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Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence

Claire Wright*

I. INTRODUCTION

The most potent weapon in the hands of the oppressor is the mind of the oppressed.¹

Men are taught to apologize for their weaknesses. Women for their strengths.²

Fourteen-year-old Josh stared mindlessly at his computer screen, unsure of how to respond to his father's latest angry rant. He had sent his father an email the night before, asking if they could postpone their weekend camping trip. Josh wanted to attend his friend's birthday party and get a good night's sleep in a proper bed before his upcoming final exams. To put it mildly, his father had not responded well to Josh's

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1. Alistair Boddy-Evans, *Quotes: Stephen (Steve) Bantu Biko*, ABOUT.COM, http://africanhistory.about.com/od/bikosteve/p/qts_biko.htm (last visited Aug. 30, 2012); see also STEVE BIKO & AELRED STUBBS, *I WRITE WHAT I LIKE*, 68, 92, 103–04 (Aelred Stubbs ed., 1978). Biko was an anti-apartheid activist in South Africa in the 1960s and 1970s. *Background Steve Biko: Martyr of the Anti-Apartheid Movement*, BBC NEWS (Dec. 8, 1997, 10:19 GMT), <http://news.bbc.co.uk/2/hi/africa/37448.stm>. In 1978, he was severely beaten and died while in police custody. *Id.* He was thirty years old. *Id.*

2. This quotation has often been attributed to Lois Wyse (see e.g., VALERIE YOUNG, *THE SECRET THOUGHTS OF SUCCESSFUL WOMEN: WHY CAPABLE PEOPLE SUFFER FROM THE IMPOSTER SYNDROME AND HOW TO THRIVE IN SPITE OF IT* 63 (Crown Business 2011); CONNER BROWN GLASER & BARBARA STEINBERG SMALLEY, *MORE POWER TO YOU: HOW WOMEN CAN COMMUNICATE* 7 (Warner Books 1995); KAREN WEEKS, *WOMEN KNOW EVERYTHING!* 181 (Quirk Books 2011); ALICE D. LAVIOLETTE & OLA W. BARNETT, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 15 (Sage Publications, Inc. 2d ed. 2000). Wyse was the president of one of the largest advertising companies in the world, and she was the author of more than sixty-five books. Claudia H. Deutsch, *Lois Wyse, Ad Wordsmith and Prolific Author, Dies at 80*, N.Y. TIMES, July 7, 2007, available at <http://www.nytimes.com/2007/07/07/business/07wyse.html>. For thirteen years, she also wrote a column about her life and family for the magazine *Good Housekeeping* entitled *The Way We Are*. *Id.* She died in 2007 at the age of eighty. *Id.*

request. He had demanded that Josh keep their “camping date” and called Josh “selfish,” “lazy,” (presumably, he thought Josh did not like to hike or “rough it” in the wild), “a mama’s boy,” and a number of other demeaning names and put-downs. The truth was that Josh liked camping and hiking and desperately wanted to have a good relationship with his father. At the same time, he knew from his fourteen years of experience with his father that the only way to get along with him was to agree with him 100 percent of the time. Ironically, though his father had called him a “wimp” in his reply message, Josh felt like a wimp only when he gave in to his father’s demands. He knew that his resistance was futile. As he felt a nauseating combination of frustration, depression, and fear of failure, Josh typed “ok” and hit the send button.

On Friday afternoon, Josh’s father surprised him by picking him up directly at school. Josh pleaded with his father to drive by his mother’s house so he could pick up some study materials that he had planned to review that weekend, but his father glared at him and asked, “You’re not going to start that up again, are you?” Josh did not even know what “that” was, but he knew better than to ask for clarification. When they arrived at their campsite, Josh’s father instructed Josh to set up the tent, and then set off to find a “nice, long hike” for them to take the next day. Josh tried to set up the tent but could not find any directions, and various pieces of equipment appeared to be missing. He sat down at a picnic table next to his father’s van and waited for him to return to their campsite.

When Josh’s father returned, he started shouting at Josh at the top of his lungs, accusing him of being lazy and disrespectful. Josh was terribly embarrassed as a number of neighboring campers heard the commotion and looked over at them. Josh’s father then said that Josh must be “brain-dead” because he had not realized that the broom they had brought with them in the back of the van actually served as the tent’s center pole. He then handed Josh the broom and instructed him to hold it over his head in a horizontal position and take ten laps around the long circular driveway of the campground, saying this run would help Josh remember how to assemble the tent in the future. As Josh was a member of the junior varsity football team at his school, the run did not take a big toll on him physically. The shame he felt as he passed other campers on his run, however, was excruciating.

After two long, mostly silent days of hiking, Josh and his father sat down to have their last meal before they drove back home. While eating, they noticed that the family at the campsite next door was packing up to return home as well. The father said he was going to fill their van with gas and would return in half an hour to an hour, and then the mother and two girls left the campsite for several minutes. After ensuring there were no witnesses, Josh’s father instructed Josh to grab the family’s big cooler and radio that were sitting on the nearby picnic table. Without thinking, Josh

said, “Dad, that’s really crazy.” His dad towered over him and, in a low, threatening voice, said that if Josh knew what was good for him, he would do exactly as he was told or he would find himself walking all the way back home. With great trepidation, Josh went over to their neighbor’s campsite, placed the radio on top of the cooler, and carried both back to his and his father’s campsite.

Just as he was heading back, the father of the family next door pulled up in their van and asked Josh what he was doing. Josh looked over to his father for guidance as to what to say, and his father then apologized profusely to this man and explained that he had been having a lot of trouble with Josh lately. He said Josh had probably intended to steal the items, if only for a prank. In fact, Josh’s father remarked to the neighbor, “You probably even heard me discipline him on Friday night.” The man nodded sympathetically, looked Josh straight in the eye, and said, “Now you listen to me, son—I’m going to do your dad a big favor and not call the cops. But you’d better start respecting other people, including your father. Your life is just going to keep going straight downhill until you can be honest and admit that *you’re* the real problem.”

As unpleasant as Josh’s life is, he nonetheless possesses a number of advantages over most abused children and adolescents in this country.³ To begin with, on some level, he understands that his father is abusing him. In addition, he is old enough to testify in his parents’ child custody dispute.⁴ Perhaps he even lives in one of the approximately twenty-five states that recognizes a rebuttable presumption against granting sole or joint custody to a parent who has perpetrated domestic violence in the recent past.⁵ It is possible that his father’s email communications can be admitted as evidence of his father’s mental abuse in his parents’ custody proceeding.⁶ As indicated, most minors who are being abused by a parent or other

3. Josh and the above-described scenario with his father are fictional, but unfortunately, the types of abuse revealed in this vignette occur on a daily basis to many children in the U.S. See *Assessing the Effects of Domestic Violence on Children*, HELIUM.COM, <http://www.helium.com/knowledge/73119-assessing-the-effects-of-domestic-violence-on-children> (last visited Aug. 30, 2012).

4. In a custody proceeding in California, the court must permit a child fourteen years or older to testify in a custody proceeding if she or he desires, unless the court determines that doing so is not in the child’s best interests, and in that case the court must explain that finding on the record. CAL. FAM. CODE § 3042(c) (West 2012). In addition, a child who is less than fourteen years of age may testify in a custody proceeding, if the court determines that permitting the child is in the child’s best interests. Cal. Fam. Code § 3042(d) (West 2012). Moreover, whenever any child is precluded from testifying, the court must provide an alternative means of obtaining input from the child regarding his or her preferences. CAL. FAM. CODE § 3042(e) (West 2012).

5. See ABACDV, *infra* note 351.

6. PETER JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 17 (“Domestic violence victims . . . [m]any times . . . cannot supply the evidence to support their claim. Even when they do, judges and lawyers may not find it relevant to determining issues related to custody and visitation . . .”).

guardian are not so lucky. Many such minors are too young to testify in a custody proceeding, and some of them may not even understand that they are being abused. Additionally, many minors are likely to live in a state that either: 1) does not respect a rebuttable presumption against granting joint custody to a parent who has committed domestic violence or 2) does respect such a rebuttable presumption but likewise recognizes a rebuttable presumption in favor of granting joint custody to both parents so that these two presumptions counter each other.⁷ At the same time, even an adolescent in a state such as California faces a formidable challenge in convincing a judge or custody mediator that custody should be denied to a parent who has been verbally or emotionally abusive. To begin with, mental abuse is notoriously difficult to prove, given that it not only typically occurs in private, but it also does not leave telltale scars that other witnesses may see.⁸ Even more importantly, though, the definition of domestic violence utilized by the overwhelming majority of states does not encompass mental abuse (other than mental abuse caused by an abuser's threat of future physical harm or sexual assault, refusal to refrain from contact with the victim, or invasion of the victim's privacy).⁹ As a result, even if Josh lives in a state that recognizes a rebuttable presumption against granting sole or joint custody to a parent who has committed domestic violence, a custody court today likely would order Josh to spend significant time alone with his father in a post-separation custody arrangement.¹⁰

7. See ABACDV, *infra* note 351.

8. George L. Jantz et al., HEALING THE SCARS OF EMOTIONAL ABUSE 11 (Revell rev. ed. 1995) ("The signs of emotional abuse . . . are easier to overlook. There is no scar tissue to stretch, no bruises to yellow and heal, no gaping wound to point to."); Catharine Dowda, INVISIBLE SCARS: HOW TO STOP, CHANGE OR END PSYCHOLOGICAL ABUSE 7 (New Horizon Press 2009) ("We are the walking wounded, but you can't see that by looking at us. The damage is not physical. You will not see bruises, cuts, breaks or marks. We hurt from the psychological impairment of abusive words, actions, thoughts and deeds. We seek to heal our wounds and form strong, healthy invisible scars."); see also Anna Marie Bowman, *What is Child Abuse and How to Spot It*, HUBPAGES (Aug. 28, 2012), <http://anna-marie-bowman.hubpages.com/hub/What-is-Child-Abuse-and-How-to-Spot-it> ("Emotional abuse is by far the hardest to recognize, the most socially accepted, and the most difficult to prove. . . . The signs manifest in behavior."); Peter Allen, *Shouting at Your Wife May Get You a Criminal Record in France*, MAILONLINE, Jan. 6, 2010, <http://www.dailymail.co.uk/news/worldnews/article-1240770/France-introduce-new-law-banning-psychological-violence-marriages.html> (explaining that since psychological abuse leaves no visible scars, "[m]any believe the offence [of psychological abuse in an intimate relationship] will be impossible to prove," and indicating that the police and courts will not be able to distinguish "rudeness" from "psychological abuse").

9. See *infra* Section VI (Definitions of Domestic Violence Utilized in the Fifty States); ABACDV, *infra* note 351.

10. Billie Lee Dunford-Jackson, *The Role of Family Courts in Domestic Violence: The U.S. Experience*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR INTERVENTION 191 (Peter G. Jaffe et al., eds., Guilford Press, 2004) ("The more recent rebuttable presumption statutes tend to be more specific about what level of domestic violence must occur to trigger the effects of the statute [A]t the same time, they offer

This article utilizes a psychological or behavioral perspective to analyze the domestic violence laws in this country and it concludes that, at the very least, states should amend their child custody laws to include “mental abuse,” a term which is used in this article to refer to verbal, emotional, and psychological abuse, each of which is discussed further below. Section II of this article explains the behavioral approach to law, while Section III provides background information regarding the phenomenon of domestic violence. Section IV discusses the major theories of domestic violence that have been proposed to date. Section V explains the psychological theory of domestic violence, which strongly suggests that the legal system should implement more effective deterrents and sanctions for the mental abuse of one family member by another, especially when the victim is a child. Section VI discusses the domestic violence laws in effect in the U.S. states, paying particular attention to how states’ child custody laws treat domestic violence in general and mental abuse in particular. Section VII addresses possible constitutional objections to states’ inclusion of mental abuse in their definitions of domestic violence. Section VIII reviews legal prohibitions against other forms of abuse of power, including bullying, hazing, torture, and other cruel, inhumane, or degrading treatment or punishment. Section IX sets forth a definition of domestic violence that incorporates mental abuse. Finally, Section X concludes by proposing that states adopt a new, psychologically-sound definition of domestic violence that encompasses all forms of mental abuse, at least for use in child custody proceedings.

II. BEHAVIORAL APPROACH TO THE LAW

Psychological issues have influenced U.S. jurisprudence for hundreds of years.¹¹ This is a natural enough state of affairs, given that the primary role of law is to regulate human behavior,¹² and the word “psychology” means “the science of mind and behavior.”¹³ In the 1970s, however,

no relief in cases where the abusive parent uses tactics of power and control that may be equally harmful but that do not meet the statutory requirement to trigger the presumption.”).

11. See, e.g., ROBERT G. MEYER & CHRISTOPHER M. WEAVER, *LAW AND MENTAL HEALTH: A CASE-BASED APPROACH* 116 (2005) (“Like much of our legal tradition, the ruling of *McNaughton* was derived from English law. As early as the 1500s, English common law had recognized that ‘lunatics and idiots’ whose mentality approached that of a ‘wild beast’ could not be held accountable for otherwise illegal conduct.”).

12. Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 412 (2005) (“[O]ne can make a strong case that all law exists to effect changes in human behavior[.]”).

13. *Psychology Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/psychology> (last visited Aug. 30, 2012); see also American Psychological Association: Support Center, *How Does the APA Define Psychology*, AMERICAN PSYCHOLOGY ASSOCIATION, <http://www.apa.org/support/about/apa/psychology.aspx#answer> (last visited Sept. 16, 2012) (defining psychology as “the study of the mind and behavior” and elaborating that “[t]he discipline embraces all aspects of the of the human experience—from the functions of the brain to the actions of nations, from child development to care for

recognition of the new interdisciplinary field of “psychology and the law,” which has been described as “involv[ing] the application of scientific and professional aspects of psychology to questions and issues relating to law,”¹⁴ began.¹⁵ The Corsini Encyclopedia of Psychology and Behavioral Science explains that this new field of study is intended to increase “the administration of justice in our society.”¹⁶ In this respect, the behavioral approach to law can be viewed as a sub-set of both critical legal theory¹⁷ and “law and society” legal theory.¹⁸

Behavioral theory was largely responsible for the American Law Institute's (ALI) Model Penal Code which relaxed the two-part insanity test set forth in the case of *Queen v. M'Naghten*.¹⁹ That test provides that a defendant was insane, if “at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.”²⁰ The Model Penal Code states that a person lacks the capacity to commit a proscribed act either when he or she cannot understand that the act is prohibited, or, despite his

the aged. In every conceivable setting from scientific research centers to mental health services, ‘the understanding of behavior’ is the enterprise of psychologists.”); DENNIS COON & JOHN O. MITTERER, INTRODUCTION TO PSYCHOLOGY: GATEWAYS TO MIND AND BEHAVIOR 12 (2007) (defining the discipline of psychology as “the scientific study of behavior and mental processes.”).

14. *Careers in Psychology and Law: Overview of Psychology and Law*, AMERICAN PSYCHOLOGY-LAW SOCIETY, <http://www.ap-ls.org/academics/careersoverview.html> (last visited Aug. 30, 2012).

15. *Id.* For a good summary of the development of the law and psychology movement, see James R.P. Ogloff et al., *Education and Training in Psychology and Law/Criminal Justice: Historical Foundations, Present Structures, and Future Developments*, 23 CRIM. JUST. AND BEHAV. 200, 203 (1996), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1012&context=publicpolicytomkins>.

16. *Forensic Psychology*, in THE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY AND BEHAVIORAL SCIENCE 590, 591 (W. Edward Craighead et al., eds., 3rd ed. 2001).

17. “Critical legal studies (CLS) is a theory that challenges and overturns accepted norms and standards in legal theory and practice. Proponents of this theory believe that logic and structure attributed to the law grow out of the power relationships of the society.” *Critical Legal Studies: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/critical_legal_theory (last visited Feb. 10, 2013). “Critical theory building in law has developed considerably during the past two decades and . . . for applications in law and psychiatry . . .” B.A. ARRIGO, PUNISHING THE MENTALLY ILL: A CRITICAL ANALYSIS OF LAW AND PSYCHIATRY 153 (2002) (internal citations omitted).

18. The “law and society” philosophy of law, stated most generally, holds that “[l]aw is a mirror of society that functions to maintain social order.” Brian Z. Tamanaha, *Law and Society*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 368, 368 (Dennis Patterson, ed., 2d ed. 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345204.

19. *Queen v. M'Naghten*, 8 Eng. Rep. 718 (H.L. 1843) available at <http://www.bailii.org/cgibin/markup?doc=/uk/cases/UKHL/1843/J16.html&query=Queen+and+v.+and+M'Naghten&method=boolean>.

20. *Id.* at 722. A good history of the *Queen v. M'Naghten* case and the U.S. Government's adoption of the insanity test set forth in *M'Naghten* can be found in DAVID C. BRODY ET AL., CRIMINAL LAW 162 (2d ed. 2011).

or her understanding of the proscription, nonetheless is incapable of conforming his or her conduct to it.²¹ The ALI explained that “[t]he law must recognize that when there is no black and white it must content itself with different shades of gray.”²² Most states have since incorporated the ALI’s Model Penal Code provision on the diminished capacity defense into their criminal codes.²³ In addition, the law and psychology movement has successfully advocated for recognition of mentally disabled people’s legal rights.²⁴ Furthermore, legal scholars and psychologists have been instrumental in demonstrating the general unreliability of eyewitness testimony,²⁵ and numerous DNA exonerations of innocent individuals have confirmed that many eyewitness identifications are flawed.²⁶ Some scholars have even proposed a new Model Penal Code that would require the exclusion of eyewitness testimony in any criminal prosecution in which police personnel failed to follow a strict set of procedures.²⁷ Practicing lawyers and legal scholars have in fact utilized tenets of psychology (as well as neuroscience, the study of “how nervous systems [including the brain] are organized, and how they function to generate behavior”²⁸) to benefit society in numerous additional ways. For example, they have assisted in the formation of litigation settlement strategies,²⁹ supported the

21. MODEL PENAL CODE § 4.01 (1) (2011) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”).

22. *People v. Drew*, 22 Cal.3d 333, 342 (1978), *superseded by statute as stated in People v. Skinner* 39 Cal.3d 765, 768–69 (1985) (citing *United States v. Freeman*, 357 F.2d 606, 618–19 (2d Cir. 1966)(quoting ALI, MODEL PEN. CODE (Tent. Drafts, Nos. 1, 2, 3, and 4, p. 158.)).

23. Michele Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 B.U. PUB. INT. L. J. 1, 12 (2005).

24. *See generally* MICHAEL L. PERLIN, *INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD* 1–19 (Oxford University Press 2012); PETER BARLETT ET AL., *MENTAL DISABILITY AND THE CONVENTION ON HUMAN RIGHTS* 254 (2006) (“Only in the last few decades has mental disability law has [sic] come into its own as a field of international human rights law. The United Nations Principles for the Protection of Persons with Mental Illness, promulgated at the end of 1991, was the first major international instrument to articulate these rights in any detail.”).

25. *See, e.g.*, Laura Engelhardt, *The Problem with Eyewitness Testimony: Commentary on a Talk by George Fisher and Barbara Tversky*, 1 STAN. J. OF LEGAL STUD. 25, 26 (1999).

26. *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Feb. 10, 2013) (“Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in nearly 75% of convictions overturned through DNA testing.”).

27. Michael J. Saks et al., *Toward a Model Act for the Prevention of Erroneous Convictions*, 35 NEW ENG. L. REV. 669, 672–74 (2001).

28. NEUROSCIENCE 1 (Dale Purves et al., eds., 4th ed. 2007).

29. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEXAS L. REV. 77, 84, n.35 (1997) (in part discussing, and in turn quoting ROBERT H. MNOOKIN & LEE ROSS, *INTRODUCTION TO BARRIERS TO CONFLICT RESOLUTION* 3, 10–19 (Kenneth J. Arrow et al., eds., 1995) to the effect that

creation of alternative dispute mechanisms for emotionally charged legal disputes such as contested child custody proceedings,³⁰ and successfully promoted the legal system's recognition of the disease model over the moral deficiency model of addictions.³¹ Domestic violence unquestionably constitutes aberrant human behavior, consisting, as it does, of a person somehow injuring one of his or her supposed "loved ones." Therefore, utilization of a behavioral perspective to analyze the available legal remedies and sanctions available for domestic violence victims is particularly apt.

III. BACKGROUND INFORMATION REGARDING DOMESTIC VIOLENCE

In the twenty-first century, domestic violence continues to be one of the most misunderstood crimes. Although commentators generally agree that the financial cost of domestic violence is too high,³² confusion and debate abound regarding many other aspects of domestic violence. For example, its definition, incidence, gender symmetry, and cause(s) are all highly controversial. Each of these issues is discussed below.

A. TYPES OF DOMESTIC VIOLENCE

The term "domestic violence" is a creation of the state legislatures. In the 1970s, states began to adopt statutes addressing "spousal abuse."³³ After it became clear that persons other than spouses or former intimate partners could be subjected to violence in relationships as well, states began to adopt statutes specifically dedicated to the various forms of violence that can occur in the context of domestic relationships.³⁴ These statutes often use the terms "domestic violence" and "domestic abuse" interchangeably,³⁵ and, given the variation among states regarding legally

certain "cognitive and motivational processes . . . [can] cause the rejection of agreements which 'seemingly meet the requirements of rational self-interest.'")

30. Ludwig F. Lowenstein, *The Value of Mediation in Child Custody Disputes (Recent Research 1996–2001)*, 166 JUSTICE OF THE PEACE 739, 739 (2000) (reporting that research strongly supports the increased use of mediation in child custody disputes).

31. See, e.g., Robert G. Meyer & Christopher M. Weaver, LAW AND MENTAL HEALTH: A CASE-BASED APPROACH 207–12 (2005) (discussing the U.S. Supreme Court's adoption of the disease model of addictions in the case of *Robinson v. California*, 370 U.S. 660 (1962).)

32. See *infra* Section III.B (Costs of Domestic Violence).

33. EVA S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 8–9, 89, 109–10 (3rd ed. 2003) [hereinafter BUZAWA]; see also Jennifer Thompson, Comment, *Who's Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialised Domestic Violence Court Programs*, 56 ME. L. REV. 407, 417–18 (2004).

34. BUZAWA, *supra* note 33, at 111.

35. Cf. ARK. CODE ANN. § 9-15-103 (2010) (LexisNexis) (defining "domestic abuse" in Arkansas' Domestic Abuse Act of 1991) and ARK. CODE ANN. § 12-9-113 (2012) (LexisNexis) (entitled "Domestic violence training" requiring all new law enforcement officers in Arkansas to complete at least twenty hours of training in "domestic violence" and

recognized domestic relationships and crime definitions, these statutes tend to define “domestic abuse” or “domestic violence” very generally as “abuse” or “violence” (i.e., a specifically proscribed act) inflicted by one member of a defined “domestic relationship” against another, and then further define “abuse” and “domestic relationship” in separate statutory provisions.³⁶

The American Psychological Association’s (APA) Presidential Task Force on Violence and the Family “defined family violence and abuse as including a range of physical, sexual, and emotional maltreatment by one family member against another[.]”³⁷ and clarified that “the term family includes a variety of relationships beyond those of blood or marriage, in recognition that similar dynamics of abuse may occur in these relationships.”³⁸ Numerous domestic violence experts and government agencies are in accord with the APA’s general statement regarding domestic violence.³⁹ For example, psychologist and domestic violence expert Daniel Sonkin states that “most advocates and professionals agree that violence manifests in three general forms, physical, sexual and psychological”⁴⁰ Similarly, the Office of Violence on Women (OVW), a U.S. Department of Justice agency, has stated that “[d]omestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person.”⁴¹ The OVW has also clarified that such psychological actions can include destruction of pets or personal property as well as forced isolation of the victim.⁴² The U.N. Declaration on the Elimination of Violence Against Women likewise

twenty hours of training in “child abuse,” and specifying that some of the topics covered will be “[t]he dynamics of domestic abuse[.]” “The Domestic Abuse Act of 1991[.]” and “[d]omestic abuse victim interview techniques[.]”.

36. See, e.g., CAL. FAM. CODE §§ 6203, 6211 (West 2012).

37. VIOLENCE AND THE FAMILY: REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY – EXECUTIVE SUMMARY, AMERICAN PSYCHOLOGICAL ASSOCIATION 1 (1996), available at <http://www.apa.org/pi/pii/pubsonviolence.html> (last accessed Feb. 2, 2012). “The American Psychological Association’s Presidential Task Force on Violence and the Family was convened to bring psychological research and clinical experience to bear on the troubling problem of violence in the family and to make recommendations for solutions.” *Id.*

38. *Id.*

39. Joseph S. Volpe, *Effects of Domestic Violence on Children and Adolescents: An Overview*, THE AM. ACAD. OF EXPERTS IN TRAUMATIC STRESS, INC., <http://www.aaets.org/article8.htm> (last visited Feb. 10, 2013); DIANE ELMORE, AM. PSYCHOLOGICAL ASS’N PUB. INTEREST GOV’T RELATIONS OFFICE, VIOLENCE AGAINST WOMEN, available at <http://www.apa.org/about/gr/issues/women/violence.pdf> (last visited Feb. 10, 2013).

40. Daniel Jay Sonkin, *Defining Psychological Maltreatment in Domestic Violence Perpetrator Treatment Programs: Multiple Perspectives*, www.danielsonkin.com/PsychAb.html (last visited Aug. 30, 2012) [hereinafter Sonkin, *Defining Psychological Maltreatment*].

41. *What is Domestic Violence?*, OFFICE OF VIOLENCE ON WOMEN, U.S. DEP’T OF JUST., <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Aug. 30, 2012).

42. *Id.*

defines "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."⁴³ Each of these types of abuse (physical, sexual, emotional, psychological, and economic) is discussed further below.

According to Sonkin, "there is fairly consistent agreement as to what behaviors are included in the physical violence category. These acts would include a range from the less lethal acts of grabbing and pushing to the more lethal acts of choking, punching and assaults with weapons."⁴⁴ The Fourth National Incidence Study (NIS-4) on child abuse mandated by the U.S. Congress similarly defines physical abuse of a child as "a form of maltreatment in which an injury is inflicted on the child by a caregiver via various nonaccidental means, including hitting with a hand, stick, strap, or other object; punching; kicking; shaking; throwing; burning; stabbing; or choking to the extent that demonstrable harm results."⁴⁵ A 2008 report synthesizing one hundred years of social science research and many hundreds of published studies concluded "that physical punishment puts children at risk for negative outcomes, including increased mental health problems,"⁴⁶ although forty-nine states clearly permit some forms of corporal punishment of a child by the child's parent or other caretaker within the child's home.⁴⁷

Psychologists generally define "sexual abuse" as "any non-consensual sexual activity."⁴⁸ As non-consensual sexual contact between spouses has

43. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, ¶ 14, U.N. Doc. A/RES/48/104 (Dec. 20, 1993), available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

44. See, e.g., Sonkin, *Defining Psychological Maltreatment*, *supra* note 40. A more complete list of examples of physical violence compiled by Sonkin include slapping, drowning, grabbing, hair-pulling, punching, arm-twisting, pushing, hanging by neck, arms, or feet, kicking, handcuffing, kneeing, tying up with rope, choking, clawing or scratching, pushing to ground, threatening with gun or knife, biting, using knife or gun, threatening with object, burning, using object, spitting, and breaking or throwing objects. Daniel Sonkin, *What is Violence?*, in DANIEL JAY SONKIN, A COUNSELOR'S GUIDE TO LEARNING TO LIVE WITHOUT VIOLENCE (1995), available at <http://www.danielsonkin.com/articles/Ch2.html> (last visited Sept. 16, 2012).

45. Angelo P. Giardino & Eileen Giardino, *Physical Abuse*, MEDSCAPE REFERENCE, <http://emedicine.medscape.com/article/915664-print> (last updated Feb. 2, 2012) (citing AJ SEDLAK ET AL., U.S. DEP'T OF HEALTH AND HUMAN SERV., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (2006)).

46. ELIZABETH T. GERSHOFF, CENTER FOR EFFECTIVE DISCIPLINE, REPORT ON PHYSICAL PUNISHMENT IN THE UNITED STATES: WHAT RESEARCH TELLS US ABOUT ITS EFFECTS ON CHILDREN 7 (2008), available at http://www.phoenixchildrens.com/PDFs/principles_and_practices-of_effective_discipline.pdf (last visited Sept. 27, 2012).

47. *Id.* at 20.

48. See, e.g., Sonkin, *Defining Psychological Maltreatment*, *supra* note 40.

been considered a crime in all fifty states since 1993,⁴⁹ state domestic violence statutes tend to include sexual assault in their definition of domestic violence.⁵⁰

Most psychologists and other domestic violence experts actually use the terms “emotional abuse” and “psychological abuse” interchangeably,⁵¹ but those who do not tend to use the former to refer to conduct that threatens to impair a victim’s ability to access and express his or her emotions, and the latter to refer to conduct that threatens to impair a victim’s entire mental faculties.⁵² For example, one psychologist who insists that emotional abuse and psychological abuse are distinct phenomena defines emotional abuse of a child as “the sustained, repetitive, inappropriate emotional response to the child’s experience of emotion and its accompanying expressive behavior,”⁵³ and psychological abuse of a child as “sustained, inappropriate behaviour which damages, or substantially reduces, the creative and developmental potential of crucially important mental faculties and mental processes of a child . . . [including] intelligence, memory, recognition, perception, attention, language and moral development.”⁵⁴

Psychologists have articulated psychological and/or emotional abuse in a number of different ways.⁵⁵ For example, the Concise Dictionary of Modern Medicine (specifically in the section dedicated to pediatrics) defines emotional abuse as “[t]he infliction of . . . coercive, demeaning, or overly distant behavior by a parent or other caretaker that interferes with a child’s normal social or psychological development.”⁵⁶ Similarly, it defines psychological abuse as “[a] form of mistreatment in which there is

49. Jennifer A. Bennice & Patricia A. Resick, *Marital Rape: History, Research, and Practice*, 4 TRAUMA, VIOLENCE & ABUSE 228, 231 (July 2003).

50. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH AND HUMAN SERV., DEFINITIONS OF DOMESTIC VIOLENCE: SUMMARY OF STATE LAWS 3 (Feb. 2011), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/defdomvio.pdf. Some states, however, include physical force as an element of sexual assault (other than statutory rape), and as “many battered women consent to sexual activity for fear of escalating physical and psychological violence . . . [,] the behavior itself (sexual intercourse, for example) may not be sufficient to [establish sexual abuse or violence in the case of intimate partners].” Sonkin, *Defining Psychological Maltreatment*, *supra* note 40.

51. See, e.g., Kieran O’Hagan, *Emotional and Psychological Abuse: Problems of Definition*, 19 CHILD ABUSE & NEGLECT: THE INT’L J. 449, 449 (Apr. 1995); see generally MARY SUSAN MILLER, NO VISIBLE WOUNDS: IDENTIFYING NON-PHYSICAL ABUSE OF WOMEN BY THEIR MEN (1996).

52. See, e.g., KIERAN O’HAGAN, EMOTIONAL AND PSYCHOLOGICAL ABUSE OF CHILDREN 28, 33–34 (1993).

53. *Id.* at 28.

54. *Id.* at 33–34.

55. See, e.g., VERA E. MOURADIAN, NAT. VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CTR, ABUSE IN INTIMATE RELATIONSHIPS: DEFINING THE MULTIPLE DIMENSIONS AND TERMS (2000), available at <http://www.musc.edu/vawprevention/research/defining.shtml> [hereinafter MOURADIAN].

56. JOSEPH C. SEGEN, CONCISE DICTIONARY OF MODERN MEDICINE 217 (2002).

intent to cause mental or emotional pain or injury . . . [which] includes verbal aggression, statements intended to humiliate or infantilize, insults, threats of abandonment or institutionalization.”⁵⁷

The U.S. Department of Health and Human Services, in a 2003 report, stated that “[p]sychological maltreatment—also known as emotional abuse and neglect—refers to ‘a repeated pattern of . . . behavior or extreme incident(s) that convey[s] to [victims] that they are worthless, flawed, unloved, unwanted, endangered, or only of value in meeting another’s needs.”⁵⁸ Yet another definition of emotional abuse, offered by the psychologist Steve Hein, is “any kind of abuse that is emotional rather than physical in nature . . . [which] can include anything from verbal abuse and constant criticism to more subtle tactics, such as intimidation, manipulation, and refusal to ever be pleased.”⁵⁹ As indicated by these definitions, verbal abuse is simply a verbal manifestation of emotional and/or psychological abuse, and such verbal manifestations can include accusing, blaming, blocking and diverting, countering, constantly criticizing, discounting, insulting, judging, name-calling, ordering, trivializing, and threatening,⁶⁰ as well as swearing, attacking, demeaning, belittling, undermining, denying abuse, and humiliating the victim.⁶¹

In an effort to clarify psychological or emotional abuse and distinguish it from simple marital or family discord, numerous researchers and domestic violence experts have attempted to more specifically detail the characteristic features, and/or provide specific examples, of this type of abuse. The most widely used such measure is the Conflict Tactics Scale, which was proposed by sociologist and renowned domestic violence expert Murray Straus in 1979.⁶² This scale was intended to measure four types of psychological abuse: passive behaviors, hostile behaviors, threatening

57. SEGEN, *supra* note 56, at 549.

58. JILL GOLDMAN ET AL., U.S. DEP'T. OF HEALTH & HUMAN SERVS., OFFICE ON CHILD ABUSE AND NEGLECT, A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 19 (2003), *available at* <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundationc.cfm#backten>.

59. Steve Hein, *What is Emotional Abuse?*, EMOTIONAL ABUSE, <http://eqi.org/eabuse1.htm>.

60. PATRICIA EVANS, THE VERBALLY ABUSIVE RELATIONSHIP: HOW TO RECOGNIZE IT AND HOW TO RESPOND 81–105 (2003).

61. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40. *See also* Cpmcd2000, *Alec Baldwin to Daughter—“Thoughtless Little Pig . . .,”* YOUTUBE (Apr. 20, 2007), <http://www.youtube.com/watch?v=lgj6NEk9xEw>. In this author’s opinion, actor Alec Baldwin’s well-publicized voicemail message for his then-eleven-year-old daughter, calling her a ‘thoughtless little pig,’ is the kind of statement, which would constitute verbal abuse. ABALK2, *That Alec Baldwin Voicemail in Full*, GAWKER.COM (Apr. 20, 2007, 4:20 PM), <http://gawker.com/254061/that-alec-baldwin-voicemail-in-full>.

62. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40 (citing M. Straus, *Measuring Intrafamilial Conflict and Violence: The Conflict Tactics (CT) Scale*, 45 J. OF MARRIAGE AND FAM. 633 (1979)).

behaviors, and overt physical violence.⁶³ Specific acts provided as examples of such behaviors were:

- Insulted or swore at the other one[;]
- Sulking or refusing to talk to the one [sic][;]
- Stomped out of the room or house (or yard)[;]
- Did or said something to spite the other one[;]
- Threatening to hit or throw something at the other one[;]
- Threw or smashed or hit or kicked something[.]⁶⁴

The Conflict Tactics Scale has been criticized for failing to include a number of actions that domestic violence experts today consider psychological maltreatment, but as Sonkin notes, it was the first attempt to specifically define and measure this form of domestic violence and it encouraged others to provide even better tools.⁶⁵

On the “other end of the spectrum of tools designed to measure psychological or emotional abuse is that proposed by the Domestic Containment Program in Duluth, Minnesota, which is typically referred to as the “Duluth Model” of domestic violence.”⁶⁶ This model is based on the feminist theory of domestic violence, which is discussed further in the following section of this article, and which maintains that domestic violence stems from the paternalistic nature of U.S. society.⁶⁷ The well-known “power and control wheel” utilized in the Duluth Model of domestic violence includes eight types of psychological violence and provides non-exhaustive examples of each such type.⁶⁸ These eight categories of psychological violence are:

Using coercion and threats (making and/or carrying out threats to do something to hurt her, threatening to leave her, to commit suicide, or to report her to welfare, making her drop charges, making her do illegal things)[;]

Using economic power (preventing her from getting or keeping a job, making her ask for money, giving her an allowance, taking her money, not letting her know about or have access to family income)[;]

63. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See infra* text accompanying notes 230–32.

68. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40.

Using male privilege (treating her like a servant, making all the big decisions, acting like the master of the castle, being the one to define men and women's roles)[;]

Using children (making her feel guilty about the children, using the children to relay messages, using visitation to harass her, threatening to take away the children)[;]

Minimizing, denying, and blaming (making light of the abuse and not taking her concerns about it seriously, saying the abuse didn't happen, shifting responsibility for abusive behavior, saying she caused it)[;]

Using isolation (controlling what she does, who she sees and talks to, what she reads and where she goes, limiting her outside involvement, using jealousy to justify actions)[;]

Using emotional abuse (putting her down, making her feel bad about herself, calling her names, making her think she's crazy, playing mind games, humiliating her, making her feel guilty)[;]

Using intimidation (making her afraid by using looks, actions, gestures, smashing things, destroying her property, abusing pets, displaying weapons)[.]⁶⁹

Melanie Shepard and James Campbell since developed what they referred to as the "Abusive Behavior Inventory" based on the frequency of the above-listed abusive behaviors in a relationship during a six-month period.⁷⁰ They distinguished their Abusive Behavior Inventory from the Conflicts Tactics Scale on the basis that their Abusive Behavior Inventory is "not framed within the context of conflict, but rather abuse"⁷¹ and includes sexual abuse as well as additional types of psychological maltreatment not included in the Conflict Tactics Scale.⁷²

In between the "narrow" list of examples of psychological abuse provided by the Conflict Tactics Scale and the "broad" list of such examples provided by the Duluth Model and the Abusive Behavior Inventory, psychologists and other domestic violence experts have provided a number of other lists of examples of psychological and/or emotional abuse.⁷³ For example, such lists include the Amnesty International list of behaviors constituting psychological violence or terrorism, which psychologist Lenore Walker proposed be utilized in the

69. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40.

70. *Id.* (citing Melanie F. Shepard & James A. Campbell, *The Abusive Behavior Inventory: A Measure of Psychological and Physical Abuse*, 7 J. INTERPERS. VIOLENCE 291, 291-305 (1992)).

71. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40.

72. *Id.*

73. *Id.*

domestic violence context,⁷⁴ and the Psychological Violence Towards Women Inventory, which was developed by Richard Tolman in 1989.⁷⁵ The behaviors included in the Amnesty International list of behaviors constituting psychological violence or terrorism are:

Isolation of victim[.]

Induced debility-producing exhaustion[.]

Monopolization of perceptions, including obsessiveness and possessiveness[.]

Threats, such as death to self, victim, family or friends, or sham executions[.]

Degradation, including humiliation, denial of victim's power, and verbal name-calling[.]

Drug or alcohol administration[.]

Altered states of consciousness produced by a hypnotic state[.]

Occasional indulgences that keep hope alive that the abuse will cease[.]⁷⁶

The fifty-eight items included in Tolman's Psychological Violence Towards Women Inventory are similarly grouped into the following six categories:

Attacking her personhood, demeaning, belittling, undermining self-worth[.]

Defining her reality, getting her to question her own perceptions and judgments[.]

Controlling her contact with outside world and support systems[.]

Demanding subservience, complying with rigid sex-role expectations within the family[.]

Withholding positive reinforcers within the relationship[.]

Threatening nonphysical punishment for noncompliance with requests; status and emotional regulation[.]⁷⁷

74. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40 (citing L.E.A. WALKER, *ABUSED WOMEN AND SURVIVOR THEORY: A PRACTICAL GUIDE FOR THE PSYCHOTHERAPIST* (1994)).

75. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40 (citing R.M. Tolman, *The Development of a Measure of Psychological Maltreatment of Women by Their Male Partners*, 4 *VIOLENCE & VICTIMS* 159, 159–78 (1989)).

76. Sonkin, *Defining Psychological Maltreatment*, *supra* note 40 (also providing specific examples of these behaviors in the domestic violence context).

77. *Id.*

Whatever general definition of psychological or emotional abuse or examples that psychologists and other domestic violence experts have provided, they agree that such abuse is almost always perpetrated through a "series of acts" or a "course of conduct," rather than through a single event, which torments the victim with anxiety, depression, and self-doubt.⁷⁸ That is, a single communication, such as a derogatory remark made by one member in a domestic relationship to another (including a child) is not considered emotional or psychological abuse.⁷⁹ In addition, experts agree that communications between parties in a domestic relationship which serve a legitimate purpose (e.g., conversations regarding a subject of interest, disagreements between couples, and the delivery of disappointing or even hurtful news) do not constitute psychological or emotional abuse.⁸⁰

Economic abuse is generally defined as behavior that is intended to prevent the victim "possessing or maintaining any type of financial self-sufficiency or resources and enforcing material dependence of the victim

78. See, e.g., Adam M. Tomison & Joe Tucci, *Emotional Abuse: The Hidden Form of Maltreatment*, 8 ISSUES IN CHILD ABUSE PREVENTION, AUSTRALIAN INST. FAM. STUD., (1997), available at <http://www.aifs.gov.au/nch/pubs/issues/issues8/issues8.html> (stating that "[a] common feature of most definitions . . . is the basic tenet that isolated instances of inappropriate responses do not constitute emotional abuse for the purposes of intervention. Unlike physical and sexual abuse, where a single incident may be considered abusive, emotional abuse is characterised by a climate or pattern of behaviour(s) occurring over time. Thus, 'sustained' and 'repetitive' are the crucial components of any definition of emotional abuse."); see also Andrew Vacchs, *You Carry the Cure in Your Own Heart*, PARADE MAGAZINE, Aug. 28, 1995, available at http://www.vachss.com/av_dispatches/disp_9408_a.html (author, lawyer, and former sex crimes investigator defining emotional abuse as "the systematic diminishment of another. It may be intentional or subconscious (or both), but it is always a course of conduct, not a single event.").

79. See, e.g., Yvonne M. Vissing et al., *Verbal Aggression by Parents and Psychosocial Problems of Children*, 15 CHILD ABUSE & NEGLECT 223, 230 (1991) (stating that "occasional verbal aggression does not constitute verbal abuse.").

80. See, e.g., Steven Stosny, *Emotional Abuse of Family Members Should be Legal?*, PSYCHOLOGYTODAY.COM (Feb. 15, 2010, 9:46 AM), <http://www.psychologytoday.com/print/38335> (renowned U.S. psychologist commenting, with respect to France's new law prohibiting psychological abuse of a spouse or other intimate partner, that "[o]bviously the law would not be applicable to 'passive-aggressive husbands' or 'nagging wives' or irrational behavior in infrequent arguments. It would prohibit harmful behaviors, not unpleasant ones. It would address human suffering, not unhappiness The legal standard would be the same applied in most social laws: what reasonable people (not paranoid or vengeful spouses) would regard as harmful, demeaning, humiliating, or fear-invoking."); James Chapman, *Domestic violence laws will now criminalize mental torment, mind games and money controls too . . . and laws will be applied to those aged under 18*, MAILONLINE, Sept. 17, 2012, available at <http://www.dailymail.co.uk/news/article-2204778/Domestic-violence-include-mental-torment-laws-applied-aged-18.html> (accessed Mar. 27, 2013) (discussing how the executive branch of the U.K. government has recently expanded the U.K.'s definition of domestic violence to "'raise awareness that domestic violence and abuse does not just encompass physical abuse but can also include coercion and control'" and clarifying that this type of abuse "isn't about people having a row and shouting. It's about people's whole lives being controlled, whether that's not being allowed a bank account, access to a phone or to leave the house . . .").

on the abusive partner.”⁸¹ Some psychologists also explicitly include actual or threatened property damage or financial injury in their definition of psychological or emotional abuse.⁸²

As stated above, the term “mental abuse” is used in this article to refer to both emotional and psychological abuse, whether expressed verbally or otherwise, and the story presented at the beginning of this article illustrates several examples of such abuse. These examples include describing Josh as “lazy” and a “wimp,” glaring at Josh with tremendous hostility, humiliating Josh both in private and in public (when he orders Josh to run ten laps around the campground while holding a broom over his head), implicating Josh in criminal activity, shifting blame to Josh by falsely indicating to their campground neighbor that it had been Josh’s idea to steal the cooler and radio, continually elevating his own needs above Josh’s, and denying Josh’s existence as a separate person (when he refuses to cancel the camping trip, insists that he and Josh drive straight to the campground without stopping by Josh’s mother’s house so that Josh can retrieve his study materials, and endangers Josh simply in order to obtain a free cooler and radio).

Of course, not every perpetrator of domestic violence continually engages in physical, sexual, mental, and economic abuse. In fact, Michael Johnson of Pennsylvania State University reports that a domestic violence perpetrator tends to engage in one of two major types or categories of domestic violence, which he refers to as “situational couple violence,” and “intimate terrorism.”⁸³ As described by Johnson, situational couple violence is characterized by physical violence, which the perpetrator engages in on an occasional basis in response to “particular conflicts or

81. See, e.g., MOURADIAN, *supra* note 55.

82. See, e.g., Melissa Smith & Jeanne Segal, *Domestic Violence and Abuse: Signs of Abuse and Abusive Relationships*, HELPGUIDE.ORG, http://helpguide.org/mental/domestic_violence_abuse_types_signs_causes_effects.htm (last updated Apr. 2012).

83. MICHAEL JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENCE RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 2, 24 (Northeastern Univ. Press 2008) [hereinafter JOHNSON 2008]; Michael P. Johnson, *Differentiating Among Types of Domestic Violence: Implications for Healthy Marriages*, in MARRIAGE AND FAMILY: PERSPECTIVES AND COMPLEXITIES 281, 282 (H. Elizabeth Peters, Claire M. Kamp Dush, eds., 2009) [hereinafter Johnson 2009]. In these two works, Johnson also mentions two other types of domestic violence, “mutual violent control,” which he describes as “the true mutuality of two people fighting for general control over the relationship” (JOHNSON 2008, *supra* at 12) and “violent resistance,” which he defines as “the use of violence to resist an intimate terrorist’s attempt to dominate the relationship” (Johnson 2009, *supra* at 282). However, Johnson does not consider mutual violent control to be a major category of domestic violence, because, as he explains, “whatever it’s [sic] dynamic, it is very rare.” JOHNSON 2008, *supra* at 24; Johnson 2009, *supra* at 294 n.1. Similarly, according to Johnson, “for most heterosexual women, the usual size difference between them and their partners ensures that violent resistance will not help and may make things worse, so they abandon violence and focus on other means of coping.” Johnson 2009, *supra* at 286. Accordingly, mutual violent control and violent resistance are not discussed further in this article.

tensions within the relationship.”⁸⁴ Intimate terrorism, on the other hand, is characterized by mental abuse,⁸⁵ with other types of abuse constituting only components⁸⁶ of the perpetrator’s concerted “attempt to take complete control of or at least generally dominate the relationship.”⁸⁷

Johnson emphasizes that it is exceedingly important to distinguish between the different types of domestic violence, as otherwise important features of these two major types of domestic violence can be missed.⁸⁸ He notes, for example, that some researchers in the past have used data regarding situational couple violence to support the erroneous conclusion that just as many women perpetrate intimate terrorism as men.⁸⁹ Additional features of both situational couple violence and intimate terrorism are described below.

1. Situational Couple Violence

According to Johnson, most incidents of physical abuse in domestic relationships (ranging from a minor punch, slap, or scratch to homicide) are examples of situational couple violence.⁹⁰ Again, Johnson reports that a perpetrator of situational couple violence engages in domestic violence solely in response to stressful situations that arise in the course of the relationship.⁹¹ As perpetrators of situational couple violence are not attempting to control their victims’ behavior on an ongoing basis,⁹² it logically follows that situational couple violence is characterized by occasional physical violence.⁹³ Johnson furthermore notes that, in heterosexual couples, females commit forty-five percent of all events of situational couple violence and males effectuate fifty-five percent of such events.⁹⁴

It is important to recognize that situational couple violence is still a very serious societal problem. Victims can suffer severe physical injuries and even death,⁹⁵ and twenty-nine percent of females who are victims of situational couple violence at the hands of a male partner have suffered a severe injury at least once.⁹⁶ Moreover, as Johnson concedes, physically

84. Johnson 2009, *supra* note 83, at 282.

85. *Id.* at 284–85.

86. Johnson 2009, *supra* note 83, at 285–86.

87. *Id.* at 282.

88. *Id.* at 283.

89. *Id.* at 283–84.

90. *Id.* at 287. Johnson estimates that situational couple violence occurs three to four times more often than intimate terrorism. *Id.* at 294, n.3.

91. Johnson 2009, *supra* note 83, at 282, 287–88; JOHNSON 2008, *supra* note 83, at 3, 11–12.

92. Johnson 2009, *supra* note 83, at 287–88.

93. *Id.*

94. JOHNSON 2008, *supra* note 83, at 22.

95. Johnson 2009, *supra* note 83, at 288.

96. *Id.*; PowerPoint: Michael P. Johnson, *Distinguishing Types of Domestic Violence*, Paper Presented at Second International Conference on Violence Against Women, at 18

injuring another person (other than in self-defense) can never be viewed as healthy behavior.⁹⁷ In fact, it is probably misleading to refer to this type of violence as “situational *couple* violence,” as that name implies that the couple, rather than the perpetrator, is responsible for the violence, and a better name for it would simply be “situational violence.” However, in this article, the term “situational couple violence” is used in order to maintain continuity with Johnson’s categories of domestic violence.

Lastly, situational couple violence appears to possess three additional characteristics distinguishing it from intimate terrorism. To begin with, the great majority of serious physical injuries and deaths attributable to domestic violence occur at the hands of an intimate terrorist rather than at the hands of a perpetrator of situational couple violence.⁹⁸ Additionally, some perpetrators of situational couple violence appear to be able to take responsibility for their own behavior and over time learn how to react to stressful events in a nonviolent manner.⁹⁹ Finally, situational couple violence does not appear to be transmitted throughout generations of a family, as children exposed to situational couple violence do not possess a higher risk of committing situational couple violence or intimate terrorism in their own adult relationships than children who have not been exposed to any type of domestic violence.¹⁰⁰

2. Intimate Terrorism

To repeat, Johnson maintains that an intimate terrorist’s use of physical violence is simply one aspect of an intimate terrorist’s seemingly relentless effort to completely control a domestic relationship.¹⁰¹ In other words, intimate terrorism is a course of conduct that consists primarily (and sometimes exclusively) of mental abuse, and the intimate terrorist tends to utilize physical abuse and sexual abuse merely as instruments to further his or her regime of control.¹⁰² Of course, it is logical that an intimate terrorist primarily engages in mental abuse, because mental abuse erodes the victim’s self-esteem and ultimately his or her autonomy to challenge the intimate terrorist’s regime of control.¹⁰³ That is, as Steve Biko’s quote at

(May 30, 2011) available at personal.psu.edu/mpj/2011%20Montreal.pptx (last accessed Sept. 27, 2012) (clarifying that “severe injury” means “injury requiring hospitalization”).

97. Johnson 2009, *supra* note 83, at 281.

98. *Id.* at 285.

99. *Id.* at 291; see also Jennifer E. Daly & Susan Pelowski, *Predictors of Dropouts Among Men Who Batter: A Review of Studies with Implications for Research and Practice*, 15 VIOLENCE AND VICTIMS 137, 138 (2000).

100. Johnson 2009, *supra* note 83, at 283.

101. *Id.* at 282–88; JOHNSON 2008, *supra* note 83, at 7–12, 40–41.

102. *Id.*

103. CENTER FOR SUBSTANCE ABUSE TREATMENT, *Substance Abuse Treatment and Domestic Violence*, in TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES, No. 25, 27 (U.S. Substance Abuse & Mental Health Serv’s Admin. ed., 1997), available at <http://www.ncbi.nlm.nih.gov/books/NBK64431> (“NONPHYSICAL abuse generally targets the victim’s sense of self-esteem, well-being, and autonomy.”) (emphasis added); T. L.

the beginning of this article implies, it is much easier for an oppressor to control his or her victim by convincing the victim that his or her subjugation is justified than by constantly physically coercing the victim into a subservient position.¹⁰⁴

As indicated above, compared to situational couple violence, intimate terrorism also “is more likely . . . to produce injuries, long-term health effects, depression, posttraumatic stress, suicide, and homicide.”¹⁰⁵ Intimate terrorism, in fact, is the type of domestic violence that comes most readily to mind when one considers domestic violence, because it is the type of domestic violence that makes headline news, and the type that domestic violence shelters and health care workers encounter on a regular basis.¹⁰⁶ Intimate terrorists often abuse a child living in their home in the same manner in which they abuse their intimate partner.¹⁰⁷ They do so for two main reasons: to control their intimate partner through the child¹⁰⁸ and prevent that child from challenging the intimate terrorist's control through the child's assertion of autonomy.¹⁰⁹

After years of being subjected to intimate terrorism, many victims live in a world of never-ending (but again, primarily mental) abuse that is both constantly denied by the terrorist and largely hidden from the outside world.¹¹⁰ Such a regime of abuse is akin to torture, brainwashing, bullying, and hazing.¹¹¹ Unfortunately, programs designed to correct intimate terrorists' aberrant behavior experience a low success rate.¹¹² In addition, intimate terrorism appears to be the type of domestic violence transmitted from one generation to another within families.¹¹³ In particular, there is a strong positive correlation in males between childhood exposure to intimate terrorism and later engagement in intimate terrorism as adults.¹¹⁴ It is no exaggeration to state that intimate terrorism is the ultimate betrayal of trust

BEAUCHAMP ET AL., *PRINCIPLES OF BIOMEDICAL ETHICS* 58 (4th ed. 1989) (“The autonomous individual acts freely in accordance with a self-chosen plan. . . . A person with diminished autonomy, in contrast, is in at least some respect controlled by others or incapable of deliberating or acting on the basis of his or her desires and plans.”).

104. See Morton Deutsch, *Oppression and Conflict*, Plenary Address at the Annual Meeting of the Int'l Soc'y of Justice Research in Skovde, Swed. (June 17, 2002), available at <http://www.humiliationstudies.org/documents/DeutschIOSJPaper.pdf> (containing a good summary of the myths and propaganda that dominant groups throughout history have used to convince subjugated groups that their own domination is justified).

105. Johnson 2009, *supra* note 83, at 285 (citing numerous studies).

106. JOHNSON 2008, *supra* note 83, at 2–3, 6.

107. *Id.* at 8, 26; Johnson 2009, *supra* note 83, at 284.

108. Johnson 2009, *supra* note 83, at 284.

109. JOHNSON 2008, *supra* note 83, at 8 (explaining that an intimate terrorist uses children to support his control in that “[f]irst of all, they, too, know he is the boss.”).

110. LUNDY BANCROFT, *WHY DOES HE DO THAT?* 1–20, 49–52, 68–78, 83–87, 120, 245, and *passim* (2003).

111. See, e.g., JOHNSON 2008, *supra* note 83, at 26.

112. Johnson 2009, *supra* note 83, at 291.

113. *Id.* at 283.

114. *Id.*

and ultimate abuse of power. That is, an intimate terrorist is able to repeatedly abuse his or her victim(s) only because he is in an intimate relationship with his victim(s)¹¹⁵

A few females are intimate terrorists.¹¹⁶ However, intimate terrorism in heterosexual couples is almost exclusively perpetrated by males against their female partners.¹¹⁷ Understandably, the male-dominated nature of intimate terrorism has led many feminist scholars and other domestic violence experts to conclude that paternalism is the main driving force behind this form of domestic violence.¹¹⁸ Given this male-on-female asymmetry of intimate terrorism, throughout the remainder of this article, when discussing the intimate terrorism form of domestic violence, only the male pronoun “he” is used when referring to the perpetrator and only the female pronoun “she” is used when referring to the victim.

B. COSTS OF DOMESTIC VIOLENCE

“[I]t is generally agreed that the most under-reported crime is domestic violence.”¹¹⁹ Even so, the Federal Bureau of Investigation (FBI) in the U.S. Department of Justice reports that, in 2010, 1336 individuals were murdered by their spouse, former spouse, girlfriend, or boyfriend,¹²⁰ and

115. Melanie Platt et al., *A Betrayal Trauma Perspective on Domestic Violence*, in 1 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 185, 206 (Greenwood Press E. Stark & Eve S. Buzawa eds., 2009) (“Victims of violence in intimate relationships are profoundly betrayed by someone they depend on.”); Bonnie Brandl et al., *The Parallels Between Undue Influence, Domestic Violence, Stalking, and Sexual Assault*, 17 J. ELDER ABUSE & NEGLECT 37, 40 (2005), available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_arta2251_undueflu_tb.authcheckdam.pdf (stating that, in “UI [Undue Influence], domestic violence, stalking, and sexual assault cases, . . . [t]he victim and exploiter are in an on-going relationship”) [hereinafter Brandl].

116. Johnson 2009, *supra* note 83, at 285; JOHNSON 2008, *supra* note 83, at 20.

117. JOHNSON 2008, *supra* note 83, at 20, 26, 48; Johnson 2009, *supra* note 83, at 285.

118. See, e.g., JOHNSON 2008, *supra* note 83, at 1–4, 6. While paternalism indeed appears to play a role in the development of an intimate terrorist, paternalism and the traumatic abuse of male children may work hand-in-hand in this process, as is explained further in Section V of this article.

119. See, e.g., *Crime and Violence: Violence Against Women*, ECE GENDER STATISTICS, U.N. ECONOMIC COMMISSION FOR EUROPE (last updated Mar. 24, 2004), <http://www.unece.org/fileadmin/DAM/stats/gender/web/genpols/keyinds/crime/violence.htm>; see also *Spouse/Partner Abuse Information*, NAT’L COUNCIL ON CHILD ABUSE AND FAMILY VIOLENCE, <http://www.nccafv.org/spouse.htm> (last visited Feb. 10, 2013) (“[W]e know that spouse/partner abuse . . . is the most common unreported crime occurring in families from all economic, social, cultural, religious and educational backgrounds.”). This underreporting of domestic violence has occurred for many years. See, e.g., PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUST., EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY V (2000) (“Most intimate partner victimizations are not reported to the police.”), available at www.ojp.usdoj.gov/nij/pubs-sum/181867.htm.

120. *Crime in the United States, 2010*, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUST., Table 10, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime>

the 2010 report entitled "National Intimate Partner and Sexual Violence Survey," published by the Centers for Disease Control and Prevention (CDC), an agency within the U.S. Department of Health and Human Services, reveals that approximately 35.6% of women and approximately 28.5% of men in the United States report having suffered physical violence, rape, and/or stalking by an intimate partner (IP) (defined as a current or former intimate partner)¹²¹ at some point in their lives.¹²² This same CDC report indicates that, in 2010 alone, approximately 686,000 incidents of rape,¹²³ approximately 3,819,000 incidents of stalking,¹²⁴ and approximately 37,126,000 incidents of psychological aggression,¹²⁵ and

-in-the-u.s.-2010/tables/10shrtbl10.xls (indicating that, of the 7,272 murder victims for whom states had reported the victim's relationship with the offender, 603 wives or former wives were murdered by their husbands or former husbands and 492 girlfriends were murdered by their boyfriends, for a total of 1095 females murdered by an intimate partner, whereas 110 husbands or former husbands were murdered by their wives or former wives and 131 boyfriends were murdered by their girlfriends, for a total of 241 males murdered by an intimate partner) [hereinafter 2010 FBI Statistics]. Note that the Federal Bureau of Investigation (FBI) does not include former boyfriends or girlfriends in its definition of intimate partners. *Id.*; see also JENNIFER L. TRUMAN, U.S. DEP'T. OF JUST., CRIMINAL VICTIMIZATION, 2010 9 (Sept. 2011), available at <http://www.bjs.gov/content/pub/pdf/cv10.pdf>; *Measuring Intimate Partner (Domestic) Violence*, U.S. DEP'T OF JUST. (last modified May 12, 2010), <http://www.nij.gov/topics/crime/intimate-partner-violence/measuring.htm> [hereinafter National Institute of Justice Report]. Note that, as a result of this omission, the number of intimate partner murders in 2010 likely was higher, because ex-boyfriends are responsible for up to eleven percent of intimate partner murders committed by males and ex-girlfriends are responsible for up to three percent of intimate partner murders committed by females. *Id.* In addition, the number of intimate partner murders reported by the FBI for 2010 was based only on the data which states had conveyed to the FBI, and some of the remaining unclassified 7,822 murders in 2010 (*see id.*; 2010 FBI Statistics, *supra* at Table 3) most likely had been committed by an intimate partner.

121. MICHELE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT, NAT'L CENTER FOR INJURY PREVENTION AND CONTROL 37 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [hereinafter 2010 CDC Intimate Partner Violence Report].

122. *Id.* at 2, 38.

123. *Id.* at 42–43 (Figure is the sum of (686,000 estimated rapes of female victims by an intimate partner (IP) during 2010, as listed in Table 4.5 on page 42) plus (zero (0) estimated rapes of male victims by an IP during 2010, as listed in Table 4.6 on page 43)).

124. *Id.* at 44–45 (Figure is the sum of (the estimated 3,300,000 acts of stalking committed against a female victim by an IP during 2010, as stated on page 44) plus (the estimated 519,000 acts of talking committed against a male victim by an IP during 2010, as stated on page 45)).

125. *Id.* at 45 (This figure is sum of (the estimated 16,578,000 acts of psychological aggression committed against a female victim by an IP during 2010, as listed in Table 4.9 on page 46) plus (the estimated 20,548,000 acts of psychological aggression committed against a male victim by an IP during 2010, as listed in Table 4.10 on page 46)). Note that, in the 2010 CDC Intimate Partner Violence Report, "psychological aggression" includes "expressive aggression" and "coercive control." *Id.* at 9. Expressive aggression "includes acting [in a] dangerous [manner], name calling, insult[ing], and humiliat[ing], while [c]oercive control includes behaviors that are intended to monitor and control an intimate partner such as threat[ening] [to inflict some type of harm], interfere[ing] with family and friends, and limiting access to money. *Id.* at 10.

approximately 14,817,000 incidents of physical violence¹²⁶ occurred between IPs. Approximately 5,429,000 of those estimated 14,817,000 incidents of physical violence between IPs were incidents of severe physical violence (defined as acts more severe than slapping, shoving, or pushing, e.g., beating, burning, choking, suffocating, kicking, harming with a knife or a gun, slamming against something, and being hit with a fist or something else that is hard¹²⁷).¹²⁸

Women suffered 82% of the above-stated 1,336 murders at the hands of an IP,¹²⁹ 58% of the incidents of severe physical violence,¹³⁰ 51% of all acts of physical violence,¹³¹ 100% of the rapes,¹³² 86% of the stalking

126. *Id.* at 44–45 (Figure is the sum of (the estimated 7,485,000 acts of physical violence—3,163,000 estimated acts of severe physical violence and 4,322,000 estimated acts of less severe physical violence—committed against a female victim by an IP during 2010, as listed in Table 4.7 on page 44) plus (the estimated 7,332,000 acts of physical violence—2,266,000 estimated acts of severe physical violence and 5,066,000 estimated acts of less severe physical violence—committed against a male victim by an IP during 2010, as listed in Table 4.8 on page 45)).

127. 2010 CDC Intimate Partner Violence Report, *supra* note 121, at 2, 10.

128. *Id.* at 44–45 (Figure is the sum of (the estimated 3,163,000 acts of severe physical violence committed against a female victim by an IP during 2010, as listed in Table 4.7 on page 44) plus (the estimated 2,266,000 acts of severe physical violence committed against a male victim by an IP during 2010, as listed in Table 4.8 on page 45)).

129. 2010 FBI Statistics, *supra* note 120, at Table 10 (Figure is the ratio obtained by dividing (the estimated 1,095 females (603 wives or former wives plus 492 girlfriends) murdered by an IP during 2010) by the total estimated 1,336 individuals (the estimated 1,095 females plus the estimated 241 males (110 husbands or former husbands plus 131 boyfriends) murdered by an IP during 2010)). Note, as stated above, that the FBI does not include former boyfriends or girlfriends in its definition of intimate partners. *Id.*; *see also* National Institute of Justice Report, *supra* note 120. As a result of this omission, the percentage of females murdered by an IP most likely is understated, because ex-boyfriends are responsible for up to eleven percent of intimate partner murders committed by males and ex-girlfriends are responsible for up to three percent of intimate partner murders committed by females. 2010 FBI Statistics, *supra* note 120, at Table 10; National Institute of Justice Report, *supra* note 120.

130. 2010 CDC Intimate Partner Violence Report, *supra* note 121, at 44–45 (Figure is the ratio obtained by dividing (the estimated 3,163,000 acts of severe physical violence committed against a female victim by an IP during 2010, as listed in Table 4.7 on page 44) by the total estimated 5,429,000 acts of severe physical violence committed against either a female victim or a male victim by an IP during 2010, as listed in Tables 4.7 and 4.8 on pages 44–45).

131. *Id.* at 44–45 (Figure is the ratio obtained by dividing (the estimated 7,485,000 acts of physical violence—3,163,000 severe acts and 4,322,000 less severe acts—committed against a female victim by an IP during 2010, as listed in Table 4.7 on page 44) by the total estimated 14,817,000 acts of physical violence committed against either a female victim or a male victim (the estimated 7,485,000 acts of physical violence committed against females plus the estimated 7,332,000 acts committed against males—2,266,000 severe acts and 5,066,000 less severe acts—by an IP during 2010, as listed in Tables 4.7 and 4.8 on pages 44–45)).

132. *Id.* at 42–43 (Figure is the ratio obtained by dividing (the estimated 686,000 rapes committed against a female victim by an IP during 2010, as listed in Table 4.5 on page 42) by the total estimated 686,000 rapes committed against either a female victim or a male victim (the 686,000 estimated rapes committed against a female victim plus the zero estimated rapes committed against a male victim) by an IP during 2010, as listed in Tables

incidents,¹³³ and 45% of the incidents of psychological aggression¹³⁴ perpetrated by either a heterosexual or same-sex IP during 2010.¹³⁵ Moreover, approximately 8.7% of women have been subjected to both rape and physical violence by an IP,¹³⁶ approximately 14.4% have been subjected to both physical violence and stalking, and approximately 12.5% have been subjected to rape, physical violence, and stalking.¹³⁷ In contrast, 92% of men who have been subjected to domestic violence by either a heterosexual or same-sex IP have suffered only physical violence,¹³⁸ while 6.3% have suffered physical violence and stalking.¹³⁹

Certainly, domestic violence is a serious problem for men as well as women. In 2010, 2% of all men experienced severe physical violence perpetrated by an IP¹⁴⁰ (compared with 2.7% of all women¹⁴¹), 4.5% of all men suffered non-severe physical violence by an IP¹⁴² (compared with 3.6% of all women¹⁴³), 0.5% of all men experienced stalking by an IP¹⁴⁴ (compared with 2.8% of all women¹⁴⁵), 2.5% of all men experienced sexual violence other than rape by an IP¹⁴⁶ (compared to 2.3% of all women),¹⁴⁷ and 18.1% of all men experienced psychological aggression by an IP¹⁴⁸

4.5 and 4.6 on pages 42–43). Note that no estimated rapes were reported for males, because either the relative standard error in the sample was more than 30% or the cell size was equal to or smaller than 20. *Id.* at 43 (Table 4.6).

133. 2010 CDC Intimate Partner Violence Report, *supra* note 121, at 42–43 (Figure is the ratio obtained by dividing (the estimated 3,300,000 acts of stalking committed against a female victim by an IP during 2010, as stated on page 44) by the total estimated 3,829,000 acts of stalking committed against either a female victim or a male victim (the 3,300,000 estimated acts of stalking committed against a female victim plus the 519,000 estimated acts of stalking committed against a male victim) by an IP during 2010, as stated on pages 44–45). Note that no estimated rapes were reported for males, because either the relative standard error in the sample was more than 30% or the cell size was equal to or smaller than 20. *Id.* at 43 (Table 4.6).

134. *Id.* at 42–43 (Figure is the ratio obtained by dividing (the estimated 16,578,000 acts of psychological aggression committed against a female victim by an IP during 2010, as listed in Table 4.9 on page 46) by the total estimated 37,126,000 acts of psychological aggression committed against either a female victim or a male victim (the 16,578,000 estimated acts of psychological aggression committed against a female victim plus the 20,548,000 estimated acts of psychological aggression committed against a male victim) by an IP during 2010, as listed in Tables 4.9 and 4.10 on page 46).

135. *Id.* at 41.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 45 (Table 4.8).

141. *Id.* at 44 (Table 4.7).

142. *Id.* at 45 (Table 4.8).

143. *Id.* at 44 (Table 4.7).

144. *Id.* at 45.

145. *Id.* at 44.

146. *Id.* at 43 (Table 4.6).

147. *Id.* at 42 (Table 4.5).

148. *Id.* at 44 (Table 4.7).

148. *Id.* at 46 (Table 4.10).

(compared with 13.9% of all women¹⁴⁹). At the same time, the fact that a significant number of female victims suffer various types of violence at the hands of an intimate partner suggests that females are more likely than males to suffer from intimate terrorism¹⁵⁰ whereas it appears that most male victims suffer from the milder (but still very serious and occasionally lethal) situational couple violence.¹⁵¹ As the U.S. Department of Justice stated in 2010, “violence is instrumental in maintaining control and . . . more than 90 percent [sic] of ‘systematic, persistent, and injurious’ violence is perpetrated by men.”¹⁵²

As indicated, the above-discussed FBI statistics on intimate partner murders committed in 2010, as well as the CDC study on nonlethal acts of domestic violence committed in 2010, encompass domestic violence committed by same-sex intimate partners,¹⁵³ and a report published by the National Coalition of Anti-Violence Programs (NCAVP) in 2012 confirms that domestic violence is a very serious problem in same-sex couples.¹⁵⁴ In fact, this report reveals that the lesbian, gay, bisexual, transgender, queer and HIV-affected (LGBQH) community suffered a very alarming 300.17% increase (from 6 to 19) in intimate partner homicides between 2010 and 2011, with males, gays and lesbians, and people of color suffering a disproportionate percentage of these homicides.¹⁵⁵

In addition, researchers estimate that, every year, between one and two million Americans age sixty-five years or older are “injured, exploited, or otherwise mistreated by someone on whom they depended for care or protection.”¹⁵⁶ Most alarmingly, a number of studies reveal that

149. *Id.* at 46 (Table 4.9).

