a crime, which means that such language inherently delegates the choice of enforcement to the government.

90. *Control*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/control [https://perma.cc/U5N8-AHME].

91. Due to most of the available studies on coercive control focusing on male perpetrators and female targets, this Article will sometimes use the female pronoun. As discussed in *supra* note 8, however, domestic abuse occurs between partners of all genders and the recommendations of this Article are intended to apply gender neutrally.

92. Serious Crime Act 2015, c. 9, § 76 (UK).

2. *Overbreadth.* A law is overbroad if it prohibits not only acts the legislature may forbid, but also constitutionally protected conduct.[93] It is only overbroad if it "reaches a substantial amount of constitutionally protected conduct."[94] This means that for a court to declare a law unconstitutionally overbroad it must be so intrusive on a fundamental right—either qualitatively, quantitatively, or both—that its negative impact on free exercise outweighs the positive social benefits that flow from its application to other, unprotected conduct.[95] Courts will not find a law to be void for overbreadth if there is a way to sever the unconstitutional portion[96] or construe it in such a way as to limit its reach only to constitutionally permissible applications.[97]

Furthermore, unlike many other constitutional claims, a defendant who wishes to mount an overbreadth challenge to a statute need not demonstrate standing: a "person whose activity *may* be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face" if it *would* be overbroad in some set of circumstances.[98] (Courts will generally decline to use the overbreadth doctrine to find laws facially invalid if they can conclude that such laws are unconstitutional as applied to the particular party.[99]) Historically, the Supreme Court has applied the overbreadth doctrine primarily in the context of the First Amendment right to freedom of speech and on several occasions rejected such claims in other areas.[100] Yet it remains unclear whether the doctrine may in fact be cognizable in other constitutional contexts.[101] Professor John Decker points out, for example, that in

93. Schwartzmiller v. Gardner, 752 F.2d 1341, 1346 (9th Cir. 1984).

94. Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 494 (1982).

95. John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53, 56 (2004) (citing Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

96. Parker v. Levy, 417 U.S. 733, 760 (1974).

97. Osborne v. Ohio, 495 U.S. 103, 118–22 (1990).

98. New York v. Ferber, 458 U.S. 747, 768 n.21 (1982) (emphasis added).

99. United States v. Stevens, 559 U.S. 460, 483 (2010) (Alito, J., dissenting).

100. Schall v. Martin, 467 U.S. 253, 268–69 n.18 (1984).

101. *Compare Ferber*, 495 U.S. at 768 ("The doctrine is predicated on the sensitive nature of protected expression."), *with* Decker, *supra* note 95, at 59 (holding a law outlawing all picketing contrary to the First Amendment right of association (citing Thornhill v. Alabama, 310 U.S. 88, 97 (1940))), Kunz v. New York, 340 U.S. 290, 293–95 (1951) (finding a municipal ordinance to hold public worship meetings on the street without obtaining an advance permit facially invalid in violation of the First and Fourteenth Amendments), Cantwell v. Connecticut, 310 U.S. 296, 300–07 (1940) (ruling that a state statute that prohibits solicitation of money for religious, charitable, or philanthropic causes unless the secretary of the Public Welfare Council approves

right-to-privacy cases arising after *Griswold v. Connecticut*[102] and *Roe v. Wade*,[103] the Supreme Court has entertained overbreadth claims without rejecting them outright for not implicating the First Amendment.[104]

In any case, it is clear that a statute criminalizing nonviolent coercive control could create an overbreadth problem. Namely, much of interpersonal controlling conduct defined by sociological literature—for example, "regulating" a partner's "everyday behavior"—necessarily takes the form of speech. Analogous challenges arose to the antistalking statutes, which most states adopted in the 1990s in response to increased public awareness of the dangers of stalking behavior, particularly in the domestic violence context.[105] The content of antistalking offenses varies by state, but many have basic elements in common.[106] For example, California, the first state to create such an offense, defines it as "willfully, maliciously, and repeatedly" following or harassing another person and making a "credible threat with the intent to place that person in reasonable fear of his or her safety."[107]

Forty-six state stalking statutes have withstood vagueness and overbreadth challenges.[108] However, in upholding these statutes courts generally rely in part on their requirement that the prohibited

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such cause and determines the cause or religion is a bona fide organization violates the First and Fourteenth Amendment right to exercise religion), *and* Berger v. New York, 388 U.S. 41, 53, 58–60 (1967) (holding that a state statute that authorizes eavesdropping pursuant to a court order but on less than probable cause for a two-month period, with no termination provision or after-the-fact notice, is contrary to the Fourth and Fourteenth Amendments).

102. Griswold v. Connecticut, 381 U.S. 479 (1965).

103. Roe v. Wade, 410 U.S. 113 (1973).

104. Decker, *supra* note 95, at 90.

105. J. Alan Baty, *Alabama's Stalking Statutes: Coming Out of the Shadows*, 48 ALA. L. REV. 229, 229–30 (1996).

106. As the *American Law Reports* explain:

> Although antistalking statutes, in general terms, have some similarities, considerable variation is to be found regarding: (a) what course of conduct suffices to constitute stalking, assuming the presence of any requisite mental state and risked or resulting consequences; (b) what varieties of fear suffice to establish the risked or resulting consequences, including whether that fear must be established by a subjective test, an objective test, or both; (c) what kind of mental state the stalker must have, and, in particular, whether the mental state must exist only as to the underlying conduct or instead or in addition as to the fear-producing consequences; and (d) what aggravating circumstances suffice to make the crime of stalking a higher level offense.

6 George L. Blum, *Validity of State Stalking Statutes*, A.L.R. 7TH 491, 495–96 (2015).

107. CAL. PENAL CODE § 646.9 (West 2020).

108. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 93 n.237 (2009).

harassing conduct include at least an implied threat of physical injury or fear thereof on the part of the victim.[109] It is well settled that the free speech right does not prevent a state from criminalizing threats due to the overriding interest in protecting its citizens "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[110] Thus, while antistalking statutes are directed at a particular form of interpersonal behavior—a pattern of unwanted conduct or pursuit—they are nonetheless typically grounded in the existence of a physical threat or fear thereof to pass First Amendment overbreadth scrutiny. This Article will discuss the relevance of antistalking statutes to the coercive control question in much greater detail in Part II.D. For now, it is simply worth noting that the new U.K. law lacks a requirement of threatened physical violence, as it defines "serious effects" on the victim to include not only fear of violence but also mere "distress" that has a "substantial effect" on day-to-day activities. The U.K. statute as written would therefore raise significant overbreadth questions in the United States.

3. *Prohibition on "Thought Crimes."* The third substantive objection to a coercive control offense also relates to the First Amendment, but it is a bit more theoretical than doctrinal. Most First Amendment scholars recognize an implicit right to "freedom of thought," which appears nowhere in the Constitution but is arguably implied in the right to freedom of expression.[111] Some scholars argue that the First Amendment is intended to protect the self-realization of the individual citizen, a theory which, if accepted, requires "governmental respect for the sanctity of an individual's thought

109. *See, e.g.*, State v. Randall, 669 So. 2d 223, 226 (Ala. Crim. App. 1995); People v. Borrelli, 77 Cal. App. 4th 703, 713–14 (5th Dist. 2000); People v. Baer, 973 P.2d 1225, 1231–32 (Colo. 1999); United States v. Smith, 685 A.2d 380, 388 (D.C. 1996); People v. Bailey, 167 Ill. 2d 210, 227 (1995); Clements v. State, 19 S.W.3d 442, 451 (Tex. App. Houston 1st Dist. 2000). *But see* People v. Relerford, 104 N.E.3d 341, 356 (Ill. 2017) (striking down as unconstitutionally overbroad the subsection of the revised Illinois stalking statute that makes it criminal to negligently "communicate[] to or about" a person, "where the speaker knows or should know the communication would cause a reasonable person to suffer emotional distress").

110. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

111. *See, e.g.*, Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 CRIM. JUST. ETHICS 29, 32 (1992) (noting that freedom of expression presupposes freedom of thought).

processes."[112] Others argue that the First Amendment speaks not of individual development but to popular sovereignty and democratic processes.[113] But even under this model, "to be effective citizens in a democratic society, individuals must be able to exercise free will—an impossibility if governmental thought control is permitted."[114] For example, critics of sentencing enhancements for "hate" crimes argue that "[b]ecause such laws are adopted for the very purpose of penalizing thought processes and political motivations found to be offensive by those in power, they constitute classic abridgements of the constitutionally protected freedom of thought."[115] Hate-crime enhancements have passed constitutional scrutiny, but it is important to note that they nonetheless require indisputably criminal acts as their predicates.[116]

The potential First Amendment prohibition on punishing thought tracks with the even older common law requirement that a crime contain a voluntary act element.[117] As Professor Michael Corrado summarizes it:

> No one should be punished except for something she does. She shouldn't be punished for what wasn't done at all; she shouldn't be punished for what someone else does; she shouldn't be punished for being the sort of person she is . . . . Our conduct is what justifies punishing us.[118]

The common law preference for action as the basis of criminal liability explains why even attempt statutes punish only those attempters who have taken a "substantial step" or "overt act" toward accomplishing their criminal goals.[119]

Against this backdrop, the idea of a coercive control offense premised on otherwise legal conduct raises some concerns. If a person does things that are in and of themselves legal to do—such as

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112. *See, e.g.*, *id.*

113. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960) ("The principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.").

114. Redish, *supra* note 111, at 32.

115. *Id.* at 37.

116. Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993).

117. Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529, 1529 (1994).

118. *Id.*

119. *See, e.g.*, ALA. CODE § 13A-4-2 (2014); OR. REV. STAT. § 161.405 (2017).

constantly complaining about or insulting his partner's actions or allocating financial resources (to the extent otherwise legal under the property laws)—he might well qualify as coercively controlling under the U.K. statute. Yet in such cases it appears to be the coercive motivation (in addition to the emotional effects on the victim)—that attracts the criminal sanction. By contrast, hate-crime enhancements increase the punishment for *already criminal* conduct based on the biased motivation of the defendant. If such enhancements have raised colorable freedom-of-thought objections, a coercive control offense would surely attract more forceful ones.

B. Evidentiary Problems

The U.K. experience has also generated some discussion about the pragmatic evidentiary problems attendant to charging and convicting someone of coercive control. In the first place, U.K. scholarship suggests that law enforcement is not particularly good at identifying what constitutes coercive control[120] (though other research indicates that they have gotten somewhat better at it with the increased attention to the problem in public discourse[121]). This stands to reason: our understanding of the harms of coercive control comes from complex, controversial psychological and sociological research, not easily digested by nonspecialists.

Furthermore, coercive control prosecutions are likely to be hampered by a big problem common to sexual assault cases and domestic violence cases more generally: victim credibility. The fact of the matter is that traumatized victims simply don't make very good witnesses.[122] Research indicates that during a traumatic incident the brain switches off the parts of itself associated with self-awareness,[123] resulting in a dissociation in which aspects of the experience—such as

120. *See, e.g.*, Amanda L. Robinson, Gillian M. Pinchevsky & Jennifer Guthrie, *Under the Radar: Policing Non-Violent Domestic Abuse in the US and UK*, 40 INT'L J. COMP. & APPLIED CRIM. JUST. 195, 195 (2016) (finding that "the use of physical violence is at the forefront of many officers' expectations about domestic abuse, and that when physical violence is absent, the police response is less proactive").

121. *See, e.g.*, *id.*

122. Charlotte Bishop & Vanessa Bettinson, *Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of "Controlling or Coercive Behaviour*," 22 INT'L J. EVID. & PROOF 3, 15 (2018) [hereinafter Bishop & Bettinson, *Evidencing*].

123. *See generally* PAUL FREWEN & RUTH LANIUS, HEALING THE TRAUMATIZED SELF: CONSCIOUSNESS, NEUROSCIENCE AND TREATMENT (2015) (describing the brain processes associated with trauma).

consciousness, memory, emotions, bodily sensations, thoughts, and sensory perceptions—split off, or dissociate, from one another.[124] Once these aspects of experience dissociate, the trauma victim is unlikely to recall them as a cohesive memory.[125] As the very essence of the coercive control offense requires that the defendant's behavior has had a "serious effect" on the victim, it would seem almost to require that the government prove trauma as an element of the offense. Yet if a trauma victim cannot recall a cohesive account of her experience, her testimony lacks the indicia of credibility adequate to prove anything under traditional principles of evidence law.[126] On the flip side, if we take these testimonial limitations as evidence *of* trauma, how do we distinguish a genuine account from one in which the lack of coherence arises from lying? These questions are hardly unique to the offense of coercive control, but they are particularly confounding in this context, where there is less likely to be physical or other supporting evidence.

C. Policy Problems

Even if there were no blackletter legal barriers to criminalizing coercive control, there are a number of very good reasons why we might hesitate to do so. The policy debate in the United Kingdom has generated a great deal of controversy, with strong counterarguments advanced on behalf of potential defendants and victims of coercive control alike. Critics fear harm to potential victims for several reasons. Some have argued that criminalizing coercive control will have the perverse effect of reducing public awareness of its prevalence. For example, due to the complexity of coercive control in reality, Professor Julia Tolmie fears that the justice system will be unequipped to respond to a sufficient number of cases, apart from those involving extreme physical abuse.[127] This, she worries, will give the false impression that coercive control occurs rarely.[128] Other scholars cite the existing "patchy" enforcement numbers for the new statute to cast doubt on law enforcement's ability to translate clinical practice into the legal

124. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 477 (4th ed. 1994).

125. Bishop & Bettinson, *Evidencing*, *supra* note 122, at 15.

126. GEORGE FISHER, EVIDENCE 377 (3d ed. 2012) (listing "perception," "memory," and "narration" as three of the four "testimonial capacities" in evidence law).

127. Julia R. Tolmie, *Coercive Control: To Criminalize or Not To Criminalize?*, 18 CRIMINOLOGY & CRIM. JUST. 50, 50 (2018).

128. *Id.* at 60.

context, which would prevent actual access to justice for most victims.[129]

On the other side of the coin, it is a valid concern that—as was said of the previously controversial stalking statutes and domestic violence laws generally[130]—a party to a failing or otherwise acrimonious relationship could take advantage of the apparent expansiveness of the coercive control offense to use the criminal law as a weapon against their partner. Even if a statute could be drafted in a way that fell short of constitutional vagueness problems, the lack of a physical threat requirement would seem to sweep into the statute's potential ambit a great deal of behavior we might not want to criminalize out of purely liberty concerns. Or, even worse, it might create an incentive for a partner seeking legal advantage in a divorce to make false accusations. The evidentiary problems already discussed amplify these concerns.

