

10-1-2016

## Criminalizing “Private” Torture

Tania Tetlow

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Tania Tetlow, *Criminalizing “Private” Torture*, 58 Wm. & Mary L. Rev. 183 (2016),  
<https://scholarship.law.wm.edu/wmlr/vol58/iss1/5>

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## CRIMINALIZING “PRIVATE” TORTURE

TANIA TETLOW\*

### ABSTRACT

*This Article proposes a state crime against torture by private actors as a far better way to capture the harm of serious domestic violence. Current criminal law misses the cumulative terror of domestic violence by fracturing it into individualized, misdemeanor batteries. Instead, a torture statute would punish a pattern crime—the batterer’s use of repeated violence and threats for the purpose of controlling his victim. And, for the first time, a torture statute would ban nonviolent techniques committed with the intent to cause severe pain and suffering, including psychological torture, sexual degradation, and sleep deprivation.*

*Because serious domestic violence routinely involves the use of torture techniques, other scholars have proposed stretching the state action requirement of international law against torture to apply it to domestic violence. This Article proposes a simpler solution, urging states to pass statutes banning torture by private actors. Indeed, California and Michigan have already done so, seemingly without controversy and without any real scholarly comment. Both states have used their general torture statutes to prosecute serious domestic violence. This proposal would better tailor a torture statute to*

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\* Felder-Fayard Professor of Law, Tulane Law School; Chief of Staff and Vice President, Tulane University; J.D., Harvard Law School. The author would like to thank Jancy Hoeffel, Becki T. Kondkar, Katherine Maris Mattes, Pam Metzger, and Kenneth Allen Polite Jr. for their helpful comments, and Joshua Bowman, Melissa Secor, Marcus Foster, and Melissa Miller for their excellent research assistance. The author would like to dedicate this Article to Sara LaMont, a Tulane law student shot by her boyfriend in an apparent murder/suicide last spring. To read tributes to her remarkable life published by her fellow law review editors, see *In Memoriam: Sara Lamont*, 89 TUL. L. REV. 997, 997-99 (2015).

*domestic violence and includes ways to motivate the state to prosecute torture more often.*

*Prosecuting domestic violence under a general torture statute would have both direct and indirect impacts. In addition to providing a solution to the existing inadequacy of criminal law, it would also have great rhetorical power. Describing domestic violence as torture focuses the criminal justice system and the public on the defendant's clear premeditation and culpability. We see batterers as merely angry, whereas we acknowledge torturers as cruel. Although we see domestic violence victims as weak and masochistic, we do not blame torture victims for their fate. Describing domestic violence as torture helps to explain both the purpose of abuse and its full pattern.*

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## INTRODUCTION

International law defines torture as acts committed by, or with the complicity of, state actors,<sup>1</sup> but the technique of torture is far more ubiquitous. Our streets are dotted with torture chambers—houses in which perpetrators use violence, threats, and psychological tricks to break the spirit of their victims.<sup>2</sup> Because those victims are usually wives and children, however, the problem fails to capture much attention.<sup>3</sup> Not only is this torture “private” because it is committed by nonstate actors, but it is doubly private because it occurs inside the home.<sup>4</sup>

Others have argued for the application of international and federal torture laws to domestic violence by stretching the state action requirement to include the state’s complicity in permitting domestic violence.<sup>5</sup> I propose a simpler solution. States should specifically criminalize “private” torture—the use of torture techniques by nonstate actors. A prohibition on torture should not prove particularly controversial, and to make it even less so, it should apply broadly to any use of torture, not just to family violence. A torture law would equally capture the terror of a drug kingpin exacting information, a kidnapper with a basement of horrors, and a domestic violence batterer. Indeed, two states, California and Michigan, have already banned torture generally and have used their torture statutes to prosecute domestic violence.<sup>6</sup>

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1. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

2. See *infra* Part I.

3. See Paul G. Chevigny, *From Betrayal to Violence: Dante’s Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 798 (2001) (suggesting that the concept of violence was socially constructed and traditionally focused on stranger violence); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2206-07 (1996) (describing the law’s permission to physically chastise a wife and children, a right that remains as to children, and the ways that the law continues to devalue domestic violence).

4. See Siegel, *supra* note 3, at 2153.

5. See, e.g., Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 299 (1994).

6. CAL. PENAL CODE § 206 (West 2016); MICH. COMP. LAWS § 750.85 (2016). California’s torture statute passed by referendum in 1990, as part of a series of tough on crime measures collectively designated Proposition 115 Criminal Law-Initiative Constitutional Amendment and

Once given the statutory tool, prosecutors should routinely prosecute serious domestic violence as torture. Doing so would solve several existing problems. Current domestic violence statutes fail to capture its cumulative horror, instead fracturing the patterns of domestic violence into constituent, *de minimis* parts.<sup>7</sup> Taken individually, many torture techniques remain perfectly legal, and most other techniques are classified as mere misdemeanors such as discrete assaults and batteries.<sup>8</sup> We need a law that accomplishes for domestic violence what stalking statutes did to criminalize that pattern crime. Before then, a terrifying pattern of intimidation constituted, at best, a few disjointed misdemeanor charges such as trespassing, while most of the defendant’s behavior remained perfectly legal.<sup>9</sup>

A torture statute would, for the first time, encompass the full scope of domestic violence.<sup>10</sup> It would connect the dots between sporadic acts of violence and make the perpetrator’s purpose of controlling his victim relevant. Instead of a fractured series of misdemeanor battery charges, a torture charge would demonstrate the terrifying whole. The law would ban other torture techniques such as sleep deprivation, sexual degradation, and psychological torture when part of a pattern of violence. It would punish domestic violence as a felony even when the perpetrator’s primary intent is to cause physical pain rather than to leave “serious bodily injury.”<sup>11</sup>

Further, identifying and punishing domestic violence as “torture” would help the criminal justice system and the public understand its full scope and horror.<sup>12</sup> Indeed, in many ways, these cultural

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Statute, Proposition 115, 1990 Cal. Legis. Serv. Prop. 115 (West). For discussion of cases applying these statutes to domestic violence, see *infra* notes 254-55 and accompanying text.

7. See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 972-73 (2004).

8. See generally Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46-53 (1992).

9. See *infra* Part II.

10. See *infra* Part III.A.

11. See *infra* note 86 and accompanying text.

12. Deborah Tuerkheimer has proposed a broad domestic violence “battering statute” that would capture the pattern and purpose of domestic violence. See Tuerkheimer, *supra* note 7, at 1019-20; see also Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 595-602 (2007) (building on Tuerkheimer’s arguments to propose a similar statute). I argue, however, that the term “torture” conveys something more useful.

signals constitute the most important aspects of our very flawed criminal justice system.<sup>13</sup> A felony crime of torture might help the public to stop blaming victims for domestic violence and stop imagining the victims as weak and pathetic or masochistic and fickle because the public recognizes that techniques of torture can control the mind and warp the will of even the most stoic soldiers.

Although the public often confuses domestic violence with the cumulation of random temper tantrums by a spouse with a nasty disposition, it tends to understand that torture has a purpose: to control or to punish.<sup>14</sup> Defining domestic violence as torture would help the public understand that batterers do not merely inflict temporary physical pain, but cause permanent psychological damage as well. Popular culture gives us insight into the deviousness of psychological torture and helps us understand why torturers alternate between inspiring despair and granting hope. All of this would go a long way to explaining some of the counterintuitive aspects of domestic violence and to curing our fixation on the victim's culpability rather than the perpetrator's cruelty.

This Article proposes a general torture statute that would apply to the use of torture techniques by private actors for a variety of actions, from domestic violence, to child abuse, to preying upon strangers. Part I describes the evidence that domestic violence abusers frequently make use of torture techniques. Part II argues that current law utterly fails to acknowledge the pattern and scope of domestic violence. Part III argues that a torture statute would capture the ongoing and varied nature of domestic violence, and would, for the first time, criminalize the full variety of torture techniques. A torture statute would also explain the real nature of domestic violence to prosecutors, judges, juries, and the public. Part IV then crafts statutory language that works to include the broad scope of torturous conduct without watering down its impact. Convincing legislators to pass a torture statute of general application should prove entirely uncontroversial. Persuading prosecutors to charge the crime of felony torture in domestic violence cases would prove transformative.

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13. *See infra* Part III.B.

14. *See infra* Part III.B.

## I. DOMESTIC VIOLENCE CONSTITUTES TORTURE

When batterers use violence and psychological torment in order to control their victims, they engage in torture.<sup>15</sup> Although torturers within the home may make use of fewer physical chains than our paradigmatic examples, they utilize every other tool of the trade. Almost every torture technique catalogued in human rights scholarship matches the strange and sadistic ways that batterers routinely exercise power: from the creative and sporadic use of violence, to sensory deprivation, to attacks on the personality of the victim.<sup>16</sup> Simply put, the most effective methods of breaking down and controlling another human being have not altered much in human history.<sup>17</sup>

The reader may object that such depressing torture chambers cannot be common. In some ways, that empirical question does not matter to my proposal for a torture statute. Regardless, making this

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15. See, e.g., Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757, 763 (1996) (framing the battering relationship as an ongoing “regime of private tyranny”); Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204-10 (1993) (discussing broader social science definitions of the nature, pattern, and severity of violence and abuse); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 537-38 (1992) (characterizing what she calls “broader description[s]” of battering in an attempt to capture interrelated aspects of coercion, power, and control not limited to physical abuse); Shannon Selden, *The Practice of Domestic Violence*, 12 UCLA WOMEN’S L.J. 1, 18 (2001) (conceptualizing domestic abuse as torture and noting that “intimate violence involves separate attacks of physical injury, strung together by patterns of domination, coercion, and control.... [T]he violence that occurs may be merely one tool of domination among many.”).

16. One scholar attempted to catalogue those techniques looking at torture cases from around the world. He listed isolation, psychological debilitation (including sleep deprivation), sensory assault (shouting or loud noise), induced desperation (random punishment or reward, implanting guilt, abandonment, or learned helplessness), threats to self or others, sexual humiliation, feral treatment (forced nakedness, denial of personal hygiene), desecration (forcing victim to violate religious practices), and finally pharmacological manipulation (forced use of drugs). See Almerindo E. Ojeda, *What Is Psychological Torture?*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 1, 2-3 (Almerindo E. Ojeda ed., 2008).

17. Cf. Shazia Qureshi, *Reconceptualising Domestic Violence as ‘Domestic Torture,’* 20 J. POL. STUD. 35, 39 (2013) (“Curiously, batterers do not receive any formal training for torture, yet the methods of abuse not only coincide with those of the other batterers’ but also bear resemblance with torture inflicted by state officials.”).

charge available to prosecutors in any case involving the horrors described in detail below would matter enormously.

Torture is, in fact, entirely ubiquitous. First, domestic violence itself is absurdly common. The Centers for Disease Control estimates that one out of four American women will be severely beaten by a partner in her lifetime.<sup>18</sup> The World Health Organization puts the worldwide average at one in three.<sup>19</sup> Even if a fraction of those cases involve what this Article attempts to proscribe as torture, it would represent an extraordinary number of cases. Indeed, the empirical evidence on domestic violence, discussed in detail below, shows that it typically involves (1) a pattern of violence, rather than random individualized acts; (2) done for the purpose of control; and (3) accompanied with the use of other techniques that we associate with torture.<sup>20</sup> Social scientist Evan Stark estimates that 60 percent of domestic violence involves “domestic terrorism.”<sup>21</sup>

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18. Matthew J. Breiding et al., Ctrs. for Disease Control, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, CDC SURVEILLANCE SUMMARIES, Sept. 5, 2014, [www.cdc.gov/mmwr/pdf/ss/ss6308.pdf](http://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf) [<https://perma.cc/8M3H-PEEF>] (“The lifetime prevalence of physical violence by an intimate partner was an estimated 31.5% among women and in the 12 months before taking the survey, an estimated 4.0% of women experienced some form of physical violence by an intimate partner. An estimated 22.3% of women experienced at least one act of severe physical violence by an intimate partner during their lifetimes. With respect to individual severe physical violence behaviors, being slammed against something was experienced by an estimated 15.4% of women, and being hit with a fist or something hard was experienced by 13.2% of women. In the 12 months before taking the survey, an estimated 2.3% of women experienced at least one form of severe physical violence by an intimate partner.”). See also John Wihbey, *Domestic Violence and Abusive Relationships: Research Review*, JOURNALIST’S RESOURCE, <http://www.journalistsresource.org/studies/society/gender-society/domestic-violence-abusive-relationships-research-review#sthash.1zNq.dpuf> [<https://perma.cc/JL4S-RQC9>].

19. See K.M. Devries et al., *The Global Prevalence of Intimate Partner Violence Against Women*, 340 SCI. 1527, 1527 (2013) (finding in their peer-reviewed metastudy that “in 2010, 30.0% [95% confidence interval (CI) 27.8 to 32.2%] of women aged 15 and over have experienced, during their lifetime, physical and/or sexual intimate partner violence” (alteration in original)).

20. Michael Johnson, for example, has attempted to categorize domestic violence into four types: mutual violent control, situational couple violence (signaled only by an event), violent resistance (a partner acting only to resist ongoing abuse), and the category that my torture statute would focus on, “intimate terrorism.” See Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1003, 1006 (2006).

21. See Peter Cohn, *Evan Stark*, Rutgers, VIMEO (Apr. 2, 2010), <https://vimeo.com/11114721> [<https://perma.cc/CZ4L-8AKH>]; *The Academics: Causes and Prevention of Domestic*

My own work with domestic violence victims, as a prosecutor and a lawyer representing survivors in family law, has provided me with plenty of anecdotal evidence to equate much domestic violence with torture. Over the past fifteen years, victims have described to me eerily similar accounts of creative cruelty. I include some of these insights below.

First, in the most obvious analogy to torture, domestic violence abusers use violence in forms both mundane and creative, and they use violence over time.<sup>22</sup> Slaps and shoves escalate to beatings and strangulation.<sup>23</sup> Batterers focus on vulnerable parts of the body, like breasts and genitals.<sup>24</sup> They also sometimes evade detection by hitting places that do not reveal bruises so easily. They use their fists, but also burn with cigarettes and cut with knives.<sup>25</sup>

In torture, actual violence constitutes a means for control rather than an end in and of itself.<sup>26</sup> As such, threats punctuated with sporadic violence prove far more effective than constant violence.<sup>27</sup> The torturer gives the victim the illusion of some control over pain by being compliant.<sup>28</sup> Consistent and regular violence would not serve the same purpose of forcing the victim to be hyper-vigilant and terrified of what might come next. That is the somewhat

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*Violence*—Evan Stark, POWER AND CONTROL: DOMESTIC VIOLENCE IN AMERICA, <http://www.powerandcontrolfilm.com/the-topics/academics/evan-stark> [<https://perma.cc/KJ7U-LMKB>].

22. Evan Stark, *The Dangers of Dangerousness Assessment*, 6 FAM. & INTIMATE PARTNER VIOLENCE Q. 13, 18-19 (2013) (arguing that, as the system pays more attention to the most egregious forms of physical domestic violence, batterers focus more on “coercive control,” the use of psychological torture, and constant low-level violence as a means of enforcing the deprivation of liberty).

23. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 388 (1996) (noting that “domestic violence usually escalates in frequency and severity”).

24. See Copelon, *supra* note 5, at 312 (“Some women are threatened with mutilation of their breasts or genitals and suffer permanent disfigurement.”).

25. *Id.* at 311.

26. See Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT’L REV. RED CROSS 591, 614-15 (2007).

27. See Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2128-29 (1993) (“[V]iolence does not need to be a constant presence for the victims to feel threatened that it could erupt at any point, nor does the explosion always have to be physical. Violence need only symbolize the threat of future abuse in order to keep the victim in fear and control her behavior.... In fact, physical abuse may only be utilized by abusers who are too unsophisticated to be able to control their victims with verbal or sexual violence.” (footnotes omitted)).

28. See Reyes, *supra* note 26, at 614.

counterintuitive pattern that we see in domestic violence. Usually batterers do not use a torrent of uncontrolled violence, but rather violence that is purposeful and sporadic.<sup>29</sup> Indeed, the seriousness of violence does not necessarily predict whether the batterer will ultimately murder his victim; his level of control over her does.<sup>30</sup>

Violence may not even constitute the most useful tool of torture. The threat of violence, whether explicit or implicit, may do as much work as its actual infliction.<sup>31</sup> To give an idea of how creative and commonplace these threats are, consider that a majority of the victims I have interviewed reported one or more of the following threats: (1) the explicit threat to kill the victim and bury her body at a specified location where it would never be recovered; (2) the implicit threat of the batterer cleaning his gun in front of the victim when making a point; and (3) the nonverbal threat of veering the car as if to crash it, or grabbing the wheel of the car while the victim is driving.

More effectively still, batterers threaten to kill those whom the victim cares about, from family members to the family dog.<sup>32</sup> Threats to pets are so common that several states have incorporated such threats into their protective order law.<sup>33</sup> Abusers will eagerly show news clippings to their victims after some other batterer

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29. See Fischer et al., *supra* note 27, at 2128.

30. See Stark, *supra* note 22, at 18-20.

31. See Fischer et al., *supra* note 27, at 2132 (“[F]ear may also be triggered by any verbal or nonverbal symbol associated with the onset of an abusive incident. In some cases, threats of harm ... may be as effective in controlling her behavior as physical violence itself.” (footnote omitted)).

32. See Frank R. Ascione et al., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 SOC’Y & ANIMALS 205, 208 (1997) (noting that in a survey of women entering a domestic violence center in Utah, 71 percent of those who reported that they currently or recently owned pets indicated that their batterer had threatened, harmed, or killed their pet); Vivek Upadhyia, Comment, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L.J. 1163, 1171-74 (2014); Stacy Teicher Khadaroo, *Texas Family Killed: In Domestic Violence Cases, More Focus on Red Flags*, CHRISTIAN SCI. MONITOR (July 11, 2014), <http://www.csmonitor.com/USA/Justice/2014/0711/Texas-family-killed-In-domestic-violence-cases-more-focus-on-red-flags-video> [<https://perma.cc/77FU-Y9SB>] (suggesting that “[t]he killing of family members of domestic violence victims is on the rise across the country”).

33. See Joshua L. Friedman & Gary C. Norman, *Protecting the Family Pet: The New Face of Maryland Domestic Violence Protective Orders*, 40 U. BALT. L.F. 81, 93-94, 94 n.99 (2009) (noting that including animals in protective orders began with Maine in 2006 and had expanded to fourteen states by 2009).

actually engages in a killing spree of his victim’s parents, siblings, coworkers, or friends.<sup>34</sup>

Most effectively of all, batterers routinely threaten to harm or kill their own children.<sup>35</sup> Studies show an overwhelming overlap between domestic violence and child abuse.<sup>36</sup> Victims who disobey thus risk not only their own lives and safety, but also those of their children. In the ultimate exercise of power, some batterers in fact murder their own children.<sup>37</sup>

Even leaving the batterer may not protect the victim’s children. Batterers routinely threaten to gain custody of the children as punishment, so escaping from the torture chamber requires leaving hostages behind.<sup>38</sup> These are not idle threats. Batterers are far more

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34. *Cf.* Copelon, *supra* note 5, at 313 (describing the psychological effect of threats to kill the victim’s family). For an example of a news clipping, see Khadaroo, *supra* note 32.

35. See Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 363 (1995) (“[M]any batterers threaten to kill their partners, their children, or their partner’s children if their partners leave the relationship. Some batterers have carried out such threats.”).

36. *Id.* at 357 (“When spouse abuse was severe, one study found 77 percent of the children in those homes had also been abused.”); *id.* at 369 (“Estimates are that between 3.3 million and 10 million children annually observe domestic violence within their homes. An estimated 87 percent of children in homes with domestic violence witness that abuse.” (footnote omitted)).

37. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 752-54 (2005) (describing how plaintiff’s ex-husband took their three daughters, aged ten, nine, and seven, in violation of a protective order and then murdered them all). In the last year, there have been several occasions in which a father with a history of domestic violence murdered his child or children. See Ashley Harding, *No Bond for Father Charged in Son’s Death*, NEWS4JAX (Nov. 13, 2015, 3:15 PM), <http://www.news4jax.com/news/local/no-bond-for-father-charged-in-sons-death> [https://perma.cc/4G3A-SRAP]; Jessica Kartalija, *Police: Father Admits to Killing 2-Year-Old Daughter, Mother*, CBS BALT. (Feb. 3, 2016, 5:26 PM), <http://baltimore.cbslocal.com/2016/02/03/woman-slain-with-2-year-old-daughter-was-2nd-grade-teacher/> [https://perma.cc/5QER-AQHF]; Jason Pohl & Jacy Marmaduke, *Colo. Girl’s Killing Shocks ‘Peaceful’ Neighborhood*, COLORADOAN (Mar. 31, 2016, 7:09 AM), <http://www.coloradoan.com/story/news/2016/03/30/girls-killing-shocks-peaceful-colorado-neighborhood/82428366/> [https://perma.cc/YN43-249C].