150. JOHNSON 2008, *supra* note 83, at 13–23.

151. *Id.*

152. National Institute of Justice Report, *supra* note 120 (citing Michael S. Kimmel, ‘Gender Symmetry’ in *Domestic Violence: A Substantive and Methodological Research Review*, 8 VIOLENCE AGAINST WOMEN 1331 (Nov. 2002)).

153. 2010 FBI Statistics, *supra* note 120, at Supplementary Homicide Reports, Table 10; 2010 CDC Intimate Partner Violence Report, *supra* note 121, at 91, 100–03.

154. National Coalition of Anti-Violence Programs, *Intimate Partner Violence 2011: Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected* (2012), http://www.avp.org/storage/documents/Reports/2012_NCAVP_2011_IPV_Report.pdf [hereinafter 2011 NCAVP Report]; see also DIANE R. DOLAN-SOTO & SARA KAPLAN, NYC GAY AND LESBIAN ANTI-VIOLENCE PROJECT 3 (2005), <http://www.avp.org/publications/reports/2005nycdvrpt.pdf> [hereinafter DOLAN-SOTO].

155. 2011 NCAVP Report, *supra* note 154, at 7–8.

156. COMMITTEE ON NATIONAL STATISTICS & COMMITTEE ON LAW AND JUSTICE, ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 1 (Richard J. Bonnie & Robert B. Wallace, eds., 2003); see also Pamela B. Teaster et al., *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older*, THE NAT’L CENTER ON ELDER ABUSE 5 (2006), http://www.ncea.aoa.gov/ncearoot/main_site/pdf/2-14-06%20FINAL%2060+REPORT.pdf (reporting that Adult Protective Services in 24 states had substantiated 88,455 of the 192,243 claims of elder abuse, neglect, or exploitation in 2004 which they investigated, a substantiation rate of over 46%); *Fact Sheet: Elder Abuse Prevalence and Incidence*, NATIONAL CENTER ON ELDER ABUSE 1 (2005), http://www.ncea.aoa.gov/main_site/pdf/publication/FinalStatistics050331.pdf (stating that

approximately 2,000 children under the age of eighteen die from child abuse or neglect each year,¹⁵⁷ at least 3.3 million children of all ages are exposed to domestic violence annually,¹⁵⁸ and approximately 2.8 million children live in a household in which at least one member of the household age twelve or older experienced violent crime (defined as rape, sexual assault, robbery, aggravated assault, and simple assault).¹⁵⁹

The physical, mental, and financial cost of domestic violence for its victims and for society at large are enormous. To begin with, even though approximately forty percent of victims of nonfatal intimate partner violence do not report such events to the police,¹⁶⁰ law enforcement costs related to domestic violence are quite substantial. It is estimated that at least one-third of all calls made to local police departments concern domestic violence,¹⁶¹ and some researchers have stated that most police calls concern domestic violence.¹⁶² In New York City alone, “the police recorded more than 226,000 domestic violence incidents in 2005—an average of roughly 620 domestic violence incidents per day,”¹⁶³ and its law enforcement costs

only 1 in 14 incidents of elder abuse in domestic settings (excluding self-neglect), are reported to authorities) (citations omitted).

157. LESLIE DELONG & NANCY W. BURKHART, *GENERAL AND ORAL PATHOLOGY FOR THE DENTAL HYGIENIST* 23 (Lippincott, Williams & Wilkins 2007) (reporting that “as many as 5,000 children are fatalities of child abuse and neglect each year) [hereinafter DELONG, *GENERAL AND ORAL PATHOLOGY*].

158. SHARMILA LAWRENCE, *DOMESTIC VIOLENCE AND WELFARE POLICY: RESEARCH FINDINGS THAT CAN INFORM POLICIES ON MARRIAGE AND CHILD WELL-BEING*, NAT'L CENTER FOR CHILDREN IN POVERTY 5 (2002) (citing L. Carter et al., *Domestic Violence and Children: Analysis and Recommendations*, 9 *THE FUTURE OF CHILDREN* 4–20 (1999)) [hereinafter Carter]. Note that Lawrence stated that between 3.3 million and ten million children are exposed to domestic violence annually. However, the authors of the study cited by Lawrence stated in their own study that the 3.3 million figure “is based on a study sample that did not include two groups particularly at risk for domestic violence—families with children under age three and families in which parents were divorced. This study also used an overly narrow definition of domestic violence.” Carter, *supra*, at 15–16. In addition, these same authors stated in their own study that “[t]he 10 million figure is derived from a study conducted in 1992 that used retrospective, self-report methods to survey individuals about the existence of domestic violence in their families.” *Id.* at 16. These two comments imply that the 3.3 million figure is on the low side and the ten million figure may be on the high side as an estimate of the number of U.S. children exposed to domestic violence annually.

159. Erica L. Smith & Jennifer L. Truman, *Prevalence of Violent Crime among Households with Children, 1993–2010*, U.S. DEPARTMENT OF JUSTICE, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=4472>.

160. Shannan Catalano, *Intimate Partner Violence in the United States*, U.S. DEPARTMENT OF JUSTICE, Office of Justice Programs, 2007, <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf>.

161. Loretta J. Stalans, *Family Harmony or Individual Protection? Public Recommendations About How Police Can Handle Domestic Violence Situations*, 39 *American Behavioral Scientist* 433 (1996).

162. Machaela M. Hocktor, *Domestic Violence as a Crime Against the State*, 85 *CAL. L. REV.* 643, 646 (1997).

163. *City Spending on Domestic Violence: A Review*, NYC Independent Budget Office, 1, 2 (2007), <http://www.ibo.nyc.ny.us/iboreports/DomesticViolenceSpending.pdf>.

related to domestic violence that year totaled nearly forty-four million dollars.¹⁶⁴

In addition, a very conservative estimate of the total health care costs attributable to domestic violence each year is \$5.8 billion.¹⁶⁵ More than 1,400,000 hospital emergency room visits per year are attributable to domestic violence,¹⁶⁶ and the American Medical Association reported that, in 1992, “domestic violence account[ed] for at least 21,000 hospitalizations, 99,800 days in the hospital, and 39,000 visits to personal physicians annually in the United States.”¹⁶⁷ Furthermore, in addition to the immediate health care required immediately following a domestic violence event, a number of researchers have discovered that victims of domestic violence suffer much higher rates of physical, mental, and reproductive health problems over the course of their lives than non-victims.¹⁶⁸

For example, the prevalence of asthma, irritable bowel syndrome, diabetes, frequent headaches, chronic pain, difficulty sleeping, and activity limitations is significantly higher among women who have suffered physical violence at the hands of an intimate partner or been raped or stalked by any perpetrator.¹⁶⁹ Male victims of domestic violence also suffer much higher rates of frequent headaches, chronic pain, difficulty sleeping, and activity limitations.¹⁷⁰ Even if a victim experiences only psychological abuse (as sometimes occurs in cases of intimate terrorism¹⁷¹), he or she tends to suffer a much higher number of physical and mental problems than non-victims over the course of his or her life.¹⁷²

While some of the long-term health problems suffered by domestic violence victims are attributable to a specific physical injury received during a domestic violence incident (e.g., walking difficulties traceable to having had one’s back broken during such an incident) and certain other

164. *Id.* at 1.

165. *Intimate Partner Violence: Consequences*, CTNS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> [hereinafter CDC Study: Consequences] (\$4.1 billion estimated for medical and mental health care costs in 1995, updated to 2003 dollars (multiplying \$4.1 billion for such costs in 1995 by 1.034)); see also DEP’T. OF HEALTH & HUMAN SERV’S DIVISION OF VIOLENCE PREVENTION, *Costs of Intimate Partner Violence against Women in the United States* 40 (TABLE 12) (2003), available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/ipv_book-final-feb18.pdf [hereinafter DEP’T OF HEALTH & HUMAN SERV’S DIVISION OF VIOLENCE PREVENTION].

166. *Id.*

167. *Id.* (citing Harris Meyer, *The Billion Dollar Epidemic*, AM. MED. NEWS, Jan. 6, 1992, at 7).

168. See, e.g., 2010 CDC Intimate Partner Violence Report, *supra* note 121, at 62; CDC Study: Consequences, *supra* note 165.

169. 2010 CDC Intimate Partner Violence Report, *supra* note 121, at 62.

170. *Id.*

171. *Supra* text accompanying notes 101–04.

172. CDC Study: Consequences, *supra* note 165.

problems may be attributable to risky coping behaviors that some victims adopt, the higher prevalence of a number of health problems suffered by domestic violence victims seems to be attributable to biological changes caused by chronic stress associated with domestic violence.¹⁷³ Specifically, chronic stress appears to impair one's cardiovascular, gastrointestinal, endocrine, and immune systems, primarily through the dysregulation of certain hormones, such as adrenaline and cortisol.¹⁷⁴ As Rita Smith, Executive Director of the National Coalition Against Domestic Violence, once remarked, "living in a dangerous and stressful environment has long-term health impacts. It's like living in a war zone[.]"¹⁷⁵

The losses employers suffer as a result of lost lives, absences, and decreased productivity are likewise very substantial. In a 2005 survey conducted by the Corporate Alliance to End Partner Violence, 44% of full-time employees stated that they had personally experienced the effects of domestic violence at work and 21% of full-time employees revealed that they themselves were victims of domestic violence.¹⁷⁶ Furthermore, 64% of the domestic violence victims indicated that their work productivity had decreased due to their victimization, with 57% of these victims indicating that they were distracted at work, 45% of these victims indicating that they feared others in the workplace would discover their victim status, 40% of these victims indicating that they were concerned their intimate partner

173. 2010 CDC Intimate Partner Violence Report, *supra* note 121, at 61; *see also* CDC Study: Consequences, *supra* note 165 (citing numerous studies).

174. *See, e.g.*, Michele C. Black, *Intimate Partner Violence and Adverse Health Consequences: Implications for Clinicians*, 5:5 AM. J. LIFESTYLE MED. 428, 429–31 (2011). In this article, the author explains that:

[d]uring the past 2 decades, research has substantially improved our understanding of the physiology that underlies the association between violence victimization and an array of adverse health outcomes During the stress response, the body releases a host of chemical mediators, for example adrenaline and noradrenaline, cortisol, catecholamines, glucocorticoids, pro- and anti-inflammatory cytokines, serotonin, systemic hormones (e.g., insulin), pituitary hormones, and a number of neurotransmitters.

These mediators are interconnected in a network of regulation; when any one mediator increases or decreases, there are compensatory changes in the other mediators. Whereas this increased physiologic activity in response to challenge is protective in the short run (e.g., the release of hormones that act on multiple neural and endocrine receptors to produce the adaptive physiologic fight or flight response), the long-term effects of prolonged stress (e.g., increased heart rate or blood pressure over extended periods) takes a toll on the human body.

Id. (internal citations omitted).

175. Will Dunham, *Quarter of U.S. Women Suffer Domestic Violence*, REUTERS.COM, <http://www.reuters.com/article/2008/02/07/us-violence-domestic-usa-idUSN0737896320080207> (last accessed Dec. 10, 2012).

176. *National Benchmark Telephone Survey on Domestic Violence in the Workplace*, CORPORATE ALLIANCE TO END PARTNER VIOLENCE 1 (Oct. 2005), <http://www.ncdsv.org/images/CAEPVSurvey.WorkPlace.pdf> [hereinafter *National Benchmark Telephone Survey*].

might harass them at work, 34% of these victims indicating that they were fearful their intimate partner would unexpectedly visit them at work, 24% indicating that they found it difficult to complete their assignments on time, and 21% indicating that they had lost a job on account of their victimization.¹⁷⁷

Interestingly, in this same study, 31% of victims' co-workers reported that they felt obligated to perform victims' work or make excuses for their failure to complete their work, 27% of such co-workers stated that they in fact frequently performed victims' work, 25% of such co-workers admitted that they resented the victims on account of their negatively-impacted work situations, and 38% acknowledged they were at least somewhat fearful that their safety at work was threatened as a result of the victims' situation.¹⁷⁸

Victims' higher rates of absenteeism and tardiness at work have been documented in a number of studies,¹⁷⁹ and a 2003 study published by the National Center for Injury Prevention and Control within the U.S. Department of Health and Human Services reported that each year victims of severe domestic violence lose nearly 8 million days of paid work—the equivalent of more than 32,000 full-time jobs—as well as almost 5.6 million days of household productivity.¹⁸⁰ A very conservative estimate of the turnover and decreased productivity losses attributable to domestic violence every year is \$2.5 billion,¹⁸¹ while the Bureau of National Affairs has estimated that these costs for employers are between \$3 billion to \$5 billion each year.¹⁸² The American Bar Association Commission on Domestic Violence has stated that total employer costs for absenteeism, employer turnover, reduced productivity, higher health insurance premiums, and administrative

177. *National Benchmark Telephone Survey*, *supra* note 176, at 1, 3.

178. *Id.* at 2.

179. *See, e.g.*, Carol A. Reeves & Anne M. O'Leary-Kelly, *Study of the Effects of Intimate Partner Violence on the Workplace* (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/227266.pdf> (reporting that "lifetime IPV victims were more likely to be tardy and absent than were non-victims"); J. Swanberg et al., *Intimate Partner Violence, Employment and the Workplace: Consequences and Future Directions*, 4 *Trauma, Violence & Abuse* 1, 9–10 (2005), [http://www.caepv.org/membercenter/files/TVASwanberg_Logan_Macke%20\(3\).pdf](http://www.caepv.org/membercenter/files/TVASwanberg_Logan_Macke%20(3).pdf) (stating that "[r]esearch [has] found that between 23% and 54% of employed partner violence victims reported being absent from work because of the abuse, with between 4% and 6% reporting that this happened frequently" . . . [and] "the studies conducted to date . . . suggest that 50% to 65% of partner violence victims reported being late for work or leaving work early because of the victimization").

180. DEP'T OF HEALTH & HUMAN SERV'S DIVISION OF VIOLENCE PREVENTION, *supra* note 165, at 7.

181. CDC Study: Consequences, *supra* note 165 (\$1.8 billion estimated for lost productivity of employees suffering non-lethal injuries plus lost lifetime earnings of murdered employees in 1995, updated to 2003 dollars (multiplying \$1.8 billion for such costs in 1995 by 1.034)).

182. BUREAU OF NAT'L AFFAIRS, SPECIAL REPORT NUMBER 23 VIOLENCE AND STRESS: THE WORK/FAMILY CONNECTION, 2 (Aug. 1990).

costs attributable to domestic violence are \$4 billion to \$5 billion per year.¹⁸³

Domestic violence is also a significant contributor to job loss,¹⁸⁴ divorce,¹⁸⁵ poverty,¹⁸⁶ and homelessness,¹⁸⁷ and the U.S. Justice

183. AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, A GUIDE FOR EMPLOYERS: VIOLENCE IN THE WORKPLACE 3 (1999).

184. See, e.g., Barbara Johnson, *Reducing Intimate Partner Abuse: National, State, and Local Strategies for Prevention of Domestic Violence*, Minnesota Center Against Violence and Abuse 2 (2002), <http://www.mincava.umn.edu/documents/barbara/barbara.html> (explaining that embarrassment over recurring injuries can lead to absenteeism, secrecy, and isolation, frequent periods of infirmity and dysfunctional coping mechanisms of addictive behavior cause many victims from retaining steady employment, and abused partners often voluntarily abandon their jobs, homes, and personal possessions in order to escape abuse); Ctrs. for Disease Control and Prevention, National Institute for Occupational Safety and Health, *Women's Safety & Health Issues at Work*, available at <http://health.groups.yahoo.com/group/globalocchyg-list/message/180> (accessed Dec. 11, 2012) (reporting that "homicide is the leading cause of death for females in the workplace, accounting for 40% of all female workplace deaths. Twenty-five percent of female victims were assaulted by people known to them, and 16% of women workplace homicides are a result of domestic violence"); *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients*, U.S. GEN. ACCOUNTING OFFICE 19 (1998) (revealing that "between 35% and 56% of employed battered women were harassed at work by their batterers; 55% to 85% missed work because of domestic violence; and 24% to 52% lost their jobs as a result of the abuse"); see also Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 REV. OF L. & SOC. JUSTICE 351 (2007) [hereinafter Tarr].

185. PETER JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 6 (2002) ("Numerous divorce studies that ask women why they ended their relationship find rates of domestic violence well above the rates in the general population."); Paul R. Amato & Denise Previti, *People's Reasons for Divorcing: Gender, Social Class, the Life Course, and Adjustment*, 24 J. FAMILY ISSUES 602, 602-04, 615 (2003) (stating that "marital discord and divorce are gendered experiences, with wives more likely to initiate a divorce than husbands, physical and emotional abuse are common reasons why women seek divorce (as illustrated in Table 1), and 0% of men and 9.5% of women listed "physical or mental abuse" as a motivating factor in their divorce (as illustrated in Table 3)); Xenia P. Montenegro, *The Divorce Experience: A Study of Divorce at Midlife and Beyond*, AARP MAGAZINE, 14, 20-21 (2004) <http://assets.aarp.org/rgcenter/general/divorce.pdf> (concluding, based on a study of people between the ages of 40 and 69, "[w]omen usually initiate the divorce," "[v]erbal, physical, or emotional abuse is the foremost reason for divorce[,] and "[v]ictims of physical or verbal use . . . are much more apt to ask for the divorce").

186. Eleanor Lyon, *Welfare, Poverty and Abused Women: New Research and Its Implications, Building Comprehensive Solutions to Domestic Violence*, NATIONAL RESOURCE CR. ON DOMESTIC VIOLENCE 4, 7-8 (Oct. 2000) (stating that abused women "were more likely to have been unemployed when they wanted to be working, to have lower personal income, and to have received AFDC, food stamps, and Medicaid in the past year"); see also BUZAWA, *supra* note 33, at 40 (citing Eleanor Lyon, *Poverty, Welfare and Battered Women: What does the research tell us?*, THE NAT'L RESOURCE CENTER ON DOMESTIC VIOLENCE (1997) <http://www.mincava.umn.edu/documents/welfare/welfare.pdf>.) (pointing out that abused women are also more likely than others to . . . have partners who oppose or interfere with school or employment, and to have more frequent periods of unemployment and welfare receipts"); Tarr, *supra* note 184, at 371-80 (discussing how victims of domestic violence often lose their jobs due to the perpetrator's interference with their jobs or their pursuit of legal actions against their abuser and often abandon their jobs in order to escape from their abuser); Erica Pearson, *Heavy Price of Domestic Abuse: Victims Not Only Beaten But Often Left in Debt by Their Tormentors*, N.Y. DAILY NEWS, <http://www.nydailynews.com>.

Department Institute has estimated that, when medical costs, indirect costs, and diminished quality of life costs are taken into account, adult victims of domestic violence suffer economic costs of \$67 billion dollars per year (stated in 1993 U.S. dollars).¹⁸⁸

Finally, although domestic violence “is disproportionately concentrated in population subgroups that are stressed by poverty, [it] . . . is present in all social strata and ethnic groups[.]”¹⁸⁹ In sum, domestic violence in this country and around the world¹⁹⁰ appears to be an epidemic that is spiraling out of control.¹⁹¹

IV. MAJOR THEORIES OF DOMESTIC VIOLENCE

com/new-york/domestic-violence-takes-financial-toll-article-1.1172451 (discussing how domestic violence perpetrators often saddle their victims with enormous debts).

187. See, e.g., *2011 Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America's Cities*, U.S. CONFERENCE OF MAYORS 23, 80 (2011), <http://usmayors.org/pressreleases/uploads/2011-hhreport.pdf> (revealing that, across the 29 cities which participated in the 2011 survey, 13% of the homeless population in these cities were victims of domestic violence); U.S. CONFERENCE OF MAYORS, 2002 HUNGER AND HOMELESSNESS SURVEY 82 (2002) (stating that “[d]omestic violence was identified by 11 cities as a primary cause of homelessness”); see also CDC Study: Consequences, *supra* note 165 (stating that “[v]ictims of IPV (intimate partner violence) sometimes face . . . [h]omelessness” and citing a number of studies); *Committee Opinion on Intimate Partner Violence*, THE AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS 2 (2012), <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co518.pdf?dmc=1&ts=20121125T1707214097> (“stating that “[d]estruction of the family unit often results in loss of financial stability or lack of economic resources for independent living, leading to increased populations of homeless women and children”) (Citation omitted.)) [hereinafter ACOG Committee Opinion].

188. Ted R. Miller et al., *Victim Costs and Consequences: A New Look*, National Institute of Justice, U.S. DEP’T OF JUSTICE 23 (1996) available at <https://www.ncjrs.gov/pdffiles/victcost.pdf>.

189. WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH, VIOLENCE BY INTIMATE PARTNERS 99 (2002) [hereinafter WORLD HEALTH ORG.]; BUZAWA, *supra* note 33, at 40; ACOG Committee Opinion, *supra* note 187, at 1; *Spouse Abuse/Partner Abuse Information*, NATIONAL COUNCIL ON CHILD ABUSE AND FAMILY VIOLENCE 1 (2012), available at <http://www.nccafv.org/spouse.htm>.

190. See, e.g., *Violence Against Women and Girls Still a Global Epidemic*, UNICEF (May 31, 2000), www.unicef.org/newsline/00pr45.htm; Mary Kimani, *Taking on Violence Against Women in Africa: International Norms, Local Activism Start to Alter Laws, Attitudes*, AFRICA RENEWAL (July 2007), <http://www.un.org/ecosocdev/geninfo/afrec/vol21no2/212-violence-aganist-women.html> (reporting that Kofi Annan, then Secretary-General of the U.N., stated in 1999 that “violence against women knows no boundaries of geography, culture or wealth . . . [and] is perhaps the most shameful human rights violation . . . [and] perhaps the most pervasive”).

191. See, e.g., Press Release, Domestic Abuse Against Women is Epidemic in America, Shalala Says, U.S. Dep’t of Health and Human Services (Mar. 11, 1994), <http://archive.hhs.gov/news/press/1994pres/940311.txt> (reporting that then-U.S. Department of Health and Human Services Secretary Donna Shalala referred to domestic abuse against women as “terrorism in the home” and “called for ‘a national awakening to this unacknowledged epidemic in America’”).

As indicated above, the phenomenon of domestic violence literally appears to be tearing the society of the United States apart. Halting the perpetuation of domestic violence throughout succeeding generations of families is imperative for both the federal government and each state government, as any society can have no more important task than the protection of its youth.¹⁹² Accordingly, legislators in each jurisdiction in the United States should make every attempt to thoroughly understand the causes of domestic violence and then address those causes in the jurisdiction's laws.

Over the years, a number of theories of domestic violence have been proposed,¹⁹³ although several of these theories overlap with others¹⁹⁴ and a number of them are focused on explaining the asymmetrical nature of male-on-female violence in heterosexual relationships.¹⁹⁵ In an article of this length, it is not possible to discuss all of the different theories of domestic violence that have been proposed, but the major theories of domestic violence are summarized below.

One of the early theories of domestic violence was the "mental defect" theory, which held that a perpetrator of domestic violence possesses a physical brain abnormality or a serious mental illness, such as schizophrenia, which essentially causes him to experience a break from reality.¹⁹⁶ Some theorists also posited that a victim of domestic violence likewise possesses a physical brain abnormality or serious mental illness,¹⁹⁷

192. This sentiment has been expressed in many different ways throughout history. Nelson Mandela, for example, stated that "[t] here can be no keener revelation of a society's soul than the way in which it treats its children." President Nelson Mandela, Speech at the Launch of the Nelson Mandela Children's Fund, Mahlamba'nlopfu, Pretoria (May 8, 1995), available at <http://www.anc.org.za/ancdocs/history/mandela/1995/sp950508.html>. Similarly, when the United States Senate dedicated a building to former U.S. Senator Hubert Humphrey, he remarked that "[t]he moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life—the sick, the needy and the handicapped." Senator Hubert H. Humphrey, Speech at the Dedication of the Headquarters of the U.S. Dep't of Health and Human Services, Washington, D.C. (Nov. 4, 1977), available at <http://www.britannica.com/EBchecked/topic/276362/Hubert-H-Humphrey>.

193. See, e.g., JOAN MCCLENNEN, SOCIAL WORK AND FAMILY VIOLENCE 222–25 (Springer Publishing Company 2010) [hereinafter MCCLENNEN].

194. *Id.*; see also David A. Wolfe & Peter G. Jaffe, *Emerging Strategies in the Prevention of Domestic Violence*, 9 DOMESTIC VIOLENCE AND CHILDREN 133, 134 (Winter 1999) [hereinafter Wolfe & Jaffe].

195. MCCLENNEN, *supra* note 193, at 222–25.

196. BATTERER MANIPULATION AND RETALIATION IN THE COURTS: A LARGELY UNRECOGNIZED PHENOMENON SOMETIMES ENCOURAGED BY COURT PRACTICES 47–48 (Joan Zorza, ed. 2002) [hereinafter Zorza]; Eli H. Newberger et al., *Child Abuse: The Current Theory Base and Future Research Needs*, 22 J OF THE AMER. ACAD. OF CHILD PSYCHIATRY 262, 266 (1983) (citing R. J. Gelles, *Violence in the Family: A Review of Research in the Seventies*, 42 J. MARRIAGE & FAM. 873, 873 (1980) (stating that "research in the '60's tended to view domestic violence as rare and confined to mentally disturbed and/or poor people . . .")).

197. Zorza, *supra* note 196, at 47–48.

which others have attributed to researchers mistaking a victim's resulting mental injuries for a rationale explaining why she would choose to remain in an abusive relationship in the first place.¹⁹⁸ People who suffer from brain injuries and diseases that affect specific sections of the brain, such as the prefrontal cortex and the amygdala, may experience difficulty in regulating their emotions¹⁹⁹ and do, in fact, possess a higher than average propensity to commit domestic violence.²⁰⁰ However, the "mental defect" theory fell out of favor when many, if not most, domestic violence perpetrators did not appear to suffer from any physical brain abnormality or be out of touch with reality.²⁰¹ In all likelihood, the "mental defect" theory is best explained as an example of the human tendency to simply label incomprehensible human behaviors as "insane."²⁰²

Researchers over the years have also suggested various biological and chemical explanations of domestic violence, with testosterone being "the most researched and proven link to violent behavior."²⁰³ As testosterone level is positively associated with aggression and violence,²⁰⁴ one advantage of the "testosterone" theory is that it could explain the higher incidence of male-on-female violence that occurs in heterosexual relationships, given that males generally possess higher testosterone levels than females.²⁰⁵ Similarly, several researchers have theorized that domestic violence is attributable to unusual levels of serotonin, dopamine, and/or other naturally occurring hormones, and some studies have indeed shown that unusual levels of serotonin and/or dopamine are positively correlated with aggression toward oneself and others, substance abuse, exaggerated depression as a result of precipitating life stressors, and suicide.²⁰⁶ In fact,

198. Zorza, *supra* note 196, at 47–48.

199. See, e.g., JOSEPH LEDOUX, *THE EMOTIONAL BRAIN* 177 (1998); *Research Links Brain Damage and Violent Crime – USC Studies Point to Underlying Causes of Violent Crime in Young Offenders*, SCIENCE DAILY, Sept. 13, 1997, <http://www.sciencedaily.com/releases/1997/09/970913073401.htm> [hereinafter *USC Studies*] (stating that "[t]he prefrontal cortex is involved in the inhibition of aggressive behavior . . . [and] [s]tudies have shown that damage to the region correlates with impulsiveness and unpredictable, uncontrolled actions"); NICKY ALI JACKSON, *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 520–21 (2007).

200. *USC Studies*, *supra* note 199.

201. *Domestic Violence – Explore the Issue: Theories of Violence*, U. OF MINNESOTA HUMAN RIGHTS LIBRARY & MINN. ADVOCATES FOR HUMAN RIGHTS (2003), available at <http://www1.umn.edu/humanrts/svaw/domestic/link/theories.htm> (summarizing Zorza, *supra* note 196, at 47–48, and reporting that "[b]atterers attack only their intimate partners [or other family members]. People who suffer from mental illnesses such as schizophrenia do not limit their violence to their intimate partners.").

202. See, e.g., D. L. Rosenhan, *On Being Sane in Insane Places*, 179 *SCIENCE* 250, 250 (Jan. 19, 1973).

203. BUZAWA, *supra* note 33, at 39.

204. *Id.*

205. *Id.*

206. See, e.g., Dongiu Seo et al., *Role of Serotonin and Dopamine System Interactions in the Neurobiology of Impulsive Aggression and its Comorbidity with Other Clinical*

“[m]ost researchers have reported that a high percentage of domestic violence offenders use illegal drugs or consume excessive quantities of alcohol, at rates far beyond the general population . . . [.]”²⁰⁷ and some writers have theorized that the chemical composition of alcohol and other narcotics alters human’s brain chemistry to such an extent that people who otherwise would not perpetrate domestic violence end up doing so.²⁰⁸

However, it is important to understand that a positive correlation between a factor and domestic violence does not establish that the factor causes domestic violence. A number of studies have actually “suggested that the relationship between alcohol and domestic violence is indirect and a function of attitudes supporting the use of violence.”²⁰⁹ In addition, researchers have conceded that testosterone alone certainly cannot explain all cases of domestic violence, because many individuals, including successful businessmen and professional athletes, possess a higher than average level of testosterone, and yet they do not all commit domestic violence.²¹⁰ Likewise, neither serotonin nor dopamine, nor any other biological or chemical factor that has been identified to date, can explain a significant percentage of domestic violence cases.²¹¹

Socio-biologists, who attempt to explain gender-linked human behavior, due to the natural selection of traits that guarantee the human species’ survival,²¹² have also offered a theory of domestic violence.²¹³ Specifically, they have proposed that, due to the fact that a child’s paternity is not easily identifiable (unlike his or her maternity), males over time developed an aggressive posture vis-à-vis their intimate female partners so as to limit their partners’ interactions with other males, thereby reducing other males’ opportunities to impregnate their intimate female partners.²¹⁴ Psychologists, however, have pointed out several problems with this theory. For example, as one commentator has noted, this theory does not

Disorders, 13 AGGRESSIVE VIOLENT BEHAV. 383, 383 (Oct. 2008); V. M. Linnoila, M. Virkkunen, 53 J. CLIN. PSYCHIATRY 46 (Oct. 1992).

207. BUZAWA, *supra* note 33, at 37.

208. See, e.g., Robert A. Nash, *The Serotonin Connection*, 11 THE J. OF ORTHOMOLECULAR MED. 35, 39 (1996) available at <http://www.orthomolecular.org/library/jom/1996/articles/1996-v11n01-p035.shtml> (last visited Jan. 21, 2013) (stating that “[t]his paper goes on to show that low serotonin is associated with poor impulse control and most likely leads to violence to self and others in susceptible individuals”).

209. BUZAWA, *supra* note 33, at 38.

210. ELIZABETH KANDEL ENGLANDER, UNDERSTANDING VIOLENCE 76–77 (Lawrence Erlbaum Associates 2006).

211. See, e.g., Wolfe & Jaffe, *supra* note 194, at 134 (stating that “[t]here are several different, and at times, overlapping theories of causation”).

212. See, e.g., D.C. ROWE, THE LIMITS OF FAMILY INFLUENCE: GENES, EXPERIENCE AND BEHAVIOR (1994); David M. Buss, *Evolutionary Psychology: A New Paradigm for Psychological Science*, 6 PSYCH. INQUIRY 1, 9–10 (1995).

213. See, e.g., DAVID M. BUSS, THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING 16, n. 19 (2003).

214. *Id.*

explain why only a small minority of men actually inflict violence on their mates, why some women are the violent aggressor in heterosexual relationships, why lesbian couples inflict violence on each other, or why men do not instead attack males whom they perceive as sexual threats.²¹⁵

In addition, numerous researchers have noted that, across a broad range of societies, domestic violence occurs more often in low-income families than in high-income families.²¹⁶ Some studies have suggested that this phenomenon is explained by the unusually high number of stressful situations that low-income families face.²¹⁷ Some writers have posited that domestic violence occurs more often in such families because males in these families suffer a masculine identity crisis when they cannot support their families and they tend to take their frustration out on their intimate female partners.²¹⁸ Still other researchers suggest that the apparent inverse relationship between domestic violence and income may be explained simply by “the additional obstacles that poor women face to leaving rather than a greater propensity of poor men to batter.”²¹⁹ In any case, given that domestic violence “affect[s] individuals in every community, regardless of age, economic status, race, religion, nationality or educational background[,]”²²⁰ poverty appears to be at most a factor contributing to domestic violence, rather than a comprehensive explanation of this aberrant behavior.²²¹

215. DONALD G. DUTTON, *THE ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS* 31–33 (The Guilford Press 2007) [hereinafter DUTTON].

216. See, e.g., Rachel Jewkes, *Intimate Partner Violence: Cause and Prevention*, 359 *THE LANCET* 1423, 1424 (Apr. 20, 2002) (citing M.C. Ellsberg et al., *Wife Abuse Among Women of Childbearing Age in Nicaragua*, 89 *AM. J. PUB. HEALTH* 241–44 (1999) [hereinafter Jewkes]; S.L. Martin et al., *Domestic Violence in Northern India*, 150 *AM. J. EPIDEMIOLOGY* 417, 417–26 (1999); R. BACHMAN & L.E. SALTZMAN, WASHINGTON: BUREAU OF JUSTICE STATISTICS, NAT’L INST. OF JUSTICE, *VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE DESIGNED SURVEY 1*, 4 (1995); G.T. Hotaling & D.B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 *VIOLENCE VICTIM* 101, 114 (1986); RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY* (1988); see also BUZAWA, *supra* note 33, at 40.

217. See, e.g., JOHN HAMEL & TONIA L. NICHOLS, *FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE: A HANDBOOK OF GENDER-INCLUSIVE THEORY AND TREATMENT* 349, 501–02 (2006) [hereinafter HAMEL & NICHOLS]; EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 59 (Oxford Univ. Press 2007).

218. See, e.g., Jewkes, *supra* note 216, at 1424.

219. See, e.g., LUNDY BANCROFT, JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 30 (2d ed., 2012).

220. Tami Lorbecke, *The Story of Domestic Violence and Tribal Child Support*, in 33:10 *Child Support Report* (Oct. 2011), Administration of Children and Families, U.S. Department of Health and Human Services, available at http://www.acf.hhs.gov/sites/default/files/ocse/csr1110_0.pdf (last accessed Jan. 21, 2013) (citing *Domestic Violence Facts*, National Coalition Against Violence, 2007, available at [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf) (last accessed Jan. 5, 2013)).