III. SOLUTIONS IN OTHER SUBSTANTIVE OFFENSES

For all the many apparent legal problems associated with criminalizing coercive control, the idea of nonphysical, nonpecuniary criminal harm is hardly unknown to Western conceptions of justice. At the most abstract level, the European Court of Human Rights has interpreted the personal integrity provisions of the European Convention on Human Rights to include protection against "moral suffering and degrading treatment that creates a sense of fear, anxiety, and inferiority in order to humiliate, degrade, and break the victim's resistance."[131] But we need not look to international conventions around state misconduct for our only examples. This Part surveys the other areas of American substantive criminal law relevant to legally

129. Sandra Walklate, Kate Fitz-Gibbon & Jude McCulloch, *Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence Through the Reform of Legal Categories*, 18 CRIMINOLOGY & CRIM. JUST. 115, 118 (2018).

130. *See, e.g.*, James Thomas Tucker, *Stalking the Problems with Stalking Laws: The Effectiveness of Florida Statutes Section 784.048*, 45 FLA. L. REV. 609, 627 n.153 (1993) (stating that an increase in protective orders in Florida in 1992 "was a result of three things: (1) battered spouses have been educated about domestic violence; (2) the new domestic violence laws make it easier to enforce the orders, encouraging their use; and (3) according to some defense attorneys, 'estranged spouses are using domestic violence claims to bolster their divorce cases'" (citing Jill Spitz, *Domestic Violence Coming Out of the Closet, Into the Courtroom*, ORLANDO SENTINEL (Lake Sentinel ed.), May 30, 1993, at 1)).

131. Julie Lantrip, *Torture and Cruel, Inhumane, and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. INT'L & COMP. L. 551, 552 (1999) (citing Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1975)).

defining coercive control. Starting with the most clearly analogous points of comparison—criminal emotional abuse of children and elders and stalking—and moving into structurally analogous commercial and financial crimes, this Part shows how American law has wrestled with vagueness and overbreadth issues in ways that should inform a legislature seeking to draft a coercive control offense.

A. Child and Elder Abuse

1. *Child Abuse.* Child abuse laws provide a seemingly relevant model for a coercive control offense insofar as the legal concept of child abuse has always included the category of pure emotional abuse.[132] In 1974, Congress passed the Child Abuse Prevention and Treatment Act ("CAPTA") which identified a minimum set of acts or behaviors, including emotional abuse, which constitute legal child abuse or neglect.[133] Unlike general physical crimes such as assault, which apply to everyone alike, CAPTA addresses a broader range of abuse, both physical and nonphysical, but only when it happens to a child at the hands of a "parent or caretaker."[134] Because CAPTA ties federal grant money to states developing programs modeled after the federal act, state child abuse laws have some basic features in common.[135] For example, the states all follow the federal requirement that they designate certain individuals with regular professional contact with children as "mandatory reporters" of suspected child abuse.[136]

Although the precise substantive laws vary from state to state, most recognize the four general categories of abuse designated in

132. *See* ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEPT. OF HEALTH & HUM. SERVS., THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 215 (1996) (listing three categories of emotional abuse).

133. Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. § 5106g(2) (2018), as amended by the Keeping Children and Families Safe Act of 2003 (defining child abuse and neglect as "any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm").

134. *Id.*

135. *See* Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 942–43 (2004) (listing child abuse–related legislation that conditioned federal grants on development of programs to prevent child abuse).

136. Bridget A. Blinn, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings To Terminate Parental Rights*, 61 WASH. & LEE L. REV. 789, 812 (2004).

CAPTA: physical, sexual, neglect, and emotional.[137] Unlike physical abuse, definitions of "emotional abuse" vary quite widely. Some states simply define "child abuse" to include the causing of "emotional harm" or "mental injury," without further elaboration.[138] However, the codes of approximately thirty-three states provide specific definitions of emotional or mental child abuse.[139] The overwhelming majority define emotional abuse in terms of the provable injury to the child. Typically, "injury to the psychological capacity or emotional stability of the child as evidenced by an observable or substantial change in behavior, emotional response, or cognition" and "injury as evidenced by 'anxiety, depression, withdrawal, or aggressive behavior.'"[140] Some states even write the requirement of professional diagnosis into the definition of the offense, as with Alaska's requirement that the existence of a "mental injury" be "supported by the opinion of a qualified expert witness."[141]

Critics have pointed out that this legal focus on medically observable harm in the victim, rather than on the abuser's conduct, has allowed recognizably egregious abusers to go unpunished when the government could not show a visible effect on the child.[142] (And this despite the fact that even an influential report from the U.S. Department of Health and Human Services ("HHS") identified "[v]erbal or [e]motional [a]ssault" as a form of emotional abuse, and defined it purely in terms of the abuser's conduct: "[h]abitual patterns of belittling, denigrating, scapegoating, or other . . . forms of overtly hostile or rejecting treatment."[143]) The documented evidentiary problems caused by the harm-based definition of emotional child abuse

137. Shauneen M. Garrahan & Andrew W. Eichner, *Tipping the Scale: A Place for Childhood Obesity in the Evolving Legal Framework of Child Abuse and Neglect*, 12 YALE J. HEALTH POL'Y & ETHICS 336, 351–52 (2012) (citing R. KIM OATES, THE SPECTRUM OF CHILD ABUSE 2 (1996)).

138. *See* U.S. DEPT. OF HEALTH & HUM. SERVS., CHILD.'S BUREAU, DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2019), https://www.childwelfare.gov/pubPDFs/define.pdf [https://perma.cc/Q2G3-PKCM].

139. *Id.*

140. *See generally id.* (collecting all state definitions of child abuse).

141. ALASKA STAT. § 47.17.290 (2019).

142. *See* J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change*, 51 STAN. L. REV. 1665, 1665–68 (1999) (recounting two such cases, one in which a mother forced her thirteen-year-old daughter to eat hot peppers as a punishment for lying, cut off her hair, and chained her to a tree for three days; and another in which a mother locked her thirteen-year-old daughter in a closet for seventeen hours, naked, without food or water, and only a bucket for a bathroom).

143. Sedlak & Broadhurst, *supra* note 132, at 2–15.

support the criticism, discussed in Part II.B, of the "serious effect" element of the U.K. coercive control statute, which depends on potentially traumatized victims being able to testify about harms they may not be able to narrate coherently.

A handful of states, however, have adopted some version of a conduct-based definition of emotional child abuse. Connecticut's code states that abuse includes "emotional maltreatment," which appears conduct based, though the law provides no definition of maltreatment.[144] A few states include in the offense not only emotional injury but the *threat* of such injury, which eases the requirement of medical proof. For example, Illinois defines abuse to include "impairment of . . . emotional health" or "substantial risk of . . . impairment of . . . emotional health."[145] The only state to adopt a clear conduct-based definition of emotional child abuse is Delaware, which defines it as "threats to inflict undue physical or emotional harm, and/or chronic or recurring incidents of ridiculing, demeaning, making derogatory remarks or cursing."[146]

The legal recognition of emotional child abuse has posed some challenges, similar to those arising with coercive control. Like the physical and mental harms of coercive control in domestic relationships, the effects of emotional abuse on children are well documented.[147] Yet, the psychological literature also suggests society tends to focus on the physical realm as more important than the psychological, and even clinicians prioritize actual or threatened physical injury.[148] Furthermore, as with coercive control and domestic violence generally, critics of child abuse laws point out the risk that false claims of emotional child abuse will arise as parents try to win custody disputes.[149]

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144. CONN. GEN. STAT. § 46b-120(5)(C) (2020).

145. 325 ILL. COMP. STAT. § 5/3 (2020).

146. DEL. CODE ANN. tit. 10, § 901(10) (2020).

147. *See* Peter Thomas, *Protection, Dissociation, and Internal Roles: Modeling and Treating the Effects of Child Abuse*, 7 REV. GEN. PSYCH. 364, 366 (2003) (reporting that 80 percent of young adults who were emotionally abused as children are not successful at psychosocial functioning).

148. *See, e.g.*, Lynn Sorsoli, *Hurt Feelings: Emotional Abuse and the Failure of Empathy*, 4 J. EMOTIONAL ABUSE 1, 3 (2004); James A. Twaite & Ofelia Rodriguez-Srednicki, *Understanding and Reporting Child Abuse: Legal and Psychological Perspective: Part Two: Emotional Abuse and Secondary Abuse*, 32 J. PSYCHIATRY & L. 443, 444 (2004).

149. *See* Robert W. Kerns, *Crying Wolf: The Use of False Accusations of Abuse To Influence Child Custodianship and a Proposal To Protect the Innocent*, 56 S. TEX. L. REV. 603, 607 (2015)

With this backdrop, coupled with the varying, vague, and underinclusive legal definitions of emotional abuse, it is unsurprising that the reporting rates of emotional child abuse vary wildly across the country, especially when compared with reporting rates for physical or sexual abuse, which remain relatively consistent from state to state.[150] A 2007 report from the Administration for Children and Families at HHS found that on cases of abuse initiated by mandatory reporters, eight states recorded emotional abuse in 10–20 percent of child abuse cases, ten states in less than 10 percent, and twenty-four states in less than 1 percent, while five reported no cases of emotional abuse at all.[151]

2. *Elder Abuse.* Historical accident has linked the legal response to child abuse to the distinct problem of elder abuse, which attracted public concern after a 1981 congressional report drew national attention to the issue.[152] Legislators responded using the recently adopted child abuse statutes as models for elder abuse statutes, meaning that the elder abuse legislation largely follows the mandatory reporting model of CAPTA and its state progeny.[153] Professor Joseph Barber argues that such a model is inappropriate for elder abuse because, first, elderly adults are more socially isolated than children; second, elders should be accorded a higher degree of respect concerning their self-determination; and third, elder abuse is difficult to diagnose.[154] He further argues that elder abuse should be treated more like domestic violence, due to the shared characteristics of the cycle of violence and dynamic of power and control between abuser and victim, involving—in both cases—fear of humiliation and shame that causes victims not to report.[155] Barber's solution is increased

(citing Hollida Wakefield & Ralph Underwager, *Sexual Abuse Allegations in Divorce and Custody Disputes*, 9 BEHAV. SCI. & L. 451, 452–53 (1991), which estimates the occurrence of false accusations of child sexual abuse as between 20 and 80 percent).

150. Andrew Ford, Note, *State Child Emotional Abuse Laws: Their Failure To Protect Children with Gender Identity Disorder*, 49 FAM. CT. REV. 642, 643 (2011).

151. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. ON CHILD., YOUTH & FAMS., CHILD MALTREATMENT 43–44 (2007), https://www.acf.hhs.gov/sites/default/files/cb/cm07.pdf [https://perma.cc/7WTD-XU4N].

152. *See* Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 869 (1991).

153. *See* Joseph W. Barber, Note, *The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 ELDER L.J. 107, 116 (2008).

154. *Id.* at 120.

155. *Id.* at 124

penalties for abusers and efforts to empower victims to change their situations themselves.[156] Although his proposal does not distinguish between physical and emotional abuse and the unique legal issues surrounding the latter, it underscores the potential sociological relationship between elder abuse and domestic coercive control.

Like the child abuse statutes they model, however, elder abuse statutes typically define emotional abuse by the observable mental injury to the victim, rather than by offender conduct. The familiar challenges for prosecutors of an injury-based standard are, if anything, most marked in the elder abuse context, as many elderly patients suffer from conditions such as Alzheimer's disease, dementia, or strokes. These patients often cannot remember or understand their abuse.[157] In 1992, Vermont Attorney General Jeffrey L. Amestoy stated in an official report that the definition of elder abuse "is so vague and difficult to prove that [his office] has never brought charges under this statute" and urged legislators to redraft it to "incorporate the concepts of cruelty and mistreatment."[158] Like its child abuse statute, Delaware's definition of elder abuse is directed at abusive conduct rather than injury, and includes:

> a pattern of emotional abuse, which includes, but is not limited to, ridiculing or demeaning an adult who is impaired making derogatory remarks to an adult who is impaired or cursing or threatening to inflict physical or emotional harm on an adult who is impaired.[159]

The Delaware statute aside, most state elder abuse statutes would appear to raise similar practical shortcomings as potential models for a coercive control offense.

3. *Constitutional Problems.* Both child and elder abuse statutes have faced constitutional challenges to their emotional abuse provisions on the grounds of vagueness and overbreadth. The Nevada Supreme Court held facially void for vagueness a statute making it a misdemeanor to "annoy[] or molest[] a minor," due to the lack of

156. *Id.* at 131.

157. Robert Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 ELDER L.J. 377, 395 (1995).

158. *Id.* at 395–96 (citing JEFFREY L. AMESTOY, ATT'Y GEN., STATE OF VT., OFF. OF ATT'Y GEN., PEOPLE IN NEED OF CARE: A POPULATION AT RISK 8 (1992)).

159. DEL. CODE ANN. tit. 31, § 3902(1) (2020).

specificity as to what sorts of annoying behaviors were prohibited.[160] By contrast, the Florida Supreme Court held that Florida's criminal child abuse statute, which prohibited, among other things, the "intentional infliction of . . . mental injury upon a child" did not render it unconstitutionally vague, even though "mental injury" was not defined.[161] The court relied on the fact that Florida law elsewhere, in its child welfare provisions, defines "mental injury" as "an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in his ability to function within his normal range of performance and behavior," which should put a defendant on notice of the sorts of mental injuries the child abuse statute includes.[162] The court also noted that such injury "will be present only in limited circumstances" and, thus, will not encourage arbitrary or discriminatory enforcement.[163]

However, to avoid overbreadth problems, a Florida court of appeal construed the same statute as inapplicable to mental injury caused by *speech* of any kind, because the statute's prohibition could otherwise extend to speech protected under the First Amendment.[164] Coming to the opposite conclusion, a New York family court held that mere words were sufficient to constitute child abuse under the child welfare laws, provided they cause a physical injury to the child that falls within the language of the statute—in this case, a fourteen-year-old boy's stomach pains caused by his father's repeated verbal attacks on his sexuality.[165] The court noted, however, the civil nature of the family court proceeding as relevant to this interpretation.[166]

Those cases, of course, involved the more common, injury-based definition of emotional abuse. In *Robinson v. State*,[167] the Delaware Supreme Court considered vagueness and overbreadth challenges to Delaware's conduct-based definition.[168] In this case, the defendant

160. City of Las Vegas v. Eighth Jud. Dist. Court, 59 P.3d 477, 479 (Nev. 2002) (quoting 1995 Nev. Stat. 1240).

161. Dufresne v. State, 826 So. 2d 272, 273–74 (Fla. 2002) (quoting FLA. STAT. § 827.03(1) (Supp. 1996)).

162. *Id.* at 276, 279 (quoting FLA. STAT. § 827.04(2) (1977)).