38. See OLA BARNETT ET AL., *FAMILY VIOLENCE ACROSS THE LIFESPAN* 301 (2d ed. 2005) (“Many IPV [Intimate Partner Violence] perpetrators threaten their victims with death or inform the victims that they will take the children, hurt the children, or both.”); see also Lundy Bancroft, *Understanding the Batterer in Custody and Visitation Disputes* (1998) (self-published article), <http://lundybancroft.com/articles/understanding-the-batterer-in-custody-and-visitation-disputes/> [https://perma.cc/2TEL-WQKG] (“A batterer also tends to involve his children in the abuse of the mother.... He may threaten to take the children away from her, legally or illegally.”).

likely than nonviolent fathers to seek, and to succeed at winning, custody of their children.<sup>39</sup>

Batterers also make use of more subtle torture techniques that are ordinarily considered innocuous under current criminal law.<sup>40</sup> When the CIA did experiments in the 1950s to decipher the torture techniques used to make its most stalwart soldiers crack, it found that mental torture and sensory deprivation worked surprisingly well.<sup>41</sup> Batterers also, for example, frequently make use of sleep deprivation as an effective way to incapacitate their victims.<sup>42</sup> Exhaustion makes every life activity, from working to parenting, difficult and seriously impairs the victim's ability to plot escape.<sup>43</sup>

My own clients described batterers who woke them up routinely and did so in jarring or terrifying ways. Sometimes their abusers turned on all the lights or blared music. Worse yet, one woke up his

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39. Cf. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 678, 707-08 (2003) (describing the significant barriers for domestic violence victims attempting to protect their children from abusers, from the application of "friendly parent" provisions to an overreliance on custody evaluators unqualified to determine the factual issue of the reality of abuse); Bancroft, *supra* note 38 ("A batterer who does file for custody will frequently win, as he has numerous advantages over his partner in custody litigation," including his ability to afford better representation, to better pass psychological testing, and to manipulate custody evaluators and the children.).

40. Some batterers use "hybrid techniques"—methods that do not leave any physical marks on the body but still cause severe physical or psychological pain. See Copelon, *supra* note 5, at 313 ("Such hybrid techniques include forcing prisoners to assume positions such as wall-standing for prolonged periods, thereby causing agonizing pain without directly administering it.... Sensory deprivation techniques, which create anxiety and disorientation, include exposure to continuous, loud noises, hooding, alternating darkness with blinding light, sleep deprivation, starvation and dehydration.").

41. See David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 833 (2012) ("[S]eemingly minor manipulations of a prisoner's environment—disruptions of space and time by capriciously varied schedules and environment, isolation, sensory and sleep deprivation, irregular sleep, and extremes of hot and cold—could cause major degradations of the victim's personality.").

42. See *id.* at 831; see also James P. Terry, *Torture and the Interrogation of Detainees*, 32 CAMPBELL L. REV. 595, 601 (2010) (explaining that sleep deprivation can reduce a victim's tolerance to pain).

43. Sleep deprivation causes as much impairment to activities like driving as being drunk does. See A.M. Williamson & Anne-Marie Feyer, *Moderate Sleep Deprivation Produces Impairments in Cognitive and Motor Performance Equivalent to Legally Prescribed Levels of Alcohol Intoxication*, 57 OCCUPATIONAL & ENVTL. MED. 649, 653 (2000) (reporting the results of a study that concluded that "commonly experienced levels of sleep deprivation depressed performance to a level equivalent to that produced by alcohol intoxication of at least a BAC [Blood Alcohol Concentration] of 0.05%").

wife by spraying her with mace, and another by raping her. All of this made sleep permanently difficult, even after escaping the relationship.

Like any good torturer, batterers particularly focus on sexual violence as the most effective way to break a victim’s spirit.<sup>44</sup> They routinely rape their victims, a practice only recently made illegal within marriage.<sup>45</sup> Just as effectively, and without breaking current criminal law, batterers use sexual humiliation—from conducting sexual “inspections” designed to sniff out alleged adultery, to coercing the victim into degrading sexual practices.<sup>46</sup> The use of shame serves multiple purposes: it creates searing psychological scars and it further isolates the victim from help as she correctly guesses at the world’s reaction.<sup>47</sup>

Batterers also use variations on the psychological torture techniques that the CIA has determined to be effective, including mind games and “crazy-making” behavior.<sup>48</sup> They tell the victim

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44. See Fischer et al., *supra* note 27, at 2123; Reyes, *supra* note 26, at 605-06; (“Researchers who have investigated the phenomenon find that rates of battered women who have been sexually assaulted consistently fall in the thirty-three percent to sixty percent range. Sexual abuse frequently involves acts that could also be classified as physical assaults, blurring the line between physical and sexual abuse, such as the insertion of objects into the woman’s vagina, forced anal or oral sex, bondage, forced sex with others, and sex with animals.” (footnotes omitted)). This translates to an extraordinary 15.8 percent of all U.S. women experiencing forms of sexual violence by an intimate partner in their lifetimes. See Breiding et al., *supra* note 18, at 9.

45. See Breiding et al., *supra* note 18, at 6 (describing the prevalence of intimate partner rape); see also Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law’s Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1830 n.92, 1833 (2011) (noting that marital rape was banned in all fifty states by 1993, but exceptions remain to certain types of marital rape in criminal law). In many states, marital rape is excluded from tort law by the interspousal tort immunity doctrine. See Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L.J. 305, 333 (2003).

46. See Copelon, *supra* note 5, at 311, 313.

47. See Copelon, *supra* note 5, at 315.

48. One example of this is “gas lighting.” The term “gas lighting” is based upon the play, *Gas Light*, that was made into films in 1940 and 1944, in which a husband attempts to drive his wife insane by manipulating her environment in small ways and claiming she imagined it. See Judith L. Alpert et al., *Comment on Ornstein, Ceci, and Loftus (1998): Adult Recollections of Childhood Abuse*, 4 PSYCHOL. PUB. POL’Y & L. 1052, 1063 (1998).

that she imagined the abuse or that she is merely overly sensitive.<sup>49</sup> They hide objects and tell her that she lost them.<sup>50</sup>

Another technique that batterers utilize is to intersperse violence and threats with kindness and false hope.<sup>51</sup> They begin, as described above, by working hard to establish an emotional connection before striking.<sup>52</sup> Some become masterful at alternating cruelty with effective appeals to victims' generosity, forgiveness, and guilt.<sup>53</sup> Lenore Walker, a distinguished researcher in the field of battered woman syndrome,<sup>54</sup> famously described a "cycle of violence" including a tension-building phase, violence, and then a honeymoon period in which the batterer pleads for forgiveness and acts with kindness.<sup>55</sup>

Batterers use stalking and surveillance to monitor their victims and to instill a sense of the batterers' own omnipotence.<sup>56</sup> They follow and monitor, demanding constant contact from the victim to avoid punishment.<sup>57</sup> They check their victims' cell phones and hack into their e-mail.<sup>58</sup> Technology has made this terrifyingly easy, allowing a batterer to establish his victim's whereabouts with a mere computer search for her smart phone location.<sup>59</sup> This stalking

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49. See NEIL S. JACOBSON & JOHN M. GOTTMAN, *WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS* 129-32 (1998).

50. See *id.* at 131; EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 254-55 (2006).

51. See LUNDY BANCROFT, *WHY DOES HE DO THAT?: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN* 65-66 (2002).

52. See *id.* at 65-67.

53. See *id.*

54. See David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 622 & n.10 (1986).

55. See LENORE E. WALKER, *THE BATTERED WOMAN* 55 (1979). Some authors have criticized Walker for being overly simplistic and have argued that many abusive relationships do not fit the paradigm so neatly. See, e.g., Faigman, *supra* note 54, at 636-42. In my experience, victims are rarely fooled by batterers' ploys (though they may defend the abuser to the world out of embarrassment at having chosen him). But victims frequently feel responsible for caring for abusers, who often have truly heart-wrenching tales of growing up in abusive households and struggling with the difficulties of the world.

56. See Justine A. Dunlap, *Intimate Terrorism and Technology: There's an App for That*, 7 U. MASS. L. REV. 10, 23 (2012).

57. See *id.* at 18-19.

58. See *id.* at 18, 22.

59. See *id.* at 23 (noting that technologies such as global positioning systems (GPS), spyware, and social media make it "easier, scarier, and deadlier" for a batterer to "undermin[e] the will ... and ... ability of the victim to resist"). Indeed, a National Public Radio

technology also allows the abuser to appear “omnipresent and omniscient to the victim,” thus extending his control past even the expansive reaches of his monitoring.<sup>60</sup>

Batterers create rules and micro-regulations of daily life, from what the victim may wear to who she can talk to.<sup>61</sup> Using this technique the perpetrator creates a world in which the victim is constantly monitored and criticized; every move is measured against an unpredictable, ever-changing and unknowable “rule-book.”<sup>62</sup> The victim’s attempt to survive leads to constant anxiety and vigilance to avoid displeasing the torturer.<sup>63</sup> The experience of walking on eggshells becomes so excruciating that some victims actually provoke an attack to get it over with.<sup>64</sup>

Most commonly of all, batterers use constant verbal cruelty to degrade their victims.<sup>65</sup> We minimize this under the category of “emotional abuse,” but it creates some of the most lasting wounds inflicted under a regime of torture.<sup>66</sup> They use relentless criticism

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survey found that 54 percent of domestic violence shelters ask survivors to disable GPS on their devices, and even more startling, 85 percent of shelters are working directly with victims whose abusers have tracked them via GPS. Aarti Shahani, *Smartphones Are Used to Stalk, Control Domestic Abuse Victims*, NPR (Sept. 15, 2014, 4:22 PM), <http://www.npr.org/sections/15/346149979/smartphones-are-used-to-stalk-control-domesticabuse-victims> [https://perma.cc/XJ2R-VMZC].

60. Dunlap, *supra* note 56, at 23.

61. See STARK, *supra* note 50, at 32, 203.

62. DOMESTIC VIOLENCE VICTORIA, SPECIALIST FAMILY VIOLENCE SERVICES: THE HEART OF AN EFFECTIVE SYSTEM 9-10 (2015) (citing STARK, *supra* note 50).

63. See Dutton, *supra* note 15, at 1221.

64. See Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN 116, 124 (Rebecca J. Cook ed., 1994) (“For some women, the psychological terror is the worst part. Indeed, it can be so great that women will precipitate battering as opposed to enduring the fear.”). This use of violence by the victim tends to gut her credibility in the criminal justice system. See Faigman, *supra* note 54, at 621-22.

65. See DAWN BRADLEY BERRY, THE DOMESTIC VIOLENCE SOURCEBOOK 2-4 (1998) (“[D]omestic violence’ is generally understood to include ... [e]motional abuse [including, but not limited to,] [c]onsistently doing or saying things to shame, insult, ridicule, embarrass, demean, belittle, or mentally hurt another person.... It also involves withholding money, affection, or attention; [and] forbidding someone to ... see friends or family.”).

66. See Nora Sveaass, *Destroying Minds: Psychological Pain and the Crime of Torture*, 11 N.Y.C. L. REV. 303, 314 (2008); Tuerkheimer, *supra* note 7, at 968 (“Victims of domestic violence often identify nonphysical abuse as a critical component of the battering dynamic. Indeed, ‘some battered women have described psychological degradation and humiliation as the most painful abuse they have experienced.’” (quoting Fischer et al., *supra* note 27, at 2123)).

and belittlement and they degrade and humiliate their victim.<sup>67</sup> Further, batterers have an advantage over those who torture strangers because the batterers have the opportunity to persuade their victim to entrust them with their secrets and emotional weak points.<sup>68</sup>

The only major distinction between domestic violence and the catalogue of torture techniques used elsewhere is that we normally associate torture with kidnapping or confinement of the victim. Batterers sometimes imprison their victims,<sup>69</sup> but more often they isolate them in less obvious ways. They almost always wait to begin abuse until they have their victims legally and emotionally entangled with them, often hitting for the first time on the wedding night or when the victim is pregnant.<sup>70</sup> Batterers use threats to prevent escape: threats of violence to the victim and her loved ones, threats to fight for custody of the victim's children, threats to impoverish the victim and her children, and threats to falsely accuse the victim of crimes.<sup>71</sup> Batterers isolate victims by punishing them for contact with their friends and family.<sup>72</sup> The resulting isolation may not

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67. See Sveaass, *supra* note 66, at 316 ("Psychological torture is deliberate and targeted attacks on the mind and dignity of the person—through humiliation, through degrading mocking, through forcing people into shameful actions and positions and impossible choices.").

68. See Selden, *supra* note 15, at 13-14 ("Like the torturer to the prisoner, a man in an intimate relationship has continuous access to the woman he beats. They are, or began as, lovers, spouses, partners. The word 'intimate' describes a proximity between individuals that is not identified in other relationships.").

69. See, e.g., *United States v. Dowd*, 417 F.3d 1080, 1083 (9th Cir. 2005) (affirming the conviction of a defendant for federal domestic violence based on his beating, kidnapping, and taking of the victim across state lines).

70. See ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 42 (1987) ("Typically—in 72 percent to 77 percent of the cases—violence occurs only after a couple has become seriously involved, is engaged, or is living together; rather than in the early, more casual stages of dating.").

71. See Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19-26 (1999) (listing the above reasons and many more). If a victim seeks help from the criminal justice system, at best, it will respond with a misdemeanor prosecution of the perpetrator with no offer of protection for her. See Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 AM. J. FAM. L. 59, 68 (2001) (reporting the results of a six-month longitudinal study that found that among sixty-five abused women applying and qualifying for a protection order, only half initially received the order).

72. See Buel, *supra* note 71, at 22.

match that of solitary confinement, but it still takes an enormous psychological toll.<sup>73</sup>

*State v. Norman* is a case that demonstrates most of these torture techniques.<sup>74</sup> J.T. Norman regularly beat Judy, his wife of twenty-five years, using a fist or any object at hand, burned her with cigarettes, and smashed glass against her face.<sup>75</sup> He knocked her down the stairs while she was pregnant, which resulted in the death of their child.<sup>76</sup> He sexually humiliated her and forced her to work as a prostitute.<sup>77</sup> He used psychological torture, calling her “bitch,” “whore,” and “dog,” and making her sleep on the floor and eat dog food.<sup>78</sup> He threatened to kill her in very specific ways if she attempted to leave or to call for help.<sup>79</sup> At trial an expert testified that the abuse resembled the treatment that the Nazis gave to prisoners-of-war (POW) or the brainwashing techniques used during the Korean War.<sup>80</sup>

As I discuss next, a court would have deemed little of this evidence of torture relevant in a prosecution of J.T. Norman for individual discrete acts of domestic violence. Indeed, the State did not prosecute Norman at all.<sup>81</sup> Almost the only legal arena in which domestic violence victims have the opportunity to describe the full horror of their abuse is in their own trials for killing their batterers

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73. See JOHN T. CACIOPPO & WILLIAM PATRICK, LONELINESS: HUMAN NATURE AND THE NEED FOR SOCIAL CONNECTION 99-108 (2008) (describing five ways that loneliness negatively impacts human health); see also Rona M. Fields, *The Neurobiological Consequences of Psychological Torture*, in THE TRAUMA OF PSYCHOLOGICAL TORTURE, *supra* note 16, at 139, 139 (arguing that feelings of fear and powerlessness can have medical consequences); Stuart Grassian, *Neuropsychiatric Effects of Solitary Confinement*, in THE TRAUMA OF PSYCHOLOGICAL TORTURE, *supra* note 16, at 113, 121-24 (discussing the psychological effects of solitary confinement through the story of Jose Padilla); Atul Gawande, *Hellhole*, NEW YORKER (Mar. 30, 2009), <http://www.newyorker.com/magazine/2009/03/30/hellhole> [<https://perma.cc/Z9QY-QFY4>] (discussing long-term solitary confinement).

74. 366 S.E.2d 586 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989).

75. *Id.* at 587.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Norman*, 378 S.E.2d 8, 17-18 (N.C. 1989) (Martin, J., dissenting).

81. *Id.* at 17.

when they present their self-defense arguments.<sup>82</sup> In this case, as in many, Judy Norman's horror stories failed to earn her acquittal.<sup>83</sup>

## II. WHAT A TORTURE CRIME ACCOMPLISHES FOR DOMESTIC VIOLENCE

Against this backdrop, it becomes easier to understand the utter failure of criminal law to grapple with domestic violence. Current law criminalizes batterers' violence and explicit threats of violence but almost no other form of torture.<sup>84</sup> Part of this stems from the fact that U.S. criminal law does not prioritize most violence as much as it does narcotics or property crime.<sup>85</sup> Violence constitutes a mere misdemeanor unless it involves "serious bodily injury" or weapons;<sup>86</sup> even cigarette burns to genitals might not rise to a felony.<sup>87</sup> But criminal law also fails to adequately address domestic violence in

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82. See Burke, *supra* note 12, at 580-81; Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 326 (1992).

83. After an escalating day of violence, Judy Norman killed her husband while he slept. *Norman*, 378 S.E.2d at 13. The trial court determined that these circumstances did not meet the legal definition of "imminent danger" necessary for perfect self-defense. *Id.* As a result, the jury was not instructed on the law related to self-defense, and the case resulted in a voluntary manslaughter conviction. *Id.* at 9. The state appellate court ordered a new trial, holding that the existence of battered spouse syndrome, in certain circumstances, "does not preclude the defense of perfect self-defense" for the "unlawful killing of a passive victim." *Norman*, 366 S.E.2d at 592. However, the State Supreme Court reversed and upheld the initial conviction. *Norman*, 378 S.E.2d at 14-16. For arguments about why self-defense law fails to understand the kind of imminent danger faced by domestic violence victims, see generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* (2000), and Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217 (2003).

84. See Tuerkheimer, *supra* note 7, at 971-72.

85. See generally Eve Buzawa et al., *Responding to Crimes of Violence Against Women: Gender Difference Versus Organizational Imperatives*, 41 CRIME & DELINQ. 443, 443, 445 (1995); Jane W. Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. L. & CRIMINOLOGY 56, 57-58 (1984); Margaret E. Martin, *Mandatory Arrest for Domestic Violence: The Courts' Response*, 19 CRIM. JUST. REV. 212, 212-13 (1994).

86. Tracy A. Bateman, Annotation, *Sufficiency of Bodily Injury to Support Charge of Aggravated Assault*, 5 A.L.R.5th 243 (1992).

87. See, e.g., *Souder v. Commonwealth*, 719 S.W.2d 730, 732 (Ky. 1986) (cigarette burns to the mouth, standing alone, were not serious enough to constitute "serious physical injury" for first-degree assault), *overruled on other grounds by B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007). *But cf.* *United States v. Peneaux*, 432 F.3d 882, 890-91 (8th Cir. 2005) (upholding a felony assault conviction for inflicting serious bodily injury on a child by extinguishing a lit cigarette on her body).

more particular ways. Criminal law does not recognize domestic violence as a pattern crime and instead treats it as individual, isolated incidents.<sup>88</sup> Because of these inadequacies, the law fails to explain the nature of domestic violence to the public, instead dividing it into a thousand minimal, constituent parts.<sup>89</sup>

*A. Criminal Law Does Not Capture the Scope and Harm of Domestic Violence*

Domestic violence violates an array of statutes, from battery, to trespass, to attempted murder.<sup>90</sup> In the 1980s, states created specific domestic violence statutes to make clear that no informal exception for violence against an intimate partner existed.<sup>91</sup> States did so, however, by merely relabeling misdemeanor battery between intimates as the crime of “domestic violence.”<sup>92</sup> They did not alter the fundamental nature of the charges already available, which were designed for far more singular acts of violence inflicted on strangers or acquaintances.<sup>93</sup> As Alifair Burke points out, domestic violence reformers have focused more on procedural attempts to improve the criminal justice system than on examining the limitations of statutory law.<sup>94</sup>

Most criminal law statutes remain “transaction-bound,” focused on a single and discrete action.<sup>95</sup> These statutes generally function well to capture the harm of stranger violence. The harm of a bar

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88. See Tuerkheimer, *supra* note 7, at 960-61.

89. See *id.*

90. See Dutton, *supra* note 15, at 1204.

91. These statutes did accomplish a few things: At a practical level, they helped to capture the quantity of domestic violence by labeling it explicitly. See Zorza, *supra* note 8, at 62. They helped law enforcement direct special services to victims. See *id.* at 56. States also allowed warrantless arrests in domestic violence cases (despite some general prohibitions on such arrests in other misdemeanor cases) and many states passed “mandatory arrest” statutes. See *id.* at 61-65. Domestic violence statutes also sometimes raised penalties for repeat offenses. See Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U. MICH. J.L. REFORM 645, 657, 664 (2014).