221. See also SUSAN WEITZMAN, *NOT TO PEOPLE LIKE US: HIDDEN ABUSE IN UPSCALE MARRIAGES* 3–17 (Basic Books 2000) (comprehensive study of 14 middle and high-income

A theory of domestic violence that was especially popular in the 1960s and 1970s was the “learned behavior” theory, which proposes that abusers and victims alike are merely modeling the behavior of their childhood role models.²²² The learned behavior theory of domestic violence is very attractive, both because it implies that today’s domestic violence perpetrators were once victims and because it suggests that domestic violence can be abolished through education. It is this theory that is most often proffered as the explanation for inter-generational transmission of domestic violence in certain families.²²³ Unfortunately, the “learned behavior” theory, just like all of the other above-discussed theories, at most appears to provide only a partial explanation of domestic violence, in that while exposure to domestic violence during childhood is positively correlated with involvement in domestic violence in adulthood,²²⁴ most people who are exposed to domestic violence in their youth do not perpetrate domestic violence as adults.²²⁵

Today, the two dominant theories of domestic violence are the family dynamics theory and the feminist theory.²²⁶ The family dynamics theory is a specific application of general systems theory,²²⁷ which holds that one should analyze any organic situation from the perspective of how each action causes reactions from each of the other dynamic elements rather than from a simple linear perspective.²²⁸ Essentially, the family dynamics theory conceptualizes violence in domestic relationships as the expression of violence in response to normal stresses in family life by dysfunctional families.²²⁹

The feminist theory, in general, maintains that violence in domestic relationships is an outgrowth of patriarchal systems of male dominance in

female victims of domestic violence conducted by author after she had encountered hundreds of such victims and learned that “spouse assault by wealthy and powerful men rarely leads to police intervention” . . . “and in more prosperous neighborhoods, spacious homes and large lots made it unlikely that neighbors or friends would learn about and report the abuse[].” WEITZMAN, *supra*, at 8.).

222. See, e.g., HAMEL & NICHOLS, *supra* note 217, at 501.

223. See, e.g., MARGI LAIRD MCCUE, DOMESTIC VIOLENCE: A REFERENCE HANDBOOK 13–14 (2d ed. ABC-CLIO 2008) [hereinafter MCCUE].

224. DUTTON, *supra* note 215 at 48–52.

225. *Id.*; see also MCCUE, *supra* note 223, at 13–14.

226. Diane L. Zosky, *The Application of Object Relations Theory to Domestic Violence*, 27 CLINICAL SOC. WORK. J. 55, 55 (1999) [hereinafter ZOSKY].

227. See, e.g., *Family Systems Theory – Basic Concepts/Propositions, Challenges and Future Directions*, <http://family.jrank.org/pages/599/Family-Systems-Theory.html> (last visited Jan. 21, 2013) (“Family systems theory’s heritage emerged from the work of Ludwig Von Bertalanffy’s work on *general systems theory* which offered the world of the mid-twentieth century a different way of viewing science.”).

228. ZOSKY, *supra* note 226, at 57.

229. MCCUE, *supra* note 223, at 12 (“The family systems model looks at the function of the entire family.”).

the society at large.²³⁰ Feminist theorists maintain that it is paternalism that permits heterosexual males to abuse their intimate female partners in the first place and that such abuse, in turn, reinforces the female partners' subservient status vis-à-vis their male abusers.²³¹ In short, feminist theorists hold that domestic violence is primarily an instrument which males utilize to retain power and control over females in their personal lives.²³²

Like the above-discussed theories of domestic violence, however, neither the family dynamics theory nor the feminist theory of domestic violence can explain a majority of domestic violence cases. For example, critics of the family dynamics theory argue that it does not explain why women suffer a disproportionately high percentage of the physical injuries and fatalities caused by domestic violence incidents within heterosexual relationships.²³³ Further, critics claim that this theory falsely suggests that the victim of domestic violence, who usually is female, is equally as culpable as her abuser, who usually is male, for the perpetuation of domestic violence in the United States.²³⁴

At a minimum, the premise of the family dynamics theory that domestic violence is a "family problem" is troubling because it suggests that a domestic violence perpetrator is not entirely responsible for his or her own behavior.²³⁵ This concept is contrary to the philosophy of personal responsibility, which is the lynchpin of the U.S. criminal justice system.²³⁶ Ironically, it appears that the family dynamics theory could even promote a perpetual cycle of domestic violence; each time the victim objects to the

230. MCCUE, *supra* note 223, at 12 (explaining that the feminist theory, in general, holds that "[a] patriarchal society supports male power, female submission, and inequities that lead to violence against intimate partners").

231. See, e.g., Barbara Hart, *Reading: Why Men Batter Women: An Analysis of Male Violence*, IOWA COALITION AGAINST DOMESTIC VIOLENCE, ICADV TRAINING MANUAL FOR CRIME VICTIM COUNSELORS 15–16, available at <http://icadv.org/pdf/Victim%20Counselor%20Manual.pdf>.

232. See, e.g., Alison Cunningham et al., *Theory-Derived Explanations of Male Violence Against Female Partners: Literature Update and Related Implications for Treatment and Evaluation* 20–26, LONDON FAM. COURT CLINIC (1998).

233. See, e.g., *supra* text accompanying notes 129–37.

234. PEGGY PAPP, COUPLES ON THE FAULT LINE: NEW DIRECTIONS FOR THERAPISTS 154 (2001) ("In the family theory field, feminist family therapists began to question the notion of reciprocity that was central to systems theory.") [hereinafter PAPP]; see also MCCUE, *supra* note 223, at 12 (stating that some commentators maintain that the family systems theory "places partial blame on the victim").

235. See, e.g., Michele Bograd, *Family Systems Approaches to Wife Battering: A Feminist Critique*, 54 AM. J. OF ORTHOPSYCHIATRY 558, 558 (Oct. 1984).

236. See, e.g., MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME 263 (New York Univ. Press 2002) (pointing out that "[criminal] [o]ffenders must be persons . . . they must possess the capacity for autonomy . . . This makes sense because . . . [c]rime . . . is nothing but the exercise of that capacity [for autonomy] against, or to the detriment of, another person") [hereinafter DUBBER].

perpetrator's abuse, the theory appears to justify an abusive response by pointing an accusatory finger back at the victim.²³⁷ In sum,

the natural difficult[y] in applying this model [of domestic violence] to the real world is that virtually all conduct not immediately acceding to the wishes of the other party might be viewed as "provocative" or "antagonistic" [to the abuser]. [However,] [i]n most households this is rarely followed by violence. So this model does not explain those instances in which violence erupts[.]²³⁸

Critics of the feminist theory, on the other hand, argue that the theory unfairly portrays domestic violence as a crime committed solely or almost entirely by men against women in heterosexual relationships and minimizes the role that other factors, such as witnessing domestic violence and dysfunctional family dynamics, can play in the perpetuation of domestic violence.²³⁹ That is, while it is certainly the case that women in cultures that condone violence against women suffer a disproportionately high share of domestic violence incidents,²⁴⁰ proponents of the feminist theory must concede²⁴¹ that it does not explain why all males in heterosexual relationships do not abuse their female partners.²⁴² The feminist theory also does not explain a number of significant categories of domestic violence, such as violence committed by females against males in heterosexual relationships²⁴³ and violence committed against intimate partners in same-sex relationships.²⁴⁴ Additionally, the feminist theory of domestic violence does not explain domestic violence directed at a non-intimate partner, such as an elderly relative or a child.²⁴⁵

Apart from the psychological theory of domestic violence (discussed in depth below), the last major theory of domestic violence is that offered by Michael Johnson of Pennsylvania State University, whose work was

237. See, e.g., William G. Herron et al., *Sources of Family Violence*, 3 J. SOC. DISTRESS & THE HOMELESS 213 (1994).

238. BUZAWA, *supra* note 33, at 50.

239. PAPP, *supra* note 234, at 157 ("Critics of this feminist approach cite the lack of attention paid to the frequency with which women return to their abusive partners Often what they want is to remain in the relationship, but without the violence. And a pure feminist approach seems to miss the underlying relationship dynamics that may contribute to the cycle of violence.").

240. See, e.g., WORLD HEALTH ORG., *supra* note 189, at 99.

241. DUTTON, *supra* note 215, at 36–40.

242. *Id.* at 38–39.

243. See, e.g., *supra* text accompanying notes 122; 140–49.

244. DOLAN-SOTO, *supra* note 154, at 3.

245. DELONG, GENERAL AND ORAL PATHOLOGY, *supra* note 157, at 22 (reporting that "[t]ypical data show that as many as 3 [sic] million children each year are reported to child protective services (CPS) agencies in the U.S. . . ., as many as 2,000 [sic] children are fatalities of child abuse and neglect each year[,] . . . and [e]lderly abuse is at least as common as child abuse").

discussed in the previous section of this article.²⁴⁶ Johnson argues that there are two major types of domestic violence:²⁴⁷ situational couple violence (which he describes as domestic violence which arises out of “particular conflicts or tensions within the relationship”²⁴⁸) and intimate terrorism (which he describes as a “[male] attempt to . . . generally dominate the [heterosexual] relationship”²⁴⁹). Furthermore, he argues that the family dynamics theory largely explains situational couple violence and the feminist theory of domestic violence largely explains intimate terrorism.²⁵⁰ Through his insight that there are two primary types of domestic violence, Johnson has made a major contribution to our understanding of domestic violence. For example, as discussed above, he has revealed that conflating these two different types of domestic violence can lead researchers to reach misleading conclusions, such as that female-on-male violence occurs as frequently as male-on-female violence in heterosexual relationships.²⁵¹ In addition, his insight helps clarify why each of the above-discussed theories of domestic violence appears to explain only certain cases of domestic violence.

From the perspective of this article, however, Johnson’s insight suggests an even more significant fact regarding domestic violence: intimate terrorism is characterized by mental abuse, while situational couple violence is characterized by physical abuse.²⁵² The psychological theory explained below clarifies the significance of this distinction and furthermore suggests that both of Johnson’s two types of domestic violence are likely caused by trauma experienced by the abuser during childhood.²⁵³ Hence, it appears that Johnson’s two types of violence may best be viewed as two points along a continuum of psychological trauma, suggesting that the psychological theory of domestic violence is the most comprehensive theory of domestic violence that has been proposed to date.

V. THE PSYCHOLOGICAL THEORY OF DOMESTIC VIOLENCE

In this article, the “psychological” theory of domestic violence refers to the theory that one of the main causes of domestic violence, if not the primary cause, is the fact that perpetrators of domestic violence tend to be persons whose individuation process was interrupted by their own exposure to domestic violence (and typically intimate terrorism) during

246. *See supra* text accompanying notes 83–118.

247. Johnson 2009, *supra* note 83, at 282.

248. *Id.*

249. *Id.* at 283–84.

250. JOHNSON 2008, *supra* note 83, at 19, 25, 32, and 63.

251. *See supra* text accompanying notes 88–89.

252. Johnson 2009, *supra* note 83, at 282, 284–85.

253. *See infra* Section V.B.

childhood.²⁵⁴ This theory could also be referred to as the “trauma” theory of domestic violence. In this section, the normal development of the human brain and mind is first discussed. Then, the effects of childhood exposure to domestic violence, and especially intimate terrorism, on the normal development of the human brain and mind are summarized. Finally, the male-on-female asymmetric incidence of intimate terrorism in heterosexual couples is explained.

A. NORMAL DEVELOPMENT OF THE HUMAN BRAIN AND MIND

Until just a few decades ago, scientists believed that the various physical structures of the human brain grew larger but were otherwise genetically determined at the time of an infant's birth.²⁵⁵ Techniques and technologies employed by researchers in recent years, however, have revealed that “large areas of . . . [one's] brain don't begin to develop until after . . . [he or she is] born.”²⁵⁶ The significance of this fact for this article is that an infant's physical brain structures and functions can be compromised by events that occur during this post-birth development process, especially in the first few years of life.²⁵⁷ For example, the right orbitofrontal system of the brain, which is key to regulating one's emotions, develops and shapes the brain's circuits during the period from approximately ten to twelve months to sixteen to eighteen months after birth.²⁵⁸

Of course, psychologists have known for many years that the human mind or “psyche” is not fully formed at an infant's birth,²⁵⁹ and Sigmund Freud and Carl Jung in the early 1900s proposed the first major theories of human psychological development.²⁶⁰ While many different theories of

254. ZOSKY, *supra* note 226, at 58–59; Diane L. Zosky, *Disruptions in the Separation-Individuation Process of Domestically Violent Men: An Empirical Examination of Mahler's Theory*, 12 J. OF HUM. BEHAV. IN THE SOC. ENV'T 43, 44 (Mar. 4, 2006); D.J. Sonkin & D. Dutton, *Treating Assaultive Men in Attachment Perspective*, 7 J. OF AGGRESSION, MALTREATMENT AND TRAUMA 105 (2003) [hereinafter Sonkin & Dutton].

255. *See, e.g.*, NORMAN DOIDGE, *THE BRAIN THAT CHANGES ITSELF* 294–96 (2007) [hereinafter DOIDGE].

256. *Id.* at 306, 343.

257. *Id.* at 225–29, 307, 343–44. In addition, if certain physical structures and functions of an infant's brain are defective or have been compromised at the time of an infant's birth, these structures or functions may be able to repair or heal themselves during the post-birth development phase. *Id.* at 258–71.

258. *Id.* at 225–29, 343–44.

259. *See, e.g.*, WILLIAM DAMON & RICHARD M. LERNER, 1 *HANDBOOK OF CHILD PSYCHOLOGY: THEORETICAL MODELS OF HUMAN DEVELOPMENT* 946 (2006) (discussing how Jean Jacques Rousseau, in his book *EMILE: OR, ON EDUCATION* (1979) (original work published 1762), did not propose a systematic theory or description of age changes, but nonetheless contemplated that a human being's psyche continues to develop at least until he or she is an adolescent).

260. *See, e.g.*, SIGMUND FREUD, *Three Essays on Sexuality*, in *THE PELICAN FREUD LIBRARY* (1977) [hereinafter FREUD]; C. J. JUNG, *PSYCHOLOGY OF THE UNCONSCIOUS* (2003) [hereinafter JUNG]; MARIO JACOBY, *INDIVIDUATION AND NARCISSISM: THE PSYCHOLOGY OF*

psychological development have been proposed since, developmental psychologists tend to generally subscribe to either the Freudian or the Jungian theory of mind development.²⁶¹ Furthermore, as demonstrated below, these two theories of human psyche development are very similar.

Freud and Jung agreed that a mature human psyche is composed of both a “conscious” component and an “unconscious” component.²⁶² In addition, they agreed that a mature human mind is capable of performing the following three major functions: engaging in rational thought, adhering to a moral code (or conscience), and recognizing and expressing emotions.²⁶³

Freud and Jung agreed that a newborn human being does not possess a fully developed psyche.²⁶⁴ That is, no infant is born with the capacity to speak a particular language, such as Russian or French, adhere to any particular moral or cultural code, or express distinct emotions, such as joy and sadness. Freud and Jung’s theories of maturation of the human psyche demonstrate how each of the three major functions of the psyche develops through an elaborate process whereby its development is dependent on the development of the other two functions.²⁶⁵

The normal maturation of the human psyche proceeds essentially as follows. To begin with, at the moment of an infant’s birth, the infant does not possess any sense of existing as a “separate being” from his or her primary caregiver.²⁶⁶ Shortly thereafter, however, the infant’s primary caregiver makes an appeal to the infant’s emotional capacity,²⁶⁷ and, after the two “share” emotions for several months, the normal infant’s psyche has developed to the point where he or she is amenable to learning a language.²⁶⁸ Through the process of learning a language, the infant’s

SELF IN JUNG AND KOHUT 96 (1991) (Jung described the development of the ‘self’ as the ‘individuation’ process) [hereinafter JACOBY].

261. JACOBY, *supra* note 260, at ix–x, 33–40, 47–49 (1991); Tom Colls, *Myths of the Mind*, BBC NEWS (Oct. 28, 2009), <http://news.bbc.co.uk/1/hi/8318000/8318707.stm>; Kendra Cherry, *Freud and Jung*, ABOUT, <http://psychology.about.com/od/sigmundfreud/ig/Sigmund-Freud-Photobiography/Freud-and-Jung.htm>.

262. *See, e.g.*, FREUD, *supra* note 260; JUNG, *supra* note 260, at xxxviii–xxxix.

263. CHRIS BARKER, *CULTURAL STUDIES: THEORY AND PRACTICE* 20–21 (2003) (citing and discussing FREUD) [hereinafter BARKER]; CARL GUSTAV JUNG, *THE THEORY OF PSYCHOANALYSIS* 54, 105 (Nabu Press 2010) [hereinafter JUNG, *THEORY OF PSYCHOANALYSIS*].

264. *See, e.g.*, sources cited *supra* note 260.

265. BARKER, *supra* note 263, at 21–22; 17 C.G. Jung, *The Development of Personality*, in *COLLECTED WORKS OF C.G. JUNG* 165–87 (Gerhard Adler trans., 1921) [hereinafter Jung, *Development of Personality*]. In addition, as noted above, psychologists and neurologists now understand that the development of the human psyche is influenced by, and, in turn, influences, the on-going development of the physical structures and functions of the brain. DOIDGE, *supra* note 255, at 225–29, 307, 343.

266. BARKER, *supra* note 263, at 21–22; JACOBY, *supra* note 260, at 96; Jung, *Development of Personality*, *supra* note 265, at 172.

267. JACOBY, *supra* note 260, at 96–97.

268. *Id.*

ability to engage in rational thought is fostered, as any language contains a logical structure.²⁶⁹ Furthermore, through this process, the infant learns aspects of his or her culture, including its moral code,²⁷⁰ and develops a greater capacity to communicate with the caretaker and others.

Then, after the infant is able to communicate at least in at least a rudimentary form, the infant's primary caregiver appeals again to the infant's emotional capacity by encouraging the infant to explore the world away from the caretaker.²⁷¹ Freud maintained that most infants have completed this first "narcissistic phase" (colloquially referred to as the "terrible twos") within eighteen to twenty-four months of age.²⁷² From the time when a child is approximately five years old until he or she is approximately twelve or thirteen years old, a child simply further develops each of the three major functions of the child's psyche.²⁷³ Finally, the child enters the second "narcissistic phase" (often referred to as an individual's "rebellious teenage years").²⁷⁴ During this second narcissistic phase, the child explores various cultures in the larger society and exercises his or her autonomy on a more or less constant basis.²⁷⁵ If, as a result of this second narcissistic phase,²⁷⁶ a child ultimately possesses a fully autonomous "personality" capable of confidently asserting itself in the world, he or she is said to have completed the "narcissistic transformation" process, in terms of Freudian psychic development theory²⁷⁷ or the "individuation" process, in terms of Jungian psychic development theory.²⁷⁸

Psychologists have emphasized that, during both of the above-described "narcissistic phases" but especially during the first such phase, it is critically important for the infant's caregivers to permit him or her to exercise his or her autonomy while providing frequent assurances that the

269. JACOBY, *supra* note 260, at 96–97.

270. *See, e.g.*, MADAN SARUP, AN INTRODUCTORY GUIDE TO POST-STRUCTURALISM AND POSTMODERNISM 8–10 (1993). Cultural theorists have pointed out that a child's conscience, in particular, is developed through appeals to both his or her capacity to appreciate emotions (*i.e.*, ability to empathize with others' emotions) as well as his or her capacity to engage in rational thought (*i.e.*, ability to learn the society's moral code). *See, e.g.*, BRIGID DANIEL, CHILD DEVELOPMENT FOR CHILD CARE AND PROTECTION WORKERS 236 (Brigid Daniel et al. eds., 1999).

271. *See, e.g.*, BARKER, *supra* note 263, at 21–22.

272. *Id.*

273. *Id.*; Jung, Development of Personality, *supra* note 265, at 165–87; PETER GAY, FREUD: A LIFE FOR OUR TIME 147 (1998).

274. *See, e.g.*, SIGMUND FREUD, THE PENGUIN FREUD READER 357–59 (Adam Phillips ed., 2006).

275. BARKER, *supra* note 263, at 21–22; Jung, Development of Personality, *supra* note 265, at 165–87.

276. Recent research has revealed that the average person does not complete this process and become fully emotionally mature until approximately twenty-five years of age. *See, e.g.*, Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, WASH. POST (Feb. 1, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A52687-2005Jan31.html>.

277. SIGMUND FREUD, THE FREUD READER 639 (Peter Gay ed., 1995).

278. JACOBY, *supra* note 260, at 96.

caregivers will remain a stable fixture in his or her new existence.²⁷⁹ This constant encouragement and soothing is needed, according to psychologists, because the child feels very excited but also very frightened of the larger world beyond his or her comfort zone.²⁸⁰

Furthermore, during the first narcissistic phase in particular, it is essential that the infant's (typically strong) emotions be reflected back to him or her, as otherwise the infant may not learn how to recognize, express, and regulate his or her emotions.²⁸¹ If a child's emotions are constantly ignored or denied, he or she ultimately becomes numb to those emotions.²⁸² Once a child has failed to develop the capacity to recognize his or her emotions, he or she most likely will also be unable to establish firm psychological boundaries between his or her self and others, which the hallmark of an autonomous personality.²⁸³ In addition, if a child cannot recognize his or her own emotions, he or she in all likelihood will be unable to recognize others' emotions and develop empathy.²⁸⁴ Moreover, a child who is bereft of empathy most likely will be unable to internalize his or her society's moral code, or, in other words, develop a conscience.²⁸⁵

B. THE EFFECTS OF CHILDHOOD EXPOSURE TO INTIMATE TERRORISM

As explained, the goal of an intimate terrorist is to completely control his or her intimate partner, and he or she can accomplish this goal only by completely controlling his or her domestic situation.²⁸⁶ The intimate terrorist's assertion of control over almost every aspect of such a household, by definition, is intended to thwart the assertion of autonomy of any other member of the household, and that certainly includes any child living in the home.²⁸⁷ Furthermore, the intimate terrorist's weapons of choice primarily are mental—including, for example, insults, derogatory names, humiliating and unfair punishments, false accusations, involvement of the victim in criminal or immoral activities, and the constant elevation of

279. PHYLLIS TYSON & ROBERT L. TYSON, *THE PSYCHOANALYTIC THEORIES OF DEVELOPMENT: AN INTEGRATION* 101–05 (1993).

280. *Id.*

281. *See, e.g.*, ALICE MILLER, *THE UNTOUCHED KEY: TRACING CHILDHOOD TRAUMA IN CREATIVITY AND DESTRUCTIVENESS* 60 (1990) [hereinafter MILLER, *THE UNTOUCHED KEY*].

282. *Id.*

283. CHARLES WHITFIELD, *BOUNDARIES AND RELATIONSHIPS: KNOWING, PROTECTING AND ENJOYING THE SELF* 54 (1994).

284. MILLER, *THE UNTOUCHED KEY*, *supra* note 281, at 60.

285. *See, e.g.*, Jennifer Copley, *Why Most People Are Not Psychopathic*, SUITE 101 (Aug. 9, 2008), http://personalitydisorders.suite101.com/article.cfm/why_most_people_are_not_psychopathic; *see also* *Conscience*, ENOTES, <http://www.enotes.com/gale-psychology-encyclopedia/conscience> (defining conscience as “[t]he moral dimension of human consciousness, the means by which humans modify instinctual drives to conform to laws and moral codes”).

286. JOHNSON 2008, *supra* note 83, at 88, 94; JOHNSON 2009, *supra* note 83, at 282, 285–86.

287. JOHNSON 2009, *supra* note 83, at 284.

his needs above the victim's needs – and such abuse fails to validate a child's emotions and undermines the child's self-esteem.²⁸⁸ In the story presented at the commencement of this article, Josh's father engages in all of the above types of mental abuse.²⁸⁹

The numerous mental injuries suffered by children in Josh's situation have been documented by many different researchers over many years.²⁹⁰ Such injuries include: the inability to recognize, express, and regulate one's emotions;²⁹¹ the inability to self-soothe following upsetting events;²⁹² significant cognitive impairments;²⁹³ dissociative states;²⁹⁴ lack of self-esteem;²⁹⁵ depression;²⁹⁶ the inability to trust others;²⁹⁷ unprovoked aggression toward others;²⁹⁸ and failure to respect others' rights and boundaries.²⁹⁹ In addition, the child's developing brain structures and functions are damaged.³⁰⁰

Psychologists typically have relied on either "object relations theory" or "attachment theory" within the general field of psychology to explain how a child exposed to intimate terrorism and such mental injuries would cause the child's individuation process to be interrupted and predispose him to commit intimate terrorism himself.³⁰¹ Very generally, object relations theory traces an insecure self and ambivalence in relationships to intermittent frustration by one's mother figure during early childhood and failure to complete the individuation process.³⁰² Similarly, attachment theory traces an insecure self to the fracture in a basic socio-biological need, that of physical attachment to one's primary caregiver.³⁰³

It would be uncharacteristic of an intimate terrorist to apologize for his abuse or attempt to soothe the trauma which a child suffers as a result of

288. JOHNSON 2008, *supra* note 83, at 88, 94; Johnson 2009, *supra* note 83, at 285–86.

289. *See supra* Section I.

290. *See id*; *see also, e.g.*, Carter, *supra* note 158, at 1 (citing, among other studies, J.L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839 (Aug. 1999); J. Wolak & D. Finkelhor, *Children Exposed to Partner Violence*, in *Partner Violence: A Comprehensive Review of 20 Years of Research* (J.L. Jasinski & L.M. Williams eds., 1998)).

291. Child Welfare Information Gateway, *Understanding the Effects of Maltreatment on Brain Development*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (2009) https://www.childwelfare.gov/pubs/issue_briefs/brain_development/effects.cfm#emotional.

292. *Id.*

293. *Id.*

294. JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO TERRORISM* 102 (1997).

295. Carter, *supra* note 158, at 6.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. DOIDGE, *supra* note 255, at 225–29, 343–44.

301. *See, e.g.*, Sonkin & Dutton, *supra* note 254, at 105.

302. DUTTON, *supra* note 215, at 126–27.

303. *Id.* at 150–531.

witnessing his abuse.³⁰⁴ Intimate terrorists tend to lack empathy,³⁰⁵ believe their children should meet their (the intimate terrorists') needs,³⁰⁶ and be preoccupied with maintaining control over their partner and their home.³⁰⁷ Moreover, the ability of the intimate terrorist's partner to comfort such a child may be compromised by the intimate terrorist's abuse.³⁰⁸ As a result, a child growing up in such an atmosphere may very well be unable to complete the individuation process and become an autonomous individual, develop his rational thought processes, or recognize his or others' emotions.³⁰⁹

Donald Dutton made several significant contributions to the psychological theory of domestic violence in his 2007 book, *The Abusive Personality*.³¹⁰ He compiled and analyzed the behavioral traits of a large number of domestic violence perpetrators, concluding that they tend to suffer from traumatic stress, as is often caused by exposure to intimate

304. See, e.g., Lundy Bancroft & Jay G. Silverman, *Assessing Risk to Children From Batterers* (2002), http://www.lundybancroft.com/?page_id=261 ("It should be noted that a large proportion of batterers are unable to create or support most of the critical healing elements [that children need in order to recover from suffering or witnessing the batterer's abuse] . . . Domestic violence perpetration has its roots in a definable set of attitudes, beliefs, and behavioral patterns. These characteristics include among others the man's belief in his right to use violence against a partner to impose his will, his sense of entitlement within the family, his patterns of controlling and manipulative behaviors, disrespect for his partner and lack of empathy for her feelings, and his externalizing of responsibility for his actions") (internal citations omitted.); H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, Office on Child Abuse and Neglect, U.S. Department of Health and Human Services, 15–20 (2003) <https://www.childwelfare.gov/pubs/usermanuals/domesticviolence/domesticviolence.pdf> (stating that "[d]omestic violence is a pattern of coercive and assaultive behaviors that include physical, sexual, verbal, and psychological attacks and economic coercion that adults or adolescents use against their intimate partner") [hereinafter Bragg]. *Id.* at 29–30 (explaining that perpetrators of domestic violence tend to cultivate a favorable public image and blame their abuse on their intimate partner and deny, minimize and justify their abuse in general). *Id.* at 31–32 (revealing that common characteristics of perpetrators as fathers include authoritarianism, preoccupation with maintaining control over their partner and meeting their own emotional needs, irresponsibility toward, and lack of involvement with, their children, undermining of their victim's parenting efforts, self-centeredness, and manipulation of their victim and children for the purpose of maintaining power in the home).

305. See, e.g., Nancy VerSteegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1392 (2005).

306. *Id.*

307. Bragg, *supra* note 304, at 30–31.

308. DUTTON, *supra* note 215, at 136–37; 196–97; see also Peter G. Jaffe & Claire V. Crooks, *Understanding Women's Experiences Parenting in the Context of Domestic Violence: Implications for Community and Court-Related Service Providers*, U.S. DEPT OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, (Feb. 2005), <http://www.vaw.umn.edu/documents/commissioned/parentingindv/parentingindv.html>; Alytia A. Levendosky & Sandra A. Graham-Bermann, *Parenting in Battered Women: The Effects of Domestic Violence on Women and Their Children*, 16 J. FAMILY VIOLENCE 173, 187 (2001).

309. See *supra* notes 279–87, 290–303, and accompanying text.

310. See, e.g., DUTTON, *supra* note 215.

terrorism in one's childhood.³¹¹ Furthermore, their symptoms of stress were so unmistakable and similar to abused children's symptoms of stress that he realized that "[c]learly there . . . [is] more than mere modeling going on in abusive families[.]"³¹²

Additionally, Dutton determined that the behavior traits of perpetrators of domestic violence appear to fall into one of three types of well-recognized "Cluster B" personality disorders³¹³—avoidant, borderline, and anti-social personality—that can occur as a result of abuse experienced or witnessed in childhood.³¹⁴ Specifically, according to Dutton, abusers who lack impulse control and engage in domestic violence on an occasional basis (perpetrators of situational couple violence, in Johnson's typology) often suffer from avoidant personality disorder, whereas abusers who engage in domestic violence on a routine basis, in a cold and calculating manner (perpetrators of intimate terrorism, in Johnson's typology) often suffer from antisocial disorder or borderline personality disorder.³¹⁵

Finally, Dutton discussed several "protective factors" or "positive events" that help prevent a child exposed to intimate terrorism from evolving into an intimate terrorist himself.³¹⁶ These factors include: "having one supportive adult in an otherwise hostile early environment, being in an emotionally supportive family as an adult, or involvement in psychotherapy as an adolescent or young adult."³¹⁷ While he conceded that it may take some time to conclusively prove the psychological theory of domestic violence, the evidence that he presented in support of this theory is quite strong and he "believe[s] it is just a matter of time until . . . a comprehensive lifespan developmental portrait of the long-term consequences of early abuse [can be presented]."³¹⁸

C. THE MALE-ON-FEMALE ASYMMETRIC INCIDENCE OF INTIMATE TERRORISM IN HETEROSEXUAL COUPLES

As mentioned above, one of the factors that Dutton listed as protecting children exposed to domestic violence from developing into an intimate terrorist is "having one supportive adult in an otherwise hostile early development."³¹⁹ The world-renowned psychologist Alice Miller went so far as to state that "[t]he absence or presence of a helping witness in childhood determines whether a mistreated child will become a despot who

311. DUTTON, *supra* note 215, at 197–209.

312. *Id.* at 126.

313. The APA publishes the DSM-IV-TR, which classifies aberrant behavior into various personality disorders. DSM-IV-TR at 8.

314. DUTTON, *supra* note 215.

315. *Id.* at 8–16.

316. *Id.* at 51–52.

317. *Id.*

318. DUTTON, *supra* note 215, at 209.

319. *Id.* at 51–52.

turns his repressed feelings of helplessness against others or an artist who can tell about his or her suffering.”³²⁰ Unfortunately for boys, this protective factor appears to be much more available to girls than boys,³²¹ as “[boys] . . . are taught to apologize for their weaknesses. [Girls] . . . for their strengths[.]”³²² For many boys, they perceive their only choices to be turning into an angry, controlling abuser themselves or retreating into themselves, where they “begin[] the task of expunging every possible source of shame from [their] identity.”³²³

The male-on-female asymmetry of abuse has been variously attributed to males’ higher levels of testosterone,³²⁴ paternalistic societal norms that justify men’s control over women,³²⁵ and/or male children witnessing and then later modeling their father’s abusive behavior of their mother.³²⁶ Each of these theories (the biological, feminist, and learned behavior theory, respectively³²⁷) most likely at least partially explains this asymmetry. At the same time, while further research certainly needs to be conducted on this point, Dutton’s psychological (or “trauma”) theory of domestic violence,³²⁸ in light of society’s inadequate soothing of abused boys’ trauma due to its the credo that “boys don’t cry; they must be ‘toughened, [both] physically and mentally,’”³²⁹ seems to provide a more comprehensive explanation for this asymmetry, at least to this writer. In particular, unlike each of the above-mentioned three alternative explanations,³³⁰ it answers why some boys who witness their father abusing their mother turn into intimate terrorists themselves, while other such boys (who likewise possess similar testosterone levels and live in a similarly paternalistic society) do not.

320. MILLER, *THE UNTOUCHED KEY*, *supra* note 281, at 60.

321. *See, e.g., id.* at 55, 192 (explaining that boys learn early in life that it is more acceptable to convert their fear of abandonment into anger, as anger is a more appropriate emotion to display than fear); DAVID B. WEXLER, *WHEN GOOD MEN BEHAVE BADLY: CHANGE YOUR SELF, CHANGE YOUR BEHAVIOR* 57–61 (2004) (discussing “the credo of toughening boys up, physically and mentally”) [hereinafter WEXLER].

322. *See* sources cited *supra* note 2.

323. DUTTON, *supra* note 215, at 192, 209 (noting that the latter “process is no more clearly represented than in the case of the entertainer Michael Jackson, who, in response to an abusive childhood, attempted to expunge every aspect of his visual identity, including his race, through repeated operations on his nose and skin bleaching”).

324. BUZAWA, *supra* note 33, at 39.

325. Amy Elizabeth Lappen, *The Neglected Side of Domestic Violence: Case Studies of Female Aggressors [sic] in Intimate Partnerships* 12 (Aug. 2007) (unpublished Ph.D. dissertation, Univ. S. Cal.) (on file with author).

326. Walter S. DeKeseredy & Martin D. Schwartz, *Theoretical and Definitional Issues in Violence Against Women*, in *SOURCEBOOK ON VIOLENCE AGAINST WOMEN* 11 (Claire Renzetti et al. eds, 2d ed. 2010).

327. *See supra* notes 203, 222, 230–32, 324–26.

328. *Supra* Section V.

329. Wexler, *supra* note 321, at 60.

330. *See supra* text accompanying notes 324–27.

This section has discussed how exposure to intimate terrorism in one's childhood has particularly deleterious effects on a child's developing brain and mind, precisely because this type of domestic violence is characterized by mental abuse. It has also explained how exposure to the trauma of intimate terrorism in one's childhood appears to predispose a child (and especially a male child) to developing into an intimate terrorist himself or herself. Finally, this section has noted that intimate terrorism appears to be the mechanism through which domestic violence is perpetrated throughout generations of American families. In sum, with respect to domestic violence, "the primary risk to . . . children is the intimate terrorist."³³¹

The next section reveals that some states include a few forms of mental abuse in the statutory definition of domestic violence which their family courts utilize during child custody proceedings.³³² However, the few forms of mental abuse included in these particular definitions of domestic violence could be categorized as 1) threats of future physical harm or sexual assault; 2) nonconsensual contacts with the victim, and 3) invasions of the victim's privacy,³³³ which certainly do not encompass all of the types of mental abuse which an intimate terrorist typically inflicts on his intimate partner and other household members.³³⁴ Moreover, given that no state requires a person to obtain pre-authorization to contact or infringe the privacy of a current intimate partner, at least the last two categories of mental abuse incorporated in such statutory definitions of domestic violence—unauthorized contacts with the victim and invasions of the victim's privacy—are premised on the notion that the intimate relationship between the domestic violence perpetrator and his victim(s) has terminated. In short, it appears that state legislatures intentionally excluded most of the forms of mental abuse which an intimate terrorist inflicts on his victim(s) from the definitions of domestic violence which family courts utilize in child custody cases.³³⁵

Finally, the state legislatures' almost complete exclusion of the forms of mental abuse suffered during an intimate relationship from their definitions of domestic violence suggests that the legislators erroneously believe it is impossible for a person to mentally abuse an intimate partner if that intimate partner is an autonomous adult who has chosen to remain in the relationship. This belief ignores scientific evidence that the autonomy

331. Michael P. Johnson, *Apples and Oranges in Child Custody Disputes: Intimate Terrorism vs. Situational Couple Violence*, 2 J. CHILD CUSTODY 43, 51 (2005).