163. *Id.* at 278.

164. Munao v. State, 939 So. 2d 125, 127–28 (Fla. Dist. Ct. App. 2006).

165. *In re* Shane T., 115 Misc. 2d 161, 164 (N.Y. Fam. Ct. 1982).

166. *Id.*

167. Robinson v. State, 600 A.2d 356 (Del. 1991).

168. *Id.* at 362.

challenged the constitutionality of the Delaware patient abuse statute, a precursor to the elder abuse statute, with nearly identical language prohibiting "ridiculing or demeaning a patient or resident, making derogatory remarks to a patient or resident or cursing directed towards a patient or resident."[169] The court rejected the challenge on both grounds, though largely for reasons related to the statute's specific application to patient victims.

On the overbreadth claim the court applied First Amendment precedent on "captive" audiences, which requires courts to balance the defendant's free speech right against the government's interest in protecting the privacy rights of those, such as homeowners, who cannot avoid the speech.[170] (In the patient setting, the victims are captive due to the necessity of seeking in-patient or at-home medical care).[171] On the vagueness claim the court found it dispositive that the statute only protects patients and residents of facilities, and only against prohibited acts that occur *within* the facilities (along with the facts that the statute punishes only "knowing[]" violations and defines "ridiculing" or "demeaning" according to an objective standard).[172] For these reasons, the court held that the patient abuse statute defined the offense of emotional abuse with sufficient definiteness such that ordinary people can understand what conduct is prohibited.[173]

The current state of child and elder emotional abuse law thus raises both pragmatic and constitutional problems likely to be amplified in the context of coercive control. First off, it is easy to see why the U.K. Parliament chose such pliable language to define the harm element of coercive control: even with the testimonial limitations of traumatized victims, prosecutors may have a somewhat easier time proving that abuse had a "substantial effect" on a victim than they do proving a clinical emotional or mental injury under American abuse law. Yet it is precisely this tough definition of harm that the Florida Supreme Court relied on in rejecting the vagueness challenge to the emotional abuse offense. The fact that such significant mental injuries will be "present only in limited circumstances" is why the court held the statute will not encourage discriminatory or arbitrary enforcement.

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169. Polisky, *supra* note 157, at 397 n.133, 403 (quoting DEL. CODE ANN. tit. 16, § 1131(1) (Michie Supp. 1994)).

170. *Robinson*, 600 A.2d at 364.

171. *Id.*

172. *Id.* at 365.

173. *Id.* at 366.

In other words, if an emotional abuse statute relies on a precise definition of observable mental injury it may pass constitutional muster but be ineffective. Furthermore, to the limited extent they have weighed in on the issue, courts seem divided over the question of whether the abuse statutes criminalizing pure speech that causes emotional injury can pass overbreadth scrutiny, which would eliminate a lot of conduct a coercive control statute should target. These problems, alone, should give legislators pause before turning to emotional abuse under these laws as a model for coercive control.

It should also be noted that, even if child and elder emotional abuse laws themselves withstand future vagueness and overbreadth challenges, their power as a foundation for a coercive control offense may be limited. Like CAPTA, most state child abuse laws target caregivers and parents, who already have a heightened duty of care to their charges under the negligence laws of most jurisdictions. Parental and caregiving relationships already give rise to unique duties under the common law. For example, while it is a general principle that people cannot be prosecuted for their merely immoral omissions to render assistance, the existence of a particular family relationship between two parties is one of the common law exceptions to that rule that creates a duty to rescue and, thus, a basis for culpable homicide by omission.[174] A similar heightened duty of care exists in the case of undertakings, such as when professionals care for the well-being of elderly patients.[175] It may be relevant for due process purposes that child and elder abuse laws affect primarily people in these existing legal classes.

That said, it is further relevant that the law also generally recognizes a parallel spouse-to-spouse duty of care, which means that if a husband "realizes (or culpably fails to realize) his wife is in danger, realizes (or culpably fails to realize) that he can rescue her with minimal risk and/or sacrifice, and realizes (or culpably fails to realize) that she is his wife," then he can be liable for criminal homicide.[176] Thus spouses, caretakers, and parents all technically fall into the same category when it comes to the law recognizing heightened duties of care, at least in the realm of negligent homicide. This may suggest that

174. *See* Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962).

175. *Id.*

176. Larry Alexander, *Criminal Liability for Omissions: An Inventory of Issues*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 121, 139 (Stephen Shute & A. P. Simester eds., 2002) (emphasis omitted).

a coercive control statute that imposes a duty between spouses to avoid causing emotional harm may pose, at least, no greater due process problems than the parallel parent–child and caretaker–elder duties embodied in the child and elder abuse laws. Yet it is unclear that the existence of these heightened, relational duties to rescue from *physical* harm translate into the realm of *emotional* harm, such as to negate all vagueness and overbreadth problems associated with punishing emotional child, elder, or spousal abuse. And in any case, courts are already reluctant to recognize even the traditional duty-to-rescue as a basis for negligent homicide in cases involving unmarried romantic partners, which many victims of coercive control are.[177]

It may be the Delaware Supreme Court's analysis in the *Robinson* case that best illustrates the danger of assuming a legislature could simply expand child or elder emotional abuse law to cover cases of coercive control between intimate partners. The *Robinson* court, remember, rejected the defendant's overbreadth challenge on the "captive audience" grounds, based on the fact that a patient—like a homeowner—cannot escape offensive speech, and the defendant lacks an unrestrained First Amendment right to impose it under those circumstances. That argument can readily be extended to children and, at least, infirm elders, who by virtue of their intrinsic status lack the independence to leave an emotionally abusive situation. One could try to argue, similarly, that an emotionally abused partner is often psychologically incapable of leaving a coercively controlling relationship. Such a theory, however, presupposes the issue in question. It would certainly violate due process to limit a defendant's constitutional objections due to the presumed existence of exactly the state of affairs for which he is being prosecuted in the first place. In short, the potential due process issues around emotional abuse, which courts have not fully resolved as to child and elder abuse law, would likely be amplified if similarly worded legislation applied to intimate partners.

B. Stalking

As mentioned above, stalking, a form of harassment, is a criminal offense of relatively recent vintage that is similar to coercive control insofar as they both target patterns of conduct someone engages in to

177. *See* Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1336–37 (2008).

impose himself or herself mentally on another person.[178] (The typical state criminal code now defines stalking as the intentional, repeated following of a person for the purpose of harassing them.[179]) Most stalking statutes contain an element of physical threat of violence or death,[180] thereby placing them squarely within the "true threats" exception to the First Amendment.[181] However, at least nine jurisdictions provide for stalking liability on a showing that the defendant has caused the victim some form of emotional distress.[182]

178. *See* discussion of stalking in *supra* notes 105–10. The most obvious difference, of course, being that the paradigmatic case of stalking involves strangers, acquaintances, or former intimate partners, whereas coercive control explicitly involves ongoing personal relationships.

179. *Stalking*, *in* NATIONAL SURVEY OF STATE LAWS 923 (Richard A. Leiter, ed.).

180. *Id.*

181. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003).

182. *See*, *e.g.*, COLO. REV. STAT. § 18-3-602(1)(c) (2019) (listing as a form of stalking "knowingly . . . [r]epeatedly follow[ing], approach[ing], contact[ing], plac[ing] under surveillance, or mak[ing] any form of communication with another person or [listed others] in a manner that would cause a reasonable person to suffer serious emotional distress and does cause [such distress]"); D.C. CODE § 22-3133(a)(2) (2020) (listing as a form of stalking "purposefully engag[ing] in course of conduct directed at a specific individual . . . [t]hat the person knows [or should have known] would cause that individual reasonably to[] [f]ear for his or her safety or the safety of another person[,] [f]eel seriously alarmed, disturbed, or frightened[,] or [s]uffer emotional distress"); IDAHO CODE § 18-7906(1) (2020) (defining second-degree stalking as "[k]nowingly and maliciously[] engag[ing] in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress[] or . . . fear of death or physical injury [to self], or . . . a family or household member"); 720 ILL. COMP. STAT. 5/12-7.3(a) (2020) (defining stalking as knowing engagement in a course of conduct directed at a specific person knowing it would cause a reasonable person to fear for safety of self or a third person or to suffer other emotional distress); LA. STAT. ANN. § 14:40.2.A (2020) (defining misdemeanor stalking as "the intentional and repeated following or harassing . . . that would cause a reasonable person to feel alarmed or to suffer emotional distress"); ME. REV. STAT. ANN. tit. 17-A, § 210-A(1) (2019) (listing as a definition of stalking "intentionally or knowingly engag[ing] in a course of conduct directed at . . . a specific person that would cause a reasonable person[] to suffer serious inconvenience or emotional distress"); MO. REV. STAT. § 565.225(2) (2017) (defining first-degree stalking as "purposely, through his or her course of conduct, disturb[ing], or follow[ing] with the intent of disturbing another person"); MONT. CODE ANN. § 45-5-220(1) (2019) (defining stalking as purposely or knowingly causing another substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly following the person or harassing, threatening, or intimidating him or her in person or by mail, electronic communication or any other method); N.Y. PENAL LAW § 120.45 (Consol. 2020) (listing, as fourth-degree stalking: "intentionally, and for no legitimate purpose, engag[ing] in a course of conduct . . . [when one] knows or reasonably should know that such conduct . . . causes material harm to the mental or emotional health of [a] person, where such conduct consists of following, telephoning or initiating communication or contact with such person, a member of such person's immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct"); UTAH ADMIN. CODE r. 76-5-106.5(2) (2020)

Many of these provisions have withstood vagueness or First Amendment overbreadth challenges in state appellate courts.[183] They would therefore seem to provide examples of more precise statutory language that might remove some of the constitutionally problematic ambiguity from the U.K. definition of coercive control.

For example, Colorado defines stalking as: "knowingly . . . [r]epeatedly follow[ing], approach[ing], contact[ing], plac[ing] under surveillance, or mak[ing] any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause" such distress.[184] This would appear to criminalize the knowing act of communication itself assuming objectively reasonable emotional distress results. In a vagueness challenge to this provision the Colorado Supreme Court found that

> [e]ven though a person is not required to actually know that his or her acts towards the victim are not innocuous, [the law] is not vague because a reasonable person could know that the only acts prohibited are those that would cause a reasonable person to suffer serious emotional distress and do in fact cause such distress.[185]

The court then held the offense was not constitutionally vague because it connects a defendant's acts "to both an objective standard and a palpable result" and because it "does not criminalize innocuous behavior."[186]

New York defines fourth-degree stalking as

> intentionally, and for no legitimate purpose, engag[ing] in a course of conduct [that the defendant] knows or reasonably should know . . .

(making it a class A misdemeanor to intentionally or knowingly cause a reasonable person to fear for him/herself or a third person or to suffer other emotional distress).

183. *See, e.g.*, Beachum v. United States, 197 A.3d 508, 510–11 (D.C. 2018) (holding a statute requiring "the defendant 'should have known' that the defendant's conduct 'would cause a reasonable person in the individual's circumstances' to suffer fear, serious alarm, or emotional distress" constitutional); State v. Dean, No. 43201, 2016 Ida. App. Unpub. LEXIS 539, at *20 (Idaho Ct. App. Jan. 27, 2016); State v. Elliott, 987 A.2d 513, 519 (Me. 2010); State v. Schleiermacher, 924 S.W.2d 269, 276 (Mo. 1996) (en banc) ("A word or phrase is not unconstitutionally vague merely because of some ambiguity."); State v. Adgerson, 78 P.3d 850, 856 (Mont. 2003) ("[S]talking another person is not constitutionally protected behavior."); State v. Weisberg, 62 P.3d 457, 461 (Utah Ct. App. 2002) (rejecting the defendant's overbreadth and vagueness arguments).

184. COLO. REV. STAT. § 18-3-602(1)(c) (2019).

185. People v. Cross, 127 P.3d 71, 78 (Colo. 2006).

186. *Id.*

> [will] cause[] material harm to the mental or emotional health of [a] person, where such conduct consists of following, telephoning or initiating communication or contact with such person . . . and the actor was previously clearly informed to cease that conduct.[187]

Although the New York statute contains the added element that the defendant has been previously told to desist, like Colorado's version it imposes liability in cases where "communication" causes mental or emotional harm.[188] In rejecting a vagueness challenge to this provision, in which the defendant primarily challenged the "no legitimate purpose" language, a New York appeals court pointed to the ways in which the various elements of the offense worked together to create the constitutionally requisite specificity.[189] The court noted that the offense contains an intent requirement as to the conduct itself, such that "[t]o be convicted, the person must have *intended* to engage in a course of conduct targeted at a specific individual" and could not be guilty of stalking through accidental conduct.[190]

Applying its precedent from a similarly structured statute criminalizing "jostling," the court further held that the prosecution need not prove that the defendant intended that the conduct have the particular effect of causing emotional distress.[191] Rather, the court concluded, the stalking statute prohibited "a certain *intentional course of conduct regardless of the wrongdoer's underlying purpose or motive*."[192] Nonetheless, the court held that the "no legitimate purpose" language combined with the lack of specific intent element as to motive did not render the crime unconstitutionally vague. The statute, the court said, "contains lucid provisos clearly applicable to defendant's conduct: The course of conduct must be intentional; it must be aimed at a specific person; and the offender must know (or have reason to know) that his conduct will (or likely will) instill reasonable fear of material harm in the victim."[193] Notably, the court accepted without comment the fact that fear of pure emotional harm would suffice to meet the elements of the offense.

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187. N.Y. PENAL LAW § 120.45.
188. *Id.* § 120.45(2).
189. People v. Stuart, 797 N.E.2d 28, 39 (N.Y. 2003).
190. *Id.*
191. *Id.*
192. *Id.* (emphasis in original) (quoting People v. Nelson, 69 N.Y.2d 302, 303 (1987)).
193. *Id.* at 41.