92. See Zorza, *supra* note 8, at 62-63.

93. Tuerkheimer, *supra* note 7, at 960, 971-74 (arguing that current domestic violence laws are “[p]remised on a transactional model of crime that isolates and decontextualizes violence”).

94. Burke, *supra* note 12, at 565-66.

95. See Tuerkheimer, *supra* note 7, at 972.

fight, for example, is usually contained by a single act of battery. But the law falls short when applied to years of abuse ranging from shoves to strangulation.<sup>96</sup> At best, a prosecutor can choose fragmented pieces of the whole by asking the victim to remember a few particular batteries. Thus, a batterer's reign of terror constitutes nothing more than the sum of any of its parts that can be singled out and shown in isolation.<sup>97</sup>

Transaction-bound offenses are not, in fact, a requirement of criminal law. Conspiracy statutes have long allowed the description of patterns of crimes; racketeering laws do so even more expansively.<sup>98</sup> Both conspiracy and racketeering would prove quite valuable to allow a prosecutor to fully describe the pattern of harm in domestic violence cases, except that each statute requires more than one perpetrator.<sup>99</sup> Batterers usually act alone, conspiring with no one.

In the 1990s, states outlawed stalking, thereby acknowledging a pattern crime committed by an individual perpetrator.<sup>100</sup> Before the passage of stalking statutes, prosecutors would have to pursue a terrifying pattern of following, monitoring, and implied threats with individual *de minimis* charges like trespassing.<sup>101</sup> Stalking

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96. See Burke, *supra* note 12, at 555; Tuerkheimer, *supra* note 7, at 960-61; see also Buel, *supra* note 83, at 233 (explaining that courts address only individual incidents of violence, rather than the pattern of abuse); Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251, 264 (1994) ("Because the criminal codes generally already provide remedies against typical forms of domestic abuse such as battery, property destruction and criminal threat, most states do not designate domestic violence as a separate crime."); G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of Deshaney*, 29 COLUM. HUM. RTS. L. REV. 641, 672 n.147 (1998) ("Because most jurisdictions do not classify domestic violence as a separate crime, intimate violence is subsumed in general crime classifications, e.g., murders, rapes, larceny.").

97. See Tuerkheimer, *supra* note 7, at 973.

98. See, e.g., 18 U.S.C. § 371 (2012) (conspiracy); *id.* §§ 1961-1962 (racketeering).

99. See *id.* § 371 (requiring "two or more persons"); *id.* §§ 1961-1962 (requiring an "enterprise").

100. See generally U.S. DEP'T OF JUSTICE, NCJ 186157, REPORT TO CONGRESS ON STALKING AND DOMESTIC VIOLENCE, at v-vii (2001), <https://www.ncjrs.gov/pdffiles1/ojp/186157.pdf> [<https://perma.cc/R8YY-SN6F>].

101. See Burke, *supra* note 12, at 589 (stating that before stalking laws, individual incidents "seem[ed] innocuous ... even flattering"); Tuerkheimer, *supra* note 7, at 1004-05.

captures the full array of harm done by a single individual over time.<sup>102</sup>

Domestic violence, however, remains mired in the world of fragmentation.<sup>103</sup> Not only do the available charges fail to present a full picture of the pattern and scope of violence, the rules of evidence often forbid painting such a picture at trial. A prosecutor conducting a trial of a single individualized act of violence often will be prohibited from bringing in evidence of all the other crimes committed by the batterer against his victim.<sup>104</sup> Under Federal Rule of Evidence 404(b), the law frowns on bringing in “prior bad acts” to prove current wrongdoing as “propensity” evidence.<sup>105</sup> Courts do not allow prosecutors to prove, for example, that a defendant committed the charged bank robbery merely because he has robbed ten other banks.<sup>106</sup>

Pursuant to Rule 404(b), the prosecutor must go to the trouble of giving notice and then defending against a motion to exclude evidence of prior bad acts in order to use such evidence to show the defendant’s motive and intent.<sup>107</sup> Even when prosecutors succeed with these efforts, the focus of the trial must remain on the single incident charged.<sup>108</sup> All other context becomes a legal distraction.

Professor Tuerkheimer points out that the isolation of single incidents also undermines the credibility of the victim’s testimony—frequently the only evidence in domestic violence cases.<sup>109</sup> The judge or jury faced with the story of a single moment of violence in isolation will never understand the totality of the reign of terror.<sup>110</sup>

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102. See Tuerkheimer, *supra* note 7, at 1004-05.

103. Stalking statutes are generally inapplicable to domestic violence cases, because a prosecutor cannot bring stalking charges until after the victim has left the perpetrator. See *id.* at 1005-06. The concept of “unconsented contact” becomes far too blurry while the victim and perpetrator still live together. See *id.* at 1010-11 (noting that the “law disregards the continuing course of conduct ... before the relationship is deemed to have ‘ended’”).

104. See *id.* at 985.

105. See FED. R. EVID. 404(b); Tuerkheimer, *supra* note 7, at 989-90.

106. See, e.g., *United States v. Phillips*, 599 F.2d 134, 136-37 (6th Cir. 1979) (reversing a bank robbery conviction because the trial court erroneously allowed admission of evidence of prior bank robberies).

107. FED. R. EVID. 404(b)(2). Upon request by the defendant, the prosecutor must give notice before trial of her intent to use evidence of prior bad acts. *Id.*

108. See Tuerkheimer, *supra* note 7, at 994.

109. *Id.* at 981-84.

110. *Id.* at 983-88.

They will never understand how the victim found herself in the situation, much less how she became trapped there.<sup>111</sup> Further, because existing law ignores the purposes of domestic violence altogether, these stilted trials omit much of the evidence of the defendant's motive that would help to explain the crime.<sup>112</sup>

An industrious prosecutor might attempt to capture all of the abuse by charging multiple counts of domestic violence—bringing a single indictment listing twenty different crimes. The power of our transactional notion of criminal law is such, however, that a judge might sever those charges into different trials.<sup>113</sup> The law requires the evidence of each charge to stand alone and gives the court discretion to avoid the potential of prejudice from overlapping evidence.<sup>114</sup>

More to the point, police or prosecutors will rarely know about the full scope of abuse precisely because the law requires them to focus on an individual incident. A busy police officer responding to a domestic violence call has no incentive to inquire about the broader pattern of domestic violence,<sup>115</sup> nor does the busy prosecutor triaging the case as part of the always-enormous docket of domestic violence cases.<sup>116</sup> Most police and prosecutors will ask only about the incident charged and may even become impatient with a victim who veers off into a jumble of descriptions about the past.<sup>117</sup>

Even when charges are brought, criminal law seriously underestimates the harm caused by a batterer's cumulative reign of terror. The law charges the vast majority of domestic violence as mere misdemeanors, punishable at best by a few months' incarceration, but rarely giving any.<sup>118</sup> Almost uniquely in the criminal justice

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111. *Id.* at 986.

112. *Id.* at 986-87.

113. *Id.* at 973 n.71

114. *See* FED. R. CRIM. P. 14.

115. *See* Burke, *supra* note 12, at 577; Tuerkheimer, *supra* note 7, at 976.

116. *See* Tuerkheimer, *supra* note 7, at 977-79.

117. *See id.*

118. *See* Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 34 (2004) ("Battered women ... frequently find their abusers punished by nothing more than probation."); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508 (1998) (discussing her frustration as a former domestic violence prosecutor "with the unwillingness of judges to sentence domestic violence offenders to incarceration"). In recognition of this issue, the federal law banning felons from

system, we “punish” domestic violence with treatment in lieu of jail time.<sup>119</sup> Regardless of whether this treatment works (and the evidence suggests it proves effective for only a small fraction of batterers), there is no reason that it should entirely supplant punishment and deterrence.<sup>120</sup>

The failure of the law to capture the full pattern or seriousness of domestic violence also results in a warped consideration of danger during bail determinations. The judge deciding bail will know nothing about the defendant’s threats to kill the victim if she reports him, his years of escalating abuse, or his use of rape and humiliation.<sup>121</sup> Instead the judge will see only a single petty offense and will likely grant the defendant’s bail. Despite the extraordinary level of witness tampering and threats endemic to domestic violence cases, the judge will not have access to the larger pattern necessary to determine danger.<sup>122</sup> Bail also depends heavily on the seriousness of the charges brought, and most domestic violence will constitute no more than a misdemeanor.<sup>123</sup>

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possession of firearms dips down to include domestic violence misdemeanors as well. See 18 U.S.C. § 922(g)(9) (2012).

119. See Hanna, *supra* note 118, at 1522 (“When prosecutors decide to go forward, the final disposition is often a period of probation, either pre- or post-conviction, contingent upon completion of a batterer treatment program.”).

120. See Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 Ky. L.J. 613, 644-46 (2004) (surveying research on batterer intervention programs).

121. See Tuerkheimer, *supra* note 7, at 976-77.

122. See *Giles v. California*, 554 U.S. 353, 405-06 (2008) (Breyer, J., dissenting). Justice Breyer noted that domestic violence cases are “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.” *Id.* at 406 (quoting *Davis v. Washington*, 547 U.S. 813, 832-33 (2006)). Regardless of the batterer’s purpose, the use of “threats, further violence, and ultimately murder can stop victims from testifying.” *Id.* at 405. Justice Breyer then criticized the majority’s ruling that the forfeiture rule required a showing of the batterer’s purpose in preventing the victim’s testimony as “grant[ing] the defendant not fair treatment, but a windfall.” *Id.* at 406.

123. See, e.g., CAL. CONST. art. 1, § 28(f)(3) (“In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.” (emphasis added)); see also Goodmark, *supra* note 118, at 35 (noting that domestic violence cases are “usually charged and tried as misdemeanors”). Indeed, a survey conducted across multiple prosecutors’ offices in California, Oregon, and Washington found that 82 percent of domestic violence cases were charged as misdemeanors. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 app. at 822 (2005); see also EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 132 (3d ed. 2003) (“[E]ven if accompanied by a night in jail, the minimal costs of arrest alone may sometimes actually

A victim who has the courage to report her torturer thus faces his almost immediate release.<sup>124</sup> If the assistant district attorney meets with her at all, it will be for the few precious minutes available for a misdemeanor charge, with a prosecutor who will ask questions only about the specific incident that led the victim to call for help.<sup>125</sup> In return for all of that risk, the victim knows that—at best—her abuser will face a mere misdemeanor conviction and a class on how to not beat women any more.<sup>126</sup> Even if convicted, and that is a big “if,” the torturer will return home enraged and seeking revenge.<sup>127</sup>

The criminal justice system does not respond to the inability of victims to testify by expanding sentences for domestic violence to keep them safer when they do come forward.<sup>128</sup> Instead, prosecutors focus on forcing reluctant victims to testify, sometimes by jailing them for contempt.<sup>129</sup> This creates a situation in which victims calling the police face a terrible choice between protecting themselves and risking jail for doing so.<sup>130</sup>

The decision to punish most domestic violence only as misdemeanors also undermines the attention paid to the national epidemic of domestic violence. Police and prosecutors give misdemeanor domestic violence less attention and fewer resources, often shuttling the cases through special misdemeanor courts.<sup>131</sup> Nor

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serve as a reinforcement of the crime’s benefits. In jurisdictions without a comprehensive strategy for domestic violence intervention, offenders will rapidly learn that there are no further sanctions imposed beyond the arrest itself.”).

124. See *supra* note 118-19 and accompanying text.

125. See Tuerkheimer, *supra* note 7, at 977-87.

126. See *supra* notes 118-19 and accompanying text.

127. See Hanna, *supra* note 118, at 1555.

128. See *id.*

129. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1851 (1996). Prosecutors act with the best intentions to remove the power of witness tampering from defendants by forcing the case forward regardless. See *id.* at 1852. The problem is that a conviction that results in little chance of punishment seems hardly worth putting the victim in that kind of danger.

130. See *id.*

131. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280-82 (2011) (explaining that most criminal cases are misdemeanors, which receive far fewer resources from both prosecutors and public defenders). Conversely, some jurisdictions have created special domestic violence courts, though these matter much more if they receive more resources than other cases, not fewer. See NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 21-22 (2009); Rekha Mirchandani, *What’s So Special About Specialized Courts? The State and Social Change in Salt Lake City’s*

does domestic violence count in the policy tradeoffs made by mayors and police chiefs.<sup>132</sup> One political fact that does not receive scholarly attention is that the FBI does not count misdemeanor violence—including the vast majority of domestic violence—in its statistics on violent crime.<sup>133</sup> So, cities concerned about the public rise and fall of their violent crime rates need not concern themselves with domestic violence until some of those cases result in murder and register in the annual homicide rate. Community pressure pushes all the actors within the criminal justice system to focus on felony arrests, prosecutions, and convictions, thus excluding domestic violence (and for that matter, most violent crime).<sup>134</sup>

The line between misdemeanor and felony violence makes sense in the context of stranger and acquaintance violence, but not in the context of domestic violence.<sup>135</sup> The defendant charged in the bar fight must face felony counts if he caused “serious bodily injury” or if he used a weapon.<sup>136</sup> Both factors represent increased dangerousness and harm. Yet, as described above, batterers focus more on control through pain than injury in and of itself.<sup>137</sup> Although the definitions of “serious bodily injury” in state law sometimes include a notion of serious pain, the pragmatic focus usually remains on lasting physical injury.<sup>138</sup> Batterers also use violence in a way that

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*Domestic Violence Court*, 39 LAW & SOC’Y REV. 379, 379-80 (2005); John R. Emshwiller & Gary Fields, *Justice Is Swift as Petty Crimes Clog Courts*, WALL ST. J. (Nov. 30, 2014), <http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782> [<https://perma.cc/TXE4-YKHC>]. Misdemeanor courts in a few states, including New York, even make use of nonlawyer judges. See William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1, A18.

132. See Buzawa et al., *supra* note 85, at 459-60.

133. U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2013 at 1 (2014), [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain\\_final](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain_final) [<https://perma.cc/CHG9-3SHU>] (“[V]iolent crime is composed of four offenses: murder and nonnegligent manslaughter, rape, robbery, and aggravated assault.”).

134. See generally Ellis, *supra* note 85, at 60-61 (discussing how the public interest affects prosecutorial charging decisions).

135. See *Johnson v. United States*, 559 U.S. 133, 150 (2010) (Alito, J., dissenting) (“Since that time, however, the term ‘felony’ has come to mean any offense punishable by a lengthy term of imprisonment (commonly more than one year); the term ‘misdemeanor’ has been reserved for minor offenses.” (internal citations omitted)).

136. See MODEL PENAL CODE § 211.1(2)(a) (AM. LAW INST., Proposed Official Draft 1980).

137. See *supra* Part I.

138. See Burke, *supra* note 12, at 583 (discussing how batterers frequently stop short of committing felony violence because they focus more on control than on causing serious injury).

maximizes psychological torment and the deprivation of liberty more than visible injuries.<sup>139</sup>

### *B. Most Torture Techniques Remain Legal*

I would add to the analysis of Professors Burke and Tuerkheimer the fact that many of the torture techniques described in Part I remain entirely legal under current criminal law.<sup>140</sup> For example, sleep deprivation violates no law, even when done for the purpose of causing extreme pain or anguish.<sup>141</sup> Torturers can make use of sexual humiliation legally, so long as they do not commit an unconsented touching of the victim's genitals.<sup>142</sup> Torturers can coerce victims into degrading sexual acts while still meeting the legal definition of consent under rape law.<sup>143</sup>

States even vary in how thoroughly they cover threats of violence. The law often punishes only explicit threats, not the kind of implied threats batterers frequently employ.<sup>144</sup> Nor does every state outlaw

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139. *See id.* at 569-70. Some of batterers' favorite techniques remain in the misdemeanor category, particularly strangulation (though many states have specifically decided to make it a felony). As of September 2014, seven states have a strangulation-specific felony statute. *See* NAT'L DIST. ATTORNEYS ASS'N, CRIMINAL STRANGULATION/IMPEDING BREATHING 4 (2014), [http://www.ndaajustice.org/pdf/strangulation\\_statutory\\_compilation\\_11\\_7\\_2014.pdf](http://www.ndaajustice.org/pdf/strangulation_statutory_compilation_11_7_2014.pdf) [<https://perma.cc/XDH8-G9SW>].

140. Both of them note that "emotional abuse" falls outside of the scope of the law. *See* Burke, *supra* note 12, at 596 ("[E]motional abuse ... is not itself criminal."); Tuerkheimer, *supra* note 7, at 1030 (discussing the "[l]aw's failure to redress the ... non-physical manifestations of the abuser's effort to dominate his victim").

141. The Department of Justice maintains that sleep deprivation of up to 180 hours does not even violate the federal torture statute, though that statute is overly narrow and the DOJ interpretation arguably wrong. *See* Luban & Shue, *supra* note 41, at 831-32; Mark Mazetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. TIMES (Apr. 16, 2009), <http://www.nytimes.com/2009/04/17/us/politics/17detain.html?hp> [<https://perma.cc/2ZXC-JLAX>].

142. Rape law, at best sexual battery, remains focused on physical contact, such as "touch[ing] an intimate part of another person while that person is unlawfully restrained." CAL. PENAL CODE § 243.4 (West 2016).

143. Coercive sex remains lawful in most states, and even the few states that have outlawed coercion have done so indirectly, by providing that it serves to negate consent. *See* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 124 (1998). For example, Florida's sexual battery statute provides that "[c]onsent' ... does not include coerced submission." FLA. STAT. § 794.011 (2016).

144. Most assault statutes require a threat to accompany an "immediate intention coupled with a present ability to commit a battery." 6 AM. JUR. 2D *Assault and Battery* § 1 (2008). Courts also frequently require more explicit threats before issuing civil protection orders, such

threats against others, such as threatening to kill the victim’s loved ones.<sup>145</sup> And some states still struggle with conditional threats, such as “I will kill you if you leave me.” Courts have dismissed conditional threats, for example, because they violated an imminence requirement,<sup>146</sup> though perhaps they would be covered under extortion statutes.<sup>147</sup>

Let me give an example of how poorly criminal law functions against domestic violence, making use of a rarely examined type of evidence in legal scholarship, the trial transcript of an acquittal.<sup>148</sup> On March 28, 2010, seventy-eight-year-old Alfred Andrews rolled into a New Orleans criminal court in a wheelchair, seeming weak

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as threats that present an immediate danger or even threats to kill. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 860-61 (1993).

145. See Klein & Orloff, *supra* note 144, at 860.

146. See, e.g., *People v. Wilson*, 112 Cal. Rptr. 3d 542, 555 (Ct. App. 2010) (holding that conditional threats must convey “a gravity of purpose and imminent prospect of execution”); *City of Cincinnati v. Baarlaer*, 685 N.E.2d 836, 840-41 (Ohio Ct. App. 1996) (requiring the victim to be placed in imminent harm before a conditional threat constitutes domestic violence). *But see, e.g., People v. Melhado*, 70 Cal. Rptr. 2d 878, 883-84 (Ct. App. 1998) (focusing on the use of the word “so” in the statutory language requiring a terroristic threat be “so unconditional” and finding that conditional threats may suffice, so long as the context conveys a “degree of seriousness and imminence” to the victim of the “future prospect of the threat being carried out”); *State v. Thompson*, 580 S.E.2d 9, 14 (N.C. Ct. App. 2003) (finding that conditional threats are unlawful if they make a reasonable person, and the victim in fact, believe that the threat is likely to be carried out). The Supreme Court itself has noted that the conditional nature of a statement diminishes its status as a true threat worthy of exception to free speech protections. See *Watts v. United States*, 394 U.S. 705, 708 (1969). *Watts*, however, involved political speech and the conditional nature of the threat helped determine its hyperbolic nature. See *id.* During its last term, the Supreme Court declined an opportunity to measure the limits of threat law against the First Amendment in a domestic violence case. See *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015). The Court did hold, however, that the federal interstate threat statute does require a showing of intent that the defendant “transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.” *Id.*

147. See, e.g., FLA. STAT. § 836.05 (2016).

148. Legal research focuses instead on conviction appeals, thus missing real, qualitative analysis of trials, but also missing all criminal acquittals—the cases in which equal protection violations are often most apparent. See generally Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75 (2009) (discussing the danger of juries engaging in discriminatory acquittals in domestic violence cases). Scholars generally do not examine trial transcripts in acquittals for the understandable reason that they are not created unless someone pays to order them. The trial transcript discussed in this section was sent to me by local journalists seeking comment and was ultimately posted online. See Transcript of Testimony, *State v. Andrews*, No. 490-177 (La. Crim. Dist. Ct. Dec. 21, 2009), [http://www.media.nola.com/crime\\_impact/other/andrews.transcript.pdf](http://www.media.nola.com/crime_impact/other/andrews.transcript.pdf) [<https://perma.cc/2YUF-EQT5>].

and frail, and complaining about diabetes.<sup>149</sup> Andrews faced trial for a misdemeanor charge of domestic violence battery.<sup>150</sup> His thirty-one-year-old wife, Jennifer Muse, testified that, on the night in question, Andrews shoved her, causing her to fall and hit a pile of books and cut her face.<sup>151</sup> Andrews testified in turn that his wife started the fight and he had simply defended himself.<sup>152</sup>

The entire incident seemed petty, and the Commissioner hearing the case found him not guilty.<sup>153</sup> She acknowledged the ways that Andrews mistreated his wife but then characterized it as provocation: “Ms. Muse was probably right for not wanting to be awakened, she was weary and tired, but that’s a part of the consequence, she married someone fifty years, forty years ... her senior. And, so that’s one of the consequences.”<sup>154</sup> The Commissioner assumed an equal power balance between the two and given the narrow scope of the trial, heard no obvious evidence to the contrary.

