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Non-Criminal Behavior: Why Idaho's Domestic Violence Laws Are Inaccurate and Inefficient

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NON-CRIMINAL BEHAVIOR: WHY IDAHO’S DOMESTIC VIOLENCE LAWS ARE INACCURATE AND INEFFICIENT

MADISON E. BASTERRECHEA

ABSTRACT

Currently, Idaho applies a violence model to their legal interventions for domestic violence. Yet, the violence model is limited in its understanding of domestic violence and in turn creates an inefficient legal response. To address this issue, Idaho must update their domestic violence codes to reflect the coercive control model. Coercive control encompasses a thorough understanding of domestic violence which would allow the law to provide intervention for more victims and address the root cause of violence.

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I. INTRODUCTION

Currently, there is a strong push for criminal justice reform across the nation and in Idaho.¹ Much reform is focused on policy-level direction for important

1. Adam Shaw & Judson Berger, *Trump Signs Criminal Justice Reform Bill*, FOX NEWS (Dec. 21, 2018), <https://www.foxnews.com/politics/trump-signs-criminal-justice-reform-bill>; IDAHO CRIMINAL JUSTICE COMM’N, <https://icjc.idaho.gov/> (last visited Jan. 25, 2021).

criminal justice issues, such as, prison rehabilitation efforts, prison population, combating crime such as gang strategies and human trafficking.² In Idaho, the Idaho Criminal Justice Commission was continued by Executive Order 2018-03.³ The executive order declared “combating crime and protecting citizens from criminal depredations is of vital concern to [the] government.”⁴ The commission’s goal was to “reduce victimization and recidivism in the state of Idaho.”⁵ The commission will track data about victims and offenders, work prevention action by surveying within schools, gather data on sex offender management and child protection.⁶ Through these actions, decreasing crime would in turn decrease the number of victims in the community.⁷ Idaho has identified victims as part of criminal justice reform but the focus appears to be offenders, prevention, rehabilitation, and recidivism.⁸

Many believe that victim rights need a stronger focus within criminal justice reform.⁹ Victims continue to struggle to engage meaningfully with the criminal justice system in their local communities.¹⁰ Some victims do not fully understand their rights and do not have an advocate or legal professional to provide that information.¹¹ Others may not be heard or believed and investigations into their reports may be feeble.¹² Advocates want clear statutory victim rights and enforcement when rights are violated.¹³

Lacking in both criminal justice reform and victim’s right advocacy is any reflection upon whether our criminal code is identifying and protecting all victims. Criminal justice reform is concerned about victims, but it is not concerned with those in our community who are suffering, yet under the color of law, are not considered victims. To explain, right now, in Idaho and in the nation, there is a strange dichotomy between what we know domestic violence to be and what forms of domestic violence we criminalize.¹⁴ For example, the Idaho Council on Domestic Violence and Victim Assistance has a “Domestic Violence is a Crime” brochure which law enforcement is required to hand out when they respond to a dispute.¹⁵ In this brochure, domestic violence is defined as one person having power and

2. Shaw & Berger, *supra* note 1; *Three-Year Strategic Plan*, IDAHO CRIMINAL JUSTICE COMM’N, <https://icjc.idaho.gov/wp-content/uploads/sites/70/2018/11/ICJC-Strategic-Plan-2018.pdf> (last visited Feb. 21, 2020).

3. *Idaho Exec. Order No. 2018-03*, IDAHO CRIMINAL JUSTICE COMM’N (Jan. 30, 2018), <https://icjc.idaho.gov/wp-content/uploads/sites/70/2018/11/Executive-Order-2018.pdf>.

4. *Id.*

5. *Three-Year Strategic Plan*, IDAHO CRIMINAL JUSTICE COMM’N, <https://icjc.idaho.gov/wp-content/uploads/sites/70/2018/11/ICJC-Strategic-Plan-2018.pdf> (last visited Feb. 21, 2020).

6. *Id.*

7. *See id.*

8. *Id.*

9. *See, e.g.,* NAT’L CRIME VICTIM LAW INST., https://law.lclark.edu/centers/national_crime_victim_law_institute/ (last visited Feb. 21, 2020).

10. Anne P. DePrince & Meg Garvin, *Criminal Justice Reform for All, Including Crime Victims*, REALCLEAR POLICY (Dec. 24, 2019), https://www.realclearpolicy.com/articles/2019/12/24/criminal_justice_reform_for_all_including_crime_victims_111341.html.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See Filing Protection Orders*, IDAHO COUNCIL ON DOMESTIC VIOLENT AND VICTIM ASSISTANCE, <https://icdv.idaho.gov/victims/filing-protection-orders/> (last visited Feb. 21, 2020).

15. *Id.*

control over another.¹⁶ “[A] pattern of abusive behavior where one partner uses physical violence, coercion, threats, intimidation, isolation and emotional, sexual or economic abuse to control and change the behavior of the other partner.”¹⁷ The brochure even says that to prevent domestic violence the public attitude must change and this involves allowing authorities to intervene.¹⁸ But the brochure clarifies that a protection order is designed to forbid and prevent violent and harassing behavior.¹⁹ This author finds the narrow legal protection compared to the broad definition of domestic violence is a current issue in Idaho’s action against domestic violence.

This Comment advocates for a change to Idaho’s criminal and civil laws around domestic violence. Currently, Idaho bases its legal definition of domestic violence upon a violence model which this author argues narrows the number of cases the legal system can address or intervene. The number of cases is limited because the violence model only concerns itself with physical abuse.²⁰ In contrast, the coercive control model encompasses the diverse complexities in domestic violence.²¹

This Comment proposes adoption of the coercive control model and discusses how its approach to domestic violence would identify more victims leading to more effective legal intervention. Part I discusses domestic violence as a societal issue and how the law has dealt with domestic violence historically. Part II discusses Idaho’s current codes that deal with domestic violence and how they reflect a violence model. Part III explains that the coercive control model is based upon different scholarly theories and looks at how the United Kingdom criminalized all coercive control. Part IV offers a comparison of three other states that incorporate concepts of coercive control. Part IV offers amendments to the Idaho criminal and civil codes and considers the implications of such changes.

II. DOMESTIC VIOLENCE AS A SOCIETAL ISSUE

Domestic violence is a societal issue.²² Across the United States, “about 1 in 4 women and 1 in 10 men experienced contact sexual violence, physical violence, and/or stalking by an intimate partner and reported an IPV-related [(Intimate Partner Violence)] impact during their lifetime.”²³ Based upon national statistics

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. See IDAHO CODE ANN. §§ 18-918 (2)(a), (3)(a), (1)(b) (West 2018) (statute requires battery and an injury must be by physical force).

21. Kristy Candela, Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes, 54 FAM. CT. REV. 112, 115 (Jan. 2016).

22. See Sharon G. Smith et al., *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release*, NAT’L CTR. FOR INJURY PREVENTION AND CONTROL (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.

23. *Id.* at 7.

about 26% of intimate partner violence (also known as domestic violence²⁴) experience repeated violence.²⁵ The impact upon an individual includes chronic physical and mental illness which in turn creates a medical cost to society.²⁶ “The cost of IPV over a victim’s lifetime was \$103,767 for women and \$23,414 for men.”²⁷ Based upon 43 million U.S. adults in 2012, the lifetime cost of IPV for the United States was close to \$3.6 trillion.²⁸

In Idaho, based upon data from 2010 to 2012, thirty-three percent of women and thirty-eight percent of men experienced IPV in their lifetime.²⁹ More recently, the Idaho Coalition Against Sexual and Domestic Violence reported, on a single day in 2018, 561 adult victims sought services for domestic violence.³⁰ 2018 had seventeen domestic violence related fatalities and as of October 16th of 2019, five fatalities had occurred.³¹ Idaho State Police alone reported 5,871 incidents of violence between dating, married, or divorced partners.³²

Domestic violence affects those most vulnerable in our society. The above mentioned statistics do not include children, many of whom are direct victims of abuse.³³ In a domestic violence environment, children develop short term and long term effects that will shape their lifetime trajectory.³⁴ In the short term, children develop anxiety and physically feel constantly on edge and fearful.³⁵ Such effects cause difficulties in school and potential developmental delays.³⁶ As these children

24. For purposes of this Comment, the term “domestic violence” will be used throughout because this author believes it is the most generally recognized term and is typically what the legal system uses. Other terms are intimate partner violence, interpersonal terrorism, or coercive control.

25. Barbara A. Oudekerk & Jennifer L. Truman, *Repeat Violent Victimization, 2005-14*, U.S. DEP’T OF JUST. (Aug. 2017), <https://www.bjs.gov/content/pub/pdf/rvv0514.pdf>.

26. *Fast Facts*, Intimate Partner Violence, CTR. FOR DISEASE CONTROL AND PREVENTION (Feb. 26, 2019), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html>; IPV related impacts include: “being fearful; being concerned for safety; symptoms of post-traumatic stress disorder (PTSD); having nightmares; trying hard not to think about it or avoiding being reminded of it; feeling constantly on guard, watchful, or easily startled; feeling numb or detached from others, activities, or surroundings; being injured; needing medical care as a result of the intimate partner violence experienced; needing housing services; needing victim advocate services; needing legal services; needing help from law enforcement; contacting a crisis hotline; missing days of work because of the intimate partner violence experienced; missing days of school because of the intimate partner violence experienced; for those reporting rape or made to penetrate by an intimate partner—contracting a sexually transmitted infection or becoming pregnant (for women).” Smith, et al., *supra* note 22 at 7.