Not all stalking offenses have fared so well in state court, however. Illinois courts have held the emotional distress–based provisions of the Illinois stalking statute to be unconstitutionally overbroad. In *People v. Relerford*,[194] the Illinois Supreme Court struck down a provision making it a crime knowingly to "communicate[] to or about" a specific person two or more times where the defendant knows or should know the communications would cause a reasonable person to suffer emotional distress.[195] The court found that the statute reached "a vast array of circumstances that limit speech far beyond the generally understood meaning of stalking," criminalized "a host of social interactions that a person would find distressing but are clearly understood to fall within the protections of the first amendment," and was thus facially overbroad.[196] As the court noted, "The phrase 'communicates to or about' was stricken from the Stalking Statute, and the remaining provisions were left intact."[197] These included a provision making it criminal stalking for a person to "knowingly 'threaten[]' a specific person two or more times when he or she knows or should know that the threats would cause a reasonable person to suffer emotional distress."[198]

In *People v. Morocho*,[199] the Illinois Appellate Court considered an appeal from conviction under this "threat"-based portion of the offense and found that it, too, was unconstitutionally overbroad. The court stated:

> Many times a person who twice threatens lawful action unrelated to violence and actually *intends* to trigger distress of another for the purpose of motivation is not a criminal stalker; he or she is an ordinary member of society engaged in any number of expressive actions attendant to everyday social, business, legal, and political interaction. Such motivational threats are constitutionally protected; "true threats" are not.[200]

The court went on to note that unlike "true threats"—with their implicit reference to physical violence—many threats that cause

194. People v. Relerford, 104 N.E.3d 341 (Ill. 2017).
195. *Id.* at 349 (construing 720 ILL. COMP. STAT. 5/12–7.3(a), (c) (West 2012)).
196. *Id.* at 353–54.
197. People v. Morocho, 132 N.E.3d 806, 811 (Ill. App. Ct. 2019).
198. *Id.* at 810–11.
199. People v. Morocho, 132 N.E.3d 806 (Ill. App. Ct. 2019).
200. *Id.* at 813 (emphasis in original).

emotional distress may in fact serve valuable social purposes like those protected by the communicative purpose of the First Amendment.[201] It observed that "[t]hreats can be proper motivating tools" as in cases of coaches threatening players with benching if they do not play defense, parents threatening their children with no dessert, a lender or agent threatening foreclosure.[202] "Under subsection (a)(2)," the court noted, "such threats, if construed to cause significant distress, anxiety, or alarm, carry felony criminal liability."[203] The court also noted that the statute could chill a core form of political speech, in the case of an activist "who decides not to attend a town hall meeting because repeatedly threatening to bring a polluting business owner's operations to a halt with a boycott or injunction could result in arrest."[204]

The case law developing around the newer offenses of "cyberstalking" and "cyber-harassment"—intended to protect victims from online bullying—raises further concerns about the constitutionality of emotional harm–based stalking laws. For example, the Minnesota Supreme Court recently invalidated that state's cyberstalking statute as facially invalid on overbreadth grounds.[205] The statute prohibited "stalking" by "repeatedly mail[ing] or deliver[ing] or caus[ing] the delivery by any means, including electronically, of letters, telegrams, messages, packages . . . or any communication made through any available technologies or other objects,"[206] and defined "stalking" as engaging

> in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim.[207]

The court struck down this statute as overbroad due to the lack of specific intent element and the fact that it covers "every type of communication without limitation."[208] In the same case, the court also

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *In re* Welfare of A.J.B., 929 N.W.2d 840, 844 (Minn. 2019).
206. MINN. STAT. § 609.749(2)(6) (2019).
207. *Id.* § 609.749(1).
208. *Welfare of A.J.B.*, 929 N.W.2d at 849.

partially invalidated the more serious "cyberharassment" statute which made it a crime to "repeatedly mail[] or deliver[] or cause[] the delivery by any means, including electronically, of letters, telegrams, or packages," even though that offense *does* require the specific intent to "abuse, disturb, or cause distress."[209] For that offense, the court severed "disturb" and "cause distress" as overbroad, thereby narrowing the mens rea element to "intent to abuse." In so holding the court observed that acts of political speech such as "[d]elivering a letter that tells an elected official that the sender will take action to defeat him in the next election if he does not take action on gun control" could certainly be done with the intent to disturb and/or cause distress.[210] The court concluded, therefore, that because such speech is clearly protected by the First Amendment, a law that criminalizes mailing or delivering a letter that disturbs or causes distress will have a substantial chilling effect on protected speech and expressive conduct.[211]

To date, Illinois and Minnesota appear to be the only states in which courts have spoken so directly on the question of pure emotional distress as a basis for stalking liability. In the general absence of case law directly addressing the question and coming to the opposite conclusion, it would seem that a legislative effort to criminalize a pattern of conduct that reasonably results in emotional distress, in the absence of threats of violence, may be constitutionally suspect on overbreadth grounds, even when written precisely enough to survive a vagueness challenge. It would also seem that any effort to fashion a coercive control offense in the domestic context should try to avoid the overbreadth questions that arise when statutory text ties liability purely to the emotional reaction the conduct elicits from the victim.

C. False Imprisonment

In a well-argued student note, Alexandra Ortiz suggests a wholly different statutory framework as a means of adapting the U.K. coercive control offense to the American constitutional order.[212] Ortiz uses the emphasis placed by Stark and other scholars of coercive control on the

209. MINN. STAT. § 609.795(1).

210. *Welfare of A.J.B.*, 929 N.W.2d at 862. Indeed, the court pointed out that the point of such speech is "often precisely to cause distress, strain, anxiety, or suffering in order to prompt action." *Id.*

211. *Id.*

212. Ortiz, *supra* note 18, at 703.

extent to which it is an offense against the victim's liberty to argue that the state of Tennessee should amend its false imprisonment offense to capture coercive control.[213] Specifically, she argues that a revised false imprisonment crime might target such liberty-impinging behaviors as controlling a person's movements, isolating them from friends and family, depriving them of basic needs or access to services, maintaining control over their assets, or otherwise—as suggested by the U.K. *Statutory Guidance*—"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."[214]

Ortiz discusses the Tennessee Criminal Code's provision that "[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."[215] She suggests that this definition be amended to prohibit "[a] course of conduct involving 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."[216] She defines "autonomy" as "the freedom to make personal decisions on a day-to-day basis" and notes that the word "substantially" ensures that the deprivation of liberty would not need to be so complete for the elements of the offense to be met.[217]

It would seem that the language of this offense could potentially criminalize some of the same sorts of speech the Illinois and Minnesota Supreme Courts found to be constitutionally protected and, thus, overbroad. For example, one could imagine someone "negligently harassing" a person through purely communicative words and deeds in a way that interfered with that person's autonomy, if the mechanism of the interference was the victim's fear of causing displeasure. But the focus on the autonomy and liberty interests at stake in the false imprisonment offense is an improvement on the emotional distress–based element of stalking offenses.

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213. *Id.* at 703–04.

214. *Id.* at 704 (quoting HOME OFF., CONTROLLING OR COERCIVE BEHAVIOUR IN AN INTIMATE OR FAMILY RELATIONSHIP: STATUTORY GUIDANCE FRAMEWORK 4 (2015), https://www.gov.uk/government/publications/statutory-guidance-framework-controlling-or-coercive-behaviour-in-an-intimate-or-family-relationship [https://perma.cc/P79V-ZD5A]).

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

216. Ortiz, *supra* note 18, at 707–08.

217. *Id.* at 708.

D. Blackmail

Another pair of crimes that potentially punish coercive, expressive conduct are the related offenses of blackmail and extortion. In most jurisdictions "blackmail" is defined as "gaining or attempting to gain anything of value or compelling another to act against such person's will, by threatening to communicate accusations or statements" that would subject the person to some form of embarrassment or public ridicule.[218] "Extortion," by contrast, is using the threat of future violence or some other unlawful act to extract something from a victim.[219] Traditionally extortion involves the demand of property but may also involve a demand that the victim perform an act or refrain from performing an act he or she has the right to do. Some jurisdictions treat this latter category of act/omission-motivated extortion as the separate crime of "coercion."[220] Some states actually treat blackmail as a particular type of extortion, with the blackmailing conduct forming the unlawful act element.[221] In general, traditional "extortion" offenses are legally noncontroversial insofar as the extortionist threatens consequences that are in and of themselves illegal.[222] Blackmail, however, is unique insofar as—like the communications of the stalker who causes emotional distress as discussed in Part III.B or those of the hypothetical coercive controller who achieves his goal through words rather than blows—the blackmailer's threatened communications might otherwise be a perfectly legal exercise of free speech.

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218. *See* Paul H. Robinson, Michael T. Cahill & Daniel M. Bartels, *Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory*, 89 TEX. L. REV. 291, 308–13 n.90 (2010) (surveying the variations between state definitions of blackmail). States vary on whether the offense of blackmail requires demands for property or includes demands that a victim engage in or refrain from action; whether it requires a threat to reveal information or whether it also extends to threats to perform other lawful but unwelcome acts; whether it contains no exceptions or permits the offense under specified circumstances; and whether "blackmail" is its own offense or a subset of more general offenses such as extortion, criminal "threats," theft, larceny, or coercion. Peter Westen, *Why the Paradox of Blackmail Is So Hard To Resolve*, 9 OHIO ST. J. CRIM. L. 585, 590 (2012).

219. Robinson et al., *supra* note 218, at 293.

220. *See, e.g.*, OR. REV. STAT. § 163.275(1) (2017) (defining coercion as "compel[ling] or induc[ing] another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage"); *see also* N.Y. PENAL LAW § 135.60 (Consol. 2020).

221. *See* Westen, *supra* note 218, at 590 (noting that some commentators use "threat" to refer to biconditionals in the context of extortion).

222. *See* Robinson et al., *supra* note 218, at 293 (defining extortion as an uncontroversial category of crime involving threats of criminal acts).

Commentators have therefore frequently described blackmail as "paradoxical," as its official meaning is difficult to square with public intuitions about what sorts of conduct should be criminal.[223] Specifically, the paradox flows from the fact that blackmail punishes "the act of obtaining or attempting to obtain something of value from persons by offering in return to do something that is noncriminal (i.e., withhold incriminating or embarrassing information) under the threat of otherwise doing something that is also noncriminal (i.e., disclose information that can be lawfully commodified and sold for the actor's personal gain)."[224] Some scholars argue that, for this reason, blackmail should be treated identically to any other commercial transaction—that "[b]oth parties gain from a voluntary trade, and this is as true of the exchange of money for silence as it is for any other case."[225] Although this proposition is difficult to squarely refute as a logical matter, it has not been accepted by courts, which treat blackmail as an obvious exception to the free speech right.[226] Furthermore, the theoretical unattractiveness of decriminalization is clear from the wealth of scholarly criticism attempting to provide a theoretical basis for criminalizing blackmail. The weight of consensus is that blackmail *must* be punished despite the very clear First Amendment problems with doing so.

No less formidable proponents of the free market than legal scholars Richard Posner and Richard Epstein have rejected the legalization of blackmail on consequentialist grounds. Posner argues that, in situations in which the blackmailer reveals information that is already criminal or tortious it constitutes, essentially, either

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223. *See, e.g.*, Westen, *supra* note 218, at 585–86, 604 n.77 (describing and problematizing the "intuition" that extorted parties in blackmail are always moral victims rather than accomplices).

224. *See id.* at 595 ("[B]lackmail appears to consist of the very things that render commercial exchange *non*criminal . . . ."); *see also* James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 671 (1984) ("If both a person's ends—seeking a job or money—and his means—threatening to expose—are otherwise legal, why is it illegal to combine them?").

225. Walter Block & David Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37, 39 (1986).

226. *See, e.g.*, Gresham v. Peterson, 225 F.3d 899, 909 (7th Cir. 2000) (collecting cases holding that the government "may proscribe threats, extortion, blackmail and the like," notwithstanding "their expressive content"); United States v. Irving, 509 F.2d 1325, 1331 (5th Cir. 1975) (noting that speech, in particular threats, is "properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues" (citing Watts v. United States, 402 F.2d 676, 690 (D.C. Cir. 1968))); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected . . . when it is the very vehicle of the crime itself." (citing 18 U.S.C. §§ 871–877 (1964))).

overenforcement of the law or enforcement by the improper party.[227] In cases where the information is simply embarrassing, Posner asserts that blackmail is "the levying of a private tax on an activity that either is unlikely to be discouraged by the tax or that society has no interest in discouraging."[228] Epstein, while going so far as to acknowledge that legalizing blackmail could potentially create economic benefit through private enforcement of the criminal laws, warns that it would also create "an open and public market for a new set of social institutions to exploit the gains from this new form of legal activity."[229] These social institutions, which Epstein calls "Blackmail, Inc.," would then become full-service firms that would also offer services to their own victims instructing them on how to best conceal whatever shameful secrets they may have from the other parties they affect.[230] This, Epstein says, would create an entire undesirable industry premised on fraud and deceit.[231]

Moral arguments for punishing blackmail are perhaps a bit easier to understand than consequentialist ones. Deontological theories capture the moral instinct that something about the choice a blackmailer forces on his victim constitutes an inherent wrong, susceptible to criminal punishment under retributive theories of justice. Professor Joel Feinberg claims that in cases in which *either* the unconditional act of keeping incriminating information secret *or* the unconditional act of revealing it is in and of itself a morally wrongful harm to a third party, the criminal law can legitimately be invoked to punish those who conditionally threaten or offer to commit either act.[232] He bases this argument on philosopher John Stuart Mill's harm

227. *See* Richard A. Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1821–27 (1993) (arguing that blackmailers would contribute to overenforcement by acting as "private law enforcers" but would also "undermine optimal law enforcement").

228. *Id.* at 1834. A particularly colorful example of the second form of inefficiency involves the potential blackmail of a victim who is sexually impotent and obtaining treatment from a sex therapist. "What would be the consequences if such blackmail were permitted?" Posner asks, and concludes "[n]ot less impotence, surely, but more. An impotent man would hesitate to seek professional assistance for fear of increasing the probability that blackmailers would discover his problem. The increase in impotence would generate (after subtracting the reduction in the use of therapists' services) a net social cost." *Id.* at 1833.

229. Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 562 (1983).

230. *Id.* at 564.

231. *Id.* at 565.

232. 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 239 (1990).

principle, which authorizes the law to restrict freedom only in cases where such freedom results in harm to others.[233] Feinberg's project, then, identifies which acts of revelation or concealment would in fact constitute moral harms.[234] So, for example, *either* offering to conceal a crime *or* threatening to violate someone's privacy by revealing embarrassing, noncriminal information about them, might form the basis for proper punishment consistent with the harm principle.[235]

By contrast, Professor George Fletcher argues that it is not the disclosure or lack thereof itself that deontologically justifies punishing blackmail, but the consequences of the *threat* to disclose.[236] Fletcher surveys ten disparate cases that would all constitute blackmail and notes that the offense represents, by turns and depending on the circumstances, "coercion of the victim, exploitation of the victim's weakness, . . . trading unfairly in assets or chips that belong to others," and "an undesirable and abusive form of private law enforcement."[237] Further, the offense "leads to the waste of resources so far as blackmailers are induced to collect information that they are willing to suppress for a fee."[238] Yet he concludes that the one core wrong of blackmail, which can be identified across all potential cases, relates to the fact that blackmail is not a "one-shot affair."[239] Because a blackmailer can continue to subject his victim to repeated requests for more and more money—in the absence of an appropriate legal mechanism by which the victim can hold the blackmailer to his original bargain—blackmail creates an ongoing state of domination and subordination between the blackmailer and his victim.[240] Fletcher argues that, because the criminal law is supposed to prevent precisely this relationship arising between private parties, not only is blackmail not anomalous but it is, in fact, a "paradigm" for understanding wrongdoing and criminal punishment generally.[241]

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233. JOHN STUART MILL, ON LIBERTY 21–22 (John Gray ed., Oxford Univ. Press 2008) (1859).