Two days after his acquittal, Alfred Andrews shot and killed his wife, her sister, and her mother before turning the gun on himself.<sup>155</sup> A neighbor interviewed on the local news described watching Muse’s mother die on the porch.<sup>156</sup> She bled to death as the SWAT team determined whether Andrews was still a threat.<sup>157</sup>

The trial transcript is remarkable for what it does not cover. It necessarily focuses on a single, seemingly minimal incident of violence, with no reference to a history of abuse. Yet some facts, chillingly relevant in hindsight, did sneak in through the testimony of Muse. She described being woken regularly by Andrews in the middle of the night even though he knew she had to leave for work

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149. See Ramon Antonio Vargas, *Treme Triple-Murder Suspect’s Poor Health a Factor in Domestic Abuse Acquittal*, TIMES-PICAYUNE (Mar. 31, 2010, 7:50 AM) [http://www.nola.com/crime/index.ssf/2010/03/treme\\_triple-murder\\_suspects\\_p.html](http://www.nola.com/crime/index.ssf/2010/03/treme_triple-murder_suspects_p.html) [<https://perma.cc/L5Q2-LSXE>].

150. See Transcript of Testimony, *supra* note 148, at 2.

151. *Id.* at 4, 10.

152. *Id.* at 20-21.

153. See *id.* at 31.

154. See *id.*

155. See Vargas, *supra* note 149. Andrews was listed in critical condition and died in jail a year later before facing trial for the triple murder. See John Simerman, *New Domestic Violence Initiative Follows Deadly Breakdowns in New Orleans*, NEW ORLEANS ADVOC. (Oct. 25, 2014, 8:29 PM), <http://www.theadvocate.com/sports/10622687-32/new-domestic-violence-initiative-follows> [<https://perma.cc/MLA6-Y6WC>].

156. See Vargas, *supra* note 149.

157. See *id.*

at four o'clock in the morning.<sup>158</sup> Andrews testified that he wanted to finish an argument with his wife, but that she left the room.<sup>159</sup> He said, “I object to that,” and kept her from leaving.<sup>160</sup> She then took a stool to try to break the window and escape.<sup>161</sup>

Worst of all, no one did the math on their ages. Muse described a relationship that spanned fifteen years, meaning that it began in statutory rape when Muse was sixteen and Andrews sixty-three.<sup>162</sup> According to later news reports, Andrews impregnated Muse while he was dating and living with her mother and sister.<sup>163</sup> For more than a decade, he lived with all three women, sleeping with at least two of them, before killing them all.<sup>164</sup> There are many facts we will never know about this case because existing law deemed them irrelevant, but it seems likely, based on the clues at trial and on his ultimate killing spree, that Alfred Andrews ran a torture chamber of his own. The structure of criminal law guaranteed that no one bothered to find out.

### III. A TORTURE STATUTE WOULD SOLVE MANY OF THESE LEGAL PROBLEMS

Professors Burke and Tuerkheimer would solve the current gaping holes in criminal law by broadening domestic violence statutes. Their proposals would punish patterns of violence and recognize

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158. See Transcript of Testimony, *supra* note 148, at 4, 9.

159. See *id.* at 20.

160. See *id.*

161. See *id.*

162. See *id.* at 10 (relative ages of the parties); LA. STAT. ANN. § 14:80 (2016) (felony carnal knowledge).

163. See Vargas, *supra* note 149. Other reports described an aggravated rape charge filed (and later withdrawn) against Andrews in 1996, charging him with raping a different girl from age eleven to sixteen while he was dating her mother. See *Man Who Killed 3 After Domestic Violence Acquittal Labeled ‘Career Criminal,’* WWLTV.COM. (April 2, 2010), <https://perma.cc/UGZ8-47M6>.

164. See Vargas, *supra* note 149.

coercive control.<sup>165</sup> I would focus instead on creating a torture statute that is not specific to domestic violence for three reasons.

First, a ban on private torture should easily pass legislatures without inspiring any organized opposition because no one publicly supports torture by private actors.<sup>166</sup> A torture statute closes gaps in existing law in a variety of contexts of acknowledged horror. It may not occur to legislators that the paradigmatic torturer in fact lives down the street, attacking only the members of his household. Instead, legislators can safely focus on drug kingpins, kidnapers,

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165. Professor Tuerkheimer proposes the following statute:

A person is guilty of battering when:

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

He or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member; and

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

Tuerkheimer, *supra* note 7, at 1019-20. Professor Burke proposes the following: “A person commits the crime of Coercive Domestic Violence if the person attempts to gain power or control over an intimate partner through a pattern of domestic violence.” Burke, *supra* note 12, at 601. Burke defines a “pattern of domestic violence” as “two or more incidents of assault, harassment, menacing, kidnapping, or any sexual offense, or any attempts to commit such offenses, committed against the same intimate partner.” *Id.* at 602 (footnote omitted).

166. The public increasingly does, however, tolerate torture by government actors seeking out terrorists. See AMNESTY INT’L, STOP TORTURE GLOBAL SURVEY: ATTITUDES TO TORTURE 5 (2014), <https://www.amnestyusa.org/pdfs/GlobalSurveyAttitudesToTorture2014.pdf> [<https://perma.cc/L7SJ-74UT>] (finding that 45 percent of Americans agree that torture is sometimes “necessary and acceptable to gain information that may protect the public”); *About Half See CIA Interrogation Methods as Justified*, PEW RESEARCH CENTER (Dec. 15, 2014), <http://www.people-press.org/2014/12/15/about-half-see-cia-interrogation-methods-as-justified> [<https://perma.cc/534B-358G>] (finding that 51 percent of people believe the CIA methods detailed in the Senate Intelligence Committee report were justified). Analysts blame this major shift in opinion over time both on changing attitudes after 9/11, but mostly on positive cultural depictions of torture, from the television show *24* to the movie about killing Osama bin Laden, *Zero Dark Thirty*. See Sam Kamin, *How the War on Terror May Affect Domestic Interrogations: The 24 Effect*, 10 CHAP. L. REV. 693, 703-08 (2007) (detailing cultural depictions of torture, such as its effectiveness in obtaining truthful confessions, and expressing concern that these depictions will desensitize the public and ultimately the courts); John Blosser, *TV Show 24 May Have Normalized Torture for Americans*, NEWSMAX (Dec. 10, 2014), <http://www.newsmax.com/US/normalized-torture-Jack-Bauer-24/2014/12/10/id/612274/> [<https://perma.cc/36M6-8KDJ>]; Eric Deggans, *Even If Torture Doesn’t Work in the Real World, TV Has Us Convinced It Does*, NPR (Dec. 12, 2014), <http://www.npr.org/2014/12/12/370264893/even-if-torture-doesnt-work-in-the-real-world-tv-has-us-convinced> [<https://perma.cc/LT9L-Q8JY>]. Despite the sad fact that Americans are becoming more inured to the horrors of torture when they deem it justified, the analogy remains a powerful tool.

or serial killers in training. This proposal does not require persuading legislators to give special status to domestic violence victims.

Indeed, in Michigan and California, the states that have already passed general torture statutes, prosecutors have used their statutes to capture other egregious harms, such as home invasions and beatings of elderly victims,<sup>167</sup> as well as cruel and sadistic rapes of strangers.<sup>168</sup> Notably, prosecutors have also used torture statutes to capture the full pattern and horror of child abuse, another enormous benefit of torture statutes that I do not address here.<sup>169</sup> Finally, prosecutors have also gone after gang members and drug dealers who cruelly torture less sympathetic victims.<sup>170</sup>

Second, a torture statute can go farther than a “coercive domestic violence” statute to cover conduct beyond battery and threats. While both Professors Burke and Tuerkheimer acknowledge that violence

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167. *See, e.g.*, *People v. Riley*, Nos. 295838, 298164, 2011 WL 4501765, at \*1 (Mich. Ct. App. Sept. 29, 2011) (per curiam) (affirming defendant’s torture conviction for breaking into an elderly man’s home, punching him in the face so hard his dentures came out, leaving a shoe print on his face, tying him up, and beating him at length until he repeatedly lost consciousness); *People v. Lachniet*, No. 297836, 2011 WL 2859818, at \*1 (Mich. Ct. App. July 19, 2011) (per curiam) (affirming defendant’s torture conviction for breaking into an elderly woman’s home, punching her repeatedly in the face until she lost consciousness, and tying her up with cords).

168. *See, e.g.*, *People v. Massie*, 48 Cal. Rptr. 3d 304, 308-09 (Ct. App. 2006) (upholding defendant’s torture conviction after he raped a stranger in her home, reacted with rage when she told him that Jesus loved him, used various methods to inflict pain, and acted over a long period of time, taking breaks in between); *People v. Pre*, 11 Cal. Rptr. 3d 739, 740-42 (Ct. App. 2004) (holding that the torture conviction was supported by evidence that defendant selected a woman unknown to him, forcibly entered into her apartment, attacked her viciously when she resisted, twice choked her into unconsciousness, and then intentionally inflicted great bodily injury and cruel and extreme pain by biting her while she was helpless and for no other apparent purpose than revenge or sadistic pleasure).

169. *See, e.g.*, *People v. Lujan*, 150 Cal. Rptr. 3d 727, 729-30 (Ct. App. 2012) (affirming defendant’s conviction for torturing his children and murdering one of them after he beat them repeatedly, fed them Tabasco sauce, and bit and shook them until one child died); *People v. Hill*, No. 317294, 2014 WL 6602570, at \*1 (Mich. Ct. App. Nov. 20, 2014) (per curiam) (affirming defendant’s conviction for murder, torture, and child abuse after beating a two-year-old to death for toilet training issues), *appeal denied*, 864 N.W.2d. 566 (Mich. 2015).

170. *See, e.g.*, *People v. Jung*, 84 Cal. Rptr. 2d 5, 6-7 (Ct. App. 1999) (finding sufficient evidence to support a torture conviction when defendant intended to cause cruel or extreme pain and suffering to a rival gang member during beating episode lasting several hours, even though victim suffered no broken bones or damage to vital organs; defendant and accomplices burned naked victim with cigarettes, hit, bit, and jumped on him, tattooed him repeatedly, poured rubbing alcohol over his fresh wounds, and applied Ben-Gay ointment to his penis, circumstances suggesting intent to cause severe pain and suffering).

represents the tip of a much bigger iceberg of abuse, they understandably do not attempt to stretch their proposed broader domestic violence statutes to explicitly cover conduct not already criminalized.<sup>171</sup> Torture statutes, including those already in place and described in Part IV, could capture far more misconduct without generating as much controversy.

Finally, the torture analogy accomplishes something profound to help the criminal justice system and the public understand the true nature of domestic violence.<sup>172</sup> When we conceive of torture, we understand things that elude us as to domestic violence. We do not blame the victim or assume she is weak. We comprehend that violence is but one tool of many, and that the torturer's ultimate goal is power.

*A. Using a Torture Statute to Capture the Full Horror of Domestic Violence*

I grapple with the specifics of a torture statute and the many problems of line drawing in Part IV, but first let me describe my general goals. A crime of torture would capture all of a batterer's physical violence and threats, tethering together discrete incidents into a full picture of the pattern of terrifying abuse. It would allow a prosecutor to describe a list of activities spanning a period of time, with specific examples, and without separating each individual act into a *de minimis* separate count. The statute would also allow for admission of the full evidence of abuse without resort to narrow Federal Rule of Evidence 404(b) exceptions.

Unlike most violent crime charges, torture would constitute a felony with sentences commensurate with the defendant's infliction of horror. Courts would no longer equate an egregious, repeated pattern of violence completed for the purpose of controlling another human being with a mere bar fight. The focus would shift to the defendant's intent to inflict severe pain and psychological scars, rather than whether the defendant caused actual physical injury.

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171. Burke, *supra* note 12, at 601-05; Tuerkheimer, *supra* note 7, at 1020 (proposed statute focuses on a "course of conduct" consisting of existing criminal violations).

172. See *infra* Part III.B.

The statute would force the justice system to look at the full span of evidence necessary to punish the defendant’s wrongdoing and to better protect victims from murder. A charge of torture could reach back farther than the statute of limitations to cover the sum total of abuse, as conspiracy law currently allows.<sup>173</sup> It would allow appropriate charges against a batterer who engaged in torture spanning decades.

A torture statute would encourage police and prosecutors to seek the victim’s full testimony about abuse, because, for the first time, the full story would prove legally relevant. By listing the less obvious torture techniques, the statute would map out the right questions to ask victims to understand the totality of abuse. As a result, law enforcement would delve into the complexity necessary to explain the motives of both defendant and victim, and to make those motives comprehensible at trial.

A torture statute also would encourage everyone in the criminal justice system to better assess the risk that domestic violence will result in murder. Almost uniquely among murder victims, domestic violence victims often approach the criminal justice system for help multiple times before ending up dead.<sup>174</sup> A system that focuses only on the latest discrete battery will miss the signals of impending homicide, which are measured more by the batterer’s degree of control over his victim than by his previous violence against her.<sup>175</sup> A torture statute would encourage police, prosecutors, and even the judge setting bail, to ask the right questions for a “lethality assessment.”<sup>176</sup>

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173. See, e.g., *Smith v. United States*, 133 S. Ct. 714, 717 (2013) (statute of limitations only begins to run at the end of a conspiracy, or when a particular defendant withdraws from the conspiracy).

174. See Jaime Adame, *Are Domestic Violence Homicides Preventable?*, CRIME REP. (Feb. 24, 2014), <http://www.thecrimereport.org/news/inside-criminal-justice/2014-02-are-domestic-violence-homicides-preventable> [<https://perma.cc/V76E-RQB8>].

175. Stark, *supra* note 22, at 20.

176. Jacquelyn Campbell worked backwards from thousands of domestic violence homicides to identify the biggest correlative factors. Her “Danger Assessment” uses a scoring system to prioritize the riskiest behaviors:

1. Has the physical violence increased in frequency during the past year?
2. Has the physical violence increased in severity during the past year and/or has a weapon or threat with a weapon been used?
3. Does he ever try to choke you?
4. Is there a gun in the house?

A torture charge could include the techniques not currently banned by the law, including psychological torture, sexual humiliation, and sleep deprivation. Rather than isolate a single, often minor, incident in a way that makes the victim's behavior seem entirely counterintuitive, a torture trial would explain all of the ways the batterer trapped her. The judge or jury would finally hear the details of a victim stuck, because she was sleep-deprived, isolated from family and friends, and threatened with violence against her children.

A prosecutor would have far more discretion to use an expert in a torture trial in order to explain the nature and harm of the abuse. At present, courts allow use of such experts primarily to explain a victim who has recanted her testimony or failed to appear.<sup>177</sup> Courts are leery, however, of admitting expert testimony in a domestic violence trial in which the victim actually testifies and cooperates.<sup>178</sup> After all, there is no need to explain the concept of an act of battery to a jury, and such evidence risks being offered merely to bolster the

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5. Has he ever forced you into sex when you did not wish to have sex?
  6. Does he use drugs? (By drugs, I mean "uppers" or amphetamines, speed, angel dust, cocaine, crack, street drugs, heroin, or mixtures.)
  7. Does he threaten to kill you and/or do you believe he is capable of killing you?
  8. Is he drunk every day or almost every day? (in terms of quantity of alcohol)
  9. Does he control most or all of your daily activities? (For instance, does he tell you whom you can be friends with, how much money you can take with you shopping, or when you can take the car?) (If he tries but you do not let him, check here \_\_\_\_)
  10. Have you ever been beaten by him while you were pregnant? (If never pregnant by him, check here \_\_\_\_)
  11. Is he violently and constantly jealous of you? (For instance, does he say, "If I can't have you, no one can.")
  12. Have you ever threatened or tried to commit suicide?
  13. Has he ever threatened or tried to commit suicide?
  14. Is he violent toward your children?
  15. Is he violent outside the home?

Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in *ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS* 96, 105 (Jacquelyn C. Campbell ed., 1995).

177. See, e.g., *Arcoren v. United States*, 929 F.2d 1235, 1239-41 (8th Cir. 1991) (affirming district court's admission of expert testimony on battered women's syndrome designed to explain victim's recanted testimony).

178. See, e.g., *People v. Christel*, 537 N.W.2d 194, 201-05 (Mich. 1995) (finding the admission of expert testimony on battered women's syndrome to be error, albeit harmless, when victim did not recant or fail to appear).

victim’s credibility.<sup>179</sup> In a torture trial, however, the prosecutor could legitimately use an expert to explain the harm that torture techniques create.<sup>180</sup> As I explain in the next section, the victim’s physical and mental pain and suffering will be an element of the offense.<sup>181</sup>

A torture statute would make a long pattern of misdemeanor conduct finally add up to a serious felony. Torture would capture the full harm that batterer behavior causes to the victim and the community. And, a torture charge would create far more bargaining power for a prosecutor to exact a plea.<sup>182</sup>

Imagine if in the trial of Alfred Andrews the prosecutor could have brought a charge of torture that covered years of whatever violence Andrews had committed against his wife, her mother, and her sister.<sup>183</sup> First, the police officer responding to the incident would have been more likely to ask questions about past history and current danger. The officer might have discovered more evidence to predict the fact that the innocuous looking old man would soon commit a triple homicide. The prosecutor, in turn, might have spent the time necessary to determine whether she could bring a felony count by asking even more questions about the history of the relationship, the use of other torture techniques, and the degree of the defendant’s control over his victim.

A felony charge of torture against Andrews would then have been acknowledged by the entire criminal justice system as worthy of resources. At the bond hearing, a felony charge would make clear

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179. *See id.*; *see also* State v. Borelli, 629 A.2d 1105, 1115 n.15 (Conn. 1993) (“Expert testimony on the subject of battered woman’s syndrome is not relevant unless there is some evidentiary foundation that a party or witness to the case is a battered woman, and that party or witness has behaved in such a manner that the jury would be aided by expert testimony providing an explanation for the behavior.”).

180. *See, e.g.*, People v. Studier, No. 317351, 2015 WL 447408, at \*5 (Mich. Ct. App. Feb. 3, 2015) (per curiam) (affirming admission of expert testimony in a torture case explaining a domestic violence victim’s sense of danger that prevented her from fleeing, though also finding the expert’s testimony that domestic violence victims rarely fabricate allegations as harmless error given overwhelming physical evidence), *rev’d in part, denied in part on other grounds*, 871 N.W.2d 524 (2015).

181. *See infra* Part IV.B.

182. *See, e.g.*, People v. Morgan, No. 315467, 2014 WL 2881073, at \*1 (Mich. Ct. App. June 24, 2014) (per curiam) (affirming sentence of defendant who agreed to plead to assault with intent to do great bodily harm for dismissal of the torture charge).

183. *See supra* Part II.B.

the seriousness of the offense. A torture charge would help demonstrate the defendant's motive of controlling and owning his wife and her family; it would have covered his psychological torture and sleep deprivation along with the physical violence.<sup>184</sup> As such, it would have provided more clues about the risk of witness tampering and intimidation to the judge considering bail. In a jurisdiction with resources for witness safety, the prosecutor might have encouraged and provided help for the victim to hide.

A torture trial against Andrews would have presented the full picture of the defendant's actions based on evidence now deemed relevant and admissible. That evidence would have provided the jury with a better understanding of the victim's situation and thus her credibility. It probably would have described a lifetime of control over Muse, her mother, and her sister, enforced through some combination of violence, threats, sleep deprivation, and years of sexual abuse. Compare that possibility to the scant evidence actually presented to the court of a single pathetic shove.<sup>185</sup>

Because of this broader context, Andrews' trial under a torture statute might have resulted in his conviction, instead of the acquittal that emboldened him to take revenge against the wife who dared testify against him.<sup>186</sup> More to the point, a torture statute would have offered more than the possibility of a mere misdemeanor conviction and a resulting slap on the wrist. A felony conviction of torture, making clear the sum total of what Andrews did to his family for years, might have resulted in actual jail time. Further, it might have kept Jennifer Muse, her mother, and her sister alive.