332. See, e.g., *infra* text accompanying notes 371–418, discussing Cal. Fam. Code § 3044.

333. *Id.* 334. See *supra* Section I (events which occurred to Josh, the teenager in the story presented at the commencement of this article) and text accompanying notes 51–80, 83–87, 101–15.

334. See *supra* Section I (events which occurred to Josh, the teenager in the story presented at the commencement of this article) and text accompanying notes 51–80, 83–87, 101–15.

335. See, e.g., *infra* text accompanying notes 371–418, discussing Cal. Fam. Code § 3044.

of an adult victim can be eroded by an intimate terrorist's persistent mental abuse.³³⁶ Furthermore, this belief is inconsistent with numerous studies documenting the many understandable reasons why an adult victim of intimate terrorism often chooses not to terminate such a relationship.³³⁷ Not infrequently, foremost among these reasons is the victim's well-founded fear that the intimate terrorist will kill or seriously injure her or her children if she does so.³³⁸ Most important, all state legislatures mandate that family courts decide each child custody case in accordance with the best interests of the child. Yet, the statutory definitions of domestic violence which these courts must follow exclude most acts of intimate terrorism even though such acts may have significantly harmed the child. The next section of this article reviews such statutory definitions of domestic violence in some detail.

VI. DEFINITIONS OF DOMESTIC VIOLENCE UTILIZED IN THE FIFTY STATES

A major premise of this article is that each state's laws for combating and treating domestic violence should be based on the most accurate information available regarding the causes and consequences of domestic violence. Only if these laws are based on such information can they provide the most effective interventions and remedies possible for the many victims of domestic violence. To that end, this section of the article reviews the various state statutory definitions of domestic violence and assesses the extent to which they reflect the above-discussed contributions made by the field of psychology to our understanding of domestic violence.

At the outset, it must be acknowledged that "[t]he U.S. legal system's treatment of domestic violence has evolved a long way from the 'rule of thumb' and the principle that children are always the exclusive property of the father upon the dissolution of a marriage, regardless of the reason for

336. See, e.g., LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* 69–73, 360–61 (3d ed. 2009); see also *supra* text accompanying notes 101–104, 110–111.

337. *The Facts about Domestic Violence*, Minn. Ctr. Against Violence & Abuse (2010) <http://www.vaw.umn.edu/documents/inbriefs/domesticviolence/domesticviolence.html#tjad-en1998> ("Victims of domestic violence experience many barriers when leaving abusive relationships. These include fear of the abuser, believing the abuser will take their children, hoping the abuser will change, embarrassment, shame and self-blame about their situation. Limited financial options, lack of transportation, lack of knowledge the services exist, and lack of proximity to those services are also factors.")

338. In fact, an intimate terrorist's tendency to increase his violence when the victim attempts to separate from him is so common that domestic violence experts have dubbed this phenomenon "separation assault." Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991); Martha R. Mahoney, *Women's Lives, Violence, and Agency* in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 79 (Martha Albertson Fineman & Roxanne Mykitiuk, eds., 1994) (noting that more than half of domestic violence homicides are committed after the victim leaves the relationship).

the dissolution.”³³⁹ Since the U.S. Congress’s enactment of the Violence Against Women Act (VAWA)³⁴⁰ in 1994, several states have enacted domestic violence laws,³⁴¹ and many victims of domestic violence have benefitted as a result.³⁴²

At the same time, much work remains to be done to provide the majority of domestic violence victims with effective legal assistance. Today, most states’ domestic violence laws are a bewildering jumble of inconsistent, incomplete and nonsensical provisions. This morass reflects society’s deep misunderstanding and confusion regarding domestic violence. In California, for example, “domestic violence” is regulated in the Penal Code,³⁴³ the Health and Safety Code,³⁴⁴ the Welfare and Institutions Code,³⁴⁵ the Family Law Code,³⁴⁶ the Civil Code,³⁴⁷ and the

339. Claire Wright, *Confronting Domestic Violence Head On: The Role of Power in Domestic Relationships*, 32 T. JEFFERSON L. REV. 21, 21 (citing James Gillray, *Judge Thumb, or Patent Sticks for Family Corrections: Warranted Lawful!* (Nov. 27, 1872), available at <http://www.loc.gov/pictures/resource/cph.3c14396/>; Marian Bussey & Jean Biesecker, *Protecting the Rights of Children in Disputed Custody Cases: Mental Health and Legal Considerations*, 16 FAMILY ATT’Y 34, 34 (citing R.A. GARDNER, FAMILY EVALUATING IN CHILD CUSTODY LITIGATION (1982)). “The phrase *rule of thumb* originated in the common-law rule that a husband could beat his wife without legal sanction if he used a rod not thicker than his thumb.” MARTHA ALBERSTON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 218, n. 9 (1994) (citing Davidson, *Wife Beating: A Recurring Phenomenon Throughout History*, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 18–21 (M. Roy ed., 1977)). See also THOMAS JEFFERSON SCHOOL OF LAW, CONFRONTING DOMESTIC VIOLENCE HEAD ON: THE ROLE OF POWER IN DOMESTIC RELATIONSHIPS, Brochure for Ninth Annual Women and the Law and Ruth Bader Ginsburg Lecture (Feb. 27, 2009) (on file with the *Thomas Jefferson Law Review*).

340. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1902.

341. See, e.g., *Domestic Violence: Encyclopedia of Everyday Law*, ENOTES, <http://www.enotes.com/everyday-law-encyclopedia/domestic-violence> (last visited Jan. 19, 2013); Leslye Orloff & Olivia Garcia, *Dynamics of Domestic Violence Experienced by Immigrant Victims*, ch. 1.1 in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 1, 6, 8–9 (Women’s Legal Defense and Education Fund, 2004), available at <http://www.legalmomentum.org/our-work/immigrant-women-program/breaking-barriers.html> (explaining that immigrant women and children are particularly vulnerable to domestic violence due to an abuser’s threat that he can have her deported (possibly without her children), their lack of family and other support networks in the United States, their unfamiliarity with the English language and the United States legal system and discussing how the VAWA permits immigrant women and children to obtain legal status in the United States without the abuser’s assistance and provides immigrant victims of domestic violence with a variety of social services).

342. Press Release, U.S. Dep’t of Justice, Justice Dep’t Commemorates Fifteen Years of Violence Against Women Act (Sept. 14, 2009) <http://www.justice.gov/opa/pr/2009/September/09-ag-953.html> (stating that “[i]n the past 15 years [since the passage of the VAWA], countless lives have been saved, the voices of survivors have been heard, families have been protected, and the criminal justice community has been trained on the complex responses to domestic violence, sexual assault, dating violence and stalking”).

343. See CAL. PENAL CODE §§ 13700(a), 13700(b) (Deering 2010).

344. See CAL. HEALTH & SAFETY CODE § 124250(a)(1) (Deering 2010).

345. See CAL. WELF. & INST. CODE § 18291 (Deering 2010).

Civil Procedure Code.³⁴⁸ The first four codes contain different definitions of domestic violence.³⁴⁹ In addition, “abuse,” “child abuse,” and “elder abuse” are addressed in a number of different code sections, some of which contain conflicting definitions.³⁵⁰

While it will take a concerted effort and a fair amount of time to rationalize this area of the law, state legislatures should address the most pressing concerns of domestic violence as soon as possible. The psychological explanations of the causes and effects of domestic violence suggest that because children are the most vulnerable victims of domestic violence, there are two particularly pressing issues that states should address. These are (1) the failure of most child custody schemes to treat a party’s prior commission of domestic violence as a rebuttable presumption against awarding custody to that party; and (2) the failure of the overwhelming majority of states to include in their definition of domestic violence for child custody proceedings the type of mental abuse perpetrated by an intimate terrorist.³⁵¹

As stated above, in every state a family court is required to make a child custody decision in accordance with “the best interest of the child,”³⁵² and, in many states, a party’s prior commission of domestic violence is a factor which the court must or may consider in this determination.³⁵³ However, only one-half of the states stipulate that a parent’s prior commission of domestic violence creates a rebuttable presumption that the court’s grant of custody of the child to a party who has committed domestic violence would not be “in the best interest of the child.”³⁵⁴ Furthermore, in at least seven of these states, a family court is required to respect a competing rebuttable presumption in favor of granting joint custody to the child’s parents.³⁵⁵ Therefore, in those seven states, the rebuttable presumption in favor of joint custody tends to effectively rebut the

346. See CAL. FAM. CODE §§ 6203, 6211 (Deering 2010).

347. See CAL. CIV. CODE § 1708.6(a) (Deering 2010).

348. See CAL. CIV. PROC. CODE § 527.6 (Deering 2010).

349. Compare CAL. PENAL CODE §§ 13700(a), 13700(b) ((Deering 2010) and CAL. HEALTH & SAFETY CODE § 124250(a)(1) (Deering 2010), with CAL. WELF. & INST. § 18291 (Deering 2010) and CAL. FAM. CODE §§ 6203, 6211 (Deering 2010).

350. See, e.g., CAL. PENAL CODE § 11165.6 (Deering 2010); see also, e.g., CAL. WELF. & INST. CODE § 18951(e) (Deering 2010) (contrasting definitions of “child abuse”).

351. See, e.g., *Child Custody and Domestic Violence by State*, AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE (Feb. 2008), <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Custody.authcheckdam.pdf> [hereinafter ABACDV]; *Custody Decisions in Cases with Domestic Violence Allegations*, AM. BAR ASS’N PROJECT ON DOMESTIC VIOLENCE, available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/probono/childcustody/domestic_violence_chart1.authcheckdam.pdf (last visited Jan. 22, 2013) [hereinafter ABACD].

352. ABACDV, *supra* note 351.

353. *Id.*

354. *Id.*

355. *Id.*

rebuttable presumption against awarding custody to a party who has committed domestic violence.³⁵⁶

Several of the state child custody statutes that do include a rebuttable presumption against awarding custody to a perpetrator of domestic violence stipulate that only an act of domestic violence committed within the last few years will trigger the presumption.³⁵⁷ In addition, some of these statutes further limit the presumption to situations in which the perpetrator committed repetitive acts of physical violence.³⁵⁸ Finally, the presumption in some such states only concerns the perpetrator's physical custody of the child, when a perpetrator can continue to abuse the other party as well as the child concerned through his or her legal custody of the child.³⁵⁹

A. CALIFORNIA'S DEFINITION OF DOMESTIC VIOLENCE FOR USE IN CHILD CUSTODY PROCEEDINGS

Many commentators believe that Section 3044 of the California Family Code provides some of the strongest protections against domestic violence in the child custody context.³⁶⁰ It provides that:

Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking

356. ABACDV, *supra* note 351.

357. *See, e.g.*, TEX. FAM. CODE ANN. § 153.004(d) (West 2008 & Supp. 2010) (presumption is triggered only if party has a history of perpetrating domestic violence "during the two years preceding the date of the filing the suit or during the pendency of the suit"); N.D. CENT. CODE § 14-09-06.2(j) (2009) (presumption is triggered only if the domestic violence in question occurred "within a reasonable time proximate to the proceeding").

358. *See, e.g.*, IDAHO CODE ANN. § 32-717B(5) (2008) (presumption that joint custody is not in best interests of child arise "if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence . . ."); ABACD, *supra* note 351; ABACDV, *supra* note 351.

359. *See, e.g.*, Pa. Coalition Against Domestic Violence, *PCADV Briefing to House Judiciary Committee* 19 (2009), http://www.pcadv.org/Resources/Briefing_CustodyReform.pdf (stating that "[j]oint custody is simply not appropriate in cases where one is parent abusive. Joint custody is dangerous to abused parents and their children because it forces continued contact and interaction even where the abusive parent poses a known risk of continued abuse." (citing Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOLOGY 91-102 (2002)); *see also* Nat'l Council of Juvenile and Family Court Judges, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE 33 (1994), http://www.ncjfcj.org/images/stories/dept/fvd/pdf/modecode_fin_printable.pdf ("In every proceeding where there is . . . determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence."); AM. BAR ASS'N, FAMILY LAW SECTION, MODEL JOINT CUSTODY STATUTE, § 1 (Aug. 1989) <http://www.abanetorg/child/joint-custody.doc> ("Joint custody is inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur.").

360. *See, e.g.*, Marie De Santis, *California Passes Tough New Domestic Violence Laws*, WOMEN'S JUSTICE CENTER, http://www.purpleberets.org/violence_new_law.html (last visited Jan. 22, 2013).

custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.³⁶¹

...

For purposes of this section the requirement of a finding by the court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any crime against the other party that comes within the definition of domestic violence³⁶²

The requirement of a finding by the court shall also be satisfied if any court, whether that court hears or has heard the child custody proceedings or not, has made a finding . . . based on conduct occurring within the previous five years.³⁶³

Both the five-year period for review and the power granted to a family court to conduct its own domestic violence investigation provided in Section 3044 of the California Family Code are particularly powerful tools for combating domestic violence.³⁶⁴ These provisions recognize that even if a domestic violence incident occurred a few years in the past and no legal tribunal declared the incident to constitute domestic violence at the time, such an event can effectively intimidate family members and obviate a perpetrator's need to engage in physical violence in more recent years.³⁶⁵ In addition, these provisions reflect the fact that a victim often is too intimidated to pursue domestic violence charges while he or she is co-

361. CAL. FAM. CODE § 3044(a) (Deering 2010).

362. *Id.* at § 3044(d)(1).

363. *Id.* at § 3044(d)(2).

364. *See supra* text accompanying notes 357, 358, 360; *see also* Lisa Bolotin, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA L. REV. 263, 276, 281, 284 (2008) (arguing that although Alaska's presumption against an award of joint custody to a domestic violence perpetrator could provide even greater protection for children in certain respects, a number of aspects of its presumption provide relatively strong protections for children and also pointing out that California's presumption, with respect to these same aspects, is at least as child-protective as Alaska's) [hereinafter Bolotin].

365. *See, e.g.*, Jan Elizabeth Brown, *Debunking The Myths: Anyone Can Be an Abuser or Victim*, HARTFORD COURANT (Sept. 3, 2009 2:14PM), http://blogs.courant.com/overcoming_battered_lives/2009/09/debunking-the-myths-anyone-can.html (“[R]egarding physical abuse, battered women's advocates have stated that male abusers do not necessarily need to use physical force in order to control their victims once power and control is established. Neither do abusive women.”).

habiting with the perpetrator and therefore it's logical that a victim might raise the matter in court for the first time during the course of a custody dispute.³⁶⁶

Moreover, Section 3044 of the California Family Code explicitly states that California's preference that a child maintain frequent and continuing contact with both parents cannot rebut the presumption against granting sole or joint custody to a parent who has committed domestic violence.³⁶⁷ Only a few of the other state statutes that recognize a rebuttable presumption against granting custody to a domestic violence perpetrator contain an explicit statement to this effect.³⁶⁸ Section 3044 of the California Family Code even specifies the categories of evidence that can rebut the presumption against granting custody to a perpetrator of domestic violence.³⁶⁹ Examples of such evidence include the perpetrator's completion of a batterer's treatment program, the perpetrator's compliance with the terms and conditions of any protective order or restraining order, the perpetrator's completion of a program of alcohol or drug abuse counseling, and the perpetrator's completion of a parenting class (assuming the court believes such counseling or class was warranted).³⁷⁰

In all of the above-mentioned respects, Section 3044 of the California Family Code serves as a model for how child custody courts should treat domestic violence. However, the definition of domestic violence incorporated in section 3044 is deficient because it does not explicitly include any and all forms of mental abuse.³⁷¹ Section 3044(c) of the California Family Code provides that, with respect to the presumption against awarding custody to a perpetrator of domestic violence,

a person has "perpetrated domestic violence" when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury to that person or to another, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior . . . for which a court

366. *Ruth Wilson Zamierowski*, *Why Does a Woman Stay in a Violent Relationship? The Very Real Risks of Leaving a Batterer*, SUITE 101 (Aug. 20, 2009), http://physical-abuse.suite101.com/article.cfm/why_does_a_woman_stay_in_a_violent_relationship#ixzz0TPR6ZRJH ("When a woman leaves an abusive relationship, it does not mean that the violence will end. In fact, the violence and the risks to her and her children often escalate.").

367. CAL. FAM. CODE § 3044(b) (Deering 2010).

368. *See, e.g.*, IOWA CODE § 598.41.1(b) (2007); MO. REV. STAT. § 452.375 (2007).

369. CAL. FAM. CODE § 3044(b) (Deering 2010).

370. *Id.*

371. *See infra* text accompanying notes 372–418. California Family Code § 3044 also would be improved if the presumption against awarding custody to a party who has committed domestic violence were not triggered solely by acts of domestic violence committed against another party to the custody proceeding, the child concerned, or the child's siblings. *See* CAL. FAM. CODE § 3044(a) (Deering 2010).

may issue an ex parte order pursuant to section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings.³⁷²

To be sure, causing or attempting to cause bodily injury, committing sexual assault, and placing a person in reasonable apprehension of imminent serious bodily injury to that person or another can cause significant mental harm to a victim. Still, as discussed above, an intimate terrorist mentally abuses his victim in a myriad of ways that are designed to control his victim.³⁷³ As discussed above, such acts, include, for example, routinely ignoring the victim's needs and desires, calling the victim derogatory names, humiliating the victim in private and public, and requiring the victim to account for every second of time that she spends outside of the perpetrator's presence,³⁷⁴ and few, if any, of these acts appear to be encompassed within the language of Section 3044(c) of the California Family Code. In fact, as the above-quoted language from section 3044(c) makes clear, the only possibility that such forms of mental abuse are included in section 3044(c)'s definition of domestic violence is if they are the type of activities that a court can enjoin under Section 6320 of the California Family Code.³⁷⁵

Section 6320 of the California Family Code is a component of California's Domestic Violence Prevention Act (DVPA),³⁷⁶ which was intended to provide victims with a broad range of legal protections against domestic violence.³⁷⁷ A section 6320 protection order in particular is intended to facilitate the temporary or permanent separation of the domestic violence perpetrator and victim, while also protecting the victim from any further acts of domestic violence by the perpetrator.³⁷⁸ To that end, section 6320 provides that an ex parte "protective order may be issued to a petitioner upon a showing of 'reasonable proof of a past act or acts of abuse,'"³⁷⁹ specifically enumerated in section 6320 as:

molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section[sic] 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a

372. CAL. FAM. CODE § 3044(c).

373. *See supra* text accompanying notes 51–80, 83–87, 101–15.

374. *Id.*

375. *See* CAL. FAM. CODE § 3044(a) (Deering 2010).

376. *Alanis-Alvarado v. Holder*, 558 F.3d 833, 838 (9th Cir. 2009) (citing CAL. FAM. CODE § 6200).

377. *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483, 1498 (2009).

378. *Id.* at 1494 (citing CAL. FAM. CODE § 6300; *Gonzalez v. Munoz*, 156 Cal. App. 4th 413, 421 (2007)).

379. *Id.* (citing CAL. FAM. CODE § 6200).

specific distance of, or disturbing the peace of the other party³⁸⁰

In ascertaining the proper interpretation of any California statute, including section 6320, one must be mindful that, in California:

[the] “fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.”³⁸¹ [Citation.]” (*Estate of Griswold* (2001) 25 Cal.4th 904, 910, 108 Cal.Rptr.2d 165, 24 P.3d 1191.). [In addition, one begins] “by examining the statutory language, giving the words their usual and ordinary meaning.’ [Citations.] If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations.] If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.]”³⁸²

In addition, Section 13 of the California Civil Code clarifies that California follows the statutory construction principle that, unless the statute in question indicates otherwise, one can “[p]resume that the legislature uses the same term consistently in different statutes.”³⁸³ The California Supreme Court has held, however, that, in applying any rule of statutory construction, “the fundamental concern . . . [is] the ascertainment and furtherance of legislative intent.”³⁸⁴

Accordingly, as Section 3044 of the California Family Code contains a specific definition of domestic violence for use in child custody proceedings, definitions of domestic violence in other California statutes are irrelevant regarding the legislature’s meaning of domestic violence in Section 3044 of the California Family Code. On the other hand, as the Legislature, in Section 6320 of the California Family Code, did not specifically define any of the acts of abused listed therein, definitions of those acts in other California statutes may very well provide guidance as to the meaning of those acts.

In light of California’s statutory construction rules, it is clear that the acts of “attacking,” “striking,” “sexually assaulting,” “battering,” and “destroying personal property,” each of which is an act of physical violence, do not encompass the various types of mental abuse which an intimate terrorist regularly inflicts on his victim(s) during the course of a

380. *Nadkarni*, 173 Cal. App. 4th at 1498 (citing CAL. FAM. CODE § 6320).

381. *Id.* at 1497.

382. *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483, 1497 (2009).

383. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 418 (2010) (citing CAL. CIV. CODE § 13 (West 2007)).

384. *Parsley v. Superior Court of Riverside Cnty.*, 9 Cal. 3d 934, 945 (1973) (internal citations omitted.).

domestic relationship. In addition, Section 646.9 of the California Penal Code defines the crime of stalking as 1) the repeated following or harassment of a person, 2) “a credible [explicit or implicit] threat with the intent to place that person in reasonable fear for his or her safety or the safety of his or her immediate family,” and 3) conduct which would cause a reasonable person to suffer substantial emotional distress and in fact causes the victim to suffer such emotional distress, and the California Civil Code similarly defines the tort of stalking as 1) a course of conduct by which the defendant intends to follow, alarm, or harass the plaintiff, 2) as a result of which the plaintiff reasonably fears for his or her safety or the safety of an immediate family member, and 3) the defendant either a) makes a credible (explicit or implicit) threat with the intent to place the plaintiff in reasonable fear for his or her safety or the safety of an immediate family member, or b) violates a restraining order.³⁸⁵ Given these statutes’ requirements that the perpetrator must intend to cause the victim to suffer severe emotional pain and also must make a credible threat to the physical safety of the victim or an immediate family member of the victim (or, alternatively, violate a restraining order, in the case of the tort of stalking), the word “stalking” in Section 6320 of the California Family Code also does not encompass all of the various forms of mental abuse which an intimate terrorist commits against his victim(s). Furthermore, the acts of “telephoning,” “contacting,” and “coming within a specified distance of . . . the other party” listed in section 6320 are premised on the notion that the intimate relationship between the perpetrator and his victim has terminated, because intimate partners regularly telephone and contact one another and typically are in close physical proximity with each other. Accordingly, these actions likewise do not encapsulate all of the various forms of mental abuse which an intimate terrorist inflicts on his victim(s).

Accordingly, the only acts listed in Section 6320 of the California Family Code which could encompass the various forms of mental abuse which an intimate terrorist inflicts on his victim(s) during an intimate relationship are “molesting,” “threatening,” “harassing,” and “disturbing the peace of the other party.” Unfortunately, as is further explained below, it appears that none of these acts is broad enough to include the various forms of mental abuse which an intimate terrorist inflicts on his victim(s) either.

385. CAL. PENAL CODE § 646.9 (Deering 2010); CAL. CIV. CODE § 1708.7 (Deering 2010); see also Lambers Royackers, *The Dutch Approach to Stalking Laws*, 3 Cal. Crim. L. Rev. 2, ¶ 23 (2000), available at <http://scholarship.law.berkeley.edu/bjcl/vol3/iss1/2> (accessed Mar. 27, 2013) (stating that a flaw in California's definition of the crime of stalking is that “the stalker must evoke fear in any reasonable person that he/she or his/her next of kin are in danger of physical violence or of being killed”); David J. Loundy, *Online Stalking*, in 2 THE INTERNET ENCYCLOPEDIA, 812 (John Wiley & Sons Hossein Bidgoli eds., 2004) (indicating that the tort of stalking in California likewise requires that the defendant's actions must cause the victim to fear for his or her physical safety).

Neither section 6320 nor any other section of the California Family Code defines the terms “threatening,” “molesting,” “disturbing the peace of,” or “harassing.”³⁸⁶ Other California code sections, as well as various court cases, however, provide some clarification of these terms. For example, the Ninth Circuit Court of Appeals, in a case discussing section 6320, indicated that the term “threatening” in section 6320 refers simply to “credible threats of violence.”³⁸⁷

In the case of *In re Marriage of Nadkarni*,³⁸⁸ the California Court of Appeals for the Sixth District defined the term “disturbing the peace of the other party” in section 6320 as “conduct that destroys the mental or emotional calm of the other party.”³⁸⁹ While this definition, on its face, appears broad enough to include an intimate terrorist’s mental abuse of his victim(s), the court’s opinion indicates that the act of “disturbing the peace of the other party,” in the context of Section 6320 of the California Family Code, assumes the separation of the parties.³⁹⁰

In *Nadkarni*, the petitioner alleged that her former spouse had “access[ed], read[], and publicly disclos[ed]... her confidential emails,”³⁹¹ “used the information obtained from her e-mail account to subpoena the records of third parties, including her business contacts [for use in a pending child custody dispute], and to find out what social events she would be attending.”³⁹² She elaborated that the petitioner had “told others that he knew which social events I would be attending within the past three months.”³⁹³ She also stated that “she feared that he would continue to use the ‘private and privileged’ information that he had obtained from her e-mails ‘to control, harass, and abuse’ her if he were not enjoined from such conduct[,]”³⁹⁴ specifically “us[ing] this information to harm her business and livelihood, her reputation in the community and her personal relationships.”³⁹⁵ The respondent’s various actions, according to the petitioner, had caused her “‘shock’ and ‘embarrassment,’ . . . fear [of] the destruction of her ‘business relationships,’ and . . . fear for her

386. CAL. FAM. CODE § 6320; CAL. FAM. CODE §§ 50-155 (Deering 2010) (defining certain terms used in CAL. PENAL CODE § 646).

387. *Alanis-Alvarado v. Holder*, 558 F.3d 833, 839 (9th Cir. 2009) (stating that “every portion of a protective order issued under section 6320 ‘involves protection against credible threats of violence, repeated harassment, or bodily injury’”) (citing 8 U.S.C. § 1227(a)(2)(E)(ii)).

388. *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483 (2009).

389. *Id.* at 1497.

390. *See infra* text accompanying notes 400–08.

391. *Nadkarni*, 173 Cal. App. 4th at 1498–99.

392. *Id.* at 1490.

393. *Id.* at 1490.

394. *Id.* at 1492.

395. *Id.*

safety,”³⁹⁶ especially given that her former spouse had physically abused her during their marriage.³⁹⁷

On appeal, the petitioner furthermore asserted that, “[h]ad she been able to be heard on the merits, the [trial] court would have heard testimony about how [the respondent’s] . . . conduct [had] harassed her, disturbed her peace, invaded her privacy, frightened her and intimidated her.”³⁹⁸ After acknowledging that its scope of review was limited to determining if the trial court had abused its discretion in dismissing the petitioner’s application for a protective order under section 6320,³⁹⁹ the court of appeals reversed the trial court’s dismissal of the petitioner’s application and remanded the case back to the trial court for a hearing on the merits of her claim. Specifically, the court of appeals held that the respondent’s conduct of “accessing, reading and publicly disclosing her confidential e-mails”⁴⁰⁰ constituted either “contact[] [with] . . . the [petitioner] ‘directly or indirectly, by mail or otherwise’”⁴⁰¹ or “destr[uction] . . . [of her] . . . mental or emotional calm . . .” and hence a “disturb[ance] . . . [of] her peace,”⁴⁰² thereby warranting the trial court’s issuance of a permanent restraining order pursuant to Section 6320 of the California Family Code if the petitioner proved her allegations.⁴⁰³

While the court did not explicitly state that the actions of “contacting . . . the other party” and “disturbing the peace of the other party” in Section 6320 of the California Family Code are premised on the parties’ separation, the court addressed only these two specific actions in section 6320,⁴⁰⁴ even though the petitioner also had alleged that the respondent’s conduct constituted several other of the proscribed actions listed in section 6320 as well.⁴⁰⁵ Additionally, each of these actions arguably is premised on the parties’ separation (e.g., when two parties share an intimate relationship, their ongoing contact with one another is assumed and furthermore no California court has held that a party to an intimate relationship could be held accountable for “disturbing the peace” of the other party to that relationship.) In addition, the parties in *Nadkarni* were themselves separated at the time of the respondent’s alleged conduct.⁴⁰⁶

Moreover, in its opinion, the court of appeals seems to consider the gravamen of the petitioner’s complaint to be the respondent’s access to her

396. *Id.* at 1499.

397. *Id.* at 1490, 1496.

398. *Nadkarni*, 173 Cal. App. 4th at 1496.

399. *Id.* at 1495.

400. *Id.* at 1498.

401. *Id.* at 1496–97.

402. *Id.* at 1498–99.

403. *Id.* at 1496–97, 1499.

404. *Id.* at 1497–99.

405. *See, e.g., id.* at 1488, 1490.

406. *Id.* at 1487.

confidential emails and public disclosure of the same.⁴⁰⁷ That is, the court of appeals seems to emphasize the respondent's alleged infringement of the petitioner's privacy,⁴⁰⁸ even though the court does not explicitly acknowledge that this is the case, and no California court has held that a person possesses a cause of action against an intimate partner for infringement of his or her privacy. Of course, if the act of "disturbing the peace of the other" in Section 6320 of the California Family Code is premised on the parties' separation, then by definition this act does not encompass the mental abuse which an intimate terrorist inflicts on his victim(s) during the course of an intimate relationship. In sum, even after *Nadkarni*, it's far from certain that the act of "disturbing the peace of the other," listed in Section 6320 of the California Family Code, is broad enough to encompass the mental abuse which an intimate terrorist regularly inflicts on his victims during an intimate relationship.

Finally, neither "molesting" nor "harassing," the two remaining acts listed in Section 6320 of the California Family Code, appear to include the acts of mental abuse which an intimate terrorist inflicts on his victim(s) during an intimate relationship. The California Supreme Court has clarified that the phrase "to molest another" in the California Penal Code means "to interfere with or meddle with unwarrantably so as to injure or disturb."⁴⁰⁹ It has also stated that "molestation is a willful injury inflicted upon another by interference with the user of rights as to person or property."⁴¹⁰ The court's association of the word "molest" with the word "disturb," its use of the word "unwarranted" when describing the type of interference or meddling that constitutes "molestation," and its definition of "molestation" in terms of infringements to the victim's rights to personhood or property all suggest that the act of "molesting" (like the act of "disturbing the peace of the other party") in Section 6320 of the California Family Code is premised on the perpetrator's nonconsensual or unauthorized contact with the victim. According, the act of "molesting" similarly appears not to be broad enough to include the acts of mental abuse which an intimate terrorist commits against his victim(s) during the course of an intimate relationship.

Finally, given that Section 6320 of the California Family Code does not define the act of "harassing," definitions of "harassing" or "harassment" in other California statutes may provide guidance as to the meaning of this act

407. See, e.g., *id.* at 1488 (referring to the respondent's alleged "use of personal information accessed through [the petitioner's] . . . email"), 1492 (stating that [the petitioner] . . . feared that [the respondent] . . . would continue to use the private and privileged information that he had obtained").

408. *Nadkarni*, 173 Cal. App. 4th at 1496.

409. *People v. Lopez*, 19 Cal. 4th 282, 290 (1998) (citing WEBSTER'S NEW INT'L DICTIONARY (2d. ed.)).

410. *Lopez*, 19 Cal. 4th at 290.

in section 6320.⁴¹¹ Section 527.6 of the California Code of Civil Procedure defines “harassment” in the civil law context, as:

unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.⁴¹²

. . . “Course of conduct” is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail . . .⁴¹³

To be sure, an intimate terrorist’s acts of mental abuse constitute a “course of conduct” directed at his victim(s)⁴¹⁴ and the above-quoted definition of “harassment” in section 527.6 of the California Code of Civil Procedure similarly includes a “course of conduct” directed by the perpetrator at a specific victim. However, the above-stated definition of “harassment” indicates that the California Legislature intended for the phrase “course of conduct” in the context of “harassment” to possess a relatively narrow scope. That is, the above-quoted definition of “course of conduct” provides that a complainant claiming that the respondent has perpetrated such a “course of conduct” must prove not only that an “average” or “typical” person would have suffered substantial emotional distress as a result of the perpetrator’s course of conduct but that he or she in fact suffered substantial emotional distress as a result of the perpetrator’s course of conduct. Moreover, all of the examples of “course of conduct” provided in the above-quoted definition involve either a credible threat of violence,⁴¹⁵ unauthorized contact with the victim, or infringement of the victim’s privacy. Therefore, as California follows the statutory

411. CAL. FAM. CODE § 6320; CAL. FAM. CODE §§ 50-155.

412. CAL. CIV. PROC. CODE § 527.6(b)(3) (Deering 2010).

413. *Id.* § 527.6(b)(1).

414. *See supra* text accompanying notes 51–80, 83–87, 101–15.

415. Again, a “stalker” in California is defined as “[a]ny person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family” CAL. PENAL CODE § 646.9(a) (Deering 2010).

construction principle of *ejusdem generis*,⁴¹⁶ these examples suggest that the California Legislature intended that only credible threats of violence, unauthorized contact with the complainant, or infringements of the complainant's privacy constitute the type of conduct which would rise to the level of "harassment."

Based on all of the above, the terms "threatening," "disturbing the peace," "molesting," and "harassing" in Section 6320 of the California Family Code together appear to refer only to the specific mental harm which a victim suffers on account of a domestic violence perpetrator's credible threats of physical harm, unauthorized contacts with the victim, or infringements of the victim's privacy, and a number of statutory construction principles support this conclusion. As noted above, a California statute must always be interpreted in accordance with the context and the Legislature's purpose,⁴¹⁷ and while the Legislature's clear intent in enacting the DVPA,⁴¹⁸ of which Section 6320 of the Family Code is a part, was to provide victims of domestic violence with a broad range of remedies,⁴¹⁹ as discussed above, the language of section 6320 strongly suggests that the Legislature considered domestic violence to consist of physical harm, threats of physical harm, and acts premised on the separation of the parties (such as unauthorized contact with the victim and infringement of the victim's privacy).