234. Feinberg, *supra* note 232, at 239–58.

235. *Id.*

236. George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1620 (1993).

237. *Id.* at 1637 (citations omitted).

238. *Id.*

239. *Id.*

240. *Id.* at 1638.

241. *Id.* at 1617.

More recently, Professor Mitchell Berman has provided an "evidentiary" theory of blackmail, focusing on what the blackmailer's overt act tells a fact-finder about his motivations.[242] Berman argues that blackmail should be understood as a subset of extortion, rather than as a unique crime.[243] Extortion, he asserts, may be criminally wrongful either due to the actus reus (in cases where what the extortionist threatens is in and of itself a crime) *or* due to the extortionist's culpability (in cases where he has the purpose to, or certain knowledge that, his conduct will harm his victim).[244] Berman concludes that blackmail falls into this second category, and that the action of threatening to reveal embarrassing information—even if legal in and of itself—may be evidence of the blackmailer's intent to do harm and thus justify criminal liability.[245] In an empirical study on lay intuitions about blackmail, Professors Paul H. Robinson, Michael T. Cahill, and Daniel M. Bartels attempt to determine what the general public feels are the appropriate justifications for criminalizing the offense.[246] They find support for Berman's theory, concluding that "lay understandings of blackmail share the position that its gravamen involves harm to the recipient of the threat, rather than some third party or generalized social interest."[247] They also find that lay institutions do not attach any significance to the magnitude of a blackmailer's demand or to the nature of the information the blackmailer threatens to disclose.[248]

These deontological theories provide a potential justification for the criminalization of coercive control. Almost every moral justification for punishing the blackmailer would appear to apply similarly to the person who deliberately coerces his intimate partner over a sustained period of time in a manner that causes the victim significant harm, even if the coercive conduct is, like the blackmailer's threatened revelation, based upon speech. Is it a morally wrongful

242. Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 797–98 (1998); Mitchell N. Berman, *Meta-Blackmail and the Evidentiary Theory: Still Taking Motives Seriously*, 94 GEO. L.J. 787, 789 (2006) [hereinafter Berman, *Meta-Blackmail*].

243. *See* Berman, *Meta-Blackmail*, *supra* note 242, at 789–98.

244. *Id.* at 790.

245. *Id.*

246. *See generally* Robinson et al., *supra* note 218 (analyzing how competing theories align with the prevailing sentiment of blackmail).

247. *Id.* at 347.

248. *Id.* at 348.

harm, as Feinberg asks of blackmail, to restrict a domestic partner's liberty in the same way that it is to violate someone's privacy? If one looks at the harms of coercive control discussed in Part I, the answer would seem to be yes. At a minimum, it is no less vague to say that coercive control does a moral harm to the victim's liberty interest than it is to say that blackmail does a moral harm to the victim's privacy interest. Does coercive control create an ongoing state of "domina[nce] and subordination" analogous to the one Fletcher argues is the product of blackmail and, indeed, the paradigmatic purview of the criminal law?[249] Almost by definition, yes—the very sociological meaning of domestic violence is "a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship," which highlights the relationship between the habits of physical and nonphysical abuse and the purpose of creating sustained domination.[250]

But does coercive control reflect the same culpability to the victim's harm that Berman identifies as integral to all cases of blackmail? Here is one theory of blackmail by which the U.K. definition of coercive control may be too broad to be justified. Recall that in the U.K. offense the defendant's mere negligence as to the "serious effect" his conduct has on his victim is enough to trigger liability; he is guilty if he "ought to know" of such an effect.[251] If we accept Berman's justification for blackmail—as Robinson and others suggest the general public may[252]—it reveals one area in which coercive control could profitably be narrowed to track with existing norms about criminally coercive speech.

This quibble aside, it seems that blackmail—which, while conceptually "paradoxical," is politically accepted and remains on the books in all fifty states—may guide an attempt to punish the similar offense of coercive control. The perpetrators of the two offenses possess similar intent—to extract something from their victims via coercive behavior that, while morally wrong, may not, in and of itself, be unlawful. Where the two offenses part ways is in the actus reus elements. Blackmail requires a particular quid pro quo—the perpetrator must threaten a particular revelation in exchange for a

249. Fletcher, supra note 236, at 1626–29.

250. *What Is Domestic Violence?*, NAT'L DOMESTIC VIOLENCE HOTLINE (May 14, 2017), https://www.thehotline.org/is-this-abuse/abuse-defined [https://perma.cc/W5CN-HTFW].

251. Serious Crime Act 2015, c. 9, § 76 (UK).

252. *See* Robinson et al., *supra* note 218, at 347.

particular concession from the victim. If one agrees with Fletcher's "subordination" view of blackmail, one could argue that the true criminal harm of blackmail lies not in that particular quid pro quo but in the ongoing enterprise of coercion that arises from the initial transaction. Nonetheless, it is clear that the nature of the conduct prohibited by blackmail statutes is far more precisely defined than the open-ended language of the U.K. coercive control statute. But this would seem to be a vagueness problem that could be resolved through more precise drafting, not a First Amendment ground for distinguishing between the two doctrines. Blackmail punishes purely and inherently communicative conduct—namely, the threat to make a revelation.

Despite blackmail's attractiveness as an analog for a legislature trying to fashion a coercive control offense that could survive constitutional challenges, the need to draft a sufficiently narrow actus reus would not be the only problem drafters would face. At least some courts have cited the historical pedigree of blackmail as a distinct crime at common law as a basis for approving its punishment of otherwise legal speech. For example, the Sixth Circuit, in asserting that "[w]ords often are the sole means of committing crime—think bribery, perjury, blackmail, fraud" and that "the First Amendment does not disable governments from punishing these language-based crimes" noted that many of these crimes "pre-dated the First Amendment."[253] The Oregon Supreme Court, in the process of holding the state's then-existing coercion statute unconstitutional on First Amendment grounds, despite the fact that it criminalized *illegal* threats, noted that "[j]udicial and academic analyses of the principles governing freedom to make demands coupled with threats have been sparse and inconclusive."[254] However, the court took care to distinguish the seemingly more problematic crime of blackmail, stating it had "no doubt" that blackmail statutes would survive free speech challenges on "historic grounds alone."[255] Needless to say, a coercive control offense would not likely enjoy such historically justified constitutional exceptionalism.

253. United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012).

254. State v. Robertson, 649 P.2d 569, 580 (Or. 1982). The redrafted version of the statute passed constitutional muster provided that the "fear" felt by the victim is objectively reasonable, the physical injury that is feared is objectively reasonable, and the "some person" to whom injury is threatened is a specific person. State v. Stone, 735 P.2d 7, 9 (Or. Ct. App.).

255. *Robertson*, 649 P.2d at 581.

E. Criminal Conspiracy

It may seem counterintuitive to seek doctrinal insights about an offense as intimate as coercive control from the jurisprudence on group liability. At first blush, the two fields might be thought to occupy theoretically polar ends of criminal liability. But the law of criminal conspiracy poses structural challenges surprisingly similar to those of coercive control. As scholar Albert Harno once observed:

> In the long category of crimes there is none . . . more difficult to confine within the boundaries of definitive statement than conspiracy. It covers the field of crimes and makes unlawful agreements among individuals to commit any crime; it extends to agreements to commit at least some torts and some breaches of contract, and, finally, it shades into the horizon with agreements to do acts, which, though not unlawful when done by the parties separately, may, nevertheless, become unlawful ends for those who agree to commit them.[256]

The crime of conspiracy at common law resembles coercive control insofar as it may capture otherwise noncriminal conduct due primarily to the harms posed by the situational and sociological structure in which the conduct occurs.

The common law rule that it can be criminal merely to agree to commit an unlawful act, even with no evidence of an attempt to execute it, dates all the way back to the 1611 *Poulterers' Case*,[257] decided by the Star Chamber and eventually followed by common law courts after the Restoration.[258] As Justice John Willes put it in the nineteenth century, "[s]o long as such a design rests in intention only, it is not indictable" but "[w]hen two agree to carry it into effect, the very plot is an *act in itself*, and the act of each of the parties . . . punishable if for a criminal object or for the use of criminal means."[259] Just as a lawful agreement between two parties would be enforceable against them, an unlawful agreement may serve as the basis for criminal sanction.

The justifications for criminalizing conspiracy as a distinct, inchoate crime are familiar and somewhat controversial. The lesser rationale is one of expedience. Conspiracy has been said to "fill the gap

256. Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 624 (1940–41) (citations omitted).

257. The Poulterers' Case, (1611) 77 Eng. Rep. 813 (KB).

258. Harno, *supra* note 256, at 628.

259. Mulcahy v. The Queen, L. R. 3 Eng. & Ir. App. 306, 317 (1868) (emphasis added).

created by a law of attempt too narrowly conceived"; it allows law enforcement to arrest perpetrators before they have proceeded so far in their plans as to have taken that dangerous "substantial step" toward commission of the offense itself.[260] The greater rationale "lies in the fact—or at least the assumption—that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end."[261] As the Supreme Court has articulated it, "[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality."[262] In other words, sharing a criminal intent with at least one other party increases the odds of it being executed to an extent that agreement alone—even without a substantial step toward its completion[263]—suffices as an actus reus to support a criminal conviction.

Some psychological literature appears to support this second justification. As Professor Neal Katyal summarizes it, "it is generally accepted that groups are more likely to polarize toward extremes, to take courses of action that advance the interests of the group even in the face of personal doubts, and to act with greater loyalty to each other."[264] Other scholars disagree on the merits as to the alleged dangerousness of groups. As Professor Abraham Goldstein argues, including multiple participants in a criminal scheme could in fact increase the risk that someone will leak the plan or result in the participants sharing uncertainties and dissuading one another from proceeding.[265]

Despite such objections, these two rationales for criminal conspiracy have carried the day to date. The law assumes both that conspiracy is a necessary tool for overcoming evidentiary obstacles to targeting certain forms of individual harm *and* that group intent poses

260. *See* Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1122 n.5, 1154 (1975).

261. *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 923–24 (1959).

262. Callanan v. United States, 364 U.S. 587, 593 (1961).

263. The Model Penal Code changes the common law rule and makes an "overt act" an element of conspiracy. MODEL PENAL CODE § 5.03(5) (AM. L. INST. 1985). States have followed the code to varying degrees, some requiring a substantial step in furtherance of the conspiracy, while others adhering to the common law rule and rejecting such a requirement. *See* Matthew Ladew, *Speaking Louder than Words: Finding an Overt Act Requirement in the Hobbs Act*, 28 CORNELL J.L. & PUB. POL'Y 67, 72 (2018).

264. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1316 (2003).

265. Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 YALE L.J. 405, 414 (1959).

a unique danger requiring a unique remedy in the substantive criminal law. Although, of course, the offense of conspiracy requires intent to commit a crime, mere intent to commit a crime is not itself a crime. Conspiracy criminalizes communicated intent, even without the clear and present danger generally required to meet the true threats exception to the First Amendment. The twin justifications for this seeming anomaly track surprisingly closely with the justifications for the coercive control offense urged by its U.K. proponents. Remember the two harms coercive control causes: the direct physical and psychological harms and the future violent harms predicted by coercive control. Conspiracy has survived for four centuries despite its tensions with traditional principles of criminality on very similar reasoning.

First, it is easier to redress the direct harms of crime if an event—in this case, the conspiratorial agreement—can be criminalized that occurs chronologically earlier than the "overt act" of which the crime of attempt requires evidence. This claim is analogous to the assertion that an offense is needed that can more easily capture the complex interrelation between all forms of control—physical and mental—rather than the "transactional" episodes of physical violence that form the primary basis for prosecution under existing law. Conspiracy does what coercive control seeks to do: removes evidentiary obstacles to targeting a well-known set of harms that are hard to prove on an individual basis.

Second, both conspiracy and coercive control seek to punish a heightened risk of danger, premised on context. Judicial intuition and empirical literature alike suggest that groups are dangerous—that what might remain merely a nasty thought if held by a single actor is more likely to manifest in the real world once it becomes the basis of an agreement with another party. Similarly, individual acts of controlling conduct toward a domestic relation become dangerous when they form a part of a broader coercive pattern. Sociology reveals the violence predicted by coercive control patterns, which in turn, provides the justification for turning something that would otherwise be a perfectly lawful incident of discord within a marriage into a crime.

Perhaps unsurprisingly, given the fundamental similarities in justification, conspiracy law's punishment of mere agreement creates several problems of legality, which quite closely parallel those previously discussed as potentially plaguing a coercive control offense. The Supreme Court has set very loose requirements for what due process requires the prosecution to show in order to prove the actus reus element of "agreement." The Court has stated that "the

agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case."[266] Courts have construed this to mean that a "mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates agreement."[267]

Professor Laurent Sacharoff has pointed out the vagueness problems inherent in this formulation.[268] As Sacharoff notes, "agreement" can mean something as legally specific as a contract—with an exchange of promises and obligation of performance—or it can refer to merely shared opinion—"as when we say, 'experts agree smoking causes cancer.'"[269] He asserts that the familiar principle that the agreement is the actus reus has devolved in practice into an effective trial rule where a person becomes guilty of conspiracy merely "for proximity to criminal activity."[270] He proposes that, to prove the agreement element of conspiracy, a prosecutor should have to prove an exchange of promises to commit a crime, which he suggests would create an obligation among the parties to follow through with the crime.[271]

Furthermore, the criminalization of mere agreement poses, similarly to a coercive control offense, potential First Amendment issues. Professor Martin Redish and then-law student Michael Downey argue that, to the extent that parties form agreements through speech unaccompanied by overt acts, they may be eligible for constitutional protection.[272] They note that under the controlling clear-and-present-danger test established in *Brandenburg v. Ohio*,[273] speech openly advocating criminal conduct may be constitutionally suppressed only when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[274] They argue that no principled distinction between criminal incitement and criminal conspiracy exists and that, therefore, the First Amendment

266. Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975).

267. *See, e.g.*, State v. Mapp, 585 N.W.2d 746, 748 (Iowa 1998).