### *B. Changing the Cultural Perception of Domestic Violence*

Those who have debated for years about how best to describe "domestic" or "intimate partner" "violence" or "abuse," understand

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184. At the least, the prosecutor would have known to ask about all of these facts. See Tuerkheimer, *supra* note 7, at 977.

185. See *supra* notes 149-54, 158-62 and accompanying text.

186. Although conviction rates in domestic violence trials are not well documented, some empirical evidence suggests that few offenders are convicted under the current system. See Hanna, *supra* note 118, at 1517-19; Virginia E. Hench, *When Less Is More—Can Reducing Penalties Reduce Household Violence?*, 19 U. HAW. L. REV. 37, 40-41 (1997).

that labels matter.<sup>187</sup> In years of training police, prosecutors, lawyers, judges, and the public, I find that describing domestic violence as torture, an argument that several domestic violence scholars have made, works better than any other to help explain the dynamics of abuse.<sup>188</sup> For the reasons detailed in this section, the torture analogy cuts through many of our cultural misunderstandings and our diminishment of domestic violence. It puts the focus back on the perpetrator instead of the victim. It reminds us that violence is but one tool of many and that the worst scars are psychological.

Current cultural attitudes acknowledge domestic violence as a clear wrong but also subject it to disdain and contempt.<sup>189</sup> The public

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187. See, e.g., Dutton, *supra* note 15, at 1196 (urging expert testimony on “battered women’s experiences” rather than “battered woman syndrome” in order to better explain the diverse reactions victims have to trauma); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 69 (1991) (arguing for the use of the term “separation assault” to better explain the difficulty of leaving and answer the age-old question of why victims stay); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985-86 (1995) (arguing for the use of the term “coercive control” to better express the nature of abuse).

188. See *supra* note 15.

189. I teach a class on domestic violence and the law and assign students to research cultural attitudes toward domestic violence so that they will understand what they are up against in courtrooms clearly influenced by those attitudes. Students have come to class with examples ranging from country music to rap. See, e.g., Toby Keith, *A Little Too Late*, YOUTUBE (June 16, 2009), <https://www.youtube.com/watch?v=nOd2NuHgwew> [<https://perma.cc/76T4-GZVY>] (making light of a man purportedly laying bricks to entomb a terrified woman tied to a chair); Eminem, *Kim*, YOUTUBE (Oct. 14, 2011), [https://www.youtube.com/watch?v=z\\_6lgDFX6y0](https://www.youtube.com/watch?v=z_6lgDFX6y0) [<https://perma.cc/T67Z-JKR4>] (rapping about his fantasy of killing his real life ex-wife complete with mimicking her screams). Eminem also has a duo with famous domestic violence victim Rihanna that features him singing about love driving him to violence and her singing the chorus “Just going to stand there and watch me burn / But, that’s alright because I like the way it hurts / Just gonna stand there and hear me cry / But that’s alright because I love the way you lie.” See Eminem ft. Rihanna, *Love the Way You Lie*, YOUTUBE (Aug. 15, 2010), [https://www.youtube.com/watch?v=uelHwf8o7\\_U](https://www.youtube.com/watch?v=uelHwf8o7_U) [<https://perma.cc/7UF9-Q3WH>]. Family Guy does its usual excellent job of mocking and revealing attitudes towards the subject. See Nando Di Fino, *Funny or Die? Family Guy’s Domestic Abuse Episode Raises Questions of Taste and Appropriateness*, MEDIAITE (Nov. 1, 2011), <http://www.mediaite.com/tv/funny-or-die-family-guys-domestic-abuse-plot-line-raises-questions-of-taste-and-appropriateness/> [<https://perma.cc/4BDF-L63A>]. Some of the most disturbing images are those aimed at children and teenagers. For example, in Disney’s *Beauty and the Beast*, Belle is terrified by a physically menacing and utterly cruel Beast before she proudly sings of having transformed him. See Rachelle Schmidt, *Local Panel Examines Domestic Violence in Popular Culture*, PORTLAND ST. VANGUARD (Oct. 22, 2013), <http://psuvanguard.com/local-panel-examines-domestic-violence-in-popular-culture/> [<https://perma.cc/5CQC-KG68>]. The *Twilight* movies

exaggerates the expansion of rights for women and thus believes that women stay in abusive relationships only by choice, not necessity.<sup>190</sup> To those who imagine that calling 9-1-1 will result in instant safety, domestic violence victims who stay seem masochistic or insane.<sup>191</sup> The public entirely overestimates the ability of victims to escape threats of murder, economic ruin, public shaming, and lost custody of children.<sup>192</sup> In contrast, Americans do not ask themselves why abused Pakistani women “stay” because they understand that these women have nowhere to turn.<sup>193</sup>

The concept of torture focuses on the culpability of the defendant and distracts us from our absurd cultural fixation on blaming victims of domestic violence.<sup>194</sup> Almost uniquely among crimes, we blame women for the domestic violence (and rape) committed against them.<sup>195</sup> We stereotype them as provocative and deserving of violence or as masochistic and thus enjoying and choosing it; we require that victims seem appropriately meek and pathetic and punish them if they seem too strong.<sup>196</sup> These hurdles, above all else, make the prosecution of domestic violence exceedingly difficult.<sup>197</sup>

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mirror this message, romanticizing stalking, obsessive jealousy, and ultimately sexual violence on the couple’s honeymoon night for which the heroine immediately forgives her new husband. See Wind Goodfriend, *Relationship Violence in Twilight*, PSYCHOL. TODAY (Nov. 9, 2011), <https://www.psychologytoday.com/blog/psychologist-the-movies/201111/relationship-violence-in-twilight> [<https://perma.cc/7NMH-THSJ>].

190. See Buel, *supra* note 83, at 297.

191. See *id.*

192. See *id.*

193. See Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1189 (2012) (noting that Americans blame domestic violence in immigrant communities and third world countries on the perpetrators’ “culture,” while simultaneously ignoring the role of American culture on America’s shameful rates of domestic violence murders).

194. Similarly, this is part of the efforts of Professors Burke and Tuerkheimer in their proposals for a broader domestic violence statute. See Burke, *supra* note 12, at 582; Tuerkheimer, *supra* note 7, at 986-87.

195. See Burke, *supra* note 12, at 580.

196. See Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593, 615-16 (1999) (“Jurors may expect victims and batterers to fit certain stereotypes and may have certain expectations regarding a battered woman’s behavior in a battering situation.... Expert testimony identifying the dynamics of domestic violence and the patterns of behavior in battering relationships is relevant ... [and] particularly important for evaluating [the victim’s] credibility.”).

197. See Hanna, *supra* note 118, at 1508.

Our cultural paradigm of *torture*, however, does not blame or even focus on the victim. Our images of torture involve strong victims such as soldiers or terrorist suspects. Few would blame John McCain for crumbling under torture in a Vietnamese POW camp and denouncing his nation.<sup>198</sup> We understand that the techniques of torture work on anyone, regardless of their physical and psychological strength. Few of us harbor any illusion that we could sustain our dignity under torture for very long.

Describing domestic violence as premeditated torture also corrects the cultural excuses we make for batterers. We stereotype them as flailing victims of their own hapless tempers, frustrated rather than cruel, emotional rather than cold-blooded.<sup>199</sup> We believe that batterers merely lash out at the closest victim out of pent-up emotion and therefore see domestic violence as more of a social problem than a violent crime.<sup>200</sup> Almost uniquely in the criminal justice system, we “punish” it with mere treatment.<sup>201</sup>

Torture, in contrast, invokes clear criminal culpability. Whether a torturer seeks information, compliance, or punishment, torture constitutes cruelly and chillingly premeditated behavior.<sup>202</sup>

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198. See Adam Chandler, *This Is How a Prisoner of War Feels About Torture*, ATLANTIC (Dec. 9, 2014), <http://www.theatlantic.com/politics/archive/2014/12/John-Mccain-Speech-Senate-Republican-CIA-Torture-Report/383589/> [<https://perma.cc/F45H-UPPV>] (describing McCain’s opposition to the use of torture and his description on the Senate floor of his five-and-a-half-year ordeal).

199. The television show *Family Guy*, for example, was criticized for a harsh depiction of domestic violence in which the characters made fun of the victim, saying things like “she’s gotten a lot better” as a result of the abuse she has endured, and “let’s hope she’s good at talking because we know she doesn’t listen so good.” *Family Guy: Screams of Silence: The Story of Brenda Q* (Fox television broadcast Oct. 30, 2011); see Whitney Jefferson, *Family Guy Hits Horrible New Low with Domestic Abuse Episode*, JEZEBEL (Oct. 31, 2011), <http://jezebel.com/5854810/family-guy-hits-horrible-new-lows-with-domestic-abuse-episode> [<https://perma.cc/5SGX-XQ6A>]. Another episode of *Family Guy* portrays a character hearing graphic domestic abuse from a neighboring apartment, including the abuser saying “You think I want to hurt you?” and “You make me hurt you!” while the woman cries, and responding by saying “I’m sure there’s two sides to this.” *Family Guy: Love, Blactually* (Fox television broadcast Sept. 28, 2008).

200. See DAVID ADAMS, WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS 23-24 (2007) (describing myths about men who batter).

201. See Goodmark, *supra* note 120, at 643-44.

202. See Reyes, *supra* note 26, at 591; see also Copelon, *supra* note 5, at 327 (“Battering, whether or not it is premeditated, is purposeful behavior’ and ‘should be seen as an attempt to bring about a desired state of affairs.’ Battered women report that men often plan their attack ... [and often have] excellent impulse control in other contexts.” (footnotes omitted))

Batterers use torture because it gives them power.<sup>203</sup> They do not torture accidentally or because they are frustrated at work; they do so because it gives them control over another human being.<sup>204</sup> Understanding that basic fact would fundamentally change how we perceive and punish the crime.

The public also understands torture to be serious—a violation of fundamental human rights. Even in a culture steeped in violence as entertainment, torture garners attention.<sup>205</sup> Popular culture is awash with descriptions of torture in fiction and in news reports, portraying both the experiences of our own soldiers in POW camps during every war, and, sadly, our own government’s use of torture.<sup>206</sup>

Domestic violence, meanwhile, remains a petty crime in the popular imagination—a bleak and inevitable social problem that makes

(first quoting SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 17 (1982); then quoting R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 24 (1979)).

203. See Cohen, *supra* note 15, at 768 (framing the battering relationship as an ongoing regime of private tyranny); Fischer et al., *supra* note 27, at 2126, (describing the context of rulemaking and dominance); Mahoney, *supra* note 187, at 34 (“Feminist activists writing about heterosexual battering have ... defined power and control, rather than incidents of violence, as the heart of the question.”); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 *HOFSTRA L. REV.* 1295, 1317 (1993) (observing “a growing emphasis in the literature and community on understanding battering not as violence, per se, but rather, as a larger pattern of dominance and control”); Joan Erskine, Note, *If It Quacks like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 *BROOK. L. REV.* 1207, 1216 (1999) (asserting that need for control motivates domestic violence).

204. Batterers come in different forms, some more closely resembling the stereotypes. For example, Donald Dutton characterizes the different types of batterers as family only batterers (who can be quite charming and functional in daily life and terrorists at home), sociopaths (who act in entirely cold-blooded cruelty for sport), and borderline batterers (who struggle with substance abuse and with their tempers and who act in escalating desperation). DONALD DUTTON WITH SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 23, 26, 29 (1995). This last category involves the kind of dysfunction we project onto the group as a whole.

205. Sadly, this is perhaps why we have so many cultural representations of torture—the need to ratchet up depictions of violence to impress viewers increasingly inured to them. See John Hayes, *Films and TV Up the Ante on Graphic Torture Scenes*, *PITTSBURGH POST-GAZETTE* (Jan. 19, 2007), <http://www.post-gazette.com/ae/movies/2007/01/19/Films-and-TV-up-the-ante-on-graphic-torture-scenes/stories/200701190242> [https://perma.cc/NM27-9G3B]; Maura Moynihan, *Torture Chic: Why Is the Media Glorifying Inhumane, Sadistic Behavior?*, *ALTERNET* (Feb. 2, 2009), [http://www.alternet.org/story/124739/torture\\_chic%3A\\_why\\_is\\_the\\_media\\_glorifying\\_inhumane\\_sadistic\\_behavior](http://www.alternet.org/story/124739/torture_chic%3A_why_is_the_media_glorifying_inhumane_sadistic_behavior) [https://perma.cc/8527-PGWS].

206. See Hayes, *supra* note 205; Moynihan, *supra* note 205.

national news only when committed against or by celebrities.<sup>207</sup> Understanding domestic violence as torture would clarify that it constitutes more than the sum total of hits and shoves. As Evan Stark argues, the core injury of domestic violence is the deprivation of liberty.<sup>208</sup> Domestic violence “seeks to take away the victim’s liberty or freedom, to strip away their sense of self. It is not just women’s bodily integrity which is violated but also their human rights.”<sup>209</sup> A felony crime of torture, by its very name, signals a premeditated, cruel, and heinous crime.

The torture description also provides an entirely comprehensive summary of the methods of domestic violence. As described in Part I, batterers use the full array of torture techniques, from sporadic violence designed to control, to the creative use of threats against the victim and everyone she cares about, sleep deprivation and psychological torment.<sup>210</sup> In the context of domestic violence, these patterns seem counterintuitive and *de minimis*—a batterer who merely wakes up his wife, who insults her, who hits her only occasionally and without great force, and who spews seemingly empty

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207. Compare the coverage of Ray Rice or Chris Brown with the countless murders that make only local news under headlines like, “Volatile Relationship Goes Bad.” Compare Ken Belson & Steve Eder, *In Ray Rice Case, N.F.L. Chose Not to Ask Many Questions*, N.Y. TIMES (Jan. 8, 2015), <http://www.nytimes.com/2015/01/09/sports/mueller-report-nfl-did-not-see-ray-rice-video-before-it-suspended-him.html> [<https://perma.cc/3ZGA-F534>], and *Times Topic: Chris Brown*, N.Y. TIMES, <http://www.nytimes.com/topic/person/chris-brown> [<https://perma.cc/6DSJ-BHX8>] (long list of articles about Chris Brown and domestic violence in New York Times), with Jennifer Portman, *Mysterious Death Reveals Volatile Relationship*, TALLAHASSEE DEMOCRAT (Mar. 1, 2015), <http://www.news4jax.com/news/local/mysterious-death-reveals-volatile-relationship> [<https://perma.cc/9DXV-8R2B>]. Even celebrity headlines can be co-opted by other subjects. Tapes released by Mel Gibson’s former girlfriend captured him essentially admitting to hitting his own baby while attempting to punch the child’s mother and threatening to bury the mother under the rosebushes, but what made headlines about the tapes was his use of racist language. See, e.g., Jewel Samad, *Controversial Character: Mel Gibson*, L.A. TIMES, <http://www.latimes.com/entertainment/gossip/la-et-controversy-mel-gibson-1598k8nc-photo.html> [<https://perma.cc/V6JG-25F9>].

208. Stark, *supra* note 22, at 4. Those who work with survivors frequently use the “power and control” wheel developed in Duluth, Minnesota, as a way to discuss this aspect of domestic violence. *Power and Control Wheel*, NAT’L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf> [<https://perma.cc/ZEK6-6VSK>]. It describes the ubiquitous forms of control, none of which actually involve violence. *Id.*

209. *What is Coercive Control?*, CEDAR NETWORK, <http://www.cedarnetwork.org.uk/about/supporting-recovery/what-is-domestic-abuse/what-is-coercive-control/> [<https://perma.cc/QP7S-NFCG>] (citing Evan Stark).

210. See *supra* Part I.

threats. In self-defense cases—the cases in which the victims are allowed to describe their entire experiences—we see how short current law falls when applied within the context of our paradigm of domestic violence.<sup>211</sup>

In the context of torture, however, the public imagination understands that the infliction of violence is merely one of many effective techniques to break the spirit.<sup>212</sup> Sporadic violence, while giving the victim some illusion of control, works better than constant violence.<sup>213</sup> Threatening the victim, or better yet, threatening his loved ones, can work even better than the reality of violence.<sup>214</sup> Sleep deprivation, or other physical efforts to unnerve and confuse the victim, work as well as the infliction of pain.<sup>215</sup>

The concept of torture also helps to explain the brutality of sexual violence and humiliation. While the law does criminalize rape within marriage, actors within the criminal justice system fail to understand that the harm of rape is not made easier by previously consensual sex, but instead is magnified by being attacked by someone the victim loved and trusted.<sup>216</sup> Our culture tends to equate rape with theft of sex, rather than violence and degradation.<sup>217</sup> If rape is merely theft, then marital rape does not involve more than

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211. See Jody Armour, *Just Deserts: Narrative, Perspective, Choice, and Blame*, 57 U. PITT. L. REV. 525, 527-28 (1996); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1247-48 (2001).

212. Unfortunately much of the public education on this subject has involved techniques used by the U.S. government against prisoners at Guantanamo and Abu Ghraib. See Luban & Shue, *supra* note 41, at 835.

213. See, e.g., *ZERO DARK THIRTY* (Sony Pictures 2012) (depicting CIA agents utilizing the phrase “when you lie to me, I hurt you” to portray to the detainee that the level of torture he endured was within his control—he would then either be rewarded for his cooperation or punished for his insubordination).

214. See, e.g., *Homeland: Blind Spot* (Showtime television broadcast Oct. 30, 2011) (depicting the CIA questioning terrorist operative and threatening the safety of the man’s family to persuade him to cooperate); *24: Day 2, 7:00 p.m.-8:00 p.m.* (Fox television broadcast Feb. 11, 2003) (depicting agents threatening to kill a terrorist’s wife and two children, and ultimately even staging a mock execution of one child, in order to coerce the suspect to cooperate).

215. See *ZERO DARK THIRTY*, *supra* note 213.

216. See Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1453 (2014) (citing NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT* 18 (2011) (noting that one in five women in the U.S. will be raped in her lifetime, and of those, half are raped by an intimate partner).

217. See *id.* at 1456, 1456 n.10.

the overruling of a frigid wife too tired to satisfy her husband.<sup>218</sup> Indeed, until quite recently, the law gave husbands that prerogative.<sup>219</sup>

We understand, however, that sexual degradation constitutes a powerful tool of torture, perhaps the most powerful. At the U.S. detainment center in Abu Ghraib, the media reported that never-released pictures showed soldiers raping male and female prisoners, sometimes with objects.<sup>220</sup> Reports also indicated that children were raped in front of their parents.<sup>221</sup> Photographs actually released showed acts of sexual humiliation against prisoners including photographs of prisoners who were forced to create a naked human pyramid or wear women’s underwear.<sup>222</sup> In the context of that searing national embarrassment, the public came to understand rape and sexual humiliation as forms of torture that cause lasting psychological wounds.

That brings us to another insight of the torture analogy—that psychological wounds matter just as much, or more, than physical injury. In the context of domestic violence, the public thinks little

218. See, e.g., *Rescue Me: Satisfaction* (Fox Network television broadcast, July 18, 2006) (portraying a marital rape as harmless); see also Scott Collins, *Dennis Leary Doesn’t Care if You’re Angry*, L.A. TIMES (June 12, 2007), <http://www.articles.latimes.com/2007/jun/12/entertainment/et-channel12> [<https://perma.cc/8Y7T-W3NR>] (describing the outrage caused by the *Rescue Me* marital rape scene).

219. See Klarfeld, *supra* note 45, at 1819.

220. See Duncan Gardham & Paul Cruickshank, *Abu Ghraib Abuse Photos ‘Show Rape,’* TELEGRAPH (London) (May 27, 2009), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5395830/Abu-Ghraib-abuse-photos-show-rape.html> [<https://perma.cc/SQH7-ZJQ2>]; Luke Harding, *Focus Shifts to Jail Abuse of Women*, GUARDIAN (London) (May 11, 2004), <http://www.theguardian.com/world/2004/may/12/iraq.usa> [<https://perma.cc/L4WM-KEX2>]; Daniel Tencer, *Journalist: Women Raped at Abu Ghraib Were Later ‘Honor Killed,’* RAW STORY (Sept. 11, 2010), <http://www.rawstory.com/2010/09/women-abu-ghraib-honor-killed/> [<https://perma.cc/5LJ5-2JG5>].

221. See Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST (May 21, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A43783-2004May20.html> [<https://perma.cc/TZ2U-UX9S>]; Geraldine Sealey, *Hersh: Children Sodomized at Abu Ghraib, On Tape*, SALON (July 15, 2004), [http://www.salon.com/2004/07/15/hersh\\_7/](http://www.salon.com/2004/07/15/hersh_7/) [<https://perma.cc/XTP2-532J>].