As the Ninth Circuit Court of Appeals stated in the case of *Alanis-Alvarado v. Holder*,⁴²⁰

some acts [listed in Section 6320], such as telephoning one's domestic partner, or coming within a specified distance of him or her, do not typically constitute violence, threats, or

416. The term "*ejusdem generis*" means "of the same kind, class, or nature." BLACK'S LAW DICTIONARY 517 (6th ed. 1990). The doctrine of *ejusdem generis* "presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage." *Kraus v. Trinity Mgmt. Svcs.*, 23 Cal. 4th 116, 141 (2000). "*Ejusdem generis* applies whether specific words follow general words in a statute or vice versa. In either event, the general term or category is "restricted to those things that are similar to those which are enumerated specifically.'" *People v. Giordano*, 42 Cal. 4th 644, 660 (2007) (internal citations omitted.); *see also Trinity Services, Inc. v. Marshall*, 593 F.2d 1250, 1258 (1978) ("It is a well-settled principle of statutory construction that where specific words precede or follow general words in an enumeration describing a particular subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the specific words.") (internal citations omitted).

417. CAL. CIV. CODE § 4 (Deering 2010) ("[P]rovisions [of the Code] are to be liberally construed with a view to effect its objects . . ."); CAL. CIV. CODE § 13 (Deering 2010) ("Words and phrase are construed according to the context . . ."); *see also Parsley v. Superior Court of Riverside Cnty.*, 9 Cal.3d 934, 945 (1973) (stating that, in applying any rule of statutory construction, "the fundamental concern . . . [is] the ascertainment and furtherance of legislative intent.") (internal citations omitted.)

418. CAL. FAM. CODE §§ 6200-6409 (West 2010).

419. *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483, 1498 (2009).

420. *Alanis-Alvarado v. Holder*, 558 F.3d 833 (9th Cir. 2009).

harassment. Indeed, such conduct is entirely expected in normal interactions. But Petitioner's argument ignores the crucial context: At the time of his conduct, *he was subject to a protective order*. As noted above, courts may issue a protective order only upon a showing of a past act of abuse. When a court has enjoined a person from, for example, telephoning his domestic partner in the context of a domestic violence protective order, the injunction involves protection against threats and harassment.⁴²¹

The California Legislature also explicitly included the term "mental suffering" in its definitions of other types of familial abuse,⁴²² such as "child abuse"⁴²³ and "dependent adult abuse"⁴²⁴ but did not include this term in Section 6320 of the California Family Code. In light of this fact, the statutory construction principle of "*inclusio unius est exclusio alterius*," which means "to express one thing is to exclude another,"⁴²⁵ supports the conclusion that the Legislature did not intend to include all forms of "mental suffering" in section 6320, but rather intended to include only those forms of mental suffering caused by the specific acts listed therein. As discussed above, it appears that the specific acts (apart from physical injury and sexual assault) listed in section 6320 include only credible threats of physical violence, unauthorized contact with the victim, and infringement of the victim's privacy.

In a child custody proceeding, the California Legislature distinguishes between "child abuse," which a family court must simply consider in accordance with Family Code section 3011(b)⁴²⁶ and "domestic violence," which triggers a presumption against awarding custody to the perpetrator thereof in accordance with section 3044(a).⁴²⁷ Furthermore, the Legislature explicitly includes "mental suffering" in its definition of "child abuse,"⁴²⁸ but, as discussed above, it does not explicitly include "mental suffering" in its definition of "domestic violence." If the definition of "domestic violence" in section 3044(c)—and specifically, the terms "threatening," "molesting," "disturbing the peace," and "harassing" in section 6320—

421. *Id.* at 839 (internal citations omitted).

422. This is supported by the principle (related to "*inclusio unius est exclusio alterius*") that "[a] broad reading[] of statutory provisions [should be avoided] if . . . [the legislature] has specifically provided for the broader policy in more specific language elsewhere." William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 99 (1994) [hereinafter Eskridge].

423. CAL. PENAL CODE § 11165.3 (West 2010).

424. CAL. WELF. & INST. CODE § 15610.07 (West 2010).

425. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 432 (2d ed. 2001); *see also* Eskridge, *supra* note 422, at 97.

426. CAL. FAM. CODE § 3011(b) (West 2010).

427. *Id.* § 3044(a).

428. *See infra* note 448 and accompanying text.

were interpreted to include mental abuse per se in any case, then arguably the Family Code provisions distinguishing between child abuse and domestic violence arguably would be rendered ineffective.⁴²⁹ The well-established principle of statutory construction requiring that each provision of a statute should be given effect⁴³⁰ argues against such an interpretation.

For all of these reasons, it appears that the type of mental abuse perpetrated by an intimate terrorist during the course of a domestic relationship is not included in any of the acts listed in Section 6320 of the California Family Code. Hence, it likewise appears that this type of mental abuse is not included in the definition of “domestic violence” in section 3044(c), which triggers a rebuttable presumption against awarding custody to a domestic violence perpetrator. Unfortunately, therefore, the mental abuse that an intimate terrorist perpetrates, despite the severe harm caused by this type of abuse, does not appear to be sufficient to raise a rebuttable presumption against awarding sole or joint custody to an intimate terrorist in California.⁴³¹

B. OTHER STATES' TREATMENT OF DOMESTIC VIOLENCE IN CHILD CUSTODY PROCEEDINGS

The definitions of domestic violence utilized by other states in child custody proceedings are similarly deficient. For example, Arkansas's domestic relations law (of which its custody statute is a part) defines “domestic abuse” (which it uses interchangeably with “domestic violence”),⁴³² as:

(A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or

429. “Child abuse” is also defined to include “neglect.” CAL. PENAL CODE § 11165.2 (West 2010). Therefore, even if “domestic violence” as defined in California Family Code section 3044(c) were interpreted so as to include “mental suffering” per se, “child abuse” still would be distinguished from “domestic violence” based on its inclusion of “neglect.” However, as the Legislature could have easily clarified that the only distinction between the two terms was the inclusion of the additional term “neglect” in “child abuse” but did not do so, this suggests that it meant to exclude “mental suffering” per se from the definition of “domestic violence” as well.

430. *Select Base Materials v. Bd. of Equal.*, 51 Cal. 2d 640, 645 (Cal. 1959); *Weber v. Cnty. of Santa Barbara*, 15 Cal. 2d 82, 85–86 (Cal. 1940); *see also Stafford v. Realty Bond Service Corp.*, 39 Cal.2d 797, 805 (Cal. 1952) (every provision should be interpreted with reference to the entire law of which it is a part); CAL. CIV. CODE § 13 (West 2012) (“Words and phrases are construed according to the context and . . . technical words and phrases . . . as may have acquired a peculiar and appropriate meaning in law . . . are to be construed according to such peculiar and appropriate meaning or definition.”); *see also Eskridge*, *supra* note 422, at 98 (citing various cases discussing the statutory construction principle that interpretation of “a provision in a way that would render other provisions of the Act superfluous or unnecessary” should be avoided).

431. CAL. FAM. CODE § 3044(a), (c) (West 2010).

432. *See, e.g.*, ARK. CODE ANN. § 9-13-101(c)(1) (West 2010) (using the term “domestic violence”); *Id.* § 9-13-101(c)(2) (using the term “domestic abuse”).

(B) Any sexual conduct between family or household members, whether minors or adults, that constitutes a crime under the laws of this state⁴³³

Similarly, Indiana defines “domestic or family violence” in its family law, including its child custody law, as follows:

[E]xcept for an act of self defense, the occurrence of one (1) or more of the following acts committed by a family or household member:

- (1) Attempting to cause, threatening to cause, or causing physical harm to another family or household member without legal justification.
- (2) Placing a family or household member in fear of physical harm without legal justification.
- (3) Causing a family or household member to involuntarily engage in sexual activity by force, threat of force, or duress.
- (4) Beating, torturing, mutilating, or killing a vertebrate animal without justification with the intent to threaten, intimidate, coerce, harass, or terrorize a family or household member⁴³⁴

Oklahoma’s child custody law likewise provides that domestic violence is:

[A]ny act of physical harm, or the threat of imminent physical harm which is committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor or minor child who are family or household members or who are or were in a dating relationship.⁴³⁵

In its child custody law, South Dakota refers to “domestic abuse” and defines “domestic abuse” as “physical harm, bodily injury, or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury between family or household members.”⁴³⁶

At least two states, Alaska and Minnesota, include the term “terrorist threatening” or “terroristic threatening” among the activities that constitute domestic violence. For example, Alaska defines domestic violence as:

one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these

433. ARK. CODE ANN. § 9-15-103(3)(A)-(B) (West 2010).

434. IND. CODE ANN. § 31-9-2-42 (West 2010).

435. OKLA. STATE ANN. tit. 22, § 60.1(1) (West 2009).

436. S.D. CODIFIED LAWS § 25-1-1 (2007); *see also* ABACDV, *supra* note 351.

offenses, or an attempt to commit the offense, by a household member against another household member:

- (A) a crime against the person . . . ;
- (B) burglary . . . ;
- (C) criminal trespass . . . ;
- (D) arson or criminally negligent burning . . . ;
- (E) criminal mischief . . . ;
- (F) terrorist threatening . . . ;
- (G) violating a protective order . . . ; or
- (H) harassment⁴³⁷

Similarly, Minnesota law provides that domestic violence

means the following, if committed against a family or household member by a family or household member: (1) physical harm, bodily injury, or assault; (2) the infliction of fear or [sic] imminent physical harm, bodily injury, or assault; or (3) terroristic threats, . . . , criminal sexual conduct, . . . or interference with an emergency call⁴³⁸

However, it is clear that neither the term “terrorist threatening” in Alaska’s definition of domestic violence nor the term “terroristic threatening” in Minnesota’s definition of domestic violence encompasses the type of mental abuse which an intimate terrorist perpetrates against his victim(s) on a routine basis. Minnesota law specifically defines “terroristic threatening” as “threaten[ing], directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror . . . [.]”⁴³⁹ and even the intentional infliction of severe mental harm is not considered a crime of violence in Minnesota.⁴⁴⁰ Similarly, sections 18.66.990(3) and 25.24.150(c) of the

437. ALASKA STAT. § 18.66.990(3) (2006).

438. MINN. STAT. ANN. § 518B.01(2)(a)(1)-(3) (West 2009).

439. *Id.* § 609.713(1).

440. KATHLEEN ANN RUANE & CHARLES DOYLE, CONG. RESEARCH SERV., RL 34200, BURNING CROSSES, HANGMAN’S NOOSES, AND THE LIKE: STATE STATUTES THAT PROSCRIBE THE USE OF SYMBOLS OF FEAR AND VIOLENCE WITH THE INTENT TO THREATEN 4, n.14, (2007), available at http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL34200_10052007.pdf (suggesting that a “terroristic threat” in section 609.713 of Minnesota’s Annotated Statutes proscribes threats of death, serious injury or property destruction); PAUL STARETT WALLACE, JR., CONG. RESEARCH SERV., RL 31314, ANTI-HOAX LEGISLATION IN THE 107TH CONGRESS: ADDRESSING PROBLEMS SINCE SEPTEMBER 2001 12 (2002) available at <http://opencrs.com/document/RL31314/2002-03-01> (noting that Minnesota Annotated Statutes § 609.713 prohibits bomb scares); see also Leslie Yalof Garfield, *The Case for a Criminal Law Theory of Intentional Infliction of Emotional*

Alaska Code define “terrorist threatening” as very specific acts of physical violence or a threat thereof.⁴⁴¹ Accordingly, this term likewise does not include the mental abuse, which an intimate terrorist typically inflicts on his victim(s).

On its face, the term “harassment” in Alaska’s definition of domestic violence, like the term “harassment” in California’s definition of domestic violence, appears to be broad enough that it may include all of the types of mental abuse that an intimate terrorist tends to engage in. However, Alaska’s statutory scheme specifically provides that “harassment,” in its definition of domestic violence, is a subset of the crime of harassment in the second degree,⁴⁴² specifically:

telephon[ing] another and fail[ing] to terminate the connection with intent to impair the ability of that person to place or receive telephone calls; . . . mak[ing] repeated telephone calls at extremely inconvenient hours; . . . and mak[ing] an anonymous or obscene telephone call, an obscene electronic communication, or a telephone call or electronic communication that threatens physical injury or sexual contact⁴⁴³

The terms “criminal trespass,” “criminal mischief,” and “violating a protective order” in Alaska’s definition of domestic violence, quoted above, are all similarly unavailing in this regard. “Criminal trespass” is defined as either “enter[ing] or remain[ing] unlawfully (1) on land with intent to commit a crime on the land; or (2) in a dwelling[]”⁴⁴⁴ or “enter[ing] or remain[ing] unlawfully (1) in or upon premises; or (2) in a

Distress, 5 CRIM. L. BRIEF 33, 33 (2009), available at <http://digitalcommons.pace.edu/lawfaculty/571> (“[T]he law redresses those who suffer injury from harmful speech through a series of seemingly innocuous remedies, including financial remuneration or retribution through minimal criminal penalties.”).

441. ALASKA STAT. § 11.56.807(a)(1)-(3) (2007) (defining “terrorist threatening” in the first degree as knowingly sending or delivering a “bacteriological, biological, chemical, or radiological substance or an imitation [of such substance] . . . and, as a result, (1) plac[ing] a person in reasonable fear of physical injury to another person; (2) caus[ing] evacuation of a building, public place or area, business premises, or mode of public transportation or (3) caus[ing] serious public inconvenience”); *Id.* § 11.56.810(a)(1)-(3), (b) (defining “terrorist threatening” in the second degree as “knowingly mak[ing] a false report that a circumstance (1) dangerous to human life exists or is about to exist and (A) a person is placed in reasonable fear of physical injury to any person; (B) causes evacuation of a building, public place or area, business premises, or mode of public transportation; (C) causes serious public inconvenience; or . . . (2) exists or is about to exist that is dangerous to the proper or safe functioning of an oil or gas pipeline or supporting facility, utility, or transportation or cargo facility . . .”).

442. ALASKA STAT. §§ 18.66.990(3)(H), 11.61.120(a)(2)-(4) (2006).

443. *Id.* § 11.61.120(a)(2)-(4).

444. ALASKA STAT. § 11.46.320(a)(1)-(2) (2007) (stating the definition of criminal trespass in the first degree).

propelled vehicle.”⁴⁴⁵ “Criminal mischief” is defined as damaging various types of public or private property with no right or reasonable ground to believe one has the right to do so.⁴⁴⁶ Finally, “violating a protective order” in Alaska’s definition of domestic violence means violating a domestic violence protective order that specifically prohibited the respondent from:

Threatening to commit or committing domestic violence, stalking, or harassment; . . .

telephoning, contacting, or otherwise communicating directly or indirectly with the petitioner; . . .

[entering] . . . the residence of the petitioner, regardless of ownership of the residence; . . .

appearing at the residence, school, or place of employment of the petitioner or any specified place frequented by the petitioner or any designated household member; . . .

entering a propelled vehicle in the possession of or occupied by the petitioner; . . .

using or possessing a deadly weapon if the court [found] the respondent was in the actual possession of or used a weapon during the commission of the domestic violence; or . . .

[refusing] to surrender any firearm owned or possessed by the respondent if the court [found] that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence[.]⁴⁴⁷

In short, just as is the case with respect to the definition of domestic violence contained in California’s child custody law, the only acts of mental abuse that appear to be included in other states’ definition of domestic violence for child custody purposes are a perpetrator’s credible threat of physical violence, a perpetrator’s unauthorized contact with the victim, and a perpetrator’s invasion of the victim’s privacy.

The failure of the great majority of states to take mental abuse seriously, even in the child custody context, is perhaps most clearly evidenced by their careful distinction between “child abuse” and “domestic violence” in their child custody laws. That is, most states, like California, tend to explicitly include mental suffering or mental injury in their definition of “child abuse.”⁴⁴⁸ However, even those states that recognize a

445. ALASKA STAT. § 11.46.330(a)(1)–(2) (2007) (stating the definition of criminal trespass in the second degree).

446. *Id.* § 11.46.475–486.

447. ALASKA STAT. §§ 11.56.740(a)(1), 18.66.100(c)(1)–(7) (2012).

448. All states except Georgia and Washington include some form of emotional maltreatment in their definition of child abuse or neglect. *Definitions of Child Abuse and*

rebuttable presumption against granting custody to a perpetrator of “domestic violence” tend to provide that a party’s past child abuse must only be *considered* by a family court in determining the custody arrangement that is in the best interests of the child.⁴⁴⁹ These states do not stipulate that a party’s past child abuse *triggers* the presumption against awarding custody to that party.⁴⁵⁰ In other words, they provide that

Neglect: Summary of State Laws, Child Welfare Information Gateway, U.S. Department of Health and Human Services, July 2009, at 3, available at www.childwelfare.gov/systemwide/laws_policies/statutes/defineall.cfm (accessed July 10, 2010). “Approximately 32 States . . . provide specific definitions of emotional abuse or mental injury to a child.” *Id.* at 3–4. *See, e.g.*, CAL. PENAL CODE § 11165.6 (West 2010) (“[T]he term ‘child abuse or neglect’ includes physical injury or death inflicted by other than accidental means upon a child by another person, sexual abuse . . . , neglect . . . , the willful harming or injuring of a child or the endangering of the person or health of the child, as defined in section 11165.3, and unlawful corporal punishment or injury”); *Id.* § 11165.3 (“[T]he willful harming or injuring of a child or the endangering of the person or health of a child,” means “a situation in which a person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed a situation in which his or her person or health is endangered.”); ALASKA STAT. § 47.17.290(2) (2007) (“[C]hild abuse or neglect’ means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby; in this paragraph, ‘mental injury’ means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child’s ability to function[.]”); *Id.* § 47.17.290(9) (“[M]ental injury’ means a serious injury to the child as evidenced by an observable and substantial impairment in the child’s ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness[.]”).

449. *See, e.g.*, CAL. FAM. CODE § 3011 (West 2010) (“In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among other factors it finds relevant, consider all of the following: . . . (b) Any history of abuse by one parent or any other person seeking custody against any of the following: (1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary. . . . As used in this subdivision, ‘abuse against a child’ means ‘child abuse’ as defined in Section 11165.6 of the Penal Code and abuse against any of the other persons described . . . means ‘abuse’ as defined in Section 6203 of this code.”); ALASKA STAT. § 25.24.150(c)(7) (2006) (“The court shall determine custody in accordance with the best interests of the child In determining the best interests of the child the court shall consider . . . any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents”).

450. *See, e.g.*, CAL. FAM. CODE § 3044(a) (West 2010) (“Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011.”); *Id.* § 3044(c) (“For purposes of this section, a person has ‘perpetrated domestic violence’ when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect

[p]sychological and emotional abuse, absent commission of a crime or infliction of physical harm, do [sic] not constitute domestic violence. . . . Psychological and emotional abuse may still be considered when a judge makes his custody determination if the abuse affects the child's well-being, but evidence of psychological and emotional abuse will be balanced against other factors⁴⁵¹

In fact, Missouri is the only state that both includes mental abuse in its definition of "child abuse" and at the same time recognizes a rebuttable presumption against awarding custody to a party who has committed "child abuse" as so defined.⁴⁵²

the other party seeking custody of the child or to protect the child and the child's siblings."); ALASKA STAT. § 25.24.150(g) (2006) ("There is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child."); *Id.* § 25.24.150(h) ("A parent has a history of perpetrating domestic violence under (g) of this section if the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence."); *Id.* § 18.66.990(3)(A)–(H) ("['D]omestic violence' and 'crime involving domestic violence' mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member: (A) a crime against the person . . . (B) burglary . . . (C) criminal trespass . . . (D) arson or criminally negligent burning . . . (E) criminal mischief . . . (F) terrorist threatening . . . (G) violating a protective order . . . or (H) harassment . . .").

451. See Bolotin, *supra* note 364, at 280.

452. MO. ANN. STAT. § 455.050.5 (2012) ("In making an award of custody, the court shall consider all relevant factors including the presumption that the best interests of the child will be served by placing the child in the custody and care of the nonabusive parent . . ."); *Id.* § 452.375.13 ("If the court finds that domestic violence or abuse, as defined in section 455.010 has occurred, the court shall make specific findings of fact to show that the custody or visitation arrangement ordered by the court best protects the child and the parent or other family or household member who is the victim of domestic violence . . ."); *Id.* § 455.010(1)(a)–(f) ("'Abuse' includes but is not limited to the occurrence of any of the following acts, attempts or threats against a person who may be protected pursuant to this chapter[.] . . . 'Assault' . . . 'Battery' . . . 'Coercion' . . . 'Harassment' . . . 'Sexual assault' . . . 'Unlawful imprisonment' . . ."); *Id.* § 455.502(1) ("As used in sections 455.500 to 455.538, the following terms mean: (1) 'Abuse', any physical injury, sexual abuse, or emotional abuse inflicted on a child other than by accidental means by an adult household member, or stalking of a child . . .") (repealed 2011). Moreover, the psychological theory of domestic violence reveals that the states' distinction in treatment between the mental abuse of a child and the mental abuse of an adult in states' child custody schemes itself appears to be non-defensible. That is, this distinction in treatment presumably is based on the rationale that an adult can choose to terminate an emotionally abusive relationship whereas a child cannot. *Cf.* DUBBER, *supra* note 236, at 9–10 (stating that "the core [principle] of criminal law . . . [is that] violent interpersonal crime [is] . . . the ultimate violation of one person's autonomy by another . . . Victims who assume the risk of suffering criminal harm have long prevented, or at least lessened, the offender's criminal liability."). Yet, the psychological theory of domestic violence teaches that, in cases of intimate terrorism, the intimate terrorist's pervasive campaign of mental abuse, which is designed to control his victim(s), can severely diminish the autonomy of even an adult victim. See

C. FAILURE OF STATES TO INCLUDE INTIMATE TERRORISM IN THEIR DEFINITIONS OF DOMESTIC VIOLENCE UTILIZED IN CHILD CUSTODY PROCEEDINGS

States' definitions of domestic violence for use in child custody cases tend to include only credible threats of physical violence, unauthorized contacts with the victim, and invasions of the victim's privacy as forms of mental abuse, in addition to various forms of physical and sexual violence.⁴⁵³ As discussed above, both the former partner and a child of a perpetrator of situational couple violence could fear that the perpetrator might commit some additional act of physical violence in the future because situational couple violence consists primarily of episodic physical violence,⁴⁵⁴ and fear of potential future attack could cause them mental distress.⁴⁵⁵ However, as illustrated above, even though children exposed to intimate terrorism are at risk of suffering much more severe mental and physical harm,⁴⁵⁶ the definitions of domestic violence in the states' child custody laws largely fail to address an intimate terrorist's regime of mental abuse.⁴⁵⁷ This failure is especially troubling, given that the psychological theory of domestic violence explains that intimate terrorism is the type of domestic violence that is transmitted throughout generations of American families.⁴⁵⁸

Therefore, if a state hopes to begin to reverse the self-perpetuating process of intimate terrorism begetting intimate terrorism, it needs to incorporate the concept of intimate terrorism in its child custody laws. At a minimum, a state should include mental abuse per se in the definition of

supra note 336. In addition, as stated above, domestic violence experts agree that victims of an intimate terrorist often choose to remain with their abuser as they are most at risk of being killed or suffering severe physical injuries when they attempt to escape his regime of control. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991) (explaining the empirical evidence that documents that the greatest risk of death and serious physical injury occurs when women try to leave their intimate terrorists and coining the term "separation assault" to refer to this phenomenon); *see also* NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 90 (1999) (explaining that an attempt to leave a violent partner along with one's children is one of the most significant triggers for severe domestic violence and death). Therefore, it is illogical for state legislatures to conclude that an adult victim who chooses to remain with an intimate terrorist for some period of time should not be heard to complain that she suffered mental abuse during that time period.

453. *See, e.g., supra* text accompanying notes 371–418, discussing CAL. FAM. CODE § 3044; *see also* ABACDV, *supra* note 351.

454. *See supra* text accompanying notes 92–93.

455. *Cf. Susan W. Brenner, Fantasy Crime*, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=susan_brenner, at 6–7 (noting that a typical required element of the crime of "stalking" is a credible threat of future physical harm and some courts have noted that stalking statutes are intended to prevent "emotional harm to victims.") (citations omitted.).

456. *See supra* text accompanying notes 98–115, 286–309.

457. *See supra* text accompanying notes 51–80, 83–87, 101–15.

458. *See supra* text accompanying note 331.

domestic violence used in its child custody cases. In addition, the psychological theory of domestic violence suggests that each state would be well-advised to recognize a rebuttable presumption against awarding custody of a child to a party who has committed mental abuse per se.

VII. CONSTITUTIONAL OBJECTIONS TO INCLUDING MENTAL ABUSE IN THE DEFINITION OF DOMESTIC VIOLENCE

During the last few years, psychologists have made great strides in developing and explicating the psychological theory of domestic violence.⁴⁵⁹ Their findings, however, have not been widely disseminated in the mainstream press, and hence many policy-makers are unaware of this theory.⁴⁶⁰ Accordingly, state legislators' failure to include mental abuse per se in their states' definitions of domestic violence⁴⁶¹ may be largely due to their lack of familiarity with the psychological theory of domestic violence, and in particular the distinction between intimate terrorism and situational couple violence.

Regardless, however, some state legislators may be concerned that including mental abuse per se in the definition of domestic violence would unnecessarily infringe their citizens' state and federal privacy,⁴⁶² free speech, and/or parental rights (the right to enjoy the companionship of

459. See, e.g., DUTTON, *supra* note 215, at 209 and *passim* (stating "it is just a matter of time until . . . [longitudinal studies of abused children and retrospective studies of abusive adults] present a comprehensive lifespan developmental portrait of the long-term consequences of early abuse experiences").

460. Kenneth Corvo et al., *Evidence-Based Practice in Domestic Violence: Towards Evidence-Based Practice with Domestic Violence Perpetrators*, 23–25 (Aug. 1, 2010), <http://www.nfvllrc.org/docs/Corvo.Article.1.pdf> (explaining that "[a] rich psychology of intimate violence perpetrators has developed since the first wave of treatment was developed. Essentially this research has unearthed what emotions, cognitions and situational interactions intermingle to generate and support abusive behavior. . . . [However,] there is a lack of political support to reframe the issue so that implementing an evidence-based approach becomes feasible").

461. The definition of domestic violence contained in states' criminal laws also typically fails to include verbal or emotional abuse, apart from that derived from a credible threat of physical violence. See, e.g., CAL. PENAL CODE § 13700 (West 2009).

462. See, e.g., U.S. CONST. amend. I, III, IX, and XIV; *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'"); *Griswold*, 381 U.S. at 484 (stating that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy[.]" and noting that the Third and Ninth Amendments provide additional sources of the right to privacy); *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The Fourteenth Amendment guarantees the right of the individual to "establish a home and bring up children, to worship God according to the dictates of his own conscience.").

one's child and raise him/her as one sees fit).⁴⁶³ Given that mental abuse is difficult to define and even more difficult to prove,⁴⁶⁴ this concern is understandable. Accordingly, the constitutionality of a state law limiting or denying a party custody of a child on account of his or her past mental abuse is considered in some depth below.

Turning first to an individual's federal right to privacy, the U.S. Supreme Court has repeatedly identified the Fourth and Fifth Amendments to the U.S. Constitution⁴⁶⁵ (in particular, the protections against unreasonable searches and seizures and self incrimination, respectively) as the main guarantees of an individual's right to privacy.⁴⁶⁶ In addition, the

463. Only a biological parent or legal guardian of a child possesses "parental rights." See, e.g., James G. Dwyer, *Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1418 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (clarifying that parental rights are unlike other individual rights in that they are based solely on an individual's status as a parent or legal guardianship of a child)); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Pierce*, 268 U.S. at 534–55, to the effect that the "liberty of parents and guardians" includes the right 'to direct the upbringing and education of children under their control'").

464. See, e.g., Peter Allen, *Shouting at Your Wife May Get You a Criminal Record in France*, MAILONLINE, Jan. 6, 2010, <http://www.dailymail.co.uk/news/worldnews/article-1240770/France-introduce-new-law-banning-psychological-violence-marriages.html> (explaining that since psychological abuse leaves no visible scars, "[m]any believe the offence will be impossible to prove," and indicating that the police and courts will not be able to distinguish "rudeness" from "psychological abuse"). Still, it should be kept in mind that most crimes happen behind closed doors and yet crimes are routinely proven with circumstantial evidence. See, e.g., Barry Liebowitz, *Book 'Em: Seven Days of Rage—The Deadly Crime Spree of the Craigslist Killer*, CBSNEWS.COM, Sept. 18, 2009, <http://www.cbsnews.com/blogs/2009/09/17/crimesider/entry5318109.shtml> ("[P]eople can hide their inner lives very well."); Alice Green, *Criminals Look Like Us*, TIMESUNION.COM, July 17, 2009, <http://blog.timesunion.com/alicegreen/category/prisons> ("Most people are able to hide their illegal acts. . . ."); Steve Thompson, *Circumstantial Evidence in Criminal Law*, ASSOCIATEDCONTENT.COM, Oct. 20, 2006, http://www.associatedcontent.com/article/71948/circumstantial_evidence_in_criminal_pg2.html?cat=17 ("Circumstantial evidence plays a large role in most criminal cases . . . Many of the most high profile cases in U.S. history have been based on circumstantial evidence. For example, the trials of Timothy McVeigh (OKC bombing), Scott Peterson (murder of his wife), Charles Manson (murder of Sharon Tate) and others."). In addition, even proving that a particular person inflicted visible physical injuries tends to turn into a matter of "he said, she said" and physical abuse cases often are resolved on the basis of the parties' credibility. *When Will They Ever Learn? Educating to End Domestic Violence: A Law School Report*, American Bar Association Commission on Domestic Violence, <http://www.ojp.usdoj.gov/ovc/publications/infores/etedv/incorp.htm> (last visited Mar. 30, 2010). This is due in part to the fact that "many [batterers] routinely deny the domestic violence and the severity of that violence. When confronted with their abusive behavior, they tend to blame their partner for provoking it or refuse to accept responsibility for it." THE NATIONAL CENTER FOR VICTIMS OF CRIME, DOMESTIC VIOLENCE VICTIMIZATION, available at http://www.ojp.usdoj.gov/ovc/publications/infores/help_series/pdfxt/domestic_violencevictimization.pdf. Yet, all fifty states include physical abuse in their definition of domestic violence. ABACDV, *supra* note 351.

465. U.S. CONST. amend. IV, V.

466. *Griswold*, 381 U.S. at 484 ("The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'").

Court has often cited the First Amendment to the U.S. Constitution⁴⁶⁷ as a guarantee of an individual's right to protection against government intrusion into the "private realm of family life."⁴⁶⁸ The Court occasionally has cited the Ninth and Third Amendments to the U.S. Constitution⁴⁶⁹ (specifically, the protection of rights retained by the people and the guarantee against occupation of one's home by the military during peacetime) as further guarantees of an individual's right to privacy in family matters.⁴⁷⁰

There are also constitutional provisions that relate to an individual's parental rights. The U.S. Supreme Court has repeatedly pointed to the Fifth and Fourteenth Amendments to the U.S. Constitution⁴⁷¹ as the primary guarantees of an individual's parental rights.⁴⁷² However, the Court has also identified the First Amendment to the U.S. Constitution (in particular, its references to the freedoms of speech, conscience, religion, and association) as either the main guarantee or one guarantee of an individual's parental rights, especially in cases regarding a parent's right to control his child's education and religious upbringing.⁴⁷³ In addition, on

467. U.S. CONST. amend. I.

468. *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

469. U.S. CONST. amend. IX, III.

470. *Griswold*, 381 U.S. at 484 (stating that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy[.]" and noting that the Third and Ninth Amendments provide additional sources of the right to privacy).

471. U.S. CONST. amend X, XIV.

472. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) ("The Fourteenth Amendment guarantees the right of the individual . . . to establish a home and bring up children, to worship God according to his own conscience."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); Donald C. Hubin, *Parental Rights and Due Process*, 1:2 J.L. & FAM. STUD. 123, 135 (1999) (citing Josephine Fiore, Comment, *Constitutional Law: Burden of Proof—Clear and Convincing Evidence Required to Terminate Parental Rights*, 22 WASHBURN L.J. 140, 141–142 (1982) (in turn citing *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972), *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), and *Meyer*, 262 U.S. at 399 ("The right of parents to raise their children is fundamental and falls within the liberty interest defined by the fifth and the fourteenth amendments.")); see also *In re Gentry*, 369 N.W.2d 889, 892 (Mich. App. 1985) ("A parent's right to the custody of his or her children is an element of 'liberty' guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.").

473. See, e.g., *Griswold*, 381 U.S. at 482 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 ("[T]he right to educate one's child as one chooses is made applicable to the State by the force of the First and Fourteenth Amendments.")); *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) (citing *W. Va. State Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943) ("The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and

several occasions, the Court has listed the Ninth Amendment (right to privacy in family matters) among the Constitutional guarantees of an individual's parental rights.⁴⁷⁴

The rights to privacy, to free speech, and to raise one's child as one sees fit are all fundamental liberty interests,⁴⁷⁵ and the U.S. Supreme Court has emphasized that a parent's right to raise his or her child as he or she sees fit "is perhaps the oldest of the fundamental liberty interests recognized by this Court."⁴⁷⁶ Accordingly, the Court has made clear that any federal or state law that infringes these rights is unconstitutional unless it "advance[s] a compelling state interest by the least restrictive means available."⁴⁷⁷ This test is referred to as the "strict scrutiny" test.⁴⁷⁸

At the same time, the Court has made it unambiguously clear that a state, due to its *parens patriae* role,⁴⁷⁹ possesses a compelling interest in

assertion of state power voicing it, have had recognition here . . . [under the First and Fourteenth Amendments].").

474. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment[.]") (citations omitted); *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[T]he right [of personal privacy under the Ninth Amendment] has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education."); see also *Doe v. Irwin*, 441 F. Supp. 1247, 1251 (1977) (*rev'd on other grounds*, *Doe v. Irwin*, 615 F.2d 1162 (1980) ("[T]he right of parents to the care, custody, and nurture of their children . . . [is a] . . . fundamental right[] protected by the First, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.")).

475. *Griswold*, 381 U.S. at 485 (right to privacy); *Barnett*, 319 U.S. at 639 (right to free speech); *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment) (parental rights).

476. *Troxel*, 530 U.S. at 65.

477. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (holding that a Texas law requiring a notary to be a U.S. citizen violates resident aliens' fundamental equal protection rights guaranteed by the Fourteenth Amendment to the U.S. Constitution); see also *Griswold*, 381 U.S. at 485 (striking down Connecticut law prohibiting the use of contraceptives as violating an individual's fundamental right to privacy); *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citing *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (striking down New York's "Son of Sam" law, which provided that an "entity" contracting with a person "accused or convicted of a crime" for the production of a book or other work describing the crime must pay to respondent Crime Victims Board any monies owed to that person under the contract" as unnecessarily limiting the fundamental free speech rights of the accused or convicted individual)).

478. *Bernal*, 467 U.S. at 219.