268. Laurent Sacharoff, *Conspiracy as Contract*, 50 U.C. DAVIS L. REV. 405, 407–08 (2016).

269. *Id.* at 408.

270. *Id.* at 410.

271. *Id.* at 410–11.

272. Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 699 (2012).

273. Brandenburg v. Ohio, 395 U.S. 444 (1969).

274. Redish & Downey, *supra* note 272, at 730 (citing *Brandenburg*, 395 U.S. at 447–48).

requires "proof of overt, non-expressive acts intertwined with the expression involved in [forming a] conspiracy."[275]

The coercive control offense shares yet another important structural feature with the crime of conspiracy. Beyond its substitution of mere agreement for actus reus, common law conspiracy is, as Harno notes, also unusual in the *sorts* of agreements it criminalizes. The common law defined conspiracy as an agreement "either to do an unlawful act, or a lawful act by unlawful means."[276] Early commentators argued over the meaning of "unlawful" in this context, including nineteenth-century treatise writer James Fitzjames Stephen. Stephen notes how, in some cases, "an agreement to do an unlawful act was held to mean something more than an agreement to do an act which is in itself criminal when done by a single person" because the courts used the word "unlawful" "in a sense closely approaching to immoral simply, and amounting at least to immoral and at the same time injurious to the public."[277] English courts at this time therefore criminalized conspiracies to commit "immoral" acts, such as falsely accusing a person of fathering a bastard, indenturing a girl at prostitution, marrying off a pauper so as to charge another parish with his support, raising workmen's wages, committing civil trespass, and combining to "defraud" the government through otherwise noncriminal means.[278]

The modern American definition of conspiracy is, depending on jurisdiction, the creature of either statute or common law and therefore widely variable. Most states now require that the object of a conspiracy be itself a crime.[279] Yet Stephen's understanding of "unlawful" as far broader than "criminal" remains on the books in some states today. Courts in those state may construe "unlawful means" to include conspiracies to commit noncriminal acts that are nonetheless injurious to the public health or morals or to trade or commerce, or that may

275. *Id.* at 732.

276. *See, e.g.*, R v. Jones (1832) 110 Eng. Rep. 485, 487 (KB).

277. 2 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 229 (London, MacMillan & Co. 1883).

278. 2 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW 393–94 (3d ed. 2018) (citations omitted).

279. *Id.* at 395.

result in the perversion or obstruction of justice or the due administration of the laws.[280]

For example, in *State v. Blackledge*,[281] the Supreme Court of Iowa upheld the criminal conviction of the defendants—officers in a workmen's organization—for conspiracy to injure the property and funds of that organization by loaning its funds out for a fee in violation of a civil provision of the Iowa Code.[282] On appeal, one of the defendants objected that the indictment below was insufficient because it had failed to allege that he had committed any acts that were themselves felonious.[283] Though acknowledging a conflict in Iowa case law on this subject, the court cited its own prior conspiracy decisions that, "in referring to the [unlawful means requirement], have used the words 'illegal' and 'unlawful' interchangeably and obviously without intending thereby to imply a crime."[284] It therefore held that the defendants' conviction for criminal conspiracy was proper because "[t]he means charged in the indictment . . . were unlawful and illegal" and "[a]lthough not criminal, the intent of the defendants named was to unlawfully obtain from the society named funds belonging thereto and to its certificate and policy holders."[285]

Some state criminal codes contain conspiracy provisions explicitly worded to include noncriminal conduct, such as the California Penal Code which states: "[t]wo or more persons [may not] conspire . . . [t]o commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws."[286]

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280. *See, e.g.*, State v. Parker, 158 A. 797, 799 (Conn. 1932) ("A conspiracy will be indictable, if the end proposed or the means to be employed are, by reason of the combination, particularly dangerous to the public interests, or particularly injurious to some individual, although not criminal." (citations omitted)); Commonwealth v. Donoghue, 63 S.W.2d 3, 6 (Ky. 1933) (noting that an agreement may be indicted under the common law of criminal conspiracy if its objectives "have a tendency to injure the public, to violate public policy, or to injure, oppress, or wrongfully prejudice individuals collectively or the public generally" (citations omitted)); State v. Burnham, 15 N.H. 396, 403 (1844) ("When it is said . . . that the means must be unlawful, it is not to be understood that those means must amount to indictable offenses, in order to make the offence of conspiracy complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal." (citation omitted)). *But see* People v. Redd, 228 Cal. App. 4th 449, 463–64 (Cal. Ct. App. 2014).

281. State v. Blackledge, 243 N.W. 534 (Iowa 1932).

282. *Id.* at 535.

283. *Id.*

284. *Id.* at 535, 537.

285. *Id.*

286. *See, e.g.*, CAL. PENAL CODE § 182(a)(5) (West 2011).

Furthermore, some states also retain fraud statutes that base criminal liability on the "unlawful means" of defrauding—the conspiratorial element—without defining the fraud itself as a crime in its own right if committed by an individual.[287]

That said, this approach has been heavily criticized. In considering a 1948 appeal of conviction under a Utah statute criminalizing "conspiracy to commit acts injurious to public morals" the Supreme Court deferred to the statutory interpretation of the Utah Supreme Court, but warned that such provisions may run afoul of the vagueness and overbreadth prohibitions of the Fourteenth Amendment:

> It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what it may include. Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. In some States the phrase "injurious to public morals" would be likely to punish acts which it would not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling.[288]

In his seminal treatise on substantive criminal law, Professor Wayne LaFave notes the extent to which state courts have ignored this warning and continued to uphold such conspiracy statutes[289] but urges, nonetheless, that the statutes fail to provide sufficient notice of what conduct is criminal.[290] He argues that if broad conspiracy provisions

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287. *See, e.g.*, *id.* § 182(a)(4) (making it an offense to "defraud any person," but by "means . . . themselves criminal"); MISS. CODE ANN. § 97-1-1(1)(d) (West 2020) (making it an offense "to defraud another out of property by any means which are in themselves criminal" or "would amount to a cheat"); OKLA. STAT. ANN. tit. 21, § 421 (West 2020) (same). Some states use the same approach to criminalizing conspiracy to defraud the government. *See, e.g.*, IOWA CODE ANN. § 425.13 (West 2020) (criminalizing fraud in obtaining homestead tax credits); MICH. COMP. LAWS ANN. § 752.1005 (West 2020) (criminalizing fraud in obtaining health care benefits); MISS. CODE ANN. § 43-13-211 (fraud regarding Medicaid benefits), *id.* § 97-7-15 (criminalizing fraud in other specified ways); OKLA. STAT. ANN. tit. 21, § 424; S.D. CODIFIED LAWS § 22-3-8 (2020) (criminalizing defrauding the state for any purpose); UTAH CODE ANN. § 26-20-6 (West 2020) (criminalizing a false claim for medical benefits); W. VA. CODE ANN. § 61-10-31 (West 2020) (criminalizing defrauding the state for any purpose).

288. Musser v. Utah, 333 U.S. 95, 96–97 (1948).

289. *See, e.g.*, Calhoun v. Sup. Ct., 291 P.2d 474, 482 (Cal. 1955); Lorenson v. Sup. Ct., 216 P.2d 859, 866 (Cal. 1950); People v. Sullivan, 248 P.2d 520, 528 (Cal. Dist. Ct. App. 1952); State v. Nielsen, 426 P.2d 13, 16 (Utah 1967).

290. LAFAVE, *supra* note 278, at 395 (citing MODEL PENAL CODE § 5.03 (AM. L. INST. 1985)).

make it easier to reach, through group liability, harmful conduct for which it is difficult to penalize individuals, then the solution is to reform the substantive criminal law in those areas.[291] Alternatively, he argues that if some activities should indeed only be criminal if engaged in by groups then special conspiracy provisions must be no less precise than any other penal provisions.[292]

To summarize, the offense of conspiracy emerged from a similar set of theoretical motivations as the offense of coercive control and has created a similar range of theoretical problems. Both may provide useful insights should state legislatures seek to follow the United Kingdom's lead and recognize coercive control as a criminal offense. Remember that under the U.K. statute, to be guilty of coercive control a defendant must *repeatedly or continuously engage in behavior that is controlling or coercive*, that behavior must have a *serious effect on the victim,* and the defendant either *must know in fact or ought to know* of this serious effect. The actus reus requirement of "repeated and continuous" behavior functions doctrinally similarly to the long-accepted actus reus of "agreement" in conspiracy law: it transforms thought that would be purely private into a public danger appropriate for criminalization.

The scholarly criticisms of conspiracy's legality problems may also inform any legislative attempt to refine the U.K. statute into an offense that could pass constitutional scrutiny in the United States. In the first place, the word "behavior" suffers from many of the same vagueness and First Amendment problems as "agreement." To avoid First Amendment issues, legislatures could substitute for "behavior" a list of conduct including "actions" and other forms of constitutionally unprotected speech: certainly "threats" of violence, but also false and fraudulent speech and coercive speech of the sort typically punished by blackmail statutes. To avoid vagueness problems legislatures could adopt a mens rea requirement that the behavioral actus reus be accompanied by a specific intent *to assert long-term, nontrivial control* over the victim's liberty.

Such revisions would still mean that the offense of coercive control covered conduct that was not in and of itself criminal. In that respect it would remain open to the sorts of objections levied at the "unlawful means" theory of criminal conspiracy. Unless, of course, the nature of

291. *Id.*

292. *Id.*

the actus reus of coercive control is reconceptualized, which will be the task of the next subsection.

F. Fraud

"Force" and "fraud" are frequently recognized as the two traditional bases for criminal liability.[293] Deontological theories of criminal punishment explain why: physical coercion and dishonesty are widely perceived to be immoral violations of the rights of others.[294] Even economic theory supports the criminalization of these two categories of conduct because "[f]orce and artifice are inherently coercive behaviors, unresponsive to the market mechanisms that put exchange prices on what people want to achieve."[295] In the economic view, fraud is wrong because it allows the perpetrator to gain an off-market advantage that the market itself cannot punish.[296] Most of the crimes discussed so far as in some way similar to coercive control create the possibility of force (stalking, conspiracy, depending on the predicate offense) or at least coercion (blackmail). Yet criminal fraud jurisprudence is relevant as well. Like coercive control, fraud is famously difficult to define precisely, often requiring an exercise of purely moral intuition to identify.[297] It therefore presents similar problems as coercive control for legislators trying to decide exactly

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293. Epstein, *supra* note 229, at 556.

294. Epstein notes that:

> The moral stand against force and fraud provides a powerful theory to generate the standard set of criminal offenses: larceny, taking by false pretenses, and embezzlement all presuppose that we have (and we do have) a clear sense of who owns what before the transaction in question takes place; with that settled, given transactions are characterized as criminal not by some haphazard formula, but because they conform to the implicit pattern of entitlements and their violations outlined above.

Id. at 556–57. Jayme Herschkopf similarly notes that:

> Fraud, at its core, is a type of deception, and it is that deception that encapsulates fraud's immorality. To deceive is to infringe on another's autonomy: to willfully alter another's mental processes by skewing the truth. Whether the deception leads to material harm is irrelevant from a deontological point of view; the deception itself is the wrong committed.

Jayme Herschkopf, *Morality and Securities Fraud*, 101 MARQ. L. REV. 453, 465 (2017) (citations omitted).

295. Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest Services Fraud*, 75 LAW & CONTEMP. PROBS. 61, 61 (2012).

296. *Id.*

297. *See, e.g.*, Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941) ("[T]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.").

where unethical dealings between two private actors should cross the line into criminality.

Fraud is commonly defined as the intentional misrepresentation of a material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage.[298] That said, the precise content and existence of each of these elements varies substantially by jurisdiction, by substantive legal context, and according to jurisprudential gloss.[299] At common law, fraud between private parties was traditionally a civil concept, leaving only frauds against the public to be punished criminally.[300] Even civil law once primarily left transacting parties to their own devices until the increasing complexity of the commercial age saw a demand for legal intervention to protect vulnerable consumers from the ever-more creative predations of their corporate counterparties.[301] In our current era, a wide range of state and, in particular, federal laws impose not only civil but criminal liability for various forms of fraud.[302] Laws like the federal mail[303] and wire fraud[304] statutes may speak generally to fraud across a wide range of circumstances; others may focus on particular contexts such as securities fraud,[305] health care fraud,[306] or banking fraud.[307]

Though the traditional understanding of fraud involves elements of both intentional deceit and resulting harm to the victim, its "moral dimension"—the justification for moving it into the criminal law as opposed to the purely compensatory realm of tort law—comes from its mental component, scienter.[308] Scienter—defined as the "fraudulent intent" or "intent to deceive"—is not always a requirement in civil

298. *See* 1 EDWARD J. DEVITT, CHARLES B. BLACKMAR, MICHAEL A. WOLFF & KEVIN F. O'MALLEY, FEDERAL JURY PRACTICE AND INSTRUCTIONS 583 (4th ed. 1992) (defining "fraud" and "fraudulent").

299. Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 738–39 (1999).

300. *Id.* at 736.

301. Herschkopf, *supra* note 294, at 465.

302. Podgor, *supra* note 299, at 737.

303. 18 U.S.C. § 1341 (2018).

304. *Id.* § 1343.

305. *Id.* § 1348.

306. *Id.* § 1347.

307. *Id.* § 1344.

308. Herschkopf, *supra* note 294, at 458.

fraud cases but typically is in criminal actions.[309] For example, the government must be able to show at least "willfulness" to convert a civil violation of the securities laws into a criminal one.[310] As the Supreme Court put it recently in a case about bankruptcy fraud:

> "Actual fraud" has two parts: actual and fraud. The word "actual" has a simple meaning in the context of common-law fraud: It denotes any fraud that "involv[es] moral turpitude or intentional wrong." "Actual" fraud stands in contrast to "implied" fraud or fraud "in law," which describe acts of deception that "may exist without the imputation of bad faith or immorality." Thus, anything that counts as "fraud" and is done with wrongful intent is "actual fraud."[311]

In other words, under the common law understanding the actor's intent in performing an act of deception has a separate legal existence and effect above and beyond the act of deception itself.

Taking this basic structure of fraud law as a guide, we can make some general observations about an attempt to criminalize coercive control. First off, the criminal law may properly address itself to the harm imposed on one party by another in a superior power relation. As Professor Alex Stein notes, the essence of fraud *is* coercion;[312] if coercion through deceit requires intervention by the state at some point it stands to reason that other forms of nonphysical, nonpecuniary coercion may as well. Second, all forms of coercive dealings—fraudulent or otherwise—may vary in severity and therefore create shades of gray for lawmakers trying to determine where criminal liability should attach. Just as the criminal law does not punish all acts of deception as criminal fraud in the absence of scienter, it may not be appropriate for criminal coercive control to include, as the U.K. statute does, inadvertent conduct even if unreasonable.