222. See Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib> [<https://perma.cc/WLV4-HLNG>]; Bill Redeker, *Former Iraqi Prisoners Recount Abuse*, ABC NEWS (May 3, 2004), <http://www.abcnews.go.com/WNT/story?id=131663> [<https://perma.cc/84XQ-47E5>]. To view some of the released photos, see *Abu Ghraib Abuse Photos*, ANTIWAR.COM (Feb. 17, 2006), <http://www.antiwar.com/news/?articleid=8560> [<https://perma.cc/KF6N-5J2J>].

of the concept of “emotional abuse”; it equates “emotional abuse” with being called fat too many times, which results in mere low self-esteem.<sup>223</sup> We dismiss the premeditated cruelty of a batterer as the careless insults of a thoughtless spouse. And, we fail to acknowledge the profound harm of sleep deprivation in domestic violence cases at all.

Our culture better understands the concept of psychological torture. Soldiers at Abu Ghraib and Guantanamo Bay used psychological torture techniques, because these techniques proved effective to break prisoners and skirted the edges of legality.<sup>224</sup> Both in our fictionalized versions of torture and our reporting on the real thing, we acknowledge the damage done. The experience forever robs the victim of sleep, implanting permanent nightmares and creating psychological wounds that distort the personality and ruin lives.<sup>225</sup> Because our paradigmatic torture victim is male, not female, we spare him the minimization of his psychological harm.<sup>226</sup>

Finally, our cultural references to torture occasionally even help to explain some of the most counterintuitive aspects of psychological warfare. Torturers intersperse cruelty with kindness.<sup>227</sup> They find

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223. For example, take note of how the characters in *Family Guy* treat the daughter, Meg Griffin: her emotional and sometimes physical abuse is made out to be a joke and is not portrayed as harmful. See *Meg Griffin*, WIKIA, [http://www.familyguy.wikia.com/wiki/Meg\\_Griffin](http://www.familyguy.wikia.com/wiki/Meg_Griffin) [<https://perma.cc/7TF7-4LZ6>] (describing all the instances of abuse Meg has suffered throughout the episodes and how she feels about herself, particularly about her weight).

224. See Luban & Shue, *supra* note 41, at 833-34; Paul Sperry, *U.S. Losing 'Hearts, Minds,' Despite Sensitivity Training*, WORLDNETDAILY (Apr. 2, 2004), <http://www.wnd.com/2004/04/24006/> [<https://perma.cc/M6SA-UUPE>] (describing other tactics that were used, including “pride-and-ego down” techniques, which attack the prisoners’ sense of self-worth to make them more willing to cooperate).

225. Perhaps the best recent example of this in fictional portrayal is the show *Homeland*, which portrays the return of an American soldier, whom terrorists captured and held for years. See *Homeland: Pilot* (Fox 21 Television Studios television broadcast Oct. 2, 2011). The show depicts Sergeant Brody’s inability to sleep, difficulty being intimate with his wife and close to his children, moments of reliving his trauma, flashes of anger, and inappropriate behavior. See *Homeland: Grace* (Fox 21 Television Studios television broadcast Oct. 9, 2011).

226. See George Simon, *Minimization: Trivializing Behavior as a Manipulation Tactic*, COUNSELLING RESOURCE (Feb. 23, 2009), <http://www.counsellingresource.com/features/2009/02/23/minimization-manipulation-tactic/> [<https://perma.cc/43D5-J448>] (discussing process by which men attempt to convince women that the wrongful things they do are not really harmful, making women feel as though they have overreacted).

227. See, e.g., ZERO DARK THIRTY, *supra* note 213 (rewarding detainee for his cooperation by speaking to him softly and politely, providing him water, or allowing him to go outside to eat a full meal and have a cigarette).

ways to persuade the victim to bond with them. For example, the tortured POW in the television series *Homeland* described with great shame the reasons he became loyal, and even “loved,” his terrorist persecutor.<sup>228</sup> After years of isolation and physical and psychological torture, his captor then offered him kindness and connection.<sup>229</sup> This insight becomes crucial to understanding domestic violence and the counterintuitive aspects of remaining emotional attachment.

The biggest disconnect in the analogy between torture and domestic violence is the absence of captivity in most domestic violence. Even so, the public has a slightly better understanding of the ways that a torture victim can feel trapped even when the door remains open. We understand that a torturer can exercise total control over a victim without constant vigilance.<sup>230</sup> Effective torture inspires a terror so total, a sense of utter omnipotence, that victims do not believe they have an avenue of escape.<sup>231</sup>

If the criminal justice system actually prosecuted domestic violence crimes as torture, it would send powerful signals both within the system and beyond it. A torture crime would help police, prosecutors, and judges understand the seemingly counterintuitive dynamics of the problem. It would also help translate the issue for those who serve on juries deciding the fate of both defendants and victims.

Most of all, prosecuting domestic violence as torture would help the public as a whole to better understand domestic violence. The

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228. *Homeland: The Weekend* (Fox 21 Television Studios television broadcast Nov. 13, 2011).

229. *Id.* (“He offered me comfort. And I took it ... I was broken, living in the dark for years, and a man walked in and he was kind to me. And I loved him.”). For a critique of the glorification of torture in *Homeland* see, for example, Alyssa Rosenberg, *The Critique of Torture that Mass Culture Can’t Make*, WASH. POST (Dec. 10, 2014), <https://www.washingtonpost.com/news/act-four/wp/2014/12/10/the-critique-of-torture-that-mass-culture-cant-make/> [<https://perma.cc/45BE-ZN5T>].

230. See, e.g., *Game of Thrones: The Gift* (HBO television broadcast May 24, 2015) (showing that a torture victim was given an avenue of escape by helping another victim, the wife of the torturer, but chose to turn her in to his torturer instead).

231. See, e.g., Daniel Schwartz, *Profiling Abductors: Q&A with Brad Garrett*, CBC NEWS (June 23, 2011), <http://www.cbc.ca/news/canada/profiling-abductors-q-a-with-brad-garrett-1.999522> [<https://perma.cc/2AMV-J7RT>] (describing why kidnap victims sometimes fail to escape when given the chance and using the example of Jaycee Dugard, who was kidnapped as a child and held hostage in the kidnapper’s back yard for eighteen years).

countries around the world with the lowest rates of intimate partner violence are those with cultures that thoroughly condemn it and shame the perpetrator instead of the victim.<sup>232</sup> The legal system can accomplish little compared to the enormous power of culture, particularly to root out deeply seeded violence in the home.<sup>233</sup> But the legal system can act as an important cultural signal of what we prioritize and what we condemn.

The criminal justice system's signaling role is perhaps its most important. Consider how the anti-drunk driving movement succeeded at fundamentally shifting cultural opinion not only with public service announcements, but also with tough laws that signaled an end to the tolerance of the behavior.<sup>234</sup> The mere presence of the penalties sent an important signal of deterrence and of the shamefulness of the conduct.<sup>235</sup> Thus, it would matter enormously to the public understanding of domestic violence if the criminal justice system declared it to be torture.

#### IV. DRAFTING A TORTURE STATUTE

We may know torture when we see it, but it remains hard to define. A torture statute must be broad and general enough to capture the cruel creativity of torturers and the full range of their techniques. Yet, as occurred with the criminalization of stalking, a torture statute may be prone to charges of vagueness as it attempts to criminalize true terrorism while excluding innocuous conduct.<sup>236</sup>

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232. Cf. WORLD HEALTH ORG., WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN: SUMMARY REPORT OF INITIAL RESULTS ON PREVALENCE, HEALTH OUTCOMES AND WOMEN'S RESPONSES 5 (2005) (connecting rates of domestic violence around the world to cultural attitudes towards domestic violence).

233. See *id.* at 22.

234. See James C. Fell & Robert B. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, PAC. INST. RES. & EVALUATION 195, 195 (2006), <http://www.documents.jdsupra.com/2a7743e0-ea80-41d8-9739-efb8cf57928b.pdf> [<https://perma.cc/S2YX-GVG9>] (describing the successful grassroots efforts of Mothers Against Drunk Driving, which have helped reduce alcohol-related traffic deaths from an estimated 30,000 in 1980 to 16,694 in 2004).

235. See *id.* at 203.

236. See Jennifer L. Bradfield, Note, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN'S L.J. 229, 233 (1998) (critiquing the effectiveness of the anti-stalking laws); Laurie Salame, Note, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67, 68-69 (1993) (discussing the development of anti-stalking legislation and constitutional issues

Members of our own government famously quibbled about the actions necessary to constitute torture, arguing, for example, that waterboarding did not count.<sup>237</sup> Torturers everywhere have taken advantage of any existing loopholes, prioritizing pain over injury and psychological scars over physical ones.<sup>238</sup> A torture statute cannot allow torture techniques to evade existing rules, nor can it apply too broadly and risk losing its rhetorical power.

The drafting of a torture statute also requires deciding how broadly the law can capture abuse without weakening the impact that the word “torture” should bring to domestic violence. It requires deciding whether the definition of torture should include specific examples of techniques. Must torture constitute a pattern of behavior, or can it be based on a single act? Should psychological torture suffice, or should violence be a necessary component? To grapple with these questions, we first will compare the statute I propose with international law, federal law, and the laws of two states that have experimented with private torture statutes.

#### A. Existing Torture Law

International law, federal law, and the state statutes in California and Michigan make different attempts to define the conduct necessary to rise to the level of torture.

The Convention Against Torture creates the broadest application, limited only by the requirement that torture be done for a broad set of purposes by a state actor.<sup>239</sup> International law does not require

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it potentially raises).

237. See Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), <http://www.nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf> [<https://perma.cc/8L77-TQMM>].

238. See *id.*

239. The Convention Against Torture (CAT) includes:

*[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 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.*

CAT, *supra* note 1, art. 1 (emphasis added). CAT contains a broad definition of torture, which I make use of, but also requires a purpose, an element that I reject for the reasons discussed

physical violence, much less physical injury; nor does it require that the victim be in the custody or control of the perpetrator.<sup>240</sup> Once stripped of the state action requirement, as I propose, this statutory language would include all of the torturous conduct previously described.<sup>241</sup> Although CAT captures a torturer who uses every technique, even in the absence of violence, its purpose requirement, discussed in more detail below, does not particularly fit domestic violence.

At the other extreme, California requires the actual infliction of “great bodily injury,” though it also states that it does not require proof of pain.<sup>242</sup> This requirement restricts the application of the torture statute to cases involving felony levels of injury and, thus, would accomplish far less than this Article attempts. Like international law, California requires a purpose for torture but includes a broader list: “revenge, extortion, persuasion, or for any sadistic purpose.”<sup>243</sup> Arguably, a batterer would meet the purpose requirement if his torture counted as “persuasion.”<sup>244</sup>

Occupying the middle ground, U.S. federal law, which Michigan essentially copied, punishes violence that causes severe physical suffering, without requiring the “great bodily injury” of California law.<sup>245</sup> This would cover a pattern of domestic violence not resulting

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below. By its nature, CAT also applies only to state action. *See id.* (applying only when pain or suffering is inflicted by or with the involvement of a public official).

240. *See id.*

241. *See supra* Part I.

242. California requires serious physical violence:

Every person who, with the *intent to cause cruel or extreme pain and suffering for the purpose of* revenge, extortion, persuasion, or for any sadistic purpose, *inflicts great bodily injury* as defined in Section 12022.7 upon the person of another, is guilty of torture.

The crime of torture does not require any proof that the victim suffered pain.

CAL. PENAL CODE § 206 (West 2016). (emphasis added). California returns to the “purpose” requirement contained in international law. California defines “great bodily injury” as “a significant or substantial physical injury,” in its sentence enhancements. *See* PENAL § 12022.7(f).

243. PENAL § 206.

244. *See* PENAL § 206

245. *Compare* 18 U.S.C. § 2340 (2012), *and* MICH. COMP. LAWS § 750.85 (2016), *with* PENAL § 206. The federal law also outlaws torture by state actors, defined as: “an act committed by a person acting under the color of law *specifically intended to inflict severe physical or mental pain or suffering* (other than pain or suffering incidental to lawful sanctions) upon another person within his *custody or physical control.*” 18 U.S.C. § 2340 (emphasis added). The federal statute mirrors international law in defining the requisite intent to torture broadly. *See* CAT,

in serious injury, ranging from slaps to punches. Like federal law, Michigan law does not actually require physical violence.<sup>246</sup> Both laws punish the intentional infliction of “severe mental pain or suffering.”<sup>247</sup> The disjunctive “pain *or* suffering” serves the purpose of avoiding any argument over the difference between the two.<sup>248</sup> Sleep deprivation, for example, can cause incredible suffering but not necessarily pain.<sup>249</sup> Although both statutes would cover the torture techniques beyond physical violence described in Part I, each then creates serious limits in their definition sections.<sup>250</sup>

In the context of domestic violence, these statutes would punish only a narrow category of torture techniques beyond violence. They would ban only specific threats of imminent death or other serious violence against the victim or another and would seem to not cover implied or more vague threats. It leaves nebulous the legality of sleep deprivation, famously approved by the Department of Justice for regular use in Guantanamo.<sup>251</sup> These laws also do not forbid other methods of psychological torture, from denigration to mind games and sexual humiliation.

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*supra* note 1, art 1. But it adds a requirement, one I also reject in my proposal, requiring physical control over the victim. See 18 U.S.C. § 2340. The statute goes on to limit the possible definition of “severe mental pain or suffering,” by creating a very limited demonstrative list of its causes. See *id.*

246. The Michigan statute defines torture this way:

A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.

MICH. COMP. LAWS § 750.85(1).

247. *Id.*

248. See Luban and Shue, *supra* note 41, at 828.

249. See *id.* (“[O]f course forms of physical suffering exist that aren’t pain: freezing cold, unbearable heat, itching, nausea, paralysis, aching all over, inability to breathe—all are suffering; none are pain.”).

250. In both statutes, “mental pain or suffering” must be caused by a restrictive list of activities: (1) the intentional infliction of either “severe physical pain or suffering” (in federal law) or more narrowly “great bodily injury” (in Michigan law); (2) the use or threatened use of mind-altering drugs (not particularly relevant to domestic violence); (3) the threat “of imminent death” or other violence (in federal law, the threat of “severe physical pain or suffering,” and in Michigan law, the threat of “great bodily injury”), thus excluding less explicit threats; or (4) the threat that another person will be subjected to each of the categories above. See 18 U.S.C. § 2340(2); MICH. COMP. LAWS § 750.85(2)(d).

251. See Memorandum from Jay S. Bybee, *supra* note 237, at 13, 28-29.

The Michigan statute's requirement that the victim be within the perpetrator's "custody or physical control" is also limiting for domestic violence purposes.<sup>252</sup> Batterers sometimes kidnap and lock up their victims, but, generally, they use far more indirect methods of isolation and control.<sup>253</sup> A torture statute aimed at domestic violence could not include a kidnapping requirement.

All of these statutes fail to fully protect victims of domestic violence. Both California<sup>254</sup> and Michigan<sup>255</sup> have used their torture

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252. MICH. COMP. LAWS § 750.85. There are domestic violence cases that include such overt kidnapping, but those cases are more rare. *See, e.g.*, *People v. Studier*, No. 317351, 2015 WL 447408, at \*1, \*7 (Mich. Ct. App. Feb. 3, 2015) (per curiam) (ruling that defendant met the "custody and control" provision of the statute because he kicked in the victim's door and assaulted her all night, and rejecting the defendant's arguments that the victim could have left before or after the attack), *rev'd in part, denied in part on other grounds*, 871 N.W.2d 524 (Mich. 2015).

253. *See supra* Part I.

254. *See, e.g.*, *People v. Alvarez*, No. F066511, 2014 WL 5409070, at \*1-2 (Cal. Ct. App. Oct. 24, 2014) (affirming defendant's conviction of torture for beating his girlfriend repeatedly with his hands, feet, a shoe rack, and aluminum bat); *People v. McCoy*, 156 Cal. Rptr. 3d 382, 386, 388 (Ct. App. 2013) (affirming defendant's conviction of torture for folding his girlfriend's legs backwards over her head, breaking her back and leaving her a quadriplegic, shoving batteries in her rectum, and smearing feces on her face); *People v. Hamlin*, 89 Cal. Rptr. 3d 402, 411-13 (Ct. App. 2009) (affirming defendant's conviction of torturing his wife and sentence of life in prison for a long history of physical abuse, including strangulation, threats with guns and a sword, hitting her with a taser, hitting her injured wrist with a metal pipe, and threatening to kill her unless she falsely confessed to molesting their children); *People v. Burton*, 49 Cal. Rptr. 3d 334, 336-37 (Ct. App. 2006) (affirming defendant's conviction of torture of the mother of his children for permanently disfiguring her face with four deep cuts in the presence of their young sons); *People v. Baker*, 120 Cal. Rptr. 2d 313, 315-16 (Ct. App. 2002) (affirming defendant's torture conviction for pouring gasoline over his wife and setting her on fire); *People v. Hale*, 88 Cal. Rptr. 2d 904, 908-09 (Ct. App. 1999) (affirming defendant's torture conviction when he entered the victim's bedroom at night, while the victim slept beside her three-year-old daughter, and struck victim twice in the face with a ball peen hammer, cracking a number of her teeth, splitting her lip, and cutting her under the eye, and then stayed and hid in the room to observe victim's pain and terror); *People v. Healy*, 18 Cal. Rptr. 2d 274, 277 (Ct. App. 1993) (affirming defendant's torture conviction when he told the victim she never had any real hardship in her life and that "he needed to create some hardship" to get her to listen to him and proceeded to beat the victim unprovoked, warning the victim not to make any noise during beatings for fear a neighbor would call police).

255. *See, e.g.*, *Studier*, 2015 WL 447408, at \*1 (affirming defendant's torture conviction based on an attack against his estranged wife, whom he had abused for years, in which he kicked open her door and assaulted her until dawn, striking her in the face, kicking her in the groin, choking her, threatening her with a steak knife, calling her a whore, and blaming her for the attack); *People v. Hinton*, No. 308019, 2013 WL 514870, at \*1 (Mich. Ct. App. Feb. 12, 2013) (per curiam) (affirming defendant's torture conviction when he committed sexual assault against his victim, peed in her mouth, made her put a beer bottle in her vagina, whipped her with a cord while naked, tied her to the bed, and gagged her while he left the house);

statutes frequently in domestic violence cases, but, given the strict requirements of their laws, those prosecutions have focused on cases involving extreme and sometimes lurid facts. As a result, a new statute that will apply more broadly must be created.

### *B. Proposed Torture Statute*

My draft of a torture statute includes some easy choices, like omitting a state action requirement and a “custody or control” requirement. Other choices remain much closer, like the decision to include at least one act of violence while criminalizing a much broader spectrum of torture techniques. To resolve the deficiencies of existing statutes, this Article proposes the following statute:

Any person who knowingly inflicts severe physical or mental pain or suffering upon another, through a pattern of torture techniques including at least one crime of violence, is guilty of torture. Torture techniques include, but are not limited to: physical violence, threats of violence to the victim or to the victims’ family members or loved ones, sleep deprivation, sexual violence or humiliation, or psychological torture.

“Crime of violence” should be defined to include simple battery, so that the torture statute will capture a broad range of domestic violence. It should also include kidnapping, because psychological abuse alone should rise to the level of torture when conducted upon a kidnapping victim. “Psychological torture” should be defined, with reference to the tort of intentional infliction of emotional distress,<sup>256</sup>

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People v. Hoover, No. 308115, 2013 WL 45647, at \*1, \*4-5 (Mich. Ct. App. Jan. 3, 2013) (per curiam) (affirming defendant’s torture conviction after he broke into his ex-girlfriend’s home, grabbed her and forcibly exposed her breast to his friends, choked her, and threatened to kill her and slash her car tires; and holding that the evidence presented was sufficient to show “severe mental pain or suffering” by the victim, even in the absence of great bodily injury); People v. Schaw, 791 N.W.2d 743, 744 (Mich. Ct. App. 2010) (per curiam) (affirming defendant’s torture conviction after he choked, restrained, threatened to kill, attempted to drug, and held a knife to the neck of his ex-wife); People v. Green, No. 279519, 2009 WL 349749, at \*1 (Mich. Ct. App. Feb. 12, 2009) (per curiam) (affirming defendant’s torture conviction when he struck the victim with his fist multiple times in the face and the vagina, forced an ammunition clip down the victim’s throat and into her anus, and heated knife blades and held them against the victim’s thigh).

256. See RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965). As background on

as “the use of extreme and outrageous conduct to intentionally cause severe emotional distress.” Finally “pattern” should be defined as two or more torture techniques, or one technique that results in serious bodily injury.