479. This phrase literally means [in Latin] "parent of the country[.]," 118 INT'L L. REPORTS 472 (E. Lauterpacht, C.J. Greenwood eds., 2001) [hereinafter INT'L L. REPORTS] (quoting *Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600, n. 8 (1982) (in turn quoting BLACK'S LAW DICTIONARY 1003 (5th ed. 1979))). In *Snapp & Son, Inc.*, Justice White explained that "[t]he *parens patriae* action has its roots in the common-law concept of the "royal prerogative[.]" INT'L L. REPORTS, *supra*, at 472 (quoting *Snapp & Son, Inc.*, 458 U.S. at 600), and he elaborated that "[t]his prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised

safeguarding the physical and/or emotional welfare of minor children living within its boundaries.⁴⁸⁰ Accordingly, the Court has consistently held that a state custody law which infringes on individuals' fundamental rights but is designed to promote the best interests of minor children is constitutional under the strict scrutiny test, so long as its infringement of those individuals' rights is minimized as much as possible.⁴⁸¹ In essence, the Court has held that the constitutionality of the law ultimately turns on whether it incorporates sufficient procedural protections to ensure that individuals' Fourteenth Amendment procedural due process rights are not violated.⁴⁸²

The general test of whether a law satisfies individuals' Fourteenth Amendment procedural due process rights was set out by the Court in the 1976 case of *Mathews v. Eldridge*.⁴⁸³ In *Mathews*, the Court held

that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴⁸⁴

In cases in which a child custody law has been found to infringe on an individual's parental rights, the Court's assessment of the constitutionality of the law has largely depended on the procedural protections that the state has established to ensure the accuracy of its determinations regarding the plaintiff's parental fitness and the "best interests of the child."⁴⁸⁵ Of course, this approach is logical, given that a state cannot possess a *parens patriae*

in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." INT'L. L. REPORTS, *supra*, at 472 (in turn quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)).

480. *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

481. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 645 (1972) (striking down an Illinois law automatically terminating unwed fathers' custody of their children upon the death of the children's mother because it violated such fathers' fundamental parental rights and furthermore did not provide each such father with an individualized hearing regarding his fitness as a parent).

482. *See, e.g.*, *Smith v. Org. of Foster Families*, 431 U.S. 816, 848-49 (1977); *Lassiter*, 452 U.S. at 27, 31; *Santosky*, 455 U.S. 745, *passim*.

483. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (upholding law terminating social security disability benefits without affording a hearing to the individual concerned).

484. *Id.* at 335.

485. *See, e.g.*, *Smith v. Org. of Foster Families*, 431 U.S. at 848-49; *Lassiter*, 452 U.S. at 27, 31; *Santosky*, 455 U.S. 745, *passim* (all citing *Mathews*, 424 U.S. 319 (1976)).

interest in restricting an individual's parental rights unless doing so actually promotes the best interests of the child concerned.⁴⁸⁶

The cases of *Stanley v. Illinois*⁴⁸⁷ and *Santosky v. Kramer*⁴⁸⁸ probably best elucidate the Court's jurisprudence regarding constitutional challenges to state child custody laws. At issue in *Stanley* was an Illinois state law that treated every unwed father as a nonparent of his children when the unwed mother of his children died.⁴⁸⁹ Joan and Peter Stanley never married but co-habited intermittently for eighteen years and during that time had three children.⁴⁹⁰ Upon Joan's death, Stanley was considered a non-parent; accordingly their three children were automatically treated as wards of the state and placed in the care of court-appointed guardians.⁴⁹¹ Although Stanley technically was not adjudged an unfit parent at that hearing, the Court found that this was only because all unwed fathers were presumed at law to be unfit.⁴⁹² Unwed mothers, married fathers, and divorced parents were not subject to this same presumption and could be separated from their children only after an individualized hearing regarding their fitness as a parent.⁴⁹³

In weighing the three *Eldridge* factors, the Court reaffirmed that an individual's parental rights are "essential" and noted that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment."⁴⁹⁴ Furthermore, it found that even though Stanley was entitled to apply for the adoption or legal custody of his children, there was no guarantee that he would be granted either, especially in light of the fact that he had already been treated by the State of Illinois as an unfit parent.⁴⁹⁵ In addition, the Court pointed out that numerous restrictions are imposed on the legal guardian of a child that are not imposed on a natural or adoptive parent of a child.⁴⁹⁶ Therefore, the Court concluded that Stanley's parental rights were "seriously prejudiced" by the above-described scheme.⁴⁹⁷

The Court then considered the risk that, in the absence of an individualized hearing, some unwed fathers in Stanley's position would be erroneously treated as unfit and the Court found that risk to be

486. See, e.g., *Stanley*, 405 U.S. at 657–58 (1972) (commenting that "[t]he State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit father").

487. *Id.*

488. *Santosky v. Kramer*, 455 U.S. 745, *passim* (1982).

489. *Stanley*, 405 U.S. at 650.

490. *Id.* at 646.

491. *Id.*

492. *Id.* at 650.

493. *Id.* at 658.

494. *Id.* at 651.

495. *Id.* at 648–49.

496. *Id.*

497. *Id.*

unacceptably high.⁴⁹⁸ In examining the third *Eldridge* factor, the Court considered the three interests which Illinois asserted its scheme served: 1) Illinois's interest in protecting "'the moral, emotional, mental, and physical welfare of the minor and the best interests of the community' and [2)] . . . 'strengthen[ing] the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . .'"⁴⁹⁹ and 3) "[t]he establishment of prompt, efficacious proceedings."⁵⁰⁰

The Court stated that Illinois's first interest was "legitimate, . . . well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children."⁵⁰¹ However, the Court pointed out that, had Stanley been given the opportunity to make his case, he may have been found to be a fit parent, and, had this been so, the State's statutory policy would have been furthered by leaving custody in him."⁵⁰² In other words, the Court found that Illinois's statutory scheme was overbroad as a method of achieving this very important state interest.⁵⁰³ Lastly, the Court noted that "the establishment of prompt, efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication."⁵⁰⁴ At the same time, the Court emphasized that Stanley's interests in obtaining an individualized hearing of his parental fitness outweighed Illinois's interest in not doing so because "the Constitution recognizes higher values than speed and efficiency."⁵⁰⁵ In conclusion, the Court held that the Fourteenth Amendment to the U.S. Constitution guaranteed Stanley an individualized hearing on his fitness as a parent before Illinois could destroy his custodial rights to his children.⁵⁰⁶ In addition, the Court held that Illinois's statutory scheme also violated Stanley's equal protection rights guaranteed by the Fourteenth Amendment because Illinois provides hearings to all other parents besides unwed fathers.⁵⁰⁷

At issue in *Santosky* was a New York statute which permitted an individual's parental rights to be permanently terminated on the basis of a preponderance of evidence that he or she had "permanently neglected" his

498. *Stanley*, 405 U.S. at 654–55 ("[S]ome [unwed fathers] are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children.")

499. *Id.* at 652 (citing Ill. Rev. Stat. c. 37, s 701-2).

500. *Id.* at 656.

501. *Id.* at 652.

502. *Id.* at 655.

503. *Id.* at 656–58.

504. *Id.* at 656.

505. *Id.*

506. *Id.* at 657–58.

507. *Id.* at 658.

or her child.⁵⁰⁸ In this case, in 1973, the Ulster County Child Welfare Department (Department), had first temporarily removed Tina Santosky from the custody of Annie and John Santosky II, her natural parents, and placed Tina with a foster family on the ground that the Santoskys had “neglected” her.⁵⁰⁹ Then, approximately ten months later, in 1974, Tina’s younger brothers, John III and Jed, were removed from the Santoskys’ custody and placed in foster homes for the same reason.⁵¹⁰ Although the Santoskys’ children were removed from their parents’ care due to “neglect,” Tina and John III had suffered a number of physical injuries in the Santosky home.⁵¹¹ Finally, in 1978, the Department had petitioned the Ulster County Family Court to permanently terminate the Santoskys’ custodial rights to Tina, John III, and Jed, on the ground that the Santoskys had “permanently neglected” all of them.⁵¹² The Department’s apparent motivation in seeking to terminate the Santoskys’ parental rights was to permit the Santoskys’ children to be adopted by parties who would provide them with a stable home.⁵¹³

At the “permanent neglect” hearing, New York law required the Department to prove two main points. First, with respect to each child, it was required to prove “that for more than a year after the child entered state custody, the [Department] . . . ‘made diligent efforts to encourage and strengthen the parental relationship.’”⁵¹⁴ Second, with respect to each child, it was required to prove that the Santoskys “failed ‘substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so.’”⁵¹⁵ At this hearing, the Santoskys challenged the constitutionality of the preponderance of the evidence standard of proof.⁵¹⁶ The family court judge rejected this claim and proceeded to find, based on a preponderance of the evidence, that the Department had proven that the Santoskys had permanently neglected their children.⁵¹⁷ At a subsequent dispositional hearing, the Family Court judge granted the Department’s petition to

508. *Santosky v. Kramer*, 455 U.S. 745, 748–49 (1982).

509. *Id.* at 752.

510. *Id.*

511. *Santosky*, 455 U.S. at 781–82, n. 10 (Rehnquist, J., dissenting) Tina had suffered injuries in petitioners’ home including a fractured left femur, treated with a home-made split; bruises on the upper arms, forehead, flank, and spine; and abrasions of the upper leg . . . John Santosky III . . . was admitted to the hospital suffering malnutrition, bruises on the eye and forehead, cuts on the foot, blisters on the hand, and multiple pin pricks on the back.

512. *Id.* at 748–52.

513. *Id.* at 748 (“stating that “if convinced that ‘positive, nurturing parent-child relationships no longer exist,’ . . . the State may initiate ‘permanent neglect’ proceedings to free the child for adoption.”).

514. *Id.* at 748 (citing New York Family Court Act §§ 614.1.(c), 611) (McKinney 1975 and Supp. 1981–1982) (hereinafter Fam. Ct. Act)).

515. *Santosky*, 455 U.S. at 748–49 (citing Fam. Ct. Act § 614.1.(d)).

516. *Id.* at 751.

517. *Id.* at 751–52.

permanently terminate the Santoskys' parental rights, stating that the order was in the best interests of the children.⁵¹⁸

The Santoskys appealed this decision to the New York Supreme Court, Appellate Division, which affirmed the lower court's ruling.⁵¹⁹ The New York Court of Appeals dismissed the Santoskys' further appeal on the ground that "no substantial constitutional question [was] directly involved."⁵²⁰ The U.S. Supreme Court granted certiorari⁵²¹ and reversed the decision of the New York Court of Appeals.⁵²²

In its opinion, the Court clarified that, in a case involving the permanent termination of parental rights, a preponderance "standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights."⁵²³ The Court then methodically considered each of the three *Eldridge* factors. First, with respect to the private interest affected by the challenged New York law, the Court stated that:

[w]hether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss. . . . When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. "If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one."⁵²⁴

Next, the Court considered the "risk of erroneous deprivation of private interests resulting from use of a 'fair preponderance' standard."⁵²⁵ On this issue, the Court noted that, in a proceeding initiated by a state to permanently terminate an individual's parental rights, a number of factors "combine to magnify the risk of erroneous factfinding."⁵²⁶ For example, the Court pointed out, when a state initiates a proceeding to permanently terminate an individual's parental rights, it typically can assemble a very strong case against the individual, especially as it often has first placed the child in question in protective custody and then supervised the parent's

518. *Santosky*, 455 U.S. at 752.

519. *Id.*

520. *Id.*

521. *Id.*

522. *Id.* at 747-48.

523. *Id.* at 765.

524. *Id.* at 758-59 (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

525. *Santosky*, 455 U.S. at 761.

526. *Id.* at 762.

interactions with the child.⁵²⁷ The Court stated, “because the child is . . . in agency custody, the State even has the power to shape the historical events that form the basis for termination.”⁵²⁸ The Court also emphasized that a state can initiate a permanent neglect proceeding against an individual an infinite number of times and present additional proof at each succeeding proceeding, while a parent whose custodial rights have been terminated cannot later regain those rights even if the state agrees that he or she is a fit parent at that time.⁵²⁹

Furthermore, the Court stated, such a proceeding “employ[s] imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.”⁵³⁰ In addition, the Court noted, a preponderance of evidence standard focuses on “the quantity, rather than the quality, of the evidence.”⁵³¹ Accordingly, under New York’s statutory scheme, “a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior.”⁵³² At the same time, the Court stated, a requirement of proof beyond a reasonable doubt at such hearings could be “an unreasonable barrier to . . . efforts to free permanently neglected children for adoption[,]”⁵³³ because much of the evidence considered at parental fitness hearings consists of medical and psychiatric evidence and such evidence does not lend itself to proof beyond a reasonable doubt.⁵³⁴

Considering the third *Eldridge* factor, the Court considered the Government’s two interests in maintaining its preponderance of evidence standard of proof in termination proceedings: New York’s *parens patriae* interest in promoting the welfare of its minor children and its interest in minimizing the expense and effort required of the state in permanent termination proceedings.⁵³⁵ With respect to New York’s *parens patriae* interest, the Court stated that a higher standard of proof in termination proceedings actually promotes the state’s *parens patriae* interest because terminating a parent’s parental rights can only promote the best interests of the child if that parent is in fact an unfit parent.⁵³⁶ In addition, the Court

527. *Santosky*, 455 U.S. at 763.

528. *Id.*

529. *Id.* at 764.

530. *Id.* at 762.

531. *Id.* at 764.

532. *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)).

533. *Santosky*, 455 U.S. at 769.

534. *Id.* (“Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress.”).

535. *Id.* at 766.

536. *Id.* at 767 (stating that “[a]t the factfinding, that goal [of providing the child with a normal home] is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home”).

asserted, the risk of an erroneous termination of a parent's custodial rights in New York was simply that the child would remain in the "uneasy status quo" of the foster care system because the state cannot initiate a permanent termination proceeding until the child has already been temporarily removed from the parent's custody on account of the parent's neglect.⁵³⁷ With respect to New York's interest in minimizing its expense and effort in parental termination proceedings, the Court stated that requiring New York family court judges to base their termination decisions on "clear and convincing evidence," rather than on a preponderance of evidence, would not impose any measurable financial or administrative burden on New York because these judges were required to apply the higher standard in other proceedings and hence were familiar with it.⁵³⁸

Given that the state's interests in avoiding an erroneous decision not to terminate a parent's rights were not nearly as strong as a parent's interests in avoiding an erroneous decision to terminate his or her rights, the Court concluded that New York's statutory scheme was inappropriate because a preponderance of evidence standard of proof indicates that the government's interests and the private interests are essentially equal.⁵³⁹ In conclusion, based on all of the above-mentioned factors, the Court held that the termination of an individual's parental rights satisfies the individual's Fourteenth Amendment due process rights only if the termination is supported by "at least clear and convincing evidence."⁵⁴⁰

In light of the above law, it's possible that a state statute that would deny child custody after an affirmative determination by a family court that a party has mentally abused another in the past would not infringe the accused party's federal privacy rights. For many years, governments justified their failure to treat domestic violence as a crime on their stated desire not to intrude on the privacy of family relations inside the family home.⁵⁴¹ However, beginning in the 1970s, after feminist scholars and

537. *Santosky*, 455 U.S. at 765–66. As Justice Rehnquist (joined by Justices White and O'Connor) stated in his dissent, however, this aspect of the majority's opinion appears flawed. The risk of erroneous failure to terminate a parent's custodial rights would include "the risk of permanent injury to the child either by return of the child to an abusive home or by the child's continued lack of a permanent home." *Id.* at 788–89, n. 13. In particular, in this regard the majority appears to have ignored the fact that if the state fails to prove its case in the permanent termination proceeding, under New York's statutory scheme the Santoskys could then request a review of the court's earlier temporary removal order and a reinstatement of their full custodial rights. *Id.* at 766, n. 16 (citing Fam. Ct. Act § 632(b) (providing that "when State's permanent neglect petition is dismissed for insufficient evidence, judge retains jurisdiction to reconsider underlying orders of placement").

538. *Id.* at 767–68.

539. *Id.* at 765.

540. *Id.* at 748.

541. See, e.g., Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 160–61 (2003) ("Traditionally, acts of violence in the home were largely ignored by law enforcement, who viewed domestic violence as a 'private' matter, inappropriate for state intervention.")

victims' rights advocates forcefully argued that governments' reliance on the right to privacy to justify nonintervention in domestic violence incidents effectively granted individuals (typically males) the right to harm their fellow family members (typically females) with impunity so long as they did so within the family home, many jurisdictions took a more affirmative law enforcement stance against domestic violence.⁵⁴² Furthermore, it is now settled law that, when a victim of domestic violence has requested or consented to police presence in a private residence, either the victim has waived the perpetrator's Fourth or Fifth Amendment privacy rights or infringement of the perpetrator's rights is outweighed by the right of the victim to be free from harm.⁵⁴³ In sum, the general argument that government intervention in incidents of domestic violence infringes the privacy rights of the individuals involved has largely been refuted.⁵⁴⁴

With respect to the specific proposal made in this article that mental abuse per se be included in the definition of domestic violence used in contested child custody proceedings, it is important to keep in mind that a contested child custody proceeding typically follows a divorce; importantly, the divorce has already abolished the family unit and family home to which the U.S. Constitution guarantees special privacy protection.⁵⁴⁵ Moreover, most of the evidence offered in a child custody

(citations omitted); Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31, 34 (2010) [hereinafter Sack]. Ironically, for a time police personnel in the U.S. were encouraged to refrain from interfering in 'domestics' on the ground that "preservation of the family unit and promotion of domestic *harmony* required that the law not interfere in spousal relations." *Id.*

542. Sack, *supra* note 541, at 32–33 ("It was the women's movement of the 1970s that brought attention to the prevalence of domestic violence, and which initiated reforms in civil and criminal justice policy to address such violence.").

543. *Georgia v. Randolph*, 547 U.S. 103, 115–19 (2006) ("We have . . . lived our whole national history with an understanding of 'the ancient adage that a man's home is his castle . . . ' [but] 'where the defendant has victimized the third-party . . . the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant's objections.'") (citations omitted.) In addition, the U.S. Supreme Court has held that if police possess probable cause to believe that physical harm to a person inside a private residence is imminent (*e.g.*, based on neighbors' complaints to police as well and/or audible sounds emanating from that residence), any infringement to the residents' Fourth and Fifth Amendment privacy rights are outweighed by the government's legitimate desire to prevent harm to that person and stop a crime in progress. *United States v. Hendrix*, 595 F.2d 883, 885–86 (D.C. Cir. 1979) (*per curiam*) (holding that if the consent of the threatened co-occupant did not justify a warrantless search, the police entry nevertheless was allowable on exigent-circumstances grounds) (cited by the U.S. Supreme Court in *Randolph*, 547 U.S. at 119).

544. *See, e.g.*, Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1144–45 (1994); *but see* JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* 36, 39, 45, 53 (2009).

545. *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("[The Fourth and Fifth Amendments] apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life") (quoted with approval in *Griswold v.*

proceeding in support of an allegation that one of the parties has committed mental abuse in the past consists of the testimony of one or more participant(s) in a domestic event in which the accused likewise was a participant.⁵⁴⁶ The U.S. Supreme Court has repeatedly held that disclosure of information regarding an event by a participant in that event does not infringe the privacy rights of any other participant.⁵⁴⁷ This is because none of the participants possess a reasonable expectation that a fellow participant

Connecticut, 381 U.S. 479, 484 (1965) (holding that a Connecticut statute that forbade the use of contraceptives violates the right to marital privacy guaranteed by the U.S. Constitution); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (stating that “[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment”). For example, it is for this reason that the spousal testimonial privilege is abolished upon the couple’s divorce (*Pereira v. United States*, 347 U.S. 1, 6 (1954)) and neither the spousal testimonial privilege nor the spousal communications privilege is available in a civil action, including a divorce proceeding, between spouses (*see, e.g., CAL. EVID. CODE §972(a)* (exception to testimonial privilege); *Manela v. Superior Court of Los Angeles*, 177 Cal. App. 4th 1139, 1147 (2009) (exception to confidential communications privilege provided in CAL. EVID. CODE §984(a) encompasses divorce proceeding) or a criminal prosecution of one spouse for a crime (including domestic violence) committed against the other spouse (*see, e.g., CAL. EVID. CODE §972(e)(1)*) (exception to spousal testimonial privilege); CAL. EVID. CODE §985(a) (exception to spousal confidential communications privilege).

546. As psychological abuse leaves no visible scars, psychological abusers tend to deny their abuse, and most types of domestic abuse, including mental abuse, takes place outside the public arena, evidence in mental abuse cases necessarily consists primarily of the testimony of the parties to various domestic events. Peter Allen, *Shouting at Your Wife May Get You a Criminal Record in France*, DAILY MAIL, Sept. 1, 2012, <http://dailymail.co.uk/news/worldnews/article-1240770/France-introduce-new-law-banning-psychological-violence-marriages.html>. (emphasizing that psychological abuse leaves no scars, which makes it exceedingly difficult to prove that it has occurred); Johnson 2009, *supra* note 83, at 284 (explaining that one of the nonviolent control tactics which intimate partners often employ is denying their abuse); Violence and Abuse, Plymouth City Council, (Sept. 2, 2012), *available at* http://www.plymouth.gov.uk/domestic_violence_and_abuse-2.pdf. (“Much of the abuse takes place in private, behind closed doors); *see also* AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, *Incorporating Domestic Violence Legal Issues into Law School Curricula*, in WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT, *available at* <http://www.ojp.usdoj.gov/ovc/publications/infores/etedv/incorp.htm> (last visited Oct. 11, 2009) (reporting that, “[i]n domestic violence cases, complex issues often arise regarding the credibility of witnesses[.]”).

547. *U.S. v. White*, 401 U.S. 745, 751 (1971) (interpreting Title III of the Federal Omnibus Crime Control Act of 1968, Pub. L. No. 90-351 (codified as amended at 18 U.S.C. §§ 2510–2522) and stating that “[f]or constitutional purposes, no different result is required if . . . [a participant] instead of immediately reporting and transcribing his conversations . . . either (1) simultaneously records them . . . (2) or . . . simultaneously transmits [them]”); *see also Rathbun v. U.S.*, 355 U.S. 107 (1957) (“We need not say that a man may never make a record of what he hears on the telephone by having someone else listen . . . as in the case at bar, even by allowing him to interpose a recording machine.”); Carol M. Bast, *Conflict of Law and Surreptitious Taping of Telephone Conversations*, 54 N.Y.L. SCH. L. REV. 147, 148 (2009–2010) [[hereinafter Bast].

to the event will not divulge information regarding the event to one or more nonparticipants.⁵⁴⁸

The Court has specifically held that admission into evidence of a surreptitious recording of an event made by a participant does not infringe upon the federal privacy rights of any other participant to that event,⁵⁴⁹ concluding that no participant in such an event possesses a reasonable expectation that another participant will not record it.⁵⁵⁰ Therefore, even if a state's inclusion of mental abuse per se in its definition of domestic violence were to encourage people to make surreptitious recordings of domestic events for use in a potential custody dispute in the future, such recordings do not infringe the federal privacy rights of any of the participants to such events.⁵⁵¹ In addition, forty-one of the fifty states (referred to as "one-party consent states") agree that a participant to an event who surreptitiously records the event does not violate his or her fellow participants' privacy rights.⁵⁵² The remaining states (referred to as "two-party consent states") generally prohibit surreptitious recordings unless all of the participants have agreed to the recording⁵⁵³ and provide

548. See, e.g., John H. Case, Gilbert B. Feibleman & Mark Gruber, *Electronic Eavesdropping and Wiretapping: How 20th Century Technology Can Cause 21st Century Headaches for You and Your Client*, 82 (2004), available at http://www.feiblemancase.com/documents/2004_wiretapping_updated.pdf (last visited Sept. 11, 2011) [hereinafter Case].

549. *White*, 401 U.S. at 751.

550. Abraham Abramovsky, *Surreptitious Record of Witnesses in Criminal Cases: A Quest for Truth or a Violation of Law and Ethics?*, 57 TULANE L. REV. 1, 9, 34 (1982); see also New York City Bar Ass'n, Formal Opinion 2003-02 http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=122 (last visited Mar. 23, 2013) ("even though recording of a conversation without disclosure may to many people 'offend a sense of honor and fair play,' it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded").

551. *White*, 401 U.S. at 751.

552. Bast, *supra* note 547, at 148 (noting that four-fifths of the states agree with the federal government on this point); see also Richard Turkington, *Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Store Communications Acts and the Common Law Privacy Intrusion Tort*, 82 NEB. L. REV. 693, 708 (2004) (stating that the Federal Wiretap Act "is mirrored in most state wiretap statutes") [hereinafter Turkington].

553. Bast, *supra* note 547, at 148; see also *Lane v. Allstate Insurance Co.*, 969 P.2d 938 (Nev. 1998) (interpreting Nevada's wiretap statute, which on its face appears to permit surreptitious recordings by participants, as requiring the consent of all parties to the recordings). Note, however, that even most two-party consent states exempt certain events, such as crimes and other dangerous events. See, e.g., CAL. PENAL CODE § 633.5 (West 2010) (clarifying that "[n]othing in Sections 631, 632 prohibits one party to a confidential communication from recording the communication for the purposes of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence . . . [and nothing] renders any evidence so obtained inadmissible . . ."); Lee Ashley Smith, *The Admissibility of Tape Recordings in Criminal Trials Involving Domestic Disputes: California's Proposition 8 and Title III of the Federal Omnibus Crime Control and Safe Streets Act*, 15

criminal and/or civil penalties for violations of this prohibition,⁵⁵⁴ with some such states mandating that such a surreptitious recording is inadmissible in any court proceeding.⁵⁵⁵ Therefore, it is unlikely that a two-party consent state's inclusion of mental abuse in its definition of domestic violence would encourage its residents to make surreptitious recordings of domestic events. Finally, note that most state courts have also held that one parent's surreptitious recording of the interaction between her child and other parent does not violate the privacy rights of either her child or the other parent.⁵⁵⁶ For all of these reasons, a state's inclusion of mental abuse in its definition of domestic violence is highly unlikely to infringe its citizens' federal or state privacy rights.

On the other hand, a state law authorizing a court's denial of child custody to a party who had committed mental abuse per se in the past unquestionably would infringe that person's First Amendment free speech, given that verbal abuse is a form of mental abuse.⁵⁵⁷ Furthermore, such a state law would infringe that party's parental rights if he or she also were that child's biological parent. As both free speech rights and parental rights are fundamental rights guaranteed to every U.S. citizen by the Fourteenth Amendment to the U.S. Constitution, *Stanley*⁵⁵⁸ and *Santosky*⁵⁵⁹ taught that,

HASTINGS WOMEN'S L.J. 217, 227–28 (2004) (noting that the Victim's Bill of Rights, otherwise known as Proposition 8, an initiative approved by California voters in 1982, effectively mandates that any recording obtained in violation of California's two-party rule be admitted into evidence "in criminal trials subject only to federal exclusionary rules"). Therefore, certain surreptitious recordings of mental abuse do not even violate the privacy laws of two-party consent states.

554. Case, *supra* note 548, at 22–23.

555. See, e.g., CAL. PENAL CODE § 631 (2012); 720 ILL. COMP. STAT. 5/14-1 to 5/14-6; MD. CODE ANN., CTS. & JUD. PROC. § 10-40.

556. See, e.g., Turkington, *supra* note 552, at 708–16 (citing Scheib v. Grant, 22 F.3d 149, 154 (7th Cir. 1994) (upholding parent's recording based on rationale that doing so intrudes on the parties' privacy rights no more than a parent's eavesdropping on a child's conversation via a home phone line extension (the "extension rationale"))); Newcomb v. Ingle, 944 F.2d 1534, 1536, (10th Cir. 1991) (allowing parent's recording based on extension rationale); Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977) (allowing all intra-family recordings pursuant to the since discredited "intra-family dispute exception rationale"); Thompson v. Dulaney, 970 F.2d 744, 748 (10th Cir. 1992) (under Federal Wiretapping Act, allowing custodial parent to vicariously consent to recording a phone conversation with a third party so long as s/he has a reasonable belief that the recording is in the best interest of the child ("vicarious consent doctrine")); Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998) (under Federal Wiretapping Act, allowing parent's recording based on vicarious consent rationale); Campbell v. Price, 2 F.Supp. 2d 1186, 1191 (E.D. Ark. 1998) (under state wiretapping statutes, allowing parent's recording based on a vicarious consent doctrine); Silas v. Silas, 680 So. 2d 368 (Ala. Civ. App. 1996) (same); State v. Diaz, 706 A.2d 264, 270 (N.J. Super. App. Ct. Div. 1998) (same); W. Va. Dep't of Health & Human Res. *ex rel* Wright v. David L., 453 S.E.2d 646, 654 (W. Va. 1994) (under both the Federal Wiretapping Act and state wiretapping statutes, allowing parent's recording based on vicarious consent doctrine, while holding those provisions inapplicable to the facts of the case itself).

557. See *supra* text accompanying notes 59–61.

558. *Stanley v. Illinois*, 405 U.S. 645, 645 (1972).

if the constitutionality of such a state law were challenged, the courts would subject it to strict scrutiny; and any such law would survive such scrutiny only if it satisfied the test established by the U.S. Supreme Court in *Mathews v. Eldridge*.⁵⁶⁰ Again, *Eldridge* requires that, in order to satisfy the demands of the Fourteenth Amendment's procedural due process guarantee, the law would have to guarantee each parent in a child custody proceeding the level of procedural due process dictated by the application of the following three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."⁵⁶¹

As the discussion of the holdings in *Stanley* and *Santosky* make clear, the private interests affected by a state's denial of a parent's child custodial rights are quite significant.⁵⁶² In addition, the great significance of these private interests increases the risk that a family court will make an erroneous finding on the issue of a parent's past mental abuse.⁵⁶³ At the same time, in a typical child custody proceeding, a family court is not deciding whether to permanently terminate either parent's custodial rights,⁵⁶⁴ and in both *Stanley* and *Santosky*, the complainant was challenging a law that could result in the permanent termination of his

559. *Santosky v. Kramer*, 455 U.S. 745, 745 (1982).

560. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

561. *Santosky*, 455 U.S. at 754; *Mathews*, 424 U.S. at 335.

562. As the Court in *Santosky* stated, "Lassiter declared it 'plain beyond the need for multiple citation' that a natural parent's 'desire for, and right to, the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right." 455 U.S. at 758 (*quoting* *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (in turn *quoting Stanley*, 405 U.S. at 651)).

563. *Santosky*, 455 U.S. at 761–66.

564. In the great majority of child custody cases (typically initiated following a divorce), a family court does not permanently terminate either parent's custodial rights but rather only determines the legal and physical custodial arrangement that will best promote the best interests of the child at that point in time. *See, e.g.*, A.R.S. § 25-411(A)(2007) (At any time after one year has expired from the date of the previous custody order, a person may make a motion to modify a custody order.) One could argue that the distinction between a family court's temporary denial of child custody to a parent based on a finding of his or her past mental abuse and the permanent termination of a parent's custodial rights is more illusory than real, given that family courts try to promote a stable living environment for a child and, to that end, are generally reluctant to modify a custody order. In fact, the family courts in some states are only permitted to amend a custody order if the moving party can establish that the child's circumstances have changed significantly. *See, e.g.*, R.S.W. § 26.50.130 (In Washington State, a court will also consider a petition for modification of a custody order "if there is reason to believe the child's present environment may seriously endanger the child's physical, mental, moral or emotional health.") In general, a parent awarded joint custody may petition the court for modification of the order based on the failure of the other parent to comply with the provisions of the order any time after six months have expired from the date of the previous joint custody order, except that a parent may always petition the court for modification of the previous joint custody order on the basis of evidence that domestic violence involving a violation of section 13-1201 or 13-1204, spousal abuse, or child abuse occurred since the entry of the joint custody order).

parental rights.⁵⁶⁵ Certainly, a parent who was denied custody of his or her child on account of his or her past mental abuse could find it very difficult to reacquire his or her custodial rights, especially in a state that recognizes a rebuttable presumption that the child's best interests would not be promoted by the court's grant of custodial rights to that parent. Still, he or she possesses at least a chance of obtaining custody of his or her child until his or her custodial rights are permanently terminated. Therefore, on balance, a court likely would conclude that the private interests in this case are exceedingly important, but they are not as important as the private interests were in *Stanley* and *Santosky*.

Without question, a state law intended to prevent minor children from being exposed to mental abuse promotes a compelling *parens patriae* interest of the state. The psychological (or trauma) theory of domestic violence reveals that it is the internal trauma from which an abuser is suffering that causes him/her to abuse others; accordingly, a parent who has committed mental abuse in the past presents a real threat of subjecting or exposing his or her child to such abuse in the future.⁵⁶⁶ Moreover, even children who merely witness a parent's mental abuse can suffer very severe mental and/or physical injuries, including the failure to develop an autonomous personality.⁵⁶⁷ In contrast, the Court in *Santosky* pointed out the only risk to the children of the court's failure to terminate their father's custodial rights was that they would be returned to the foster care system (not to their possibly abusive father).⁵⁶⁸ Here, a state possesses yet another compelling reason to ensure that young children are not exposed to a parent's mental abuse, which is that the psychological theory of domestic violence teaches that such children are more likely to abuse others as adults and thereby perpetuate the cycle of domestic violence.⁵⁶⁹

As the Court in *Santosky* noted, a state does not possess a *parens patriae* interest in denying a parent custody of his or her child until the state has in fact established that the parent is unfit.⁵⁷⁰ Still, in this case, in determining the level of proof required to prove that a parent has been mentally abusive, courts should consider the fact that this type of abuse does not leave visible scars and as a result is particularly difficult to prove.

Finally, in child custody cases, most family courts around the country are required to consider any child abuse that a party committed in the past,⁵⁷¹ and furthermore, most states include "mental abuse" in their definition of child abuse.⁵⁷² States just do not treat mental abuse as

565. *Santosky*, 455 U.S. at 747–49; *Stanley*, 405 U.S. at 646–49.

566. JOHNSON 2008, *supra* note 83, at 8, 26; Johnson 2009, *supra* note 83, at 284.

567. *See supra* text accompanying notes 105–06, 110–15, 172–75, 279–309.

568. *Santosky*, 455 U.S. at 769–70.

569. DUTTON, *supra* note 215.

570. *Santosky*, 405 U.S. at 766–67.

571. ABACDV, *supra* note 351.

572. *See supra* note 448.

“domestic violence,”⁵⁷³ probably because approximately one half of the states mandate that a finding of past domestic violence triggers the rebuttable presumption against awarding custody to a party with a history of domestic violence.⁵⁷⁴

The great majority of family courts around the country have had a fair amount of experience reviewing mental abuse claims in child custody proceedings, which is helpful for two reasons. First, this fact would decrease a state’s cost of implementing a new definition of domestic violence, at least in child custody cases. More importantly, family courts’ long experience in handling mental abuse claims suggests that their rate of erroneous findings of past mental abuse should already be low.

In light of the competing interests described, if a parent were to challenge a state law denying his or her child custody rights based on a finding of his or her past mental abuse, the U.S. Supreme Court most likely would hold that the law must afford any such parent an individualized hearing on the issue. The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution does not require a state to hold a formal hearing before it infringes a fundamental liberty interest of an individual.⁵⁷⁵ However, it does require a state to provide such an individual with some opportunity to be heard and confront the witnesses and evidence against him or her.⁵⁷⁶

In all likelihood, the Court would hold that the proper standard of proof at such a hearing would be a preponderance of the evidence. Adoption of a “clear and convincing” or “beyond a reasonable doubt” burden of proof most likely would exclude many meritorious claims and thereby endanger the population, but a “substantial evidence” burden of proof certainly would not be sufficiently protective of an accused parent’s interests. There is an enormous evidentiary obstacle for a party attempting to prove another’s past mental abuse, the great harm a child can suffer at the behest of a mental abuser, and the ever-continuing cycle of trauma begetting trauma balanced against the extremely valuable liberty interest of a parent to enjoy the company of his or her child and raise that child as he or she sees fit. The Court in *Santosky* held that a “clear and convincing” standard was appropriate in that case, but there the interest of the father in avoiding the permanent termination of his parental rights was much higher than an accused parent in this case.⁵⁷⁷ Furthermore, there the risk of harm to which the children were exposed by the state’s failure to terminate the father’s custodial rights was much lower than when a custody court is considering

573. ABACDV, *supra* note 351.

574. *Id.*

575. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

576. *Id.* at 264.

577. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982).

whether to temporarily deny custody of a child to a party on account of that party's past domestic violence.

This article recommends that all family courts recognize a rebuttable presumption against awarding sole or joint custody to a party who has committed mental abuse in the past. However, given that such a presumption increases the risk of a family court reaching an erroneous finding that a party committed verbal abuse in the past, this article likewise recommends that any state which recognizes such a presumption 1) ensure that the presumption be rebutted with proof no greater than a preponderance of the evidence and 2) specify with particularity the types of evidence which could rebut the presumption, either initially or later in a modification hearing (as some states' custody laws already do). Officials in states should be free to decide what evidence they find credible on the issue of the parent's parental fitness, but provision of a clear roadmap toward reunification of child and parent, at least over time, would seem to greatly reduce the incidence of erroneous abuse findings and thereby fortify the statute against constitutional attack.

Last but not least, a state could further reduce its incidence of erroneous abuse findings by providing a clear and comprehensive definition of mental abuse in its child custody law. Such a definition should provide that mental abuse (1) is a course of conduct or series of events (2) which has no legitimate purpose and (3) which the perpetrator knows or should know could traumatize his intended victim and any other witness to his abuse in his household. If a state incorporated such a definition of mental abuse into its custody laws, then no one could be denied custody of a child "based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior."⁵⁷⁸ As the court in *Santosky* feared could happen as a result of the statute challenged in that case.⁵⁷⁹ Such a definition would be especially helpful if it included a list of specific behaviors, which, if repeated, would constitute mental abuse.

In the next section of this article, U.S. anti-bullying statutes,⁵⁸⁰ U.S. anti-hazing statutes,⁵⁸¹ and the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment⁵⁸² (CAT) are reviewed for any guidance they may be able to provide regarding legal proscriptions against mental abuse. Each of these schemes is similar to a

578. *Santosky*, 455 U.S. at 763 (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)).

579. *Id.*

580. *See infra* text accompanying notes 583–613.

581. *See infra* text accompanying notes 614–35.

582. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, Annex, U.N. GAOR, 39th Sess., 93rd plen. mtg., U.N. Doc. A/39151 (Dec. 10, 1984) [hereinafter CAT]. This followed the General Assembly's Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, Annex, U.N. GAOR, 30th Sess., 2433 plen. mtg., U.N. Doc. A/10034 (Dec. 9, 1975).

proscription against mental abuse in domestic relations because they prohibit mental abuse that flourishes on account of the ongoing contact between perpetrator and victim, in a particular setting—a school, a social organization, or a correctional institution—that society in general promotes.

VIII. REVIEW OF OTHER LEGAL SCHEMES REGULATING MENTAL ABUSE

A. PROHIBITIONS AGAINST BULLYING⁵⁸³

Montana is the only state that does not have a law targeting school bullying,⁵⁸⁴ and many states enacted anti-bullying legislation within just the last few years.⁵⁸⁵ In May 2010, Massachusetts enacted what its legislators claim “is the most comprehensive and best piece of anti-bullying legislation in the country.”⁵⁸⁶ It prohibits bullying on school grounds, school buses, or school-sponsored activities.⁵⁸⁷ It defines “bullying” as:

583. For a good discussion of several such statutes, see Susan Hanley Kosse, Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 62–69 (2005) [hereinafter Kosse & Wright].

584. Dena T. Sacco et al., *An Overview of State Anti-Bullying Legislation and Other Related Laws*, KINDER & BRAVER WORLD PROJECT, 3, n. 2 (Feb. 23, 2012) http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf (stating that “[a]s of January 2012, 48 states had enacted legislation requiring school districts to adopt policies regarding bullying” and “South Carolina and Montana do not have anti-bullying bills as addressed in this document, nor does the District of Columbia”) [hereinafter Sacco] (citing, U.S. DEP’T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES XI (2011), <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf> (reporting that, as of April 2011, forty-six states had enacted anti-bullying legislation) [hereinafter DOE REPORT]); S.D. Codified Laws §§ 13-32-14-12-13-32-19 (2012); Youth Bullying Prevention Act of 2012, D.C. Act 19-11 (2012), <http://dcclims1.dccouncil.us/images/00001/20120510093523.pdf>; see also Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws, Cyberbullying Laws*, THE CYBER BULLYING RESEARCH CENTER (Nov. 2012), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf; Ross Brenneman, *Another Good Reason to Stop Bullying: Paperwork*, Rules for Engagement (Oct. 19, 2012 5:07 PM), http://blogs.edweek.org/edweek/rulesforengagement/2012/10/bullying_causes_a_lot_of_paperwork_so_please_just_stop.html?qs=ross+brenneman; Rules for Engagement: A look at school culture & student well-being (Oct. 2012) <http://blogs.edweek.org/edweek/rulesforengagement/2012/10> (noting that “[e]very state but Montana has a bullying law of some kind”).

585. Jennifer Dounay, *State Anti-Bullying Statutes*, EDUCATION COMMISSION OF THE STATES, <http://www.ecs.org/clearinghouse/60/41/6041.htm> (last visited Mar. 23, 2013) (reporting that, by April 2005, only seventeen states and Guam had enacted anti-bullying statutes).

586. Jessica Van Sack & Joe Dwinell, *Senate and House Pass Anti-Bullying Bill*, BOSTONHERALD.COM, Apr. 29, 2010, http://bostonherald.com/news_opinion/local_politics/2010/05/gov_deval_patrick_signs_anti_bully_bill; Hillary Chabot, *Gov. Deval Patrick Signs Anti-Bully Bill*, BOSTONHERALD.COM, May 4, 2010, <http://news.bostonherald.com/news/politics/view.bg?articleid=1252208>.

587. S. No. 2404, 186th Gen. Court, Reg. Sess. (2010), available at <http://www.mass.gov/legis/bills/senate/186/st02pdf/st02404.pdf>.

The repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. . . . [B]ullying shall include cyber-bullying.⁵⁸⁸

The legislation requires school employees to report suspected bullying to the principal. It requires principals to investigate such reports, convey the results of their investigations to the parents of the alleged victim(s) and the alleged bull(ies), and take disciplinary action.⁵⁸⁹ All public and private schools are required to offer an anti-bullying curriculum, school officials are mandated to obtain special training so they can recognize bullying, and students are required to receive education in bullying every year.⁵⁹⁰ In another example of states taking action against bullying, Alabama enacted a law in 2009 that makes it illegal for students to "engage in harassment, intimidation, violence, or threats of violence on school property, on a school bus, or at any school-sponsored function,"⁵⁹¹ and it requires each school to develop policies designed to encourage students to report such behavior.⁵⁹²

State legislatures have enacted anti-bullying statutes because of the serious physical and mental harm that victims of bullying suffer as well as the tremendous harm that society suffers on account of bullying.⁵⁹³ The various definitions of bullying adopted by state legislatures and boards of education also recognize that bullying is characterized by the bully's intent to control the victim.⁵⁹⁴ These laws give credence to a bully's desire to reduce the victim to a state of severe emotional upset, so that he or she is then empowered to inflict even greater harm on, and exert even greater control over, the victim.⁵⁹⁵ In other words, these laws acknowledge that bullying is a system of domination that is self-perpetuating, which, like

588. Mass. S. Res. 2404.

589. *Id.*

590. *Id.*

591. ALA. CODE § 16-28B-4 (West 2009).

592. *Id.*

593. *See, e.g.*, DOE REPORT, *supra* note 584, at ix.

594. Kosse & Wright, *supra* note 583, at 54, n.3.

595. *See, e.g.*, Mark Dombeck, *The Long Term Effects of Bullying*, American Academy of Experts in Traumatic Stress, [aaes.org](http://www.aaets.org/article204.htm), 2012, <http://www.aaets.org/article204.htm> [hereinafter Dombeck]; Angela Oswalt, *Bullying and Peer Abuse*, SEVEN COUNTIES, http://www.sevencounties.org/poc/view_doc.php?type=doc&id=38393&cn=1262 [hereinafter Oswalt].

torture, hazing, and domestic violence, is a form of abuse that erodes the victim's autonomy and ability to resist the bully's domination over time.⁵⁹⁶

While some statutes leave the definition of bullying to the state board of education or individual school districts, a number of statutes contain a definition of bullying.⁵⁹⁷ Some anti-bullying laws focus more on the bully's intentions, some focus more on the reasonableness of the perpetrator's actions, some emphasize the effect of the perpetrator's acts on the victim, others, and/or the educational process, and some consider multiple factors.⁵⁹⁸

Colorado's anti-bullying statute, for example, emphasizes the bully's intentions. It provides that bullying is: "any written or verbal expression, or physical act or gesture, or a pattern thereof, that is intended to cause distress upon one or more students in the school."⁵⁹⁹ Similarly, Connecticut's anti-bullying statute focuses on the bully's intentions and defines bullying as:

[A]ny overt acts by a student or group of students directed against another student with the intent to ridicule, humiliate or intimidate the other student while on school grounds, at a school-sponsored activity or on a school bus, which acts are committed more than once against any student during the school year.⁶⁰⁰

Washington's statute emphasizes the effect of the perpetrator's acts on the victim and/or others. It provides that:

"Harassment, intimidation, or bullying" means any intentional electronic, written, verbal or physical act, including but not limited to one shown to be motivated by any characteristic in RCW 9A.36.080(3), or other distinguishing characteristics, when the intentional electronic, written, verbal, or physical act:

- (a) Physically harms a student or damages the student's property; or
- (b) Has the effect of substantially interfering with a student's education; or
- (c) Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment;

596. Dombeck, *supra* note 595; Oswald, *supra* note 595.

597. DOE REPORT, *supra* note 584, at 25.

598. Kosse & Wright, *supra* note 583, at 62-64; Sacco, *supra* note 584, at 4.

599. COLO. REV. STAT. § 22-32-109.1(1)(b)(2012).

600. CONN. GEN. STAT. ANN. § 10-222d (West 2011).

(d) Has the effect of substantially disrupting the orderly operation of the school.⁶⁰¹

Likewise, Florida's anti-bullying statute⁶⁰² provides that "each school district shall adopt a policy prohibiting bullying and harassment"⁶⁰³ and shall define these activities "in a manner that is no less inclusive"⁶⁰⁴ than the following definitions:

(a) "Bullying" means systematically and chronically inflicting physical hurt or psychological distress on one or more students and may involve:

1. Teasing;
2. Social exclusion;
3. Threat;
4. Intimidation;
5. Stalking;
6. Physical violence;
7. Theft;
8. Sexual, religious, or racial harassment;
9. Public humiliation; or
10. Destruction of property.⁶⁰⁵

and

(b) "Harassment" means any threatening, insulting, or dehumanizing gesture, use of data or computer software, or written, verbal, or physical conduct directed against a student or school employee that:

1. Places a student or school employee in reasonable fear of harm to his or her person or damage to his or her property;

601. WASH. REV. CODE ANN. § 28A.300.285(2) (West Supp. 2010). *See also* OR. REV. STAT. ANN. § 339.351(1) (West Supp. 2009) (Bullying is "any act that substantially interferes with a student's educational benefits, opportunities or performance, that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop, and that has the effect of: (a) Physically harming a student or damaging a student's property; (b) Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student's property; or (c) Creating a hostile educational environment.").

602. FLA. STAT. ANN. § 1006.147 (West 2009).

603. *Id.* § 1006.147(4).

604. *Id.* § 1006.147(4)(b).

605. *Id.* § 1006.147(3)(a).

2. Has the effect of substantially interfering with a student's education performance, opportunities, or benefits; or
3. Has the effect of substantially disrupting the orderly operation of a school.⁶⁰⁶

Finally, Michigan and Louisiana's anti-bullying laws are good examples of statutes that focus on the reasonableness of the perpetrator's actions. Michigan's law provides that "[b]ullying means any written, verbal, or physical act, or any electronic communication, that is intended or that a reasonable person would know is likely to harm 1 [sic] or more pupils"⁶⁰⁷ Louisiana's law states that:

The terms 'harassment', 'intimidation', and 'bullying' shall mean any intentional gesture or written, verbal, or physical act that:

- (a) a reasonable person under the circumstances should know will have the effect of harming a student or damaging his property or placing a student in reasonable fear of harm to his life or person or damage to his property; and
- (b) Is so severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.⁶⁰⁸

Significantly, these statutory definitions of "bullying" do not distinguish between the bully's infliction of physical harm and the bully's infliction of mental harm except to suggest that the bully's main intent is to cause the victim mental pain.⁶⁰⁹ A bully's infliction or threat of physical harm or property damage in order to create emotional upset in his or her victim is consistent with the modus operandi of an intimate terrorist or torturer.⁶¹⁰ The examples of proscribed behaviors provided in the various state anti-bullying statutes help provide clarity. Furthermore, these statutes reveal that a bully is able to cause his or her victim mental pain through the infliction or threat of physical injury, mental injury, or property damage, or a course of conduct that creates a hostile, intimidating environment for the victim.⁶¹¹ Of course, it is the ongoing connection between abuser and victim that affords the abuser—here, referred to as the bully—the

606. FLA. STAT. ANN. § 1006.147(3)(b). *See also* N.J. STAT. ANN. § 18A:37-14 (West, Supp. 2009) (defining "harassment, intimidation or bullying" together).

607. MICH. COMP. LAWS. § 380.1310b(8)(b) (2011).

608. LA. REV. STAT. § 17:416.13. (2012).

609. *See, e.g.*, DOE REPORT, *supra* note 584, at 131–46 (Appendix C); Bullying Definitions in State Anti-Bullying Statutes, National School Boards Association (Feb. 2012), <http://www.nsba.org/SchoolLaw/Issues/Safety/Definitions.pdf>.

610. *See supra* Section III.A.1–2, and text accompanying notes 83–87, 101–15.

611. *Supra* note 609.

opportunity to perpetuate a hostile, intimidating course of conduct.⁶¹² Finally, these anti-bullying statutes seem to require only a “reckless” or “knowing” mens rea. This aligns with this article’s suggestion that a definition of domestic violence should require that a perpetrator possess only a “reckless” or “knowing” state of mind, given that most abusers tend to deny, minimize, and rationalize their abuse and thereby make it difficult for their victims to prove that they possessed the “specific intent” to harm them.⁶¹³ All of these aspects of anti-bullying statutes suggest useful components of a psychologically sound definition of domestic violence.

B. PROHIBITIONS AGAINST HAZING

Black’s Law Dictionary defines “hazing” as “[t]he practice of physically or emotionally abusing newcomers to an organization as a means of initiation.”⁶¹⁴ Hazing is common in a wide variety of organizations, including gangs, organized crime syndicates, the military, athletic teams, private clubs, and school organizations.⁶¹⁵ The essential element of hazing is an organization’s control over its individual members, in particular its newest recruits.⁶¹⁶ That is, “[t]he [hazing] process appears to involve [behavior that is] self-destructing and re-constructing rather than self-enhancing . . . [.]”⁶¹⁷ and the serious harm that this process can cause to individual victims as well as society in general has long been recognized.⁶¹⁸

Forty-four states prohibit hazing today,⁶¹⁹ typically providing that the state can impose a civil fine, criminal sanction, or both on a person who

612. See, e.g., Randall Collins, *The Inflation of Bullying: From Fagging to Cyber-Effervescent Scapegoating*, SOCIOLOGICAL EYE (July 7, 2011), <http://sociological-eye.blogspot.fr/2011/07/inflation-of-bullying-from-fagging-to.html> (stating that “[b]ullying is not a single event but an ongoing relationship”; see also Brandl et al., *supra* note 115, at 40 (noting that, in “UI [Undue Influence], domestic violence, stalking, and sexual assault cases, . . . [t]he victim and exploiter are in an on-going relationship”).

613. See Johnson 2009, *supra* note 83, at 424.

614. BLACK’S LAW DICTIONARY 736 (8th ed. 2004).

615. HANK NUWER, *THE HAZING READER passim* (2004) (discussing hazing processes in various contexts, including college sororities and fraternities, various military organizations, and sports teams) [hereinafter NUWER].

616. *Id.* at 73.

617. *Id.* (citing John van Maanen, *Doing New Things in Old Ways: The Chains of Socialization*, in *COLLEGE AND UNIVERSITY ORGANIZATION: INSIGHTS FROM THE BEHAVIORAL SCIENCES* 211–47 (J. L. Bess ed., 1984)).

618. Julia Fisher, *The Pain of Pledging: Hazing*, THE CORNELL DAILY SUN, Feb. 4, 2010, available at <http://cornellsun.com/node/40541> (reviewing numerous examples of hazing from as long ago as the 1800s and documenting the enormous emotional and physical injury suffered by hazing victims).

619. Education Commission of the States, *State Anti-Hazing Laws*, <http://www.ecs.org/html/document.asp?chouseid=4483> (last visited May 20, 2010) (citing StopHazing.org, *State Anti-Hazing Laws*, <http://www.stophazing.org/laws.html> (last visited May 10, 2010) (compiling the forty-four state anti-hazing statutes)); see also Kappa Alpha Psi, *Hazing Laws*, http://c.y.mcdn.com/sites/www.kappaalphapsi1911.com/resource/resmgr/docs/state_hazing_laws.pdf (last visited Jan 2013).

participates in a hazing event.⁶²⁰ In addition, some states permit a hazing victim to recover civil damages from a responsible party.⁶²¹ A few states' anti-hazing statutes encompass all group initiation or pre-initiation activities, but most anti-hazing statutes are specifically directed at school groups.⁶²²

Only fifteen of the forty-four state anti-hazing statutes in effect limit their definition of hazing to conduct that endangers a person's physical health.⁶²³ The remaining twenty-nine statutes either define hazing to include conduct that endangers another person's physical or mental health, or include in their definition of hazing specific activities that could only endanger a person's mental health; these activities include forcing a person to appear in public partially or totally nude, carry pornographic materials in public, or commit a crime.⁶²⁴

Most of the anti-hazing statutes stipulate that the mens rea required for a finding of hazing is recklessness,⁶²⁵ prohibiting willful or reckless hazing. A few statutes proscribe willful or knowing hazing, and a few statutes prohibit willful, knowing, or reckless hazing.⁶²⁶ Though some of these statutes may not contain a definition of these mental states, in a legal context, willful conduct is generally defined as conduct that "proceed[s] from a conscious motion of will . . ."⁶²⁷ On the other hand, "[a]n individual acts 'knowingly' when he acts with awareness of the nature of his conduct,"⁶²⁸ and he acts recklessly when he "does not desire harmful consequence but . . . foresees the possibility and consciously takes the

620. *Id.*

621. *See, e.g.*, CAL. PENAL CODE § 245.6(e) (2008).

622. *Id.* § 245.6(b) For example, Section 245.6 of the Penal Code of California (otherwise known as "'Matt's Law' in memory of Matthew William Carrington, who died on February 2, 2005, as a result of hazing") defines hazing as: "[A]ny method of initiation or preinitiation into a student organization or student body, whether or not the organization or body is officially recognized by an educational institution, which is likely to cause serious bodily injury to any former, current, or prospective student of any school, community college, college, university, or other educational institution in this state. The term 'hazing' does not include customary athletic events or school-sanctioned events."

623. *See* sources cited in *supra* note 619 (revealing that the anti-hazing statutes of only the following states are so limited: California, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Nevada, New Jersey, New York, North Carolina, Virginia, and Wisconsin).

624. *See* sources cited, *supra* note 619 (illustrating that the definition of hazing in Michigan's anti-hazing statute includes forcing another person to commit a crime and the definition of hazing in Idaho and Oregon's anti-hazing statutes includes forcing an individual to appear in public partially or totally nude, forcing an individual to carry pornographic materials in public, transporting and abandoning an individual, assigning an individual to commit pranks on others, and (in Oregon) compelling a person to act as one's personal slave).

625. *See supra* note 619.

626. *Id.*

627. BLACK'S LAW DICTIONARY 1599 (6th ed. 1991).

628. *Id.* at 872.

risk”⁶²⁹ or “does not care about the consequences of his or her actions.”⁶³⁰ Finally, none of the anti-hazing statutes provides that a victim’s consent constitutes a defense to hazing, and thirteen of these statutes specifically state that a victim’s consent does not provide a defense to hazing.⁶³¹

For example, Massachusetts defines hazing as:

[A]ny conduct or method of initiation into any student organization, whether on public or private property, which willfully or recklessly endangers the physical or mental health of any student or other person. Such conduct shall include whipping, beating, branding, forced calisthenics, exposure to the weather, forced consumption of any food, liquor, beverage, drug, or other substance, or any other brutal treatment or forced physical activity which is likely to adversely affect the physical health or safety of any such student or other person, or which subjects such student or other person to extreme mental stress, including extended deprivation of sleep or rest or extended isolation.⁶³²

Similarly, Texas provides that hazing means:

[A]ny intentional, knowing, or reckless act occurring on or off the campus of an educational institution, by one person alone or acting with others, directed against a student, that endangers the mental or physical health or safety of a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining membership in any organization. The term includes:

(A) any type of physical brutality, such as whipping, beating, striking, branding, electronic shocking, placing of a harmful substance on the body, or similar activity;

(B) any type of physical activity, such as sleep deprivation, exposure to the elements, confinement in a small space, calisthenics, or other activity that subjects the student to an unreasonable risk of harm or that adversely affects the mental or physical health or safety of the student;

(C) any activity involving consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that subjects the student to an unreasonable risk of harm or that adversely affects the mental or physical health or safety of the student;

(D) any activity that intimidates or threatens the student with ostracism, that subjects the student to extreme mental stress,

629. BLACK’S LAW DICTIONARY 1298 (8th ed. 2004).

630. *Id.* at 1299.

631. *See supra* note 619.

632. MASS. GEN. LAWS ch. 269, § 17 (2008).

shame, or humiliation, that adversely affects the mental health or dignity of the student or discourages the student from entering or remaining registered in an educational institution, or that may reasonably be expected to cause a student to leave the organization or the institution rather than submit to acts described in this subdivision; and

(E) any activity that induces, causes, or requires the student to perform a duty or task that involves a violation of the Penal Code.⁶³³

The most important implication of the anti-hazing statutes with regard to states' legal regulation of domestic violence is that most state legislatures have concluded that controlling another human by breaking his or her independent will or spirit (the essential element of hazing) can be effected either by endangering a person's physical health or by endangering his or her mental health. As an intimate terrorist's goal is likewise to completely control his victim,⁶³⁴ the state anti-hazing statutes provide strong support for the adoption of a definition of domestic violence that encompasses both physical harm and mental harm. The mens rea of recklessness incorporated into most hazing definitions suggests that the same mens rea should be included in a definition of domestic violence. This is the case because perpetrators of both hazing and domestic violence endanger their victims' physical and mental harm, not for the purpose of harming their victims, but for the purpose of controlling them. Given this, in many cases a prosecutor could find it very difficult to establish that a perpetrator of hazing or domestic violence willfully or knowingly endangered his victim's physical or mental health. Nonetheless, as a perpetrator's actions endanger his victim's physical or mental health, the perpetrator should be held accountable for his actions.

The fact that several anti-hazing statutes explicitly provide that a victim's consent cannot constitute a defense to hazing has important ramifications in the domestic violence context. A number of courts and legislatures have considered the effect of an autonomous adult's consent to hazing, and they have consistently concluded that "[c]onsent . . . certainly should not be a bar to prosecution; intelligent consent cannot be a defense when the public conscience and morals are shocked."⁶³⁵ Such courts and

633. TEX. EDUC. CODE ANN. § 37.151 (Vernon 2006).

634. *See supra* text accompanying notes 85–87, 101.

635. *People v. Lenti*, 260 N.Y.S.2d 284, 287 (N.Y. County Ct. 1965); *see also* Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 179 (discussing how the Model Penal Code § 2.11(2)(b) "recognize[s] consent as a defense for the harmful conduct of the perpetrator and bodily injuries of the victim only when those harms were 'reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport . . . or other concerted activity not forbidden by law'"

legislatures have reasoned that if a state considers endangering another person's physical or mental health to be immoral and therefore proscribes such conduct in its criminal law, the fact that a person has consented to be the victim of such conduct does not alter the immoral, and hence criminal, nature of the perpetrator's act.⁶³⁶

Similarly, a domestic violence victim's choice to remain in a relationship with his or her abuser should not constitute consent to abuse, and, in any case, a victim's consent to abuse should not vitiate or mitigate the perpetrator's abuse of the victim. As discussed above, an adult victim may wish to maintain a relationship or home with an abuser for many reasons unrelated to a desire to be abused. In addition, a minor who is being abused by an adult in his or her household or who is forced to witness another person's abuse is typically unable to leave home and support himself or herself and thereby avoid exposure to the perpetrator's abuse. Moreover, endangering the physical or mental health of a family member certainly is as morally offensive as hazing. For all of these reasons, a definition of domestic violence should likewise include the proviso that the appearance of consent by an adult or child victim is irrelevant.

Finally, the examples of hazing provided in the various anti-hazing statutes, such as those quoted above, help provide parameters for the nebulous crime of hazing. This article suggests that the provision of similar examples in a definition of domestic violence would help clarify the often intangible, but nonetheless horrific, crime of domestic violence.

C. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT

Whether in a "humanitarian" (international conflict) context or a "human rights" (peacetime) context, the "prohibition against torture" is a peremptory norm of international law and has acquired the status of *jus cogens*.⁶³⁷ Such a principle is "accepted and recognized by the international community of States as a whole as a norm from which no

and stating that "[i]t is likely, although not specifically provided, that other harmful, hostile activities, such as hazing, are . . . not covered by . . . [this provision]").

636. *Lenti*, 260 N.Y.S.2d at 287. Some hazing experts have noted that the very nature of hazing is that its victims are subject to the arbitrary whim of the perpetrator(s) and are deprived of meaningful advance knowledge of, or control over, the details of their hazing. NUWER, *supra* note 615, at 95. This would suggest that many hazing victims could not provide informed consent to their hazing in any case. However, as *People v. Lenti* makes clear, a victim's consent to hazing is irrelevant regardless of whether such consent is both voluntary and informed.

637. Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9, 17 (2005) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 102, 702 (1987)) [hereinafter Rouillard].

derogation is permitted[.]”⁶³⁸ For example, even “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”⁶³⁹ It is debatable whether the prohibition against cruel, inhuman or degrading treatment or punishment likewise is a *jus cogens* principle,⁶⁴⁰ but it certainly constitutes customary international law and is reflected in numerous international treaties.⁶⁴¹ In 1984, the General Assembly of the United Nations adopted the binding CAT,⁶⁴² and, as of November 19, 2012, 153 nations were parties to the treaty.⁶⁴³ The United States signed the CAT on April 18, 1987,⁶⁴⁴ the Senate approved the treaty on April 30, 1994,⁶⁴⁵ subject to certain rules, understandings, and declarations⁶⁴⁶ and the U.S. Congress officially ratified the treaty on

638. Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 742 n.6 (2003) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]).

639. Vienna Convention, *supra* note 638.

640. Rouillard, *supra* note 637, at 22.

641. THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 598–99 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). “Thus, for customary law the ‘best evidence’ is the proof of state practice, ordinarily by reference to official documents and other indications of governmental action.” *Id.* § 103 cmt. a.

642. CAT, *supra* note 582.

643. *Id.*

644. *Id.*

645. Pub. L. 103-236, 506(a), 103rd Cong. 2d Sess. (Apr. 30, 1994).

646. U.S. reservations, declarations, understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990). These reservations, understandings and declarations (RUDs) primarily concern the U.S.’ understanding that the definition of “mental torture” in the CAT includes only “specifically intended . . . prolonged mental harm caused or resulting from (1) the intentional infliction or threatened infliction of severe physical pain and suffering; (2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” *Id.* at II.(1)(a). The definition of “torture” in the Torture Prevention Act of 1991, which provides a civil remedy against torture committed by a foreigner on foreign soil, contains the same narrow definition of “mental pain or suffering.” Pub. L. 102-256, 106 Stat. 73, at § 3 (1992). Furthermore, in its RUDs to its ratification of the CAT, the U.S. limited its obligation to prevent other cruel, inhuman or degrading treatment or punishment in territories under its control “only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” *Id.* at I(1). As conduct does not violate the Fifth Amendment guarantee of due process of law unless it “shocks the conscience,” *Rochin v. Cal.*, 342 U.S. 165, 172 (1952) (forced pumping of suspect’s stomach contents in order to find drugs is unconstitutional because it “shocks the conscience”), it is unlikely that the U.S. Supreme Court in the near future would consider mental torture that does not stem from a threat of physical harm or the administration of mind-altering drugs to constitute cruel,

October 21, 1994,⁶⁴⁷ subject to those rules, understandings, and declarations.

The CAT supplemented rather than supplanted customary, nonwritten international law prohibitions against torture and other cruel, inhuman or degrading treatment or punishment, and the preamble to the CAT references earlier treaty provisions prohibiting torture and other cruel, inhuman or degrading treatment or punishment,⁶⁴⁸ including Article 55 of the U.N. Charter,⁶⁴⁹ Article 7 of the International Covenant on Civil and Political Rights,⁶⁵⁰ and Article 5 of the Universal Declaration of Human Rights.⁶⁵¹

The CAT defines “torture” as:

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁶⁵²

The CAT’s definition of “torture” greatly assists in the effort to develop a workable definition of domestic violence. First, the definition makes no distinction whatsoever between the significance of severe mental pain and suffering and physical pain and suffering. If a government agent’s intentional infliction of severe mental pain and suffering on a person can constitute “torture,” so too should a person’s intentional infliction of severe mental pain and suffering on someone with whom he or she is in a domestic relationship constitute “domestic violence.” Second, this

inhuman or degrading treatment or punishment. While the U.S.’s RUDs to the CAT are important to note, the great majority of nations did not condition their ratification of the CAT on such a narrow interpretation of “severe [mental] pain and suffering” or otherwise limit the scope of the mental pain and suffering encompassed in the definition of “torture” in the CAT. *See* CAT, *supra* note 582.

647. U.N. Treaty Collection, CAT, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

648. CAT, *supra* note 582, at pmb. ¶¶ 3–5.

649. U.N. Charter, art. 55, 59 Stat. 1031, 1045 (1945).

650. Universal Declaration of Human Rights, G.A. Res. 217(A), Annex, art. 5, U.N. GAOR, 3d Sess., 83d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

651. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, Annex, art. 7, U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966).

652. CAT, *supra* note 582, at art. 1.

definition acknowledges that an abusive government official engages in or acquiesces in acts of torture in order to coerce, intimidate or discriminate against a victim. This motivation, of course, is very similar to an intimate terrorist's (often unconscious) motivation to intimidate and control his or her victim. Finally, the CAT states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture."⁶⁵³ This unequivocal statement clarifies that no excuse or justification can exonerate torture, just as society can countenance no justification or excuse for domestic violence.

Given the "invisible" nature of domestic violence, especially mental abuse, and that perpetrators of domestic violence, especially intimate terrorists, often deny, minimize and/or justify their violence, the "specific intent" aspect of the torture definition contained in the CAT should not be included in a definition of domestic violence. It is unrealistic to expect a victim of domestic violence to prove that the perpetrator intentionally inflicted harm on the victim or specifically engaged in domestic violence in order to intimidate or control the victim. In addition, perpetrators of situational couple violence do not appear to engage in domestic violence in order to exert power and control over their victims.⁶⁵⁴ Therefore, requiring a knowing or reckless state of mind would better comport with the nature of domestic violence.

IX. PROPOSED DEFINITION OF DOMESTIC VIOLENCE

In this section, a more psychologically sound definition of domestic violence is proposed, and states are urged to adopt this or a similar definition of domestic violence, at least for use in child custody cases. This definition reflects both situational couple violence and intimate terrorism, and accordingly includes mental abuse as well as physical abuse. It furthermore incorporates protections for individuals' privacy, free speech, and parental rights under the U.S. Constitution, including those suggested by similar legal prohibitions against mental abuse. The definition that this article proposes states adopt, at least for child custody purposes, is the following:

"Domestic violence" is defined as:

Any act(s) or communication(s) (whether delivered orally, in writing, electronically, or via body language) which a perpetrator directs at a protected person or a third person known by a protected person and which has/have no legitimate purpose as a result of which the perpetrator (1) willfully, knowingly, or recklessly

653. CAT, *supra* note 582, at art. 2.

654. *See supra* text accompanying notes 91–92.

endangers the physical or mental health of that protected person or third person; or (2) causes that protected person or third person to suffer (a) non-consensual or underage sexual contact; (b) property damage; or (c) financial harm. Constitutionally-protected activity is exempt from this definition.

The mental health of a person is endangered not by any single act but by a course of conduct that a reasonable person would believe creates an intimidating, hostile, or degrading atmosphere for a target of that course of conduct. By way of example but not limitation, such conduct may consist of a series of any of the following: name-calling, insulting, demeaning, glaring, countering, criticizing, and isolating. "Countering" refers to the practice of automatically disagreeing with any and all statements which a person makes. A court shall base a finding that a person's mental health has been or is endangered on the basis of a preponderance of the evidence.

Neither an excuse offered by a perpetrator of domestic violence nor a protected person or third person's consent shall diminish the culpability of, or the severity of punishment imposed on, the perpetrator.

"Financial harm" is defined as "the use of a person's financial assets or exposure of a person to financial liability, without the consent of that person." A "protected person" is defined as . . . [state's definition].

X. CONCLUSION

The great majority of U.S. states do not include mental abuse in their definitions of domestic violence, even though mental abuse is the *sine qua non* of intimate terrorism, the most dangerous and pervasive form of domestic violence. Based on a comprehensive review of the psychological theory of domestic violence and numerous laws outlawing bullying, hazing, and torture, this article proposes a new, psychologically sound definition of domestic violence which encompasses mental abuse and at the same time provides protections against infringements of individuals' privacy, free speech, and parental rights. The legal regimes proscribing bullying, hazing, and torture were reviewed because the psychological literature reveals that it is the perpetrator's ongoing contact with the victim which permits the former to mentally abuse the latter in each of these situations, which also is the case with domestic violence.

This article concludes that there is every reason for U.S. states to include mental abuse in their definitions of domestic violence and no

reason for them not to do so. In fact, it concludes that the states' failure to treat mental abuse as domestic violence is greatly facilitating the perpetuation of domestic violence in U.S. society, as each generation is permitted to suffer emotional trauma at the hands of family members and intimate partners and then inflict similar trauma on the next generation. If states fail to include mental abuse in their definitions of domestic violence, they are severely limiting the ability of the U.S. legal system to prevent and sanction domestic violence. While the definition of domestic violence undoubtedly will continue to evolve, it is hoped that the definition of domestic violence proposed in this article will help combat the epidemic of domestic violence in this country.