On the flip side, criminal fraud itself presents a host of conceptual and enforcement problems that also find analogs in the coercive control context. In particular, the expansive theories of fraud justifying

309. *Id.* at 458, 472.

310. *See* Securities Act of 1933 § 24, 15 U.S.C. § 77x (2018) (requiring a person to "willfully" violate); Securities Exchange Act of 1934 § 32(a), 15 U.S.C. § 78ff(a) (same); Investment Company Act of 1940 § 49, 15 U.S.C. § 80a-48 (same); Investment Advisers Act of 1940 § 217, 15 U.S.C. § 80b-17 (same).

311. Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1586 (2016) (alteration in original) (quoting Neal v. Clark, 95 U.S. 704, 709 (1878)).

312. Stein, *supra* note 295, at 61.

most prosecutions under the federal mail and wire fraud statutes draw a great deal of critical fire for allowing too much room for prosecutorial abuse and excessive discretion.[313] In the 1940s, courts began to interpret the potential object of a criminal "scheme or artifice to defraud" under those statutes to include not only money or property but the "intangible rights" to such goods as intellectual property[314] and the honest services of government employees, free from the influence of unlawful gratuities.[315] Eventually, the Supreme Court rejected the theory of "honest services" fraud,[316] but Congress restored it with 18 U.S.C. § 1346, which clarifies that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[317]

This statutory fix, however, left unresolved a number of conceptual problems that have troubled courts, litigants, and commentators in the years since. First off, it appears that the "intangible right of honest services" includes the right to receive honest services from private actors, and not merely public employees.[318] This raises the question of whether, to form the basis for a private-sector honest services fraud action, the deprivation of honest services must involve the violation of a fiduciary duty. In *United States v. Milovanovic*,[319] the Ninth Circuit held that a breach of fiduciary duty is indeed a required element of private-sector honest services fraud, but that such a duty is not "limited to a formal 'fiduciary' relationship well-known in the law" and may include relationships in which "one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise."[320] The rule that certain relationships give rise to obligations of fair dealing, particularly where the nature of the relationship induces trust on the

313. The statutes' perceived expansiveness and potential for abuse has given rise to the facetious expression, "when in doubt, charge mail fraud." John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 (1981).

314. Carpenter v. United States, 484 U.S. 19, 25 (1987).

315. Shusan v. United States, 117 F.2d 110, 115 (5th Cir. 1941).

316. McNally v. United States, 483 U.S. 350, 358 (1987).

317. 18 U.S.C. § 1346 (2018).

318. *See, e.g.*, United States v. Frost, 125 F.3d 346, 367–68 (6th Cir. 1997) (affirming the honest services fraud conviction of university professors for allowing students to plagiarize work and receive degrees on that basis).

319. United States v. Milovanovic, 678 F.3d 713 (9th Cir. 2012) (en banc).

320. *Id.* at 724.

part of the victim, is similar to the idea that intimate relationships create other sorts of trust, the exploitation of which could be in the purview of criminal law. Nonetheless, legislators drafting a coercive control offense should avoid the ambiguity caused by Congress's decision in § 1346 not to be clear about the particular private-sector relationships that might trigger a right to "honest services."

One question the Supreme Court has answered as to the scope of honest services fraud is the nature of the "scheme to defraud" necessary for liability to attach. As discussed earlier in this Article, *Skilling v. United States*[321] held that mere "self-dealing" by private actors—such as former Enron CEO Jeff Skilling, whose securities fraud was motivated in part by his interest in receiving gigantic bonuses—was insufficient to support an honest services fraud conviction.[322] In considering Skilling's vagueness challenge the Court explicitly limited private-sector honest services fraud to cases specifically involving bribery or kickbacks, which it described as forming the "core of the pre-*McNally* case law."[323] Congress, of course, would have been free to define the range of contemplated schemes to defraud however it chose. But *Skilling* shows how a generally worded prohibition on a "scheme to coerce" would likely fail vagueness scrutiny. At least in the context of fraud, background common law indicates that certain types of conduct—bribery and kickbacks—fell squarely into the category of honest services fraud Congress sought to codify at § 1346. In the absence of such pre-statutory case law on coercive control, it seems unlikely that a similarly worded coercive control statute would survive even in part on the logic of *Skilling*.

Another illuminating open question in private-sector honest services fraud jurisprudence is whether the government must prove that the victim faced any risk of economic harm or that such harm was foreseeable to the defendant. Circuits are currently split. The majority rule, followed by the First, Fourth, Sixth, Eleventh, and D.C. Circuits, is that a breach of fiduciary duty must cause a risk of reasonably foreseeable harm.[324] The Second, Fifth, and Tenth Circuits, however,

321. Skilling v. United States, 561 U.S. 358 (2010).

322. *Id.* at 368.

323. *Id.* at 409.

324. *See, e.g.*, United States v. Vinyard, 266 F.3d 320, 328 (4th Cir. 2001); United States v. Martin, 228 F.3d 1, 17 (lst Cir. 2000); United States v. Devetger, 198 F.3d 1324, 1330 (11th Cir. 1999); United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997); United States v. Lemire, 720 F.2d 1327, 1337 (D.C. Cir. 1983).

follow the so-called "materiality standard," which requires only that the government prove the deceitful employee "has reason to believe the information [hidden] would lead a reasonable employer to change its business conduct."[325] To avoid a near-identical problem of construction, a coercive control offense would need to be clear about whether the government would be required to prove an objective risk of harm to the victim, or whether it would be enough to show that the perpetrator had reason to believe his conduct was likely to change his victim's conduct in some way. Either way, to the extent that honest services fraud requires, at most, only a *risk* of injury to the victim, it is a better model for coercive control than the emotional injury-based theories of child and elder abuse discussed in Part III.A, with their bedeviling problems of proof. For the same reasons it is an improvement on the "serious effect" element of the U.K. coercive control statute.

Beyond the particular doctrinal puzzles of honest services fraud, a look at how courts generally apply fraud offenses in practice provides a final set of insights into how a coercive control offense might play out. As Professor Samuel Buell notes, the difficulty in defining fraud lies precisely in determining the optimal level of specificity as to prohibited conduct.[326] Defined too broadly, the offense may fail to adequately clarify what behavior is actually criminal.[327] Defined too narrowly, however, the law may fail to anticipate and keep up with the endless creativity of commercial actors who excel at devising new ways to achieve arguably fraudulent results while narrowly remaining on the right side of existing law.[328] The preceding sections have demonstrated how any attempt to draft a coercive control offense presents a similar Scylla and Charybdis.

To resolve this problem in fraud cases, Buell observes, courts and enforcement actors appear to apply a post hoc methodology for determining whether to punish an actor pursuing truly "novel" deceptive conduct that does not clearly violate existing fraud prohibitions.[329] He asserts that such actors get convicted when the

325. United States v. Ballard, 663 F.2d 534, 541 (5th Cir. 1981); *accord* United States v. Brown, 459 F.3d 509, 519 (5th Cir. 2006); United States v. Rybicki, 354 F.3d 124, 145 (2d Cir. 2003) (en banc); United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997).

326. Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1973–74, 1980 (2006).

327. *Id.* at 1981.

328. *Id.* at 1973–74.

329. *Id.* at 1971.

government can present evidence of "consciousness of wrongdoing"—for example, "badges of guilt" such as concealment—accompanying their behavior.[330] Buell concludes that this post hoc sorting avoids some of the problems inherent in devising more precise conduct rules and can be justified on the basis that an actor who pursues deceptive behavior "in the face of actual knowledge that prevailing norms reject that behavior" is "equivalently blameworthy to an actor who intentionally pursues a course of conduct that the law has previously described as fraud."[331]

Buell's argument is useful to this Article's discussion of coercive control for two reasons. In the first place, he gives reason to believe that the adjudication process itself provides an ex post limitation on which sorts of ambiguous conduct actually get punished for violating a somewhat generally worded intent-based offense. His account of how courts have cabined fraud suggests that even if a coercive control offense contained somewhat broad conduct rules, there may be reason to expect courts to serve a sorting function by only allowing cases to proceed where the evidence suggests the defendant had awareness of the wrongfulness of his conduct. The counterargument, of course, is that "novel" fraud cases arise against the backdrop of a well-established common law offense, and we could not expect a brand-new crime like coercive control to be enforced in such a principled way on a case-by-case basis. Even accepting that objection, however, Buell's work urges thought about the importance of "consciousness of guilt" as an ex ante element of the offense. His conclusions demonstrate that the scienter element adds predictability to the treatment of evidence in a potentially chaotic area of the law. The lack of such a requirement in the U.K. coercive control offense is, therefore, one of its most significant problems.

IV. TOWARD A COERCIVE CONTROL OFFENSE

This survey of offenses with similar structures, purposes, and legality problems as coercive control provides a foundation for legislatures to use in drafting a statute with the same policy goals as the U.K. version, without creating an unconstitutional anomaly under American law. It now remains to offer model statutory language that is logically consistent with the legal justifications for the familiar

330. *Id.* at 1999–2000.

331. *Id.* at 1971, 2022–31.

offenses discussed. After first presenting the model offense, this Part will consider the evidentiary and policy objections that may still urge against its adoption.

A. The Elements of the Offense

The following proposal improves upon the U.K. coercive control offense by adopting a structure roughly similar to the crime of conspiracy to commit fraud. Although this may seem like a counterintuitive point of departure, conspiracy and fraud jurisprudence, examined together, help resolve some of the overbreadth and vagueness problems inherent in drafting a nontransactional, coercive offense that encompasses nonviolent interactions between two private parties.

Fraudulent speech itself is punishable because speech intrinsic to committing the elements of an existing crime is not constitutionally protected.[332] Part III.D explained how even despite this general principle blackmail has been the subject of significant critical debate due to the fact that it appears to be a crime comprising *solely* legal speech (for example, a verbal threat to make a verbal revelation). Professor Stephen Galoob has defended blackmail on the unique grounds that it functions as a *kind* of fraud.[333] Each blackmail, he points out, consists of two parts: the initial threat, which is coercive, and the subsequent agreement.[334] The agreement, he argues, is actually *fraudulent* because it is unenforceable. According to Galoob, "Proving criminal law charges of fraud usually requires showing that the defendant has deceived the target, but deception matters mainly in virtue of its connection to value."[335] Because the blackmailer's agreement not to reveal the information after being paid is unenforceable, the victim of blackmail has entered into a valueless, and thus fraudulent, exchange.[336]

Galoob's account of blackmail illuminates the structure of coercive control, which is similarly morally offensive but equally difficult to translate into propositions of accepted criminal harm. Like blackmail, coercive control is, naturally, part coercion. But to the

332. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

333. Stephen Galoob, *Coercion, Fraud, and What Is Wrong with Blackmail*, 22 LEGAL THEORY 22, 22 (2016).

334. *Id.* at 34.

335. *Id.* at 35 (citation omitted).

336. *Id.* at 36–37.

extent that it contains an agreement—"If you don't do X, I will do Y, or I will withhold Z"—it is just as fraudulent as the blackmailer's threat. In both cases—due, in one, to the unenforceability of the blackmailer's agreement and, in the other, to the ongoing, repetitive pattern of behavior necessary to prove coercive control—the victim receives nothing of value in return. The blackmailer can continue to extort money because his victim has no legal recourse. And the domestic abuser can continue to extract obedience, because—until the moment he threatens physical violence—neither does his.

With those starting principles as a foundation, the basic model offense is as follows:

> A person is guilty of the crime of coercive control when they:
>
> a) Continuously engage in a coercive pattern of behavior over a substantial period of time with the intent to deprive another person of their autonomy to make decisions and engage in conduct to which they otherwise have the right; and
>
> b) The two parties are spouses, intimate partners, or family members; and
>
> c) The pattern of behavior causes or creates a risk of nontrivial economic, physical, mental, or emotional harm to the coerced party.

The remainder of this Section will work through each of the elements of this proposed offense to demonstrate how they use lessons from other criminal offenses to resolve many of the problems of legality and administrability identified in Part II of this Article as posed by the U.K. statute.

1. *"Continuously engage in a pattern of coercive behavior over a substantial period of time."* The element of a "pattern of behavior" is intentionally broad in order to capture the essence of coercive control—and of domestic abuse generally—which is not "transactional."[337] The U.K. commentators argued, as the motivating policy behind the offense, that the core of domestic abuse is the perpetrator's "micro-regulation" of a victim's day-to-day affairs, with the ultimate goal of fully controlling them.[338] This abuse may take the

337. *See* Bettinson & Bishop, *supra* note 46, at 9; Tuerkheimer, *supra* note 48, at 959–60.

338. *See* Tuerkheimer, *supra* note 48, at 963–65 & nn.3–7.

form of words, actions, financial decisions, or a wide range of other conduct it would be overly limiting to attempt to enumerate, particularly given the context-specific importance of any individual example of coercive behavior.[339] Although the wording of this element is open to criticism for being overly expansive, it is no less so than the well-acknowledged "know-it-when-I-see-it" quality of fraud, remarked upon above.[340] Like fraud, coercive control must remain a flexible enough concept to allow fact-finders to fit the law to complicated, unforeseeable fact patterns. In both cases, the goal is for fact-finders to determine whether one private party's course of conduct toward another crosses the line that separates the immoral from the criminal.

To avoid the potential for abuse, however, the proposed language shares and exceeds the U.K. statute's requirement that the coercive behavior be ongoing, adding that it must occur over a "substantial period of time." Like the U.K. version, the offense attempts to avoid punishing just *any* sort of technically coercive behavior within a relationship, which could include the strategies of persuasion two people with differing preferences engage in throughout the course of a typical intimate relationship. The requirements of continuity and longevity aim to target the sort of coercive conduct that fits a particular sociological pattern: coercion that rises to the level of systematic abuse.

Criminalizing only such ongoing patterns of conduct—even where individual instances within the pattern may be, in and of themselves, perfectly legal—can be justified for the same reasons conspiracy law justifies criminalizing verbal agreements to do things it is perfectly legal to think about. If external agreement makes a "thought crime" both more dangerous and easier to prove without violating due process, the same can be said about an ongoing *pattern* of individually legal actions geared toward the improper goal of depriving another person of autonomy. The pattern, like the agreement, creates the danger—in the case of coercive control, the danger is the well-documented risk of repeated nonphysical coercion turning into physical, indeed lethal, violence.