The statute (1) removes a state action requirement in order to apply to private torture; (2) includes a requirement of at least some physical violence, threat of violence, or kidnapping to avoid controversy and the dilution of the concept of felony torture; (3) provides that once that threshold requirement is met, the full range of torture techniques are illegal and clearly relevant at trial; (4) adds a pattern requirement made necessary by broad line drawing; (5) removes the “custody and control” requirement as too narrow in the context of domestic violence; and (6) removes a purpose requirement as both redundant given the conduct involved and difficult to prove in the abstract. The choices involved in each of these elements are explained below.

### *1. Removing the State Action Requirement*

First and foremost, a private torture statute must drop any state action requirement. The common definition of “torture” refers to the technique rather than to its use by state actors.<sup>257</sup> Michigan and California, as previously discussed, have already passed private torture statutes of general application seemingly without controversy.<sup>258</sup> Numerous states use torture as an aggravating factor in murder cases.<sup>259</sup> Several other states also use torture in their child

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definitions of psychological torture, see Reyes, *supra* note 26, at 594-95.

257. See, e.g., *Torture*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/torture> [<https://perma.cc/2HYB-XGMQ>] (“[T]he act of causing severe physical pain as a form of punishment or as a way to force someone to do or say something; something that causes mental or physical suffering; a very painful or unpleasant experience.”); *Torture*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/torture](http://www.oxforddictionaries.com/us/definition/american_english/torture) [<https://perma.cc/X2U9-V3JJ>] (“The action or practice of inflicting severe pain on someone as a punishment or to force them to do or say something, or for the pleasure of the person inflicting the pain.”).

258. See CAL. PENAL CODE § 206 (West 2016); MICH. COMP. LAWS § 750.85 (2016).

259. See, e.g., ALASKA STAT. § 12.55.125(a)(3) (2016); ARK. CODE ANN. § 5-4-604(8) (2015); see also Christopher G. Browne, Note, *Tortured Prosecuting: Closing the Gap in Virginia’s Criminal Code by Adding a Torture Statute*, 56 WM. & MARY L. REV. 269, 274-75 (2014) (discussing the inclusion of torture as an aggravating factor for murder and capital punishment).

abuse statutes.<sup>260</sup> And, several states have “sexual torture” statutes that cover crimes like rape with objects.<sup>261</sup>

Outlawing torture committed by private actors does nothing to weaken the special condemnation of state-sponsored torture. Torture committed by state actors is particularly terrible and worthy of special attention, but all torture is abhorrent and worthy of criminalization. Nor does the focus of international and federal law on state-sponsored torture make that focus mandatory. As a practical matter, neither body of law could have general jurisdiction over private torture.<sup>262</sup>

Focusing the public on the abhorrence of torture in general might actually help remind the public that the state is not justified in making use of torture. To an extraordinary degree after the September 11 attacks, the American public’s resistance to the state’s use of torture to capture terrorists eroded in the face of government arguments about its necessity to remain safe in a dangerous world.<sup>263</sup> Popular culture, from the television show *24* to the film *Zero Dark Thirty*, reifies this effect through dramatized stories justifying torture by government officials.<sup>264</sup> When the public feels vulnerable enough to rationalize torture, it also becomes tempted to minimize the harm of torture.

In contrast, torture committed by private actors presents no such cognitive dissonance. It epitomizes acknowledged evil and,

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260. See, e.g., CONN. GEN. STAT. § 53-20 (2015); see also Browne, *supra* note 259, at 275 (discussing the inclusion of torture as an aggravating factor for child abuse).

261. See, e.g., ALA. CODE § 13A-6-65.1 (2016) (banning “sexual torture” in order to include rape with an inanimate object).

262. International law focuses on state action. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW II INTRO. NOTE (AM. LAW INST. 1987). Federal law requires a constitutional basis to regulate private violence, either through the Commerce Clause or to enforce the Fourteenth Amendment, neither of which would seem to apply here. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down portion of the Violence Against Women Act that created a private right of action against gender-based violence, because it exceeded Congress’s power). Regardless, the focus of international and federal law on state action has nothing to do with the question of whether states *should* regulate nonstate action.

263. Recent polling shows that the American public has become increasingly inured to the horrors of torture when done by the state to root out terrorism. See *supra* note 166.

264. See, e.g., M. Angela Buenaventura, *Torture in the Living Room*, 6 SEATTLE J. SOC. JUST. 103, 116-25 (2007) (discussing the impact of the television show *24* on the public’s perception of torture); Jane Mayer, *Zero Conscience in Zero Dark Thirty*, NEW YORKER (Dec. 14, 2012), <http://www.newyorker.com/news/news-desk/zero-conscience-in-zero-dark-thirty> [<https://perma.cc/2KZ7-HUG5>].

thus, reminds the public of torture's cumulative harm. The public can more clearly measure, for example, the degradation of psychological abuse and the impact of sleep deprivation in the context of a kidnapper than it can when justifying police interrogation techniques.<sup>265</sup> The public is unlikely to rationalize the horrors of waterboarding conducted by criminals, though it proves surprisingly willing to do so when it seems necessary to locate terrorists.<sup>266</sup>

## *2. Defining Torture*

The proposed statute would borrow language from the statutes described above to define torture as the intentional infliction of "severe physical or mental pain or suffering."<sup>267</sup> As with stalking laws, the requirement of injury to the victim is both subjective—the victim must actually be so injured—and objective—a reasonable person would be so injured. The injury must rise to the level of "severe" to qualify as torture. And, as explained immediately below, it must involve a pattern including at least one act of violence.

This proposed statutory language would capture and criminalize the full array of torture techniques. A nonexclusive list of these techniques helps to clarify the types of nonviolent behavior the statute means to address. I would include both the obvious—violence and threats of violence—and the less obvious techniques with particular resonance in domestic violence cases—sleep deprivation, sexual humiliation, and psychological torture. While even nonexhaustive lists risk being treated as exhaustive, this list is necessary to suggest to courts the types of techniques batterers and other torturers use. In theory, the statute should still remain open to punishing more creative methods of abuse.

### *a. Requiring at Least One Act of Violence*

Labeling domestic violence as torture will have less impact if we water down the definition of torture. Thus, the proposed statute

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265. *See, e.g.*, *Lisenba v. California*, 314 U.S. 219, 229-30, 240 (1941) (deeming answers given during a police interrogation voluntary, despite the testimony of use of sleep deprivation and physical contact).

266. *See supra* note 166 and accompanying text.

267. *See, e.g.*, 18 U.S.C. § 2340(1) (2012).

creates a threshold requirement of a “crime of violence” before turning to the punishment of other torture techniques. Accordingly, psychological abuse standing alone, no matter how painful, would not meet the definition of torture.

The threshold requirement of violence is not overly high. The definition would include simple battery and misdemeanor domestic violence, a broader standard than the California torture statute’s requirement of “great bodily injury.”<sup>268</sup> At the same time, however, the statute as a whole would clearly avoid inflating every petty shove into torture. Standing alone, a shove would not rise to the level of torture, unless other behavior causing the victim “severe physical or mental pain or suffering” accompanied it.

I singled out kidnapping, which is usually considered a crime of violence anyway,<sup>269</sup> in my threshold requirement in order to capture the kind of torture that occurs in nondomestic violence cases. Sexually humiliating, degrading, and using mind games against someone you have tied up in your basement meets the public paradigm of torture without watering down its impact.

The threshold act of violence requirement purposefully excludes the abuser who causes severe mental pain and suffering through verbal cruelty, sleep deprivation, sexual humiliation, and emotional degradation but never actually uses violence. This was not an easy decision. There exist torture chambers operated through purely psychological means, some of them quite dangerous.<sup>270</sup> By its nature, torture focuses on mental and emotional scars and permanent changes to the personality.<sup>271</sup> As some scholars of torture point out, the line between physical and mental injury is inherently blurred given the physiological reactions of the brain and body to trauma.<sup>272</sup>

Should we punish cruelty as torture? We have a growing trend of punishing nonviolent behavior, because it causes serious emotional

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268. CAL. PENAL CODE § 206 (West 2016).

269. *See, e.g.*, 18 U.S.C. § 924(c)(3)(A) (defining “crime of violence” as any felony containing the use or threatened use of force against another). The commentary for the United States Sentencing Commission Guidelines makes clear that this definition includes kidnapping. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENTENCING COMM’N 2015).

270. Luban & Shue, *supra* note 41, at 824.

271. *See supra* Part I.

272. Luban & Shue, *supra* note 41, at 830 (“[M]ental pain and suffering can cause physical effects and, vice versa, that physical pain and suffering can cause mental effects—including mental pain and suffering.”).

suffering. Stalking statutes punish patterns of behavior that collectively amount to implied threats.<sup>273</sup> In the last few years, every state has enacted an antibullying statute.<sup>274</sup> These statutes punish a course of conduct designed to psychologically abuse another.<sup>275</sup> Antibullying statutes range from prohibitions on “creat[ing] a hostile environment [and] ... disrupt[ing] the education process,”<sup>276</sup> to the causing of “psychological distress” through, among other things, “teasing” or “social exclusion.”<sup>277</sup> The statutes focus on the mental pain bullying causes, whether that mental pain is caused by physical violence, threats, or by purely psychological techniques.<sup>278</sup> Forty-four states also prohibit hazing, using similar definitions of patterns of sometimes purely psychological techniques against consenting victims.<sup>279</sup>

Broadening torture to include cruelty in the absence of violence would resemble the criminalization of the tort of intentional infliction of emotional distress (IIED).<sup>280</sup> IIED allows civil damages for “outrageous” behavior resulting in “extreme emotional distress.”<sup>281</sup>

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273. See Ashley N.B. Beagle, Comment, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457, 476 (2011).

274. See Deborah Temkin, *All 50 States Now Have a Bullying Law. Now What?*, HUFFINGTON POST (Apr. 27, 2015, 12:19 PM, updated June 27, 2015), [http://www.huffingtonpost.com/deborah-temkin/all-50-states-now-have-a\\_b\\_7153114.html](http://www.huffingtonpost.com/deborah-temkin/all-50-states-now-have-a_b_7153114.html) [<https://perma.cc/M9CG-C8WG>].

275. Massachusetts, for example, defines “bullying” as follows:

[T]he 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.

MASS. GEN. LAWS ch. 71, § 370 (2016).

276. CONN. GEN. STAT. § 10-222d (2016).

277. FLA. STAT. § 1006.147(3)(a)(1)-(2) (2016).

278. See Claire Wright, *Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN’S L.J. 457, 554 (2013).

279. See *id.* at 555. For a current list of anti-hazing statutes by state, see *States with Anti-Hazing Laws*, STOP HAZING, <http://www.stophazing.org/states-with-anti-hazing-laws/> [<https://perma.cc/FG7F-ZLTX>].

280. See, e.g., N.M. STAT. ANN. § 13-1628 (West 2016).

281. See Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 188 (1995) (“The success of suits for intentional infliction of emotional distress

In the context of marriage in particular, courts struggle, but have managed, to find lines between mere meanness and “outrageous” cruelty.<sup>282</sup>

I reject this path for several reasons. First, most potentially lethal cases do, in fact, involve violence.<sup>283</sup> Second, I cannot imagine that prosecutors would charge even terrible cruelty as torture, unless it involved at least some violence. Indeed, as I address below, it will require serious effort to persuade prosecutors to make use of the statute even in the most paradigmatic cases. Accordingly, there would be little benefit to including a very broad definition, and it might come at quite a cost. This Article attempts to create a felony torture statute deemed serious, a law that will bring the most horrendous of facts to light for the first time. Diluting the statute would make it both more controversial to legislators and less influential with the public.

#### *b. Adding a Pattern Requirement*

As another method to narrow the scope of the statute to a recognizable definition of torture, I also would require a minimum pattern of conduct. A pattern requirement helps to distinguish between true torture and more isolated and less horrific conduct. It helps to prove both the intentionality and the impact of the defendant’s behavior.<sup>284</sup> For this reason, stalking, hazing, and bullying statutes almost always make use of a pattern requirement in order to limit their scope.<sup>285</sup>

I include a pattern requirement even though none of the existing general torture statutes discussed do so. A pattern requirement provides a limiting factor that better captures the repetitive nature

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generally turns on the plaintiff’s ability to demonstrate that the defendant’s conduct was ‘outrageous.’”).

282. See *id.* at 188-89; see, e.g., *id.*; *Hakkila v. Hakkila*, 818 P.2d 1320, 1330-31 (N.M. Ct. App. 1991) (holding that a husband’s insults to his wife over the course of their marriage were insufficiently outrageous to establish liability for intentional infliction of emotional distress).

283. See Campbell, *supra* note 176, at 97; Jaquelyn C. Campbell et al., *Risk Assessment for Intimate Partner Violence*, in *CLINICAL ASSESSMENT OF DANGEROUSNESS* 136, 137 (Georges-Franck Pinard & Linda Pagani eds., 2000).

284. See Wright, *supra* note 278, at 518.

285. See *id.* For an analysis of each state’s stalking laws, see *Criminal Stalking Laws*, STALKING RESOURCE CTR. (July 20, 2015), <https://victimsofcrime.org/our-programs/stalking-resource-center/stalking-laws/criminal-stalking-laws-by-state> [<https://perma.cc/R3N2-9JZG>].

of domestic violence.<sup>286</sup> It replaces some of the other limiting factors in those statutes that I have rejected, from “great bodily injury”<sup>287</sup> to “custody or physical control” over the victim.<sup>288</sup>

A pattern requirement directs prosecutors to examine and prove a history of abuse, rather than focus on the culminating act, as the Michigan and California torture prosecutions have tended to do.<sup>289</sup> When prosecutors present evidence of a pattern, moreover, they should have little difficulty proving the defendant’s intent, as discussed below.<sup>290</sup>

In my proposal, this pattern requirement would be met with two or more “torture techniques.” The proposal also leaves the door open for a single egregious act resulting in “serious bodily harm” to cover an extreme case: a defendant who sets his victim on fire, and nothing else, would still be guilty of torture.<sup>291</sup>

### *3. Torture Should Require Specific Intent but Without a Further Purpose Requirement*

The crux of each of the existing torture statutes discussed herein rests on the defendant’s specific intent to inflict “severe,”<sup>292</sup> or “cruel or extreme,”<sup>293</sup> “physical or mental pain or suffering.”<sup>294</sup> The

286. For similar reasons, several child abuse torture statutes also include a pattern requirement. *See, e.g.*, IOWA CODE § 726.6A (2016); *State v. Crawford*, 406 S.E.2d 579, 581 (N.C. 1991).

287. CAL. PENAL CODE § 206 (West 2016).

288. 18 U.S.C. § 2340 (2012).

289. *See supra* notes 254 and 255.

290. *See People v. Hamlin*, 89 Cal. Rptr. 3d 402, 455 (Ct. App. 2009) (affirming defendant’s torture conviction based on a pattern of violence as itself proof of specific intent). The defendant in that case also argued to no avail that the California torture statute precluded a pattern of conduct adding up to torture, because the statute did not require a course of conduct. *Id.*

291. *See, e.g., People v. Baker* 120 Cal. Rptr. 2d 313, 319 (Ct. App. 2002) (affirming defendant’s torture conviction after he poured gasoline over his wife and set her on fire).

292. CAT, *supra* note 1, art. 1; 18 U.S.C. § 2340.

293. MICH. COMP. LAWS § 750.85(1) (2016); CAL. PENAL CODE § 206 (West 2016).

294. The federal torture statute requires “specific intent” in its statutory language. 18 U.S.C. § 2340. Michigan courts have interpreted its torture statute to require specific intent. *See People v. Galvan*, Nos. 299814, 299822, 2013 WL 5338520, at \*8 (Mich. Ct. App. Sept. 24, 2013) (per curiam) (“[D]efendant was charged with torture and first-degree child abuse. These were specific intent crimes.”). California courts have similarly interpreted their own statutes. *See People v. Pearson*, 266 P.3d 966, 980 (Cal. 2012) (“[T]his mental state element describes a specific intent rather than general criminal intent.”).

defendant must act with the *purpose* of causing the victim to suffer, not with mere knowledge that pain will result.<sup>295</sup>

The proposed statute would incorporate this specific intent requirement to avoid watering down the definition of torture. First, a specific intent requirement distinguishes between a true torturer and a dentist or surgeon. Surgeons act with the knowledge that they cause pain but (hopefully) without the purpose of causing pain.<sup>296</sup> Second, the intent requirement helps to distinguish between true torture and ordinary violence by requiring that the infliction of pain constitute more than an afterthought. A torturer commits violence not just out of rage, but because he intends to make the victim suffer.<sup>297</sup> Along with the other proposed limiting factors, the specific intent requirement helps to identify the requisite cruelty.

How would a prosecutor prove specific intent? Courts in California and Michigan have upheld torture convictions when evidence of the defendant’s callous disregard for suffering demonstrated specific intent.<sup>298</sup> Prosecutors met this standard by providing evidence of, for example, repeated beatings,<sup>299</sup> or the severity of the victim’s wounds.<sup>300</sup>

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295. See generally MODEL PENAL CODE § 2.02 (AM. LAW INST., Proposed Official Draft 1962); Oona Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT’L L. 791, 801 n.40 (2012) (“The Code ‘establishes four levels of culpable criminal intent ranging, in order, from the most culpable to the least culpable level; purposeful, knowing, reckless, and negligent.’” (quoting FRANK AUGUST SCHUBERT, CRIMINAL LAW: THE BASICS 157 (2d ed. 2010))).

296. Luban & Shue, *supra* note 41, at 849. The author of the infamous “torture memo” argued that the specific intent of the federal torture statute required that a torturer act with the “precise objective” of causing pain, rather than the use of pain in order to extract information. Memorandum from Jay S. Bybee, *supra* note 237, at 3. It is hard to imagine a state court adopting such strained reasoning when applied to private torture.

297. See, e.g., 18 U.S.C. § 2340 (defining torture as an act “specifically intended to inflict severe physical or mental pain or suffering”); CAL. PENAL CODE § 206 (West 2016) (defining a torturer as one who “inten[ds] to cause cruel or extreme pain and suffering”).

298. See *supra* Part III.

299. See, e.g., *People v. Assad*, 116 Cal. Rptr. 3d 699, 706 (Ct. App. 2010) (holding that the state met its burden of proving defendant acted with the intent to inflict cruel pain when he repeatedly struck his son in regions of his body in which he had already suffered injuries); *People v. Misa*, 44 Cal. Rptr. 3d 805, 809 (Ct. App. 2006) (upholding finding of specific intent based on evidence that the defendant struck his victim in the head repeatedly over a significant period of time and displayed callous indifference to the victim’s obvious need for medical attention).

300. See *People v. Burton*, 49 Cal. Rptr. 3d 334, 337 (Ct. App. 2006) (ruling that “a jury may consider the severity of the wounds in determining whether the defendant intended to torture,” and rejecting defendant’s argument that he did not act with “intent to cause cruel

The violence committed by batterers involves an abundance of evidence that the batterer intended to cause his victim to suffer. As described in Part I, domestic violence involves a pattern of repeated activity, clearly demonstrating intent and premeditation.<sup>301</sup> Batterers also use a variety of different techniques designed to find new and creative ways to cause physical and mental pain.<sup>302</sup> They do not just demonstrate the callous disregard for their victims' pain; they work hard to cause suffering in creative and terrible ways.<sup>303</sup>

Although I would require specific intent to inflict "severe physical or mental pain or suffering," I would not go farther and require a specified purpose or motive.<sup>304</sup> The specific intent to cause pain should suffice to distinguish torture from more mundane violence. Indeed, neither the federal torture statute, nor the Michigan statute, requires a particular purpose.<sup>305</sup> And despite the purpose requirement in international law, legal scholars have rarely focused on that element, arguing instead that the government should not engage in torture regardless of its purpose.<sup>306</sup>

Omitting a purpose requirement may seem counterintuitive—a lost opportunity to focus on the batterer's motive. I argued above that one of the important insights that the torture label brings to an understanding of domestic violence is the notion of a purpose beyond the loss of temper.<sup>307</sup> Batterers act to control another human being, to exert power.<sup>308</sup> For that reason, Professor Tuerkheimer

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or extreme pain and suffering" when he permanently disfigured the face of his ex-girlfriend by cutting her deeply four times in the face in the presence of their children).

301. See *supra* Part I.

302. See *supra* Part I.

303. See *supra* Part I.

304. In contrast, international law lists the following requisite purposes, nonexclusively: "obtaining from [the victim] 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." CAT, *supra* note 1, art 1. California requires a purpose of "revenge, extortion, persuasion, or for any sadistic purpose." CAL. PENAL CODE § 206 (West 2016). Note that California courts have interpreted "sadistic purpose" as any defendant who derives pleasure from causing pain. *People v. Pre*, 11 Cal. Rptr. 3d 739, 743 (Ct. App. 2004).