27. *Violence Prevention*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html> (last visited Feb. 26, 2019).

28. Cora Peterson et. al., *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults*, 55 AM. J. OF PREVENTIVE MED., 433, 433 (Oct. 2018).

29. Smith, et al., *supra* note 22, at 128, 144, <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>.

30. *Idaho Domestic Violence Fact Sheet*, IDAHO COALITION AGAINST SEXUAL & DOMESTIC VIOLENCE, <https://idvsa.org/wp-content/uploads/2019/09/2019-Idaho-DV-Fact-Sheet.pdf> (last visited Jan. 25, 2021).

31. *Id.*

32. *Id.*

33. *Effects of Domestic Violence on Children*, OFFICE ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH & HUM. SERVICES, <https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children> (last visited Apr. 1, 2020).

34. *Id.*

35. *Id.*

36. *Id.*

age into adulthood, they may develop health issues, such as diabetes, obesity, and heart disease, to name a few.³⁷ Additionally, these now adults are at a higher risk to abuse others and reflect their childhood experience, traumatizing their own children.³⁸ The cycle may continue without interruption or intervention.

Legal intervention was not historically considered best practice to combat domestic violence.³⁹ Marriage was considered the legal communion of man and wife, leaving the wife without her own legal identity.⁴⁰ Because of this union, the man was not only responsible for his wife but had authority to discipline her.⁴¹ The law only intervened to limit harm where discipline was excessive.⁴² Even though the legal system “criminalized wife battering by the late nineteenth century,” there was little legal recourse for wives.⁴³ Courts and law enforcement considered domestic violence a private issue and one to be domestically solved.⁴⁴ It was not until the 1970s that a feminist movement highlighted domestic violence and battled for recognition and support from the government.⁴⁵

Recognition of legal intervention was still not enough; public accounts of severe domestic violence⁴⁶ created shock across the country and forced the legal system to evaluate its responses.⁴⁷ No-drop policies and mandatory arrest policies were implemented to solve the lack of response by law enforcement and prosecutors.⁴⁸ These policies emphasized that domestic violence was a societal issue and should be criminalized and prosecuted.⁴⁹ In 1994, Congress publicly recognized domestic violence as a national issue and enacted the Violence Against Women Act (VAWA).⁵⁰ Unfortunately, VAWA expired in February of 2019,⁵¹ and

37. *Id.*; see also S.M. Monnat & R.F. Chandler, *Long Term Physical Health Consequences of Adverse Childhood Experiences*, 56 THE SOCIOLOGIST QUARTERLY 723 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4617302/>.

38. *Effects of Domestic Violence on Children*, *supra* note 33. This author would like to note that children are incredibly resilient and there are many survivors who do not harm others, however, many of these individuals have worked hard to overcome their trauma. For survivors and victims that are struggling, there are resources: Idaho Domestic Violence Hotline 1-800-669-3176, 24 hr., free, confidential assistance; National Domestic Violence Hotline 1-800-799-SAFE (7233) 1-800-787-3224 (TTY line for deaf/hearing impaired) 24 hr., free, confidential assistance.

39. Thomas L. Hafemeister, *If All You Have Is A Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 926 (2011).

40. *Id.* at 926.

41. *Id.*

42. *Id.* at 926–27.

43. *Id.* at 927.

44. *Id.* at 928.

45. Hafemeister, *supra* note 39.

46. *Id.* at 930–31; *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1525–26 (D. Conn. 1984).

47. Hafemeister, *supra* note 39.

48. *Id.* at 932–33.

49. *Id.*

50. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994).

51. Jenny Gathright, *Violence Against Women Act Expires Because of Government Shutdown*, NPR (Dec. 24, 2018, 3:21 PM), <https://www.npr.org/2018/12/24/679838115/violence-against-women-act-expires-because-of-government-shutdown>.

Congress has stalled reauthorization over a dispute about the “boyfriend loophole.”⁵² The boyfriend loophole is underinclusive and does not recognize non-marital relationships in that only married, formerly married, or live-in abusers convicted of domestic violence are prohibited from owning firearms.⁵³

The expiration of the VAWA sends a clear message to victims of domestic violence: you have been given enough attention, time to move on. However, domestic violence needs more attention, and Idaho’s current codes are limited in what they can prevent, interfere with, and prosecute. This Comment next discusses all of Idaho’s codes that define domestic violence.

III. THE IDAHO CODE

Due to the important role legal intervention has in the prevention of domestic violence this Comment focuses upon Idaho’s criminal and civil codes. To only focus upon one, and not the other, would leave a weakness in Idaho’s response. Victims may need their partner for financial support, child support, or they may love their abuser and want to work on the relationship rather than end it. Thus, victims may have good reason to seek a civil protection order but not report their abuse to law enforcement. Other times, it may be necessary to involve the criminal justice system to protect the victim through no-contact orders, potential prison time, and required treatment. This Part looks first at the criminal code for domestic violence, next civil protection orders, and finally, a recent House Bill that updates the definition of domestic violence for state funding.

A. Idaho Criminal Code

For criminal purposes, Idaho has defined domestic violence as the following, “Any household member who in committing a battery . . . inflicts a traumatic injury upon any other household member. . . . [Or] [a] household member who commits an assault . . . against another household member. . . .”⁵⁴ Household member is a spouse, former spouse, person who has a child in common, or cohabitant.⁵⁵ Traumatic injury is a bodily condition caused by physical force.⁵⁶ The necessary actions, battery and or assault, are defined by criminal code as well.⁵⁷ Both actions focus upon force and violence which causes injury, or threat of force, or violence.⁵⁸

Idaho’s legal definition reflects the violence model.⁵⁹ Yet domestic violence is commonly understood as a pattern or course of conduct in which the abuser uses

52. Julie G. Brufke, *House votes to Reauthorize Violence Against Women Act, Closing ‘Boyfriend Loophole’*, THE HILL (Apr. 04, 2019, 12:36 PM), <https://thehill.com/homenews/house/437348-house-votes-to-reauthorize-violence-against-women-act-close-the-boyfriend>.

53. *See id.*

54. IDAHO CODE ANN. §§ 18-918 (2)(a), (3)(a) (West 2018).

55. *Id.* § 18-918 (1)(a).

56. *Id.* § 18-918 (1)(b).

57. *Id.* §§ 18-901, 903.

58. *See id.*

59. *See* IDAHO CODE ANN. § 18-918 (2)(a), (3)(a) (West 2018) (Idaho’s legal definition of domestic violence requires physical violence or assault and does not consider other forms of domestic violence such as emotional abuse).

coercive and or violent tactics to exert control and dominance over the victim.⁶⁰ The violence model says that each incident of physical violence is distinct and separate from another.⁶¹ For example, if an abusive partner slaps and throws the victim-partner on Monday and then rapes the victim-partner on Saturday, the violence model interprets these incidents as individual occurrences which are not part of a larger scheme or pattern. The violence model's narrowing of the issue fails to reflect reality.⁶² Violence is only one tactic used within the broader scheme of domestic violence.⁶³ Many have identified other tactics such as psychological harm, emotional abuse, economic abuse, isolation, and more.⁶⁴

Violence models are effective at drawing bright lines for judges and juries,⁶⁵ but the focus on only physical violence inhibits the effectiveness of legal intervention to punish, deter, and reduce incidents of abuse.⁶⁶ Not only will certain cases of domestic violence be ignored—sending the message that emotional, psychological, economic abuse are acceptable—but the limited focus of the violence model ignores the underlying issues of domestic violence. In turn, this creates evidentiary barriers for prosecution and difficult decisions for judges.

Because the law and the courts view domestic violence as one incident at a time, the evidentiary rules barring crimes, wrongs, or other acts are immediately triggered. Idaho Rule of Evidence (IRE) 404(b) Crimes, Wrongs, or Other Acts directs that “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with that character.”⁶⁷ The common law purpose of IRE 404(b) was to protect the criminal defendant from character evidence that may “induce[] the jury to believe the accused is more likely to have committed the crime on trial because

60. *Preventing Intimate Partner Violence*, CTR. FOR DISEASE CONTROL AND PREVENTION (Oct. 9, 2020), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html> (last visited Nov. 10, 2020); *FAQs About the Wheels*, DOMESTIC ABUSE INTERVENTION PROGRAMS: HOME OF THE DULUTH MODEL, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> (last visited Nov. 10, 2020).

61. Abigail Hazlett, *Why is a Coercive Control Framework So Important?*, COERCIVE CONTROL COLLECTIVE (March 8, 2018), <https://coercivecontrolcollective.org/news/2018/3/8/why-is-a-coercive-control-framework-so-important>.

62. See EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 85–86 (2007) [hereinafter STARK, COERCIVE CONTROL] (Domestic violence is complex and includes more than only physical violence, harms that the violence model ignores).

63. *Id.*

64. Melvin H. Wilson & Rita Webb, *Social Work’s Role in Responding to Intimate Partner Violence*, NAT’L ASSOC. OF SOCIAL WORKERS: SOCIAL JUSTICE BRIEF (Apr 9, 2018), <https://www.socialworkers.org/LinkClick.aspx?fileticket=WTrDbQ6CHxI%3d&portalid=0>; see also *Domestic Violence*, IDAHO COALITION AGAINST SEXUAL & DOMESTIC VIOLENCE, <https://idvsa.org/focus/domestic-violence/> (last viewed Nov. 10, 2020); see generally *Preventing Intimate Partner Violence*, *supra* note 60; see also DOMESTIC ABUSE INTERVENTION PROGRAMS, *supra* note 60.

65. STARK, COERCIVE CONTROL, *supra* note 62, at 85–86.

66. *Id.*

67. IDAHO R. EVID. 404(b)(1).

he is a man of criminal character.”⁶⁸ The jury is supposed to focus upon the defendant’s guilt or innocence of the charged crime at hand, without prejudice.⁶⁹

While evidence rules generally bar use of other crimes, wrongs, or bad acts, textual exceptions exist. IRE 404(b) provides an exception when the evidence is offered for a permitted purpose, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”⁷⁰ If the evidence is offered for a permitted purpose then the trial court has a two-tiered analysis.⁷¹ “First, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact,” always keeping in mind that the proposed evidence must be relevant.⁷² “Second, the trial court must engage in a balancing under IRE 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence.”⁷³ This analysis is to be carefully scrutinized to ensure that bad act evidence is serving a permitted purpose rather than providing propensity evidence in disguise.⁷⁴ Additionally, the Idaho Supreme Court has held, “there is no principled basis for relaxing application of these rules to facilitate prosecution of a single class of criminal offenses.”⁷⁵ In *State v. Grist*, the Idaho Supreme Court declined to broaden or loosen the permitted purposes of bad act evidence for sex crimes.⁷⁶ It is unlikely the Court would do so in domestic violence cases.

Juries are unable to see a clear picture of the nature and severity of the domestic abuse without other crimes, wrongs, or bad acts. This issue was clearly played out in *State v. Joy*,⁷⁷ which involved a defendant who was charged with “felony domestic battery, sexual penetration by a foreign object, and second-degree kidnapping.”⁷⁸ One night, the defendant and his wife got into an argument about the location of the defendant’s keys and cellphone.⁷⁹ The wife testified that the defendant filled a bathtub with water, pushed her into it, pulled her hair, held her head under water, gagged her, all while slapping and punching her.⁸⁰ Later the defendant removed his wife’s clothing, bound her wrists to an ankle and “penetrated her anus with a dildo.”⁸¹ Afterwards the defendant dragged his wife outside while naked and continued to abuse her.⁸² The defendant threatened to tie his wife to the tree and leave her if she did not disclose where his keys and phone were located.⁸³ The defendant untied her when she lied and said she could show

68. *State v. Grist*, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2009) (quoting *State v. Wrenn*, 99 Idaho 506, 510, 584 P.2d 1231, 1235 (1978)).

69. *Id.*

70. IDAHO R. EVID. 404(b)(2).

71. *Grist*, 147 Idaho at 52, 205 P.3d at 1188.

72. *Id.* (citing M. Clark, Report of the Idaho State Bar Evidence Committee, C 404, at 4 (4th Supp. 1985)).

73. *Id.*

74. *Id.* at 55, 205 P.3d at 1191.

75. *Id.*

76. *Id.* at 55, 205 P.3d at 1191.

77. *State v. Joy*, 155 Idaho 1, 304 P.3d 276 (2013).

78. *Id.* at 4, 304 P.3d at 279.

79. *Id.* at 5, 304 P.3d at 280.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Joy*, 155 Idaho at 5, 304 P.3d at 280.

him where his keys and phone were.⁸⁴ After the defendant fell asleep, his wife called law enforcement.⁸⁵

The trial court in *Joy* allowed prosecutors to present evidence of other crimes, wrongs, or bad acts at trial.⁸⁶ The defendant's wife testified to four previous incidents of physical abuse,⁸⁷ including waking to defendant anally penetrating her without consent; the defendant binding her hands and slapping her face forty to fifty times one occasion and fifteen to twenty times on another occasion; and the defendant throwing her down an embankment causing her serious injury.⁸⁸ During trial, the defendant disputed the wife's testimony, alleging she was the initial aggressor.⁸⁹ The defense presented evidence of inconsistent statements by the defendant's wife. The jury found the defendant "guilty of domestic battery and not guilty of sexual penetration by a foreign object, but it did not reach a verdict on the kidnapping charge."⁹⁰

The defendant in *Joy* ultimately received a new trial because IRE 404(b) renders the evidence of prior misconduct inadmissible.⁹¹ The Idaho Supreme Court held demonstrations of a common scheme or plan requires more than evidence that the same misconduct occurred before.⁹² Instead, the prior misconduct must be linked to the charged conduct such that it "permits the inference that the prior conduct was planned as part of a course of conduct leading up to the charged offense."⁹³ The Court held "this evidence is not relevant to show a common scheme or plan because it merely shows the manner in which [the defendant] has allegedly abused [his wife] in the past, and *does not demonstrate a planned course of connected behavior.*"⁹⁴ Because the evidence was inadmissible and the State could not prove the error did not contribute to the verdict, the judgment was vacated and a new trial ordered.⁹⁵

Like in *Joy*, in *State v. Porter* the trial court permitted testimony of past misconduct.⁹⁶ The defendant was charged with first degree murder of his girlfriend.⁹⁷ They had been living together for a little over a month when law enforcement was called to their house by a neighbor who witnessed the defendant

84. *Id.*

85. *Id.*

86. *Id.* at 4, 304 P.3d at 279.

87. *Id.*

88. *Id.*

89. *Joy*, 155 Idaho at 5, 304 P.3d at 280.

90. *Id.*

91. *Id.* at 6, 304 P.3d at 281.

92. *Id.* at 9, 304 P.3d at 284.

93. *Id.* at 10, 304 P.3d at 285.

94. *Id.* (emphasis added).

95. *Joy*, 155 Idaho at 12, 304 P.3d at 287. *State v. Joy*, No. 42166, 2015 WL 7090421, at *2 (Idaho Ct. of App. 2015) (unpublished) ("After the second trial, the jury convicted [the defendant] of the felony domestic battery charge and acquitted him of the second degree kidnapping charge.").

96. *State v. Porter*, 130 Idaho 772, 782–85, 948 P.2d 127, 137–40 (1997).

97. *Id.* at 779, 948 P.2d at 134.

beating the girlfriend in the yard.⁹⁸ The defendant was arrested for misdemeanor battery.⁹⁹ A few days later the defendant's girlfriend requested his eviction from the home.¹⁰⁰ About two weeks later, law enforcement found the naked corpse of the defendant's girlfriend on the bed in their home.¹⁰¹ Her face and head were severely beaten, and several clumps of human hair were discovered on the floor.¹⁰² The autopsy determined the defendant's girlfriend "died of multiple blunt trauma to the head."¹⁰³ In addition, her scalp had three to six bald spots "the size of a fifty-cent piece" where hair was likely pulled out.¹⁰⁴

The trial judge in *Porter* allowed more testimony than in *Joy*. Three former girlfriends testified to demonstrate the defendant's pattern of behavior which was probative of the identity of his girlfriend's killer.¹⁰⁵ Even though the defendant had extensive alleged history of domestic abuse upon partners, it was initially considered too common to be admissible under IRE 404(b).¹⁰⁶ The trial judge ultimately determined the proffered evidence, particularly the tendency and aggressive nature of the hair pulling, showed similarity and was probative of identity.¹⁰⁷ Furthermore, the trial judge allowed testimony about the defendant's tendency to beat his victim's head even though initially this was found too commonplace.¹⁰⁸

The Idaho Supreme Court's opinion in *Porter* also constitutes a departure from *Joy*. The trial court did not abuse its discretion and the prior act evidence was admissible for purposes of identity because the evidence demonstrated sufficiently similar characteristics or patterns between the prior abuse and the murder.¹⁰⁹ *Porter* demonstrates that sometimes evidence of prior domestic violence may be admissible, but this case is highly distinct from typical domestic violence cases like *Joy*. *Porter* was using prior evidence to prove identity which is not as common an issue in domestic violence cases. Judges have discretion but with such limited case law they are unlikely to allow IRE 404(b) beyond the permitted purposes. Idaho does not recognize or accept domestic violence as a pattern of conduct that is about power and control.¹¹⁰ Consequently, relevant and material evidence is deemed inadmissible and the scope of trial is limited, ignoring the complexities of domestic violence.¹¹¹

There is limited attention around this evidentiary issue, most likely because domestic violence cases live and die in trial courts, meaning there are limited appeals which makes for an inadequate number of case examples and undeveloped

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Porter*, 130 Idaho at 779–80, 948 P.2d at 134–35.

103. *Id.* at 780, 948 P.2d at 135.

104. *Id.*

105. *Id.* at 782, 948 P.2d at 137.

106. *See id.*

107. *Id.* at 138, 130 Idaho at 783.

108. *Porter*, 130 Idaho at 783, 948 P.2d at 138.

109. *Id.* at 783–84, 948 P.2d at 138–39.

110. *See* IDAHO CODE ANN § 18-918 (West 2018).

111. *See* IDAHO R. EVID. 404(b).

case law. Next, this Comment discusses Idaho's civil code and what constitutes domestic violence for the purposes of a civil protection order.

B. Idaho Civil Protection Orders

The Idaho Legislature sought to make the courts a vehicle of assistance for victims and to prevent further abuse.¹¹² To achieve this goal, Idaho recognized that civil protections are effective in ending and decreasing violence.¹¹³ Civil protections are particularly important due to the autonomy it can provide victims.¹¹⁴ Civil protection orders are initiated by the victim, which helps shift power and gives the victim a sense of autonomy and control.¹¹⁵

Civil protection orders are a vehicle that prohibits further violence and harassment.¹¹⁶ The court order may prohibit physical violence; prohibit being near the victim or entering their home, work, or school; prohibit contact; order counseling; require the abuser to leave the home; or declare who should care for the children.¹¹⁷ To acquire a protection order, the victim can go to the local county courthouse and request a petition.¹¹⁸ It is no cost for the petitioner and does not require an attorney to complete or file.¹¹⁹ If the situation is more imminent, then the victim may file for a temporary restraining order which lasts for fourteen days while a hearing is scheduled to determine the necessity of a full order of protection.¹²⁰ Full protection orders are ninety days, and permanent protection orders can be renewed every year.¹²¹ Violations may be punished up to one year in jail and a maximum fine of \$5,000.¹²²

For civil protection purposes Idaho defines domestic violence as "the physical injury, sexual abuse or forced imprisonment or threat thereof of a family or household member, or of a minor child by a person with whom the minor child has had or is having a dating relationship, or of an adult by a person with whom the adult has had or is having a dating relationship."¹²³ Similar to the criminal code the civil model is violence focused.¹²⁴ In fact, Idaho has made it very clear that violence

112. *Id.*

113. See Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J. OF L. AND FAM. STUDIES 35, 36, 57 (2008); see also IDAHO CODE ANN § 39-6302 (West 1989).

114. Baker, *supra* note 113, at 36.

115. *Id.*

116. *Filing Protection Orders*, IDAHO COUNCIL ON DOMESTIC VIOLENCE AND VICTIM ASSISTANCE, <https://icdv.idaho.gov/victims/filing-protection-orders/> (last visited Mar. 8, 2020).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Filing Protection Orders*, *supra* note 116.

123. IDAHO CODE ANN. § 39-6303(1) (West 1988) (amended 2003).

124. Compare *id.*, with IDAHO CODE ANN. § 18-918 (West 2018).

is the concern.¹²⁵ The stated purpose provides, in part, “[v]iolent behavior in the home is criminal behavior and will not be tolerated.”¹²⁶

Although everyone can agree violent abuse is a concern, all victims of domestic violence deserve the opportunity to use legal avenues to end their abuse. If Idaho defined domestic violence as a pattern of conduct that involved more than physical violence, civil protection orders would be more effective at preventing all forms of domestic violence.¹²⁷ Furthermore, victims could seek legal relief earlier, potentially before physical violence occurs.¹²⁸

Overall, Idaho’s current laws for victims of domestic violence are limited under a violence-based model. Legal intervention can deter, prevent, and reduce domestic violence.¹²⁹ But when a victim of economic abuse cannot qualify for a civil protection order or a psychologically abusive spouse is never arrested during house calls then both the abuser and victim are told this conduct is accepted. When forms of abuse are normalized the root of domestic violence is never addressed.¹³⁰ “Violence is a result, not the cause, of this power and control dynamic.”¹³¹ Idaho has made a recent step towards broadening the legal understanding of domestic violence, but it only applies to funding which is next discussed.

C. Idaho State Funding

Idaho House of Representatives recently approved to update the definition of domestic violence in the Rules of the Idaho Council on Domestic Violence and Victim Assistance Grant Funding.¹³² Originally, this rule defined domestic violence as, “[t]he physical injury, sexual abuse, or forced imprisonment or threat thereof of a family or household member.”¹³³ A family or household member is “[o]ne who is related by blood or marriage or who resides or has resided with, or who has been married to the person committing the domestic violence.”¹³⁴ These definitions have been updated as follows:

05. Domestic Violence. Crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state of Idaho, or a family or household member. This definition also includes criminal or non-

125. See IDAHO CODE ANN. § 39-6302 (West 2018).

126. *Id.*

127. See Baker, *supra* note 113, at 36.

128. *Id.* at 58.

129. IDAHO CODE § 39-6302.

130. See *id.*; Baker, *supra* note 113, at 35.

131. Baker, *supra* note 113, at 35.

132. Office of the Admin. Rules Coordinator, Div. of Financial Mgmt., *Pending Rules Committee Rules Review Book 1004* (House Health & Welfare Committee, 65th Idaho Legislature, 2nd Reg. Session Jan. 2020), https://adminrules.idaho.gov/legislative_books/2020/pending/20H_HealthWelfare.pdf#nameddest=G71.999750.

133. *Id.*

134. *Id.*

criminal acts constituting intimidation, control, coercion and coercive control, emotional and psychological abuse and behavior, expressive and psychological aggression, financial abuse, harassment, tormenting behavior, distributing or alarming behavior, and additional acts. This definition applies to individuals and relationships as set forth in 45 CFR 1370.2.

06. Victim. A person who suffers direct or threatened physical, sexual, emotional, psychological, or financial harm as a result of an act by someone else, which is a crime.¹³⁵

The updated definition specifically applies to grants provided by the Idaho Council on Domestic Violence and Victim Assistance (the Council).¹³⁶ According to Nicole Fitzgerald, the Executive Director of the Council, the revisions “update definitions to reflect federal language.”¹³⁷ The Council was created to provide funding for services and programs that support victims of domestic violence and similar crimes.¹³⁸ The policy declaration identified domestic violence as a growing concern of a complex nature that interrelates with other family problems and stressors which in turn disrupts personal and community life.¹³⁹ The Idaho Legislature wanted to fund projects across the state that provided refuge and aid to victims of domestic violence for temporary safety and support, so that victims may remove themselves from their abusive circumstances.¹⁴⁰ In 2020, the Council allocated funds to 45 programs.¹⁴¹

Although the updated and broadened definition of domestic violence only applies for grant allocation, it is an important step for Idaho. The definition includes coercive control, emotional and psychological abuse and behavior, financial abuse, and other examples that do not involve physical violence.¹⁴² Additionally, the victim does not have to experience physical harm to be considered a victim because the

135. *Id.* at 1259.

136. *Committee Minutes 4* (House Health & Welfare Committee, 65th Idaho Legislature, 2nd Reg. Sess. Jan 2020), https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/standingcommittees/200113_hhea_0900AM-Minutes.pdf.

137. *Id.*

138. See IDAHO COUNCIL ON DOMESTIC VIOLENCE AND VICTIM ASSISTANCE, <https://icdv.idaho.gov/>; IDAHO CODE ANN. § 39-5201 (West 1982) (amended 2000).

139. IDAHO CODE ANN. § 39-5201 (West 1982) (amended 2000).

140. *Id.*

141. *FY2020 Grant Funding*, IDAHO COUNCIL ON DOMESTIC VIOLENCE AND VICTIM ASSISTANCE, <https://icdv.idaho.gov/wp-content/uploads/sites/80/2019/10/Award-for-Website.pdf> (last visited Sept. 29, 2020).

142. Office of the Admin. Rules Coordinator, Div. of Financial Mgmt., *Pending Rules Committee Rules Review Book 1259* (House Health & Welfare Committee, 65th Idaho Legislature, 2nd Reg. Sess. Jan. 2020), https://adminrules.idaho.gov/legislative_books/2020/pending/20H_HealthWelfare.pdf#nameddest=G71.999750.

definition also recognizes financial, emotional, and psychological harm.¹⁴³ Here, Idaho recognizes that domestic violence involves more than violent abuse and that non-physical abuses are equally harmful.¹⁴⁴ This definition is a more accurate understanding of what domestic violence is and how it occurs.

IV. Coercive Control Model

A. Defining Coercive Control

It is universally agreed that domestic violence is about the abuser's power and control over the victim.¹⁴⁵ For a better understanding and visualization of that dynamic, the Duluth Model created the Power and Control Wheel¹⁴⁶ to demonstrate the different tactics abusers use to enforce their dominance over their partner.¹⁴⁷ Listed around power and control is: using intimidation; using emotional abuse; using isolation; minimizing, denying, and blaming; using children; using male privilege; using economic abuse; using coercion and threats.¹⁴⁸ Surrounding all of this is physical sexual violence.¹⁴⁹ The wheel goes into detail of what each abuse looks like, for example, using isolation includes: "[c]ontrolling what she does, who she sees and talks to, what she reads, where she goes[;] limiting her outside involvement[;] using jealousy to justify actions."¹⁵⁰

The Power and Control Wheel demonstrates how many tactics do not require physical violence and instead are more comparable to psychological and emotional abuse. Psychological abuse has received less attention than physical abuse in the domestic violence debate, especially in the legal field due to the difficult nature to identify and define. There are many ways to define psychological abuse.¹⁵¹ One definition of psychological abuse is "acts of recurring criticism and/or verbal aggression toward a partner, and/or acts of isolation and domination of a partner."¹⁵² Emotional abuse is defined as "any nonphysical behavior or attitude that is designed to control, subdue, punish, or isolate another person through the use of humiliation or fear."¹⁵³ Emotional abuse includes "verbal assault, dominance,

143. *Id.*

144. *Id.*

145. DOMESTIC ABUSE INTERVENTION PROGRAMS, *supra* note 60; *Fast Facts*, CTR. FOR DISEASE CONTROL AND PREVENTION (Feb. 26, 2019), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html>; Melvin H. Wilson & Rita Webb, *Social Work's Role in Responding to Intimate Partner Violence*, NAT'L ASSOC. OF SOCIAL WORKERS (Apr. 9, 2018), [https://www.socialworkers.org/LinkClick.aspx?fileticket=WTrDbQ6CHxI%3d&portalid=0](https://www.socialworkers.org/LinkClick.aspx?fileticket=WTrDbQ6CHxI%3d&portalid=0;); *Domestic Violence*, IDAHO COALITION AGAINST SEXUAL & DOMESTIC VIOLENCE (2020), <https://idvsa.org/focus/domestic-violence/>.

146. Image Appendix A.

147. Domestic Abuse Intervention Programs, *supra* note 60.

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.*

152. K. Daniel O'Leary, Psychological Abuse: A Variable Deserving Critical Attention in Domestic Violence, 14 VIOLENCE AND VICTIMS, 23, 39 (1999).

153. Gunnur Karakurt & Kristin E. Silver, *Emotional Abuse in Intimate Relationships: The Role of Gender and Age (2013)* (unpublished manuscript) (on file with National Institute of Health), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3876290/pdf/nihms419073.pdf>.

control, isolation, ridicule, or the use of intimate knowledge for degradation.”¹⁵⁴ Even though terms and definitions are diverse it is agreed that psychological and emotional abuse are more pervasive and potentially more debilitating than physical abuse.¹⁵⁵ Typically, psychological abuse and physical aggression are intimately intertwined, but psychological abuse regularly precedes physical abuse through the life of a relationship.¹⁵⁶ Because of this, psychological and emotional abuse requires more efforts to identify and treat so that intervention may be provided earlier before the victim experiences severe physical injury.¹⁵⁷

But the Power and Control wheel demonstrates how psychological abuse is only one tactic used in a pattern of abuse which seeks power and control over another. Nevertheless, the negative effects that psychological and emotional abuse causes victims is critical. Psychological abuse regularly has greater adverse effects upon the victim compared to physical violence.¹⁵⁸ In one study, ridicule had the highest negative impact and was one of the top three most frequently used types of psychological abuse.¹⁵⁹ In that same study, seventy-two percent of the victims said that emotional abuse had a more negative impact personally compared to the physical abuse experienced.¹⁶⁰ Notably, these victims reported similar levels of physical abuse compared to the victims that said the physical abuse had worse impact upon them.¹⁶¹ In sum, a majority of victims in this study reported experiencing psychological abuse was worse than being physically abused.¹⁶²

Shifting to a more comprehensive understanding of domestic violence is necessary to capture all the techniques of the abuser and experiences of the victim. Dr. Evan Stark sought to develop such a comprehensive understanding through his model of coercive control. Dr. Stark defines coercive control as “a pattern of micro-regulation of a victim’s daily life and behaviors.”¹⁶³ “Coercive control typically complements frequent, but often minor, assaults with tactics to intimidate, isolate, humiliate, exploit, regulate, and micromanage women’s enactment of everyday life.”¹⁶⁴ This coercive control permeates the victim’s life effecting one’s safety, identity, relationships, and autonomy.¹⁶⁵ Dr. Stark describes the experience as a

154. *Id.*

155. O’Leary, *supra* note 152; Karakurt & Silver, *supra* note 153, at 3.

156. O’Leary, *supra* note 152, at 31, 39.

157. *Id.* at 23; Karakurt & Silver, *supra* note 153, at 2.

158. O’Leary, *supra* note 152, at 23, 39.

159. *Id.* at 33.

160. *Id.*

161. *Id.*

162. *See id.*

163. Kristy Candela, Protecting the Invisible Victim: Incorporating Coercive Control In Domestic Violence Statutes, 54 FAM. CT. REV. 112, 115 (2016).

164. STARK, COERCIVE CONTROL, *supra* note 62, at 307.

165. Chelsea Brass & Abigail Hazlett, *What is Coercive Control?*, COERCIVE CONTROL COLLECTIVE (Feb. 21, 2018), <https://coercivecontrolcollective.org/what-is-coercive-control/>.

condition of entrapment and can be analogized to living in a cage.¹⁶⁶ Coercive control is “ ‘ongoing’ and its effects cumulative.”¹⁶⁷

A more comprehensive understanding also provides context for the interplay between domestic violence and the need to gain power and control. Dr. Stark views the increased use of coercive control as a male’s clear response to female empowerment and equality.¹⁶⁸ Historically, sex roles used to be clear, providing males with the dominance and control; now a male must establish the patriarchy within his own home through more refined control tactics other than just violence and threat of violence.¹⁶⁹ As female autonomy and access to resources continually increases, deliberate male intervention requires specific control over the female’s autonomy.¹⁷⁰ Coercive control is personalized, pervasive throughout everyday life, and typically imposes traditional gender roles.¹⁷¹ Because the abuser and victim have an intimate relationship the abuser is able to use his specialized knowledge of the victim’s personal life to create fear, humiliation or degradation.¹⁷² Lastly, gender entrapment is the control strategy that Stark sees as the “most dramatic facet of control strategies.”¹⁷³ Coercive control involves the male micromanaging how the female manages her time in the household such as whether she can work, what she cooks, when she cooks, when and how she should be sexually attentive to her partner.¹⁷⁴ Outside the home, the male tracks who she is talking to, where she is going, and decides whether she can have a job or go to school.¹⁷⁵ All of these, and infinitely more tactics, are to enforce the female’s subordination to the abusive male partner.¹⁷⁶

Mary Ann Dutton and Lisa A. Goodman conceptualized the model of coercive control as a sequence of events that links a “demand with a credible threatened negative consequence for noncompliance.”¹⁷⁷ This sequence occurs repeatedly and will overlap other demands with credible threats until there is a complete environment of coercive control.¹⁷⁸ Although Dutton and Goodman break down coercion into a demand and threat concept they also view domestic violence as a pattern, more similar to Dr. Stark’s model than the violence model.¹⁷⁹ Central to their concept of coercion is a demand or expectation by the abuser.¹⁸⁰ Dutton and Goodman identify eight domains of control where the abuser would make a

166. Evan Stark, *Re-Presenting Battered Women: Coercive Control and the Defense of Liberty*, PRESSES DE L’UNIVERSITÉ DU QUÉBEC 7 (2012), http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf [hereinafter Stark, *Re-Presenting Battered Women*]; STARK, COERCIVE CONTROL, *supra* note 62 at 356.

167. Stark, *Re-presenting Battered Women*, *supra* note 166 at 14.

168. STARK, COERCIVE CONTROL, *supra* note 62 at 194.

169. *Id.* at 194, 196.

170. *Id.* at 196–97.

171. *Id.* at 205.

172. *Id.* at 206.

173. *Id.* at 211.

174. STARK, COERCIVE CONTROL, *supra* note 62 at 211.

175. *Id.*

176. *Id.* at 271.

177. Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 746–47 (2005).

178. *Id.* at 743.

179. *See id.* at 754.

180. *Id.* at 749.

demand: personal activity and appearance, social and family life, household, work and economic resources, intimate relationship, legal, immigration, and children.¹⁸¹ In any one of these domains the abuser will make a demand or set an expectation.¹⁸² What creates the coercive behavior is the credible threat that follows that demand.¹⁸³ The threat may be credible due to past experience or in any way that the abuser has communicated “that he is able, willing, and ready to carry out a threat for noncompliance.”¹⁸⁴ Even though the threat is the only necessary component for a coercive environment, part of the dynamic between the demand and threat involves completion of the threat.¹⁸⁵ “Negative consequences” solidify the credibility of the threat.¹⁸⁶ Often these threats involve violence which becomes part of the cumulative pattern of domestic violence.¹⁸⁷ Another key piece of coercion is the surveillance.¹⁸⁸ The abuser must know if and when a demand has not been complied with for the demand and threat to be credible.¹⁸⁹ Examples of surveillance include frequent phone calls, checking the car mileage, inspections of the house, and inspections of the victim’s body to determine whether she has had sex with other men.¹⁹⁰

Notably, Dutton and Goodman do not base their model of coercive control upon gender dynamics¹⁹¹ and make clear that either men or women may be agents of coercion as well as targets.¹⁹² Equally important, they emphasize coercive control does not only occur in heterosexual relationships.¹⁹³ Instead, Dutton and Goodman believe the coercive control model will help legal professionals further understand the complexities and patterns of domestic violence.¹⁹⁴ Understanding the nature of domestic violence will help explain both abuser and victim behavior and how to treat abusers and protect victims.¹⁹⁵ Although there are many conceptions of the coercive control model, the scholars agree that domestic violence is about more than physical abuse.¹⁹⁶ Many of these scholars are encouraging the criminalization of coercive control so that all forms of domestic violence can finally be

181. *Id.* at 747.

182. *Id.* at 749–50.

183. Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *SEX ROLES* 743, 749–50 (2005).

184. *Id.* at 750.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *SEX ROLES* 743, 750 (2005).

190. *Id.* (these examples are listed from Dutton’s and Goodman’s clinical experience).

191. *Id.* at 745.

192. *Id.*

193. *Id.*

194. *Id.* at 754.

195. Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *SEX ROLES* 743, 754 (2005).

196. *Id.* at 746–47; STARK, *supra* note 168, at 205–06.

confronted.¹⁹⁷ Most notably, in 2015, the United Kingdom decided to fully embrace the coercive control model.¹⁹⁸

B. United Kingdom's Adoption of Coercive Control

The United Kingdom saw the legal disparity between victims who experience physical violence and victims who suffer extreme psychological abuse.¹⁹⁹

No one should live in fear of domestic abuse, which is why this government has made ending violence against women and girls a priority. Our new coercive or controlling behaviour offence will protect victims who would otherwise be subjected to sustained patterns of abuse that can lead to total control of their lives by the perpetrator.²⁰⁰

In response they created a new coercive or controlling behavior offense.²⁰¹ The government described coercive behavior as “an act or a pattern of acts” and controlling behavior designed to subordinate an individual.²⁰² By the end of 2015, the United Kingdom explicitly criminalized coercive control:²⁰³

Controlling or coercive behavior in an intimate or family relationship

(1) A person (A) commits an offence if—

- (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
- (b) at the time of the behavior, A and B are personally connected,
- (c) the behaviour has a serious effect on B, and
- (d) A knows or ought to know that the behaviour will have a serious effect on B.²⁰⁴

The United Kingdom legislation criminalizing coercive control emphasized that the abuser's behavior must be repeated or continuous.²⁰⁵ Additionally, the element of causing a serious effect upon B can be proven one of two ways: “if — (a) it causes B to fear, on at least two occasions, that violence will be used against B, or (b) it causes B serious alarm or distress which has a substantial adverse effect on B's day-to-day activities.”²⁰⁶ The Crown Prosecution Service provided guidance for

197. Dutton & Goodman, *supra* note 177, at 743, 754–55; STARK, *supra* note 168, at 365, 383.

198. Home Office & Karen Bradley, *Coercive or Controlling Behaviour Now a Crime*, Gov.UK (Dec. 29, 2015), <https://www.gov.uk/government/news/coercive-or-controlling-behaviour-now-a-crime>.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Controlling or Coercive Behaviour in an Intimate or Family Relationship*, CROWN PROSECUTION SERVICE (June 30, 2017), <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship>.

203. *Id.*

204. Serious Crime Act 2015, c. 9, § 76 (Eng.), <http://www.legislation.gov.uk/ukpga/2015/9/section/76/enacted>.

205. *Id.*

206. *Id.*

prosecutors to understand substantial adverse effect, such examples were “stopping or changing the way someone socializes; physical or mental health deterioration.”²⁰⁷ Because these concepts are new to law enforcement, prosecution, and courts, the Crown Prosecution provided descriptions of scenarios and red flags to be on alert for, such as: isolation, deprivation of basic needs, monitoring time, controlling clothing, reputational damage or threat thereof, preventing employment or schooling.²⁰⁸ Based upon UK’s criminal offense language and the guidance provided, the UK was concerned with all domestic violence and moving beyond the violence model to applying the coercive control model.²⁰⁹

Conceivably, the United Kingdom’s commitment to criminalizing coercive control has broadened the number of victims that can seek criminal charges against their abuser and or petition for a civil protection order.²¹⁰ Maybe even more important is the message sent to the United Kingdom’s society—domestic violence is a complex crime of coercion and control which the United Kingdom government has determined is a crime not only against the individual but society and it will not be tolerated. Criminalizing coercive behavior sends a message to victims that what they are experiencing is wrong and they do not deserve to be treated as such. One critique of the United Kingdom’s domestic violence criminal offense is that it could not be adopted within the United States due to the vagueness doctrine and potential for raising Constitutional violations.²¹¹ This Comment next discusses issues that may arise when coercive control is criminalized.

C. Issues Surrounding the Coercive Control Model in a Legal Context

Coercive control is not defined in the United Kingdom’s criminal offense and the definition is not easily understood or common knowledge.²¹² Scholars of domestic violence do not have one definitive definition of coercive control, ranging from broad to narrow interpretations.²¹³ Even more suggestive of vagueness is the United Kingdom’s need to create statutory guidance for their domestic violence criminal offense.²¹⁴ Although the United Kingdom has a procedure to provide statutory guidance for their criminal offenses, the United States does not have such a scheme and each jurisdiction must have clear, well-settled, or technical meanings

207. Crown Prosecution Service, *supra* note 202.

208. *Id.*

209. See *id.*; Serious Crime Act 2015, c. 9, § 76 (Eng.), <http://www.legislation.gov.uk/ukpga/2015/9/section/76/enacted>.

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

211. Alexandra Michelle Ortiz, Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee, 71 VAND. L. REV. 681, 697–98 (2018).

212. *Id.* at 697.

213. Tamara L. Kuennen, Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?, 22 BERKELEY J. GENDER, L. & JUST. 2, 10–11 (2007).

214. See CROWN PROSECUTION SERVICE, *supra* note 202.

in their codes.²¹⁵ When a criminal statute is impermissibly vague and is at risk of or has encouraged arbitrary enforcement then the statute violates due process of law.²¹⁶

There are more legitimate concerns about criminalizing coercive control.²¹⁷ Coercion deals with issues of autonomy and voluntariness.²¹⁸ The distinction between voluntary behavior versus coerced behavior is incredibly subjective.²¹⁹ Consequently, a judge may find the civil protection petitioner has experienced serious levels of coercion and enforces a civil protection order. However, it is unclear whether the judge can presume the request is coerced if the petitioner returns to request the order be vacated, victim autonomy and the court's own exercise of power and control.²²⁰ Judicial ethics and due process forbid the court from interfering with the victim's liberty and right to freedom and choice, similar to the abusive relationship which the victim sought refuge.²²¹

Legal reform must recognize the complexity of coercion and continue reform with particularity for effectiveness.²²² Although it is unlikely that any jurisdiction within the United States could adopt a coercive control statute like the United Kingdom, adoption of coercive control remains a possibility. Next, this Comment discusses how multiple states have implemented different legal techniques to deal with non-physical abuse and the inherent pattern of domestic violence.

V. Policy Changes

This part focuses upon the United States and policies that States have implemented to reflect concepts of coercive control. This part also discusses how Idaho law already implements elements of coercive control and how that can be translated into the domestic violence code. This author provides a recommendation for what a coercive control code could look like in Idaho criminal and civil codes. Lastly, this Comment considers issues that would arise under a broader domestic violence statute and briefly recommends how Idaho should address these concerns.

A. Other States

Not every State is shying away from the complex nature of domestic violence. Notable is Missouri, a state that has attempted to criminalize controlling behavior.²²³ Other states have changed evidentiary rules to allow evidence of prior bad acts into trial.²²⁴ Lastly, multiple states have attempted to broaden their civil response to ensure victims may acquire protection orders.²²⁵

215. Ortiz, *supra* note 211211, at 698.

216. *Id.* at 697–98.

217. Kuennen, *supra* note 213.

218. *Id.* at 2.

219. *Id.* at 5.

220. *Id.* at 6–7.

221. *Id.* at 6.

222. *Id.* at 8.

223. STARK, COERCIVE CONTROL *supra* note 62, at 382.

224. Alaska R. Evid. 404(b)(4); Cal. Evid. Code § 1109.

225. Baker, *supra* note 113, at 61–62.

i. Criminalizing Coercive Control

Missouri's domestic assault statute includes when, "the person knowingly attempts to cause or causes the isolation of such domestic victim by unreasonably and substantially restricting or limiting his or her access to other persons, telecommunication devices or transportation for the purpose of isolation."²²⁶ This statute has criminalized a more diverse spectrum of domestic violence rather than just assault and battery.²²⁷ It encompasses elements of coercive control because it identifies the intentional pattern to control another's life through access to other persons, communication, transportation.²²⁸ As a result, the statute allows law enforcement, prosecutors, judges, and juries to interpret conduct as patterns of intent and purpose.²²⁹ At this time, there does not appear to be any case law where the Missouri appellate courts have had to interpret and apply this statute.²³⁰

Overall, criminalization of coercive control across the country remains stagnant.²³¹ Advocates continue to argue for criminalizing coercive control; one particularly creative advocate recommended the state of Tennessee interpret their false imprisonment statute to cover domestic violence under the coercive control theory.²³² The author argues false imprisonment is the best statute to build upon because it already deals with liberty issues.²³³ Because false imprisonment currently focuses on restrictions on physical movement the statute would add tactics of coercive control such as "harassment, intimidation, exploitation, humiliation, isolation, and/or control."²³⁴ Additionally, the statute would broaden the understanding of liberty by identifying that personal liberty includes the right of "association, movement, labor, personal finance, and access to services."²³⁵ Interference with autonomy would also be included to emphasize the freedom to have control over one's day to day decisions.²³⁶ Creating such a statute would embody coercive control and in turn include a broad range of victims.²³⁷ Criminalizing coercive control would broaden society's understanding of domestic violence and the inherent human rights violation.²³⁸

226. MO. ANN. STAT. § 565.076(6) (West 2017).

227. STARK, *supra* note 62, at 382.

228. *Id.* at 383.

229. *Id.*

230. As of Feb. 15, 2020.

231. IDAHO CODE ANN. § 18-918 (West 2018); OHIO REV. CODE ANN. § 2919.25 (West 2019); VT. STAT. ANN. TIT. 13, § 1042 (West 2019).

232. Ortiz, *supra* note 211211, at 681.

233. *Id.* at 703-04.

234. *Id.* at 707.

235. *Id.* at 708.

236. *Id.*

237. *Id.* at 709.

238. Ortiz, *supra* note 211211, at 709.

ii. Change in Evidentiary Rules

In the alternative, other states have attempted to deal with patterns of domestic violence through evidentiary rule exceptions.²³⁹ These carve outs specifically allow evidence of prior domestic violent conduct into the trial.²⁴⁰ For example, Alaska's Rule of Evidence (ARE) 404, Character Evidence Not Admissible to Prove Conduct—Exceptions—Other Crimes, has a specific exception that says,

In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, "domestic violence" and "crime involving domestic violence" have the meanings given in AS 18.66.990.²⁴¹

The effect of the rule is to allow evidence of past domestic violence behavior even when the only relevance for providing such evidence is to prove a characteristic of the defendant.²⁴² This overcomes the normal 404(b) ban that does not allow character evidence to prove that the defendant most likely was acting characteristically and therefore likely committed the charged crime.²⁴³ The Alaska Legislature enacted ARE 404(b)(4) in 1997.²⁴⁴ The Alaska Legislature had previously created exemptions for child abuse and sexual assault due to grave concern for high recidivism rates and the "difficulties of prosecuting cases involving child victims."²⁴⁵

Although the Alaska Court of Appeals found the legislative history around ARE 404(b)(4) limited,²⁴⁶ the legislative intent was incredibly reflective about the domestic violence issues within the legal system and why changes need to be made. The Chief Assistant Attorney General explained the proposed rule change "reflect[ed] that domestic violence is the type of thing that happens over and over again, and tends to escalate in violence. . . . a pattern of physical abuse . . . on previous occasions could be admissible."²⁴⁷ Additionally, there was concern that judges did not apply rules of evidence consistently and some would allow prior evidence under ARE 404(1)²⁴⁸ to provide explanation or context while others would

239. Alaska R. Evid. 404(b)(4); Cal. Evid. Code § 1109.

240. ALASKA R. EVID. 404(b)(4); CAL. EVID. CODE § 1109 (making an exception to general evidentiary rules for domestic violence cases).

241. ALASKA R. EVID. 404(b)(4).

242. *Bingaman v. State*, 76 P.3d 398, 401 (Alaska Ct. App. 2003).

243. *Id.* at 401.

244. *Id.* at 405.

245. *Id.* at 404.

246. *Id.* at 405 ("Evidence Rules 404(b)(2) and 404 (b)(3) were major components of their respective bills, and they received a corresponding degree of attention from the legislative committees that considered them. Evidence Rule 404(b)(4), on the other hand, was tacked onto a victims' rights bill by the House Finance Committee with very little discussion.").

247. *Id.* at 405 (quoting Victim's Rights/Criminal Law Changes: Hearing on HB 9, SLA 1997, ch. 63 Before the H. Fin. Comm. (statement of Dean Guaneli, Chief Assistant Att'y Gen.).

248. ALASKA R. EVID. 404(1).

see it as inadmissible.²⁴⁹ Therefore the creation of ARE 404(b)(4) would create a bright line exception for domestic violence purposes.²⁵⁰

However, the Alaska Court of Appeals was concerned with the “expansive definition of ‘domestic violence’” and the Alaska Court of Appeals emphasized that even when applying ARE 404(b)(4) the court must weigh issues of relevance, probative value and unfair prejudice.²⁵¹ The Alaska Court of Appeals provided six factors to consider when applying ARE 404(b)(4):

1. How strong is the government’s evidence that the defendant actually committed the other acts?
2. What character trait do the other acts tend to prove?
3. Is this character trait relevant to any material issue in the case? How relevant? And how strongly do the defendant’s other acts tend to prove this trait?
-
4. Assuming that the offered character evidence is relevant to a material issue, how seriously disputed is this material issue? Does the government need to offer more evidence on this issue? And is there less prejudicial evidence that could be offered on this point? In other words, how great is the government’s need to offer evidence of the defendant’s other acts? Or, if evidence of one or more other acts has already been admitted, how great is the government’s need to offer additional evidence of the defendant’s other acts?
5. How likely is it that litigation of the defendant’s other acts will require an inordinate amount of time?
6. And finally, how likely is it that evidence of the defendant’s other acts will lead the jury to decide the case on improper grounds, or will distract the jury from the main issues in the case?²⁵²

These factors were created to ensure courts were evaluating the appropriateness of admissibility; additionally, the factors help ensure the defendant due process of law.²⁵³

Although Alaska and other states have created evidentiary exceptions to accommodate the nature and pattern of domestic violence, the new evidentiary

^{249.} *Bingaman*, 76 P.3d at 405–06 (citing audiotape: H. Fin. Comm. Minutes, 97–31, side 2 (Alaska Feb. 18, 1997)).

^{250.} *See id.*

^{251.} *Id.* at 406, 413, 415 (applying ALASKA R. EVID. 402 and ALASKA R. EVID. 403).

^{252.} *Id.* at 415–16.

^{253.} *Id.* at 416.

rules do not sufficiently shift away from a violence model.²⁵⁴ While the Chief Assistant Attorney General in Alaska spoke of the repeated nature of domestic violence, the Attorney General only referenced physical abuse and violence.²⁵⁵ Furthermore, the definition of domestic violence is primarily focused upon incidents of violence or property damage.²⁵⁶ As a result, ARE 404(b)(4) fixes evidentiary issues when it comes to repeated acts of physical violence, but it does not broaden the definition of abuse or the identification of victims. Because it does not broaden the definition of abuse or identify more victims, changing evidence rules is not as effective as criminalizing coercive control behavior which would address the root issues of domestic violence.

iii. Civil Protections for Coercive Control

As noted earlier, civil law is critical in addressing domestic violence.²⁵⁷ Some states have incorporated ideas of coercive control theory into their civil law.²⁵⁸ For example, Illinois uses the term personal liberty in their definition of domestic violence.²⁵⁹ Additionally, Illinois had an interesting civil case, *Feltmeier v. Feltmeier*,

254. See ALASKA R. EVID. 404(b)(4) (citing ALASKA STAT. ANN. § 18.66.990 (West 2019) as the given meaning of “domestic violence” and “crime involving domestic violence” for purposes of the evidence rule).

“domestic violence” and “crime involving domestic violence” mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:

- (A) a crime against the person under AS 11.41;
- (B) burglary under AS 11.46.300--11.46.310;
- (C) criminal trespass under AS 11.46.320--11.46.330;
- (D) arson or criminally negligent burning under AS 11.46.400--11.46.430;
- (E) criminal mischief under AS 11.46.475--11.46.486;
- (F) terrorist threatening under AS 11.56.807 or 11.56.810;
- (G) violating a protective order under AS 11.56.740(a)(1);
- (H) harassment under AS 11.61.120(a)(2)--(4); or
- (I) cruelty to animals under AS 11.61.140(a)(5) if the animal is a pet;

ALASKA STAT. ANN. § 18.66.990(3) (West 2019).

255. *Bingaman*, 76 P.3d at 405 (quoting H.B. 9, 1997 Leg. 20th Sess. (Alaska 1997)).

256. ALASKA STAT. ANN. § 18.66.990 (West 2019).

257. IDAHO CODE ANN. § 39-6302 (West 2018).

258. STARK, COERCIVE CONTROL, *supra* note 62, at 383–84. Missouri lists different forms of abuse which includes harassment, “engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to an adult or child and serves no legitimate purpose.” MO. ANN. STAT. § 455.010 (West 2019). Hawaii includes “extreme psychological abuse” as part of the definition of domestic abuse. HAW. REV. STAT. ANN. § 586-1 (West 2019). Extreme psychological abuse is defined as, “an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress.” HAW. REV. STAT. ANN. § 586-1 (West 2019). Michigan created a catch all under their personal protection orders that says, “any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.” MICH. COMP. LAWS ANN. § 600.2950(l) (West 2019). Although no Michigan appellate court has interpreted the statute without evidence of physical violence, arguably a trained court system could find the language covers elements of coercive control without physical violence. Baker *supra* note 113, at 61.

259. 725 ILL. COMP. STAT. 5/112A-3 (West 2019).

where the victim-plaintiff used the theory of intentional infliction of emotional distress to qualify domestic abuse as a continuing tort.²⁶⁰

Illinois civil protection orders for purposes of domestic violence defined abuse as the following, “physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor child by a parent or person in loco parentis.”²⁶¹ Without case law it cannot be determined how Illinois is applying this statute, but it is clear the state is concerned with coercive control by including “interference with personal liberty or willful deprivation.”²⁶²

In *Feltmeier v. Feltmeier*, the victim-plaintiff alleged intentional infliction of emotional distress to qualify domestic abuse as a continuing tort.²⁶³ A continuing tort requires more than one act rather than one incident that created continuing effects.²⁶⁴ Intentional infliction of emotional distress requires a showing of outrageous conduct.²⁶⁵ When considering marital relationships, the degree of control and authority the defendant has over the plaintiff influences the level of outrageousness.²⁶⁶ Notably, all these considerations that the appellate court made are reflective of the coercive control model rather than the violence model.²⁶⁷

The allegation was “a decade of verbal insults and humiliations with episodes where freedom of movement was deprived and where physical injury was often inflicted.”²⁶⁸ The defendant attempted to argue each abuse was separate and distinct incidents that the court must analyze individually.²⁶⁹ Arguably, the allegation could have been brought under assault, battery, and defamation.²⁷⁰ However, the Illinois Supreme Court found the alleged domestic abuse was a continuing series of behavior which rose to the level of intentional infliction of emotional distress.²⁷¹ Although this case was for financial liability and not in regards to a protection order, it is a demonstration of the Illinois Supreme Court’s knowledge and theory of domestic violence as a pattern of abusive conduct to exert power and control over one’s spouse and how Illinois may interpret their civil protection code.²⁷²

260. *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 78 (Ill. 2003).

261. 725 ILL. COMP. STAT. 5/112A-3 (West 2019).

262. *Id.*

263. *Feltmeier*, 798 N.E.2d at 78; STARK, COERCIVE CONTROL, *supra* note 62, at 383–84.

264. *Feltmeier*, 798 N.E.2d at 85.

265. *Id.* at 80.

266. *Id.* at 82 (quoting *McGrath v. Fahey*, 533 N.E.2d 806, 809–10 (Ill. 1989)).

267. See STARK, COERCIVE CONTROL, *supra* note 62, at 383.

268. *Feltmeier*, 798 N.E.2d at 83 (quoting *Feltmeier v. Feltmeier*, 777 N.E.2d 1032 (Ill. App. Ct. 2002)).

269. *Id.* at 87.

270. *Id.*

271. *Id.* at 86–88.

272. *Cf.* STARK, COERCIVE CONTROL, *supra* note 62 at 383.

B. Idaho Law and the Coercive Control Model

Although the violence model is convenient it ignores devastating effects of non-violent abuse.²⁷³ “In addition to causing immediate pain, injury, fear, or death, coercion can have long-term physical, behavioral, or psychological consequences.”²⁷⁴ Research suggests coercive control is experienced by 60% to 80% of reported domestic violence cases.²⁷⁵ Additionally, mounting research suggests that the degree of control is a better predictor of violence than previous assaults.²⁷⁶ Because coercive control is incredibly pervasive and dangerous Idaho must update their definition of domestic violence if they want the law to play a meaningful role in ending domestic violence. Even though applying a coercive control model is more complex than a bright line violence model, Idaho already has statutes in place that deal with similar complexities.²⁷⁷

The coercive control model can be compared to how Idaho already deals with false imprisonment. “False imprisonment is the unlawful violation of the personal liberty of another.”²⁷⁸ The Idaho Supreme Court defined personal liberty under false imprisonment as the right to travel, to move from one place to another as one wishes.²⁷⁹ The key to false imprisonment is the restraint of another.²⁸⁰ The extent of the restraint is not the crux of the issue but instead the lawfulness.²⁸¹ Which means that the Idaho Supreme Court was not concerned with the degree of actual physical force, threat, or injury; instead the court was only focused upon the restraint of another’s personal liberty.²⁸² Coercive control is similar in the way the abuser restrains the victim’s liberty of personal choice and autonomy. Shifting to a coercive control model, the courts would be less concerned with the violence and more focused upon the abuser’s power and control over the victim.

Additionally, coercive control model sees domestic violence as a course of conduct like stalking or harassment.²⁸³ Perpetrators of stalking use intimidation, humiliation, and domination—similar tactics used for coercive control.²⁸⁴

Idaho defines stalking as:

if the person knowingly and maliciously: (a) [e]ngages in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress; or (b) [e]ngages in a course of conduct such as would cause a reasonable

273. Stark, Re-Representing Battered Women, *supra* note 166, at 4.

274. Stark, Re-Representing Battered Women, *supra* note 166, at 8.

275. Stark, Re-Representing Battered Women, *supra* note 166, at 7.

276. Stark, Re-Representing Battered Women, *supra* note 166, at 4.

277. See IDAHO CODE ANN § 18-2901 (West 2018); *id* § 18-7906(1).

278. *Id.* § 18-2901.

279. Griffin v. Clark, 55 Idaho 364, 373, 42 P.2d 297, 301 (1935).

280. *Id.* at 373, 42 P.2d at 301.

281. *Id.*

282. *Id.*

283. STARK, COERCIVE CONTROL, *supra* note 62, at 383.

284. *Id.*

person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member.”²⁸⁵

Coercive control in comparison is an ongoing pattern of abuse (course of conduct) using fear to dominate and control.²⁸⁶

Reflecting upon false imprisonment and stalking statutes, Idaho can manage the complex nature of coercive control. The following recommendations incorporate elements from the stalking statute due to the similarity in nature.²⁸⁷ Furthermore, this author felt it most persuasive to use the language Idaho has already adopted to define domestic violence in the administrative code.²⁸⁸ This is because the Idaho Legislature has already considered this definition and the House has determined it was an appropriate and accurate definition of domestic violence.²⁸⁹ Below is both the recommended addition for the Idaho Criminal Code and the Idaho Civil Protection Code. Lastly, this Comment considers what issues would arise under a broader domestic violence statute.

This Comment suggests adding coercive control to the elements of domestic violence contained in sections 18-918²⁹⁰ and 39-6303²⁹¹ of the Idaho Code. Section 18-918's definition of domestic violence should be expanded to include the following:

Any household member who engages in a course of conduct which constitutes intimidation, control, coercion and coercive control, emotional and psychological abuse and behavior, expressive and psychological aggression, financial abuse, harassment, tormenting behavior, distributing or alarming behavior, as would

(i) cause a reasonable person substantial emotional distress; or

*(ii) cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member.*²⁹²

285. IDAHO CODE ANN. § 18-7906(1) (West 2018).

286. Stark, *Re-presenting Battered Women*, *supra* note 164, at 7.

287. See IDAHO CODE ANN. § 18-7906(1) (West 2018).

288. See Office of the Admin. Rules Coordinator, Div. of Financial Mgmt., *Pending Rules Committee Rules Review Book 1004* (House Health & Welfare Committee, 65th Idaho Legislature, 2nd Reg. Session Jan. 2020).

289. *Id.*

290. *Infra* Appendix B.

291. *Infra* Appendix C.

292. Not provided are the definitions of all the different forms of abuse which were listed. This is best left to the Legislature to determine what each term means and the reasoning behind adopting these terms. To a certain extent these terms can be intuitive because of the requirement of proof of emotional distress similar to Idaho's stalking statute.

Section 39-6303's definition of domestic violence should be expanded to include the following:

a course of conduct which constitutes intimidation, control, coercion and coercive control, emotional and psychological abuse and behavior, expressive and psychological aggression, financial abuse, harassment, tormenting behavior, distributing or alarming behavior, as would:

(i) *cause a reasonable person substantial emotional distress; or*

(ii) *cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member, or of a minor child by a person with whom the minor child has had or is having a dating relationship, or of an adult by a person with whom the adult has had or is having a dating relationship.*

The benefits of including such language to the Idaho codes is to provide more victims, who would not qualify under mere physical abuse, with legal vehicles to seek refuge. The language includes course of conduct which identifies domestic violence as a pattern of conduct but does not allow only one occurrence of non-physical abuse. Having clear language about course of conduct resolves evidentiary barriers under IRE 404(b). Additionally, it requires a proof of harm—substantial emotional distress—which helps courts determine whether the conduct has risen to a level of domestic violence. This Comment has discussed the critical reasons why the coercive control model should be adopted into law: however, the Legislator and Judicial systems will need to create surrounding policy that monitors potential issues a coercive control model could create.

C. Considerations

Broadening the criminal code for domestic violence would not come without its costs. There are persuasive and legitimate concerns that must be recognized, considered, and individually addressed. For example, the Idaho Coalition Against Sexual & Domestic Violence (Idaho Coalition) does not advocate to change the current Idaho criminal code to include coercive control under the domestic violence definition.²⁹³ They have primarily two concerns, victims being arrested as the alleged offender and overcriminalization, in particular for people of color.²⁹⁴

Because domestic violence is complex, law enforcement and the criminal justice system struggle to evaluate what occurred within the home. Due to

293. Interview with Annie Hightower, Director of Law & Policy, and Molly Kafka, Social Change Attorney, Idaho Coalition Against Sexual & Domestic Violence. In Boise, Idaho. (March 4, 2020).

294. *Id.*

mandatory arrest policies²⁹⁵ and no-drop policies,²⁹⁶ victims are increasingly being arrested and prosecuted for domestic violence.²⁹⁷ If law enforcement bases their arrest off of physical injuries alone, they may mistake the victim as the offender because the abuser presents with injuries. What can be overlooked is that victims are using self-defense.²⁹⁸ Furthermore, abusers can be manipulative, convincing law enforcement they are the victim or even filing accusations against the victim to exert more control.²⁹⁹ If the criminal code was to broaden this would provide more opportunity for abusers to manipulate the system. Victims already must overcome barriers of bias to receive law enforcement and legal help,³⁰⁰ making the law more complex could easily exacerbate these issues.

Overcriminalization of people of color is an issue that permeates throughout the criminal justice system. It is well recognized that people of color are arrested and prosecuted at higher rates than their white counterparts. In Idaho, African Americans, Native Americans, and Hispanics are arrested and imprisoned at much higher rates than their population.³⁰¹ For example, based upon the 