Further, this language addresses the somewhat limited case law on emotional distress–based stalking offenses. In striking down portions of their states' stalking statutes, Illinois and Minnesota courts, at least, have suggested that a coercion offense lacking an element of physical

339. *Id.* at 964–65.

340. *See, e.g.*, Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941).

threat may raise constitutional overbreadth concerns.[341] Unlike the problematic Illinois stalking statute, which would criminalize "knowingly threatening" someone two or more times when one should know it would cause emotional distress, this model coercive control offense requires a more frequent and lengthy series of behaviors. Indeed, much like the stalking statute the Colorado Supreme Court upheld, which also prohibited distressing "repeated" contact, an offense prohibiting a lengthy pattern of behavior does not criminalize "innocuous behavior,"[342] particularly when combined with the other elements of the offense.

2. *"With the intent to deprive another person of their autonomy to make decisions and engage in conduct to which they otherwise have the right."* The specific intent element of the model offense is its sharpest departure from the U.K. version—and also from existing state stalking statutes and the proposal by Ortiz to make coercive control a form of false imprisonment.[343] All of those models criminalize intentional conduct that recklessly or negligently creates a particular response in the victim.[344] This feature prevents defendants from arguing they were unaware of the fact that their behavior made their victim feel threatened, emotionally distressed, coerced, etc. Nonetheless, it is in this lack of specific intent to bring about the state of coercion that makes the U.K. coercive control offense difficult to defend against free speech objections.

Due to the fraud-like aspects of coercive control, the law of fraud may help narrow the scope of behavior, including communications, that may properly be criminalized. As discussed in Part III.E, a hallmark component of fraud is scienter. Not all misrepresentations qualify as criminal, but the specific intent to defraud a victim brings deceptive conduct into the ambit of the criminal law. Therefore, a coercive control offense must include a specific intent element analogous to scienter in fraud. The perpetrator must have the purpose of using coercive behavior to extract unearned obedience from his victim in exchange for nothing but more threats.

In addition to the legality problems the inclusion of a specific intent element resolves, there is good reason to believe it will also

341. *See* discussion *supra* Part III.B.

342. People v. Cross, 127 P.3d 71, 78 (Colo. 2006) (en banc).

343. *See supra* Part III.B–C.

344. *See supra* Part III.B–C.

resolve some of the problems of administrability likely to result from the open texture of the "pattern of behavior" actus reus element. Buell finds that courts deal with potentially open-ended fraud offenses by allowing cases to proceed against defendants who demonstrate a "consciousness of guilt" that their behavior runs afoul of prevailing legal norms rejecting such behavior. For a coercive control offense to effectively sort the clearly criminal cases of abuse from the ambiguous ones, it must contain an element that allows courts and fact-finders to weigh evidence of such "consciousness" on the side of conviction. Without such an element the offense risks encouraging prosecutorial exploitation.

3. *"[S]pouses, intimate partners or family members."* This list of potential victims is by no means exhaustive. The model offense includes particular categories of victim to avoid some of the problems that have arisen from the fact that Congress failed to specify which sorts of service relationships gave rise to an "honest services fraud" prosecution under 18 U.S.C. § 1346. The list is intended to capture the relationships most likely to create the risk of a permanent power imbalance between intimate parties, but arguments could conceivably be made for expanding or narrowing it. The role of coercive control in human trafficking, for example, opens a whole new avenue of inquiry.[345]

4. *"Risk of nontrivial economic, physical, mental, or emotional harm to the coerced party."* The model offense intentionally incorporates an element equivalent to the "majority rule" in private-sector honest services fraud, which requires at least an objective risk of reasonably foreseeable harm to the defrauded party. In adopting the foreseeable harm standard in honest services fraud cases, the D.C. Circuit noted that "the broadening of the scope of the statute to cover intangible harms" urged that attention be paid to the outer limits of the offense.[346] Because many of the harms of coercive control are similarly "intangible," it is consistent with this precedent to incorporate the more rigorous harm standard from the federal case law. Unlike in honest services fraud cases, of course, the relevant risked harm will only sometimes be economic, so the model statute also expands the list

345. *See, e.g.*, Susie B. Baldwin, Anne E. Fehrenbacher & David P. Eisenman, *Psychological Coercion in Human Trafficking: An Application of Biderman's Framework*, 25 QUALITATIVE HEALTH RES. 1171, 1177 (2015).

346. United States v. Lemire, 720 F.2d 1327, 1336 (D.C. Cir. 1983).

of cognizable potential harms to include all of those developed in the sociological literature on coercive control. However, by not requiring proof of injury-in-fact, the model statute focuses on abuser misconduct rather than on forcing vulnerable victims to convince the fact-finder of their victimization. Furthermore, the requirement that the threatened harm be nontrivial serves to address the potential overbreadth problems posed by inclusion of "intangible" harms. Such a limitation excludes cases of mere annoyance and irritation and requires the fact-finder to determine whether the nature of the coercive conduct poses genuine psychological risk to the victim. In a world in which the justice system is, if anything, overly punitive, the criminal law should only expand to address nontrivial harms and evils.[347]

B. Policy Considerations

The model offense described above provides a theoretical basis for criminalizing coercive control consistent with existing principles that pass constitutional scrutiny in other areas of the criminal law. The fact that a state *could* create this offense, however, does not of course mean that it *should*. Simply limiting the offense in the manner this Article proposes addresses some of the most obvious policy objections to the U.K. version. The heightened mens rea requirement helps limit the number of cases in which the offense can be said to occur, thereby reducing the prospect of prosecutorial abuse and opportunism on the part of would-be victims. At the same time, the shift in focus to abuser conduct and risked harm, rather than injury-in-fact, will remove some impediments to proving genuine cases of abuse.

Even with these improvements, any attempt to criminalize behavior that arises in intimate settings runs the risk of creating incentives for personal grievances to turn into criminal prosecutions. Yet critics once made the same arguments about the criminal prosecution of domestic assault[348] and even "date" rape.[349] The experience in those areas warns that it is simply not a valid blanket objection to punishing the serious abuse of an intimate partner to state that angry wives and lovers could gain traction in their private disputes by abusing the criminal law. That said, such a risk is necessarily

347. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 65–66 (2008).

348. *See* WEISBERG & APPLETON, *supra* note 21, at 332.

349. *See generally* Richard S. Orton, *Date Rape: Critiquing the Critics*, 31 J. SEX RES. 148 (1994) (discussing critiques of date rape prosecutions).

uniquely high in the coercive control context, which seeks to punish conduct that is not necessarily violent and at least sometimes ineffable. This is, therefore, a real set of concerns any legislature should weigh and measure against the equally real physical, psychological, and economic harms the conduct causes its victims.

Another extremely important objection to criminalizing coercive control relates less to its potentially unfair effect on defendants and more to its potentially harmful effect on victims. Some feminist scholars suggest that the effort to affix the label of criminality to sexual and interpersonal encounters risks causing more and more women to *perceive* themselves as victims where they would not otherwise have done so had the law not intervened.[350] For example, Professor Aya Gruber criticizes the feminist critique of so-called "rape culture" for formalizing a "trauma narrative" of rape in the context of campus sex.[351] The trauma narrative is "rife with other risks, including bureaucratic management of students stripped of their subjectivity and speech restrictions" and "construes sexual assault complainants as devastated (or self-deluding) and female students as incapable of self-management."[352] In short, she fears, "anti-rape culture repackages feminist energy and female empowerment as sexual victimhood."[353]

It is very easy to see how this risk might be even greater in cases of nonviolent coercive control than in sexual assault, which at least necessarily involves a physical act. Legislatures would need to balance very carefully the risk of inscribing a narrative of official victimization on any person whose partner engages in unpleasant behavior against the risk of preventing the behavior at the point it crosses the line into abuse. It is worth noting, however, that because my proposed statute focuses on abuser misconduct rather than victim injury, it is less likely to impose dignitary costs on victims by overemphasizing victim narratives.

The most important objection to criminalizing coercive control is the argument against expanding criminal law in any way: it opens the door to overreaching and abuse in a way that would disproportionately affect communities that already experience the harms of excessive policing. The brutal shooting of twenty-six-year-old Louisville woman

350. *Id.* at 150.

351. Aya Gruber, *Anti-Rape Culture*, 64 KAN. L. REV. 1027, 1048–49 (2016).

352. *Id.* at 1048.

353. *Id.* at 1049.

Breonna Taylor by a police officer executing a misdirected search warrant in her apartment is only one recent high-profile example of the dangers of licensing police incursion into the home.[354] Indeed, a new body of literature argues against achieving feminist goals through criminalization, suggesting that exacerbating the punitiveness of the criminal law will, among other ill effects, disproportionately affect Black and other minority communities.[355] Particularly relevant to the heavily gendered case of domestic abuse, recent cultural commentary argues that the trope of violated femininity has, throughout history, been a weapon to justify police violence against Black men.[356] Indeed, many domestic violence activists fear that criminalizing coercive control would exacerbate domestic violence because "[t]he legal system is not something people always view as helpful to them, and that can be related to an individual's class and race and ethnicity and immigration status."[357] The counterpoint to some of these concerns is that the harms of domestic violence are, themselves, disproportionately felt by women of color.[358] Regardless of the identities of the victims or the perpetrators, the project of criminalizing coercive control should not occur in a vacuum, but only against a backdrop of police reform geared toward eliminating structural racism

354. *See* Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What We Know About Breonna Taylor's Case and Death*, N.Y. TIMES (Oct. 2, 2020), https://nyti.ms/3ez7ODt [https://perma.cc/6VQG-46DQ].

355. *See, e.g.*, FRANCINE BANNER, CROWDSOURCING THE LAW: TRYING SEXUAL ASSAULT ON SOCIAL MEDIA 184 (2019); AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 7–14 (2020).

356. Charles M. Blow, *How White Women Use Themselves as Instruments of Terror*, N.Y. TIMES (May 27, 2020), https://nyti.ms/2XEyvzJ [https://perma.cc/5VY20QN8D] (situating the case of Amy Cooper, who told a Black man who had asked her to leash her dog that she was going to call the police and tell them he was threatening her, in the historical context of rape as a justification for lynching).

357. Nora Mabie, *Coercive Control: It's a Legal Term but Should It Be Criminalized?*, SOC. JUST. NEWS NEXUS (June 12, 2019, 2:49 PM), https://sjnnchicago.medill.northwestern.edu/blog/2019/06/12/coercive-control-its-a-legal-term-but-should-it-be-criminalized [https://perma.cc/7D6F-GZZ2].

358. MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, NAT'L CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 40 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/D8RB-9XKM] (reporting that non-Hispanic Black and Native American/Alaska Native women reported higher prevalence rates of lifetime interpersonal violence (43.7 percent and 46 percent, respectively) compared to non-Hispanic White women (34.6 percent) and that the rate for Hispanic women was slightly higher than for non-Hispanic White women (37.1 percent)).

in police decisionmaking around use of force. Even beyond the problems of structural racism, police departments should receive training—as their counterparts in the United Kingdom have begun to[359]—on de-escalation in the unique context of domestic violence. Some promising examples already exist in the United States. Police departments in Dallas and Houston have begun to deploy social workers with police officers on certain calls.[360] Camden, New Jersey entirely reconstructed its police department along the principle that an officer should no longer be the "arbitrary decider of what's right and wrong," but "a facilitator and a convener."[361]

Finally, legislatures would need to think about how the creation of a domestic fraud-based coercive control offense would interact with the affirmative defense of provocation. After all, the legal context of the Sally Challen case, currently so important to the recent state of the United Kingdom's legal discourse on the subject, related to whether the *victim* of coercive control should have some sort of duress defense that would bump the killing of her controller down to manslaughter from murder. If coercive control itself became a criminal offense, would that qualify it as a source of "extreme mental or emotional disturbance for which there is reasonable explanation or excuse"?[362] The provocation doctrine, particularly the Model Penal Code's broad formulation, has been criticized for intrinsic sexism, to the extent that it appears to partially excuse the rage-based killings often associated with male violence.[363] Should the law come to recognize coercive control as a basis for provocation, it would seem to restore some symmetry to that beleaguered doctrine, though perhaps at the risk of encouraging violent self-help. These questions provide new directions for future research.

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359. *Updated Training Improves Police Understanding of Coercive Control*, COLL. POLICING, https://www.college.police.uk/News/archive/september_2017/Pages/Updated_training_improves_police_understanding_of_coercive_control.aspx [https://perma.cc/24Q6-F2MG].

360. Julian Gill & Hannah Dellinger, *'The Wave of the Future': How Police and Social Workers Team Up To Help Those in Crisis*, HOUS. CHRONICLE (July 9, 2020), https://www.houstonchronicle.com/news/houston-texas/houston/article/Social-workers-partner-with-Houston-police-for-15397543.php [https://perma.cc/ED84-WGG6]; Lucas Manfield, *Dallas Has Been Dispatching Social Workers to Some 911 Calls. It's Working*, DALL. OBSERVER (Dec. 10, 2019, 4:00 AM), https://www.dallasobserver.com/news/dallas-has-been-dispatching-social-workers-to-some-911-calls-its-working-11810019 [https://perma.cc/3CGD-GG2C].

361. Katherine Landergan, *The City That Really Did Abolish the Police*, POLITICO (June 12, 2020, 4:30 AM), https://politi.co/3hmWRY7 [https://perma.cc/65W2-KANU].

362. *See* MODEL PENAL CODE § 210.3(1)(b) (AM. L. INST. 1985).

363. *See, e.g.*, Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1335 (1997).

CONCLUSION

This Article has advanced two claims, one explicit and one implicit. At the blackletter level, it has presented a model for thinking about coercive control using the doctrinal tools of criminal fraud and other offenses. The statutory solution proposed here is far from perfect, in part because any attempt to criminalize harmful conduct as wide-ranging and open to prosecutorial interpretation as coercive control is going to sit in tension with the basic rule of law. However, the proposed model statute has the advantage of harmony with other long-standing legal doctrines, as opposed to creating a brand-new, open-ended crime from whole cloth. This is particularly important as other "newer" statutory offenses, such as emotional child or elder abuse, stalking, and cyberbullying, continue to face due process objections, in addition to enforcement challenges.

As a few states have begun to show interest in criminalizing coercive control, this exercise also demonstrates that legal reformers who seek to use society's increased understanding of the sociological reality of gender-based harm may be better served not to create specialized offenses to address it. Although the criminal law may be a blunt tool for dealing with such complex problems as coercive control, using existing doctrines not only assures constitutionality—it prevents public perception of the offense as something less than a true crime. Conversely, a legal system that already punishes harmful immoral coercion in commercial settings through offenses like fraud would be more internally consistent if it accounted for equally harmful coercion in domestic settings. Integrating these bodies of law strengthens the legal foundations of both.