305. See 18 U.S.C. § 2340 (2012); MICH. COMP. LAWS § 750.85 (2016).

306. See Copelon, *supra* note 5, at 329, 329 n.136; Rebecca B. Schechter, Note, *Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture*, 18 AM. U. INT'L L. REV. 1233, 1257 (2003).

307. See *supra* Part III.B.

308. See *supra* Part I.

would craft a broader domestic violence statute defining it as violence done for the purpose of control.<sup>309</sup> The list of purposes contained in the California statute—“revenge, extortion, persuasion, or for any sadistic purpose”<sup>310</sup>—would still work well in covering domestic violence, perhaps with the addition of the word “control.”

Yet a torture statute should provide the insight of purpose without actually requiring a prosecutor to prove purpose. Demonstrating that the level of cruelty over time involved in domestic violence is torture will necessarily show the judge or jury that the defendant did not act out of whim or frustration.<sup>311</sup> By its very nature, torture implies premeditation and purpose. Requiring proof of purpose to control, moreover, seems both pointless and arduous, akin to suddenly requiring prosecutors to prove motive in every case. The law generally does not require this kind of proof of motive.<sup>312</sup> A prosecutor can prove intentional murder, for example, without ever understanding why the defendant chose to kill his victim.<sup>313</sup> Yet evidence of motive remains generally admissible, as it would in a torture prosecution.<sup>314</sup> Courts recognize that motive evidence helps the jury understand and believe the other evidence of the defendant’s guilt.<sup>315</sup>

A purpose requirement would add little and might even come at significant cost. A prosecutor might prove a pattern of domestic violence sufficient to show that the defendant acted intentionally (rather than merely negligently) and that the defendant’s actions

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309. Tuerkheimer, *supra* note 7, at 1019-20.

310. CAL. PENAL CODE § 206 (West 2016). The concept of “sadism” as a purpose would capture much, but not all, of domestic violence. About 40 percent of men in Professor Dutton’s treatment groups meet the diagnostic criteria for antisocial behavior. See DUTTON WITH GOLANT, *supra* note 204, at 26. These men seem to take pleasure in violence and in their utter lack of empathy find violence soothing. *Id.* Yet even these batterers are motivated by getting their way. *Id.* at 28-29.

311. See Tuerkheimer, *supra* note 7, at 977; *supra* Part I.

312. See Burke, *supra* note 12, at 592 (“[H]ardly any rule of penal law is more definitely settled than that motive is irrelevant.” (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 153 (1947))); Tuerkheimer, *supra* note 7, at 984-85. There are exceptions to this general rule for crimes that revolve around motive, like hate crimes. See *Wisconsin v. Mitchell*, 508 U.S. 476, 477-78 (1993) (holding that states could lawfully enhance punishment for conduct based on disfavored motives); Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 389 n.2 (2002).

313. See Burke, *supra* note 12, at 594; Tuerkheimer, *supra* note 7, at 984-85.

314. Tuerkheimer, *supra* note 7, at 984-85.

315. *Id.*

thus demonstrate his intent to cause “severe physical or mental pain or suffering.” Yet that prosecutor might seriously struggle to further prove that the defendant intended to control the victim. Ideally, every case would involve an exhibit of the batterer’s written “rules” for the victim. In many cases, however, the batterer’s purpose will remain more subtle and implied, and thus very difficult to prove.

Under the proposed statute, the prosecutor must prove the defendant’s specific intent to cause pain or suffering, without having to prove a further motive to control the victim through that suffering. The torture description, in and of itself, helps to clarify that violence has a purpose without having to actually prove that purpose in each case. And as with any motive, evidence of a controlling purpose should remain admissible.<sup>316</sup>

### *C. Making Sure the Torture Statute Does Not Sit on a Shelf*

Finally, crafting a statute and getting it passed by state legislatures would constitute only the beginning of the effort to properly redefine domestic violence as torture. The bigger step is to find persuasive ways to encourage police and prosecutors to make use of a new torture statute.<sup>317</sup> This will not be an easy task, but I will now suggest some very pragmatic methods to try.

As described above, prosecutors in California and Michigan have used their torture statutes in domestic violence cases.<sup>318</sup> But given the size of those states, and the relatively few appeals of torture convictions, it seems unlikely that prosecutors make use of the torture statutes as often as they could. The cases clearly focus on the most egregious levels of violence, perhaps because those torture statutes are drawn too narrowly, as I argue above.<sup>319</sup> Michigan’s requirement that the defendant have “custody or control” over the victim and California’s requirement of “great bodily injury” would make the statutes inapplicable to most domestic violence cases.<sup>320</sup>

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316. Wright, *supra* note 278, at 561.

317. See generally Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011).

318. See *supra* notes 254-55 for descriptions of some of those cases.

319. See *supra* Part IV.A.

320. See *supra* Part IV.A.

My hope is that a statute designed for the purpose of capturing domestic violence would broaden its application. Even with this new statute in place, there would remain a real risk that this felony torture statute would remain unused, or used only in nondomestic violence cases. Prosecutorial discretion can become a black hole that swallows statutory law.<sup>321</sup>

The scale of the pragmatic problems involved in using a new statute can be illustrated by statistics I have access to in my home city. With a population of only about 390,000,<sup>322</sup> New Orleans had 7390 9-1-1 calls complaining of domestic violence in the first *six months* of 2015.<sup>323</sup> Those calls resulted in 1690 arrests or warrants: a charge rate of approximately 23 percent.<sup>324</sup> The police booked 204 of those cases as felonies: 12 percent of all charged cases.<sup>325</sup> After screening, the district attorney added another 56 cases,<sup>326</sup> bringing the felony rate up to 15 percent.

The District Attorney’s Office assigns five prosecutors to their misdemeanor domestic violence cases and chooses to prosecute these cases in a Municipal Court.<sup>327</sup> Each assistant district attorney therefore has a docket of approximately 60 cases a month, or about 3 new cases per work day. Of the 1430 misdemeanor cases charged in six months, prosecutors brought only 8 to trial, resulting in 7 acquittals and 1 guilty verdict.<sup>328</sup> Another 522 pleaded guilty, often to lesser offenses, like trespassing or disturbing the peace.<sup>329</sup> Presumably, the rest were dismissed. Meanwhile, the domestic-violence-related murders continue to pile up.<sup>330</sup>

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321. See Fairfax, *supra* note 317, at 1261.

322. *Quick Facts: New Orleans City, Louisiana*, U.S. CENSUS BUREAU, [www.census.gov/quickfacts/table/PST045215/2255000](http://www.census.gov/quickfacts/table/PST045215/2255000) [<https://perma.cc/L5S2-6BPF>].

323. NEW ORLEANS HEALTH DEPT., BLUEPRINT FOR SAFETY DOMESTIC VIOLENCE DATA TRACKING (July 2015) [hereinafter NOLA BLUEPRINT 2015] (on file with the *William & Mary Law Review*). This information was provided pursuant to a federally funded “Blueprint” project in New Orleans, Louisiana, by the Police Department and District Attorney’s Office. The author serves on a taskforce for that project and has the statistics in a report on file.

324. *See id.*

325. *See id.*

326. *Id.*

327. See Alex Woodward, *Domestic Violence: The DA’s Side*, GAMBIT WKLY. (Dec. 9, 2013), <http://www.bestofneworleans.com/gambit/domestic-violence-the-das-side/Content?oid=2285348> [<https://perma.cc/4DQA-WUZT>].

328. NOLA BLUEPRINT 2015, *supra* note 323.

329. *Id.*

330. In 2015, nine women and children were reportedly killed by abusers in New Orleans,

In general, district attorney's offices fear domestic violence prosecutions, because they lower conviction rates.<sup>331</sup> At the moment, prosecutors succeed at tucking these cases away in their statistics as mere misdemeanors, generally deemed unimportant by FBI statistics and the press.<sup>332</sup> Indeed, in 2011, the city of Topeka,

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a city of fewer than 400,000 people. See, e.g., Jonathan Bullington, *In Algiers Shooting, Years of Abuse End in Daughter's Heroic Act*, TIMES-PICAYUNE (Feb. 4, 2015), [http://www.nola.com/crime/index.ssf/2015/02/in\\_algiers\\_pattern\\_of\\_abuse\\_en.html](http://www.nola.com/crime/index.ssf/2015/02/in_algiers_pattern_of_abuse_en.html) [<https://perma.cc/YC8D-Q7Z4>] (reporting on Lindsey Crain, 28, who was killed by her stepfather with a shotgun as she protected her mother from him); Jonathan Bullington, *McDonald's Stabbing Victim IDed by Orleans Coroner*, TIMES-PICAYUNE (Mar. 23, 2015), [http://www.nola.com/crime/index.ssf/2015/03/woman\\_fatally\\_stabbed\\_at\\_elysi.html](http://www.nola.com/crime/index.ssf/2015/03/woman_fatally_stabbed_at_elysi.html) [<https://perma.cc/NR79-QGS3>] (reporting on Julia Anderson, 23, who was stabbed in the neck by her boyfriend in a parking lot); Andy Cunningham, *Family of Murdered Mom, Daughter Speak Out After Accused Killer's Arrest*, WDSU NEWS (Mar. 6, 2015), <http://www.wdsu.com/news/local-news/neworleans/family-of-murdered-mom-daughter-speak-out-after-accused-killers-arrest/31658712> [<https://perma.cc/E7RD-UWC3>] (reporting on Walesha Williams, 25, her daughter, Paris Williams, 8, and a friend, who were all shot and killed by the mother's ex-boyfriend); Ken Daley, *Here's How a Broken Ankle Became a Homicide*, TIMES-PICAYUNE (Mar. 27, 2015), [http://www.nola.com/crime/index.ssf/2015/03/heres\\_how\\_a\\_broken\\_ankle\\_became\\_a\\_homicide.html](http://www.nola.com/crime/index.ssf/2015/03/heres_how_a_broken_ankle_became_a_homicide.html) [<https://perma.cc/R47Y-35GA>] (reporting on Teita Vaughn, 33, who died from a pulmonary embolism, after her boyfriend attempted to throw her out of a window, and then broke her ankle by repeatedly smashing it with an object until it cracked); Ken Daley, *Slain Tulane Law Student Sara LaMont 'Always Was the Brightest Star'*, TIMES-PICAYUNE (Apr. 16, 2015), [http://www.nola.com/crime/index.ssf/2015/04/slain\\_tulane\\_law\\_student\\_alway.html](http://www.nola.com/crime/index.ssf/2015/04/slain_tulane_law_student_alway.html) [<https://perma.cc/987H-GSMU>] (reporting on Sara LaMont, who was third in her class at Tulane Law School and killed in an apparent murder-suicide by her boyfriend, also a Tulane Law School student); Heather Nolan, *Couple's Death Investigated as Murder-Suicide: NOPD*, TIMES-PICAYUNE (June 30, 2015), [http://www.nola.com/crime/index.ssf/2015/06/couples\\_death\\_investigated\\_as.html](http://www.nola.com/crime/index.ssf/2015/06/couples_death_investigated_as.html) [<https://perma.cc/N2PQ-9QAZ>] (reporting on Margaret Ambrose, 72, killed by her husband in an apparent murder-suicide); Heather Nolan, *Victim's Boyfriend Is Suspect in Metropolitan Street Shooting: NOPD*, TIMES-PICAYUNE (June 4, 2015), [http://www.nola.com/crime/index.ssf/2015/06/metropolitan\\_street\\_shooting.html](http://www.nola.com/crime/index.ssf/2015/06/metropolitan_street_shooting.html) [<https://perma.cc/KR37-TG7H>] (reporting on Melissa Hunter, 23, who was shot multiple times by her boyfriend); Carlie Kollath Wells, *Algiers Woman Killed in Stabbing Identified by Coroner*, TIMES-PICAYUNE (Apr. 20, 2015), [http://www.nola.com/crime/index.ssf/2015/04/algiers\\_woman\\_stabbed\\_name.html](http://www.nola.com/crime/index.ssf/2015/04/algiers_woman_stabbed_name.html) [<https://perma.cc/E8FK-SDNF>] (reporting on Esperanza Rojas, 25, who was stabbed multiple times). See also Matt Sledge & John Simerman, *Arrested NOPD Officer Wardell Johnson Has History of Downplaying Domestic Violence Incidents*, NEW ORLEANS ADVOCATE (July 8, 2015, 9:03 AM), <http://theadvocate.com/news/neworleans/neworleansnews/12847224-123/arrested-nopd-officer-wardell-johnson> [<https://perma.cc/PD7Z-JULE>].

331. See Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 43-44 (2007).

332. Naomi Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, 161, 162-63 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) ("For battered women and their advocates, prosecutors' offices have often been a major impediment to improving the overall response of the criminal justice system. Indeed, some prosecutors admit that they simply do not take

Kansas, threatened to repeal its municipal domestic violence statute in order to save money by not prosecuting the cases at all.<sup>333</sup>

Treating domestic violence as torture would ratchet up the pressure to take these cases seriously as felonies.<sup>334</sup> This only works, however, if the police charge those cases as felonies in the first place. Prosecutors are not measured by how many misdemeanor arrests they fail to bump up to felonies; they are measured by how many felony arrests they decline.<sup>335</sup> Then, and only then, do the cases become politically and statistically relevant in our current regime.

Another probable hurdle is getting police to do full investigations that could potentially lead to convictions under a torture statute. Police are unlikely to do the kind of work required to identify patterns of torture on the scene of a domestic violence arrest. First, police avoid making difficult subjective statutory calls when they can charge simpler lesser offenses.<sup>336</sup> More importantly, the political pressure to reduce crime rates has famously resulted in fewer charging decisions.<sup>337</sup> In an environment in which attempted murder routinely becomes aggravated battery by shooting, felony torture will probably result in an arrest for simple domestic violence, instantly “reducing” that jurisdiction’s violent crime rate.

Ideally, the dedicated prosecutor—armed with excellent training, infinite investigative resources, and the time to triage each case—would make these charging decisions. This, of course, rarely oc-

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domestic violence as seriously as other crimes.” (footnote omitted)); *see also* Hanna, *supra* note 118, at 1860-61 (“Prosecutors may also resist pursuing cases because they believe that battering is a minor, private crime.”).

333. *See* A.G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES (Oct. 11, 2011), <http://www.nytimes.com/2011/10/12/us/topeka-moves-to-decriminalize-domestic-violence.html> [<https://perma.cc/AD3B-VYRU>].

334. *See, e.g.*, Hanna, *supra* note 118, at 1521 (“Of those cases that are prosecuted, many are charged or pled down to misdemeanors despite facts that suggest the conduct constituted a felony.”).

335. *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1715 (2010) (explaining that little evidence exists of declination rates for felonies, and even less for misdemeanors).

336. For more on how police officers respond to domestic violence calls and arrests, *see* BUZAWA & BUZAWA, *supra* note 123, at 152-53.

337. *See, e.g.*, William K. Rashbaum, *Retired Officers Raise Questions on Crime Data*, N.Y. TIMES (Feb. 6, 2010), <http://www.nytimes.com/2010/02/07/nyregion/07crime.html> [<https://perma.cc/2AT4-7FQU>] (reporting that precinct commanders and administrators manipulated Compstat data to favorably impact crime rate statistics for their precinct).

curs.<sup>338</sup> Yet, there are still two ways to encourage felony torture prosecutions: first, by making torture easier and more obvious to identify in police investigations, and second, by applying political pressure to incentivize using the torture statute.

In order for this to work, police reports would need to include questions about each of the torture techniques listed in the statute. Some jurisdictions have already done this, in part by adding a lethality assessment to police reports, to facilitate prosecutors' bond consideration and triage.<sup>339</sup> In other jurisdictions, police ask victims more general questions about their attackers' history of violence such as the following: "(1) How recent was the last violence?; (2) Is the violence increasing in frequency?; (3) What types of violence and threats are you experiencing?; and (4) Do you think [the offender] will seriously injure or kill you or your children?"<sup>340</sup>

To capture the possibility of torture charges, a police report would need to *require* officers to ask questions like these:

- (1) How long has the offender abused you?
- (2) How often does he hit you?
- (3) What kinds of violence does he use against you? (Include a checklist of types, including strangulation.)
- (4) Does he hurt your children?
- (5) Does he threaten you? What does he say?
- (6) Does he threaten to hurt anyone else, including your children?
- (7) Does he have a weapon?
- (8) Does he point a weapon at you or intimidate you with it?

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338. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262-63 (2011).

339. See JILL THERESA MESSING ET AL., POLICE DEPARTMENTS' USE OF THE LETHALITY ASSESSMENT PROGRAM: A QUASI-EXPERIMENTAL EVALUATION, at i (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247456.pdf> [<https://perma.cc/3BEK-3RUX>].

340. See CITY OF NEW ORLEANS, THE NEW ORLEANS BLUEPRINT FOR SAFETY 15 (Oct. 21, 2014), <http://www.nola.gov/health-department/domestic-violence-prevention/domestic-violence-documents/blueprint-for-safety-opening-pages-and-chapter-one/> [<https://perma.cc/P4CM-J7SE>] (alteration in original); see also SECOND JUDICIAL DIST. VIOLENCE COORDINATION COUNCIL, GUIDELINES AND PROCEDURES FOR DOMESTIC ABUSE-RELATED CRIMINAL CASES 56 (4th ed. Jan. 1, 2013), [http://www.mncourts.gov/mncourtsgov/media/second\\_district/documents/Criminal\\_Court/Guidelines\\_DA\\_Related\\_Cases\\_Crim.pdf](http://www.mncourts.gov/mncourtsgov/media/second_district/documents/Criminal_Court/Guidelines_DA_Related_Cases_Crim.pdf) [<https://perma.cc/E4A3-QVC2>] (St. Paul, Minnesota); CITY OF DULUTH, THE DULUTH BLUEPRINT FOR SAFETY 39 (Jan. 29, 2015), <http://www.theduluthmodel.org/cms/files/4-Duluth-law-enforcement-chapter-3.pdf> [<https://perma.cc/N2R9-65M3>] (Duluth, Minnesota).

- (9) Does he force you to perform sex acts that you do not want to do?
- (10) Does he call you names? What names?
- (11) Does he purposefully keep you from sleeping?
- (12) Does he control you?
- (13) Does he check your phone or your email, or demand to know your whereabouts?
- (14) Do you believe that he will kill you or your children?<sup>341</sup>

Police policy would need to insist on officers asking these questions as part of every domestic violence call, and, of course, to allow officers to spend more time responding to such calls. On a pragmatic note, officers often fill in these reports using drop-down menus, which can require particular questions to be answered.

Police reports listing each of the graphic and gripping details relevant to a torture charge would make it easier for a prosecutor to screen the case and to understand that a torture statute *could* apply. Without those facts, we would be relying too heavily on prosecutors' time and willingness to interview victims themselves in order to determine the context of cases. Moreover, these prosecutor interviews often come too late, after the batterer has had time to intimidate and coerce his victim to be uncooperative with the system.

Just as importantly, such reports would amp up the political pressure to prosecute felony torture. This would not happen in a direct way; the news would not report on the number of cases that could have been charged as felonies but were not. Instead, prosecutors will know that they face a ticking time bomb of cases in which any facts relevant to the risk of homicide are clearly laid out but ignored. Once a felony torture statute exists and a police report documents a torture chamber in graphic detail, the district attorney's office will suddenly become far more culpable for failing to protect the victim.

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341. I include this last question because it has proved to be a fairly accurate predictor of the chances of homicide. See Judith A. Wolfer, *Top 10 Myths About Domestic Violence*, 42 MD. B. J. 38, 40 (2009) (“The second highest predictor of whether a woman will be killed by an intimate partner is his threat to kill her.” (citing Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089-97 (2003))).

## CONCLUSION

“The limits of my language mean the limits of my world.”<sup>342</sup> In many ways, we have failed both culturally and in our criminal justice system to understand the full horror of domestic violence because we simply lack the proper language to describe it. Identifying domestic violence as torture gives us a name for the scope of the terror batterers inflict. It reveals domestic violence as a pattern of accumulated cruelty, with searing psychological scars often worse than the physical pain. It redirects our focus away from blaming victims and instead focuses on the cold calculation of the batterer.

Prosecuting domestic violence as torture would save lives. Batterers would face serious felony charges for years of terrorizing a victim, rather than disjointed misdemeanor offenses. Judges could correctly calculate the danger of witness tampering and homicide during bond consideration. For the first time, police, prosecutors, judges, and juries could hear the full story of a pattern of torture rather than a single, isolated incident. The system would gain a better understanding of the motives of both abusers and their terrified victims.

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342. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 74 (C.K. Ogden trans., Kegan Paul, Trench, Trubner & Co., LTD. 1922) (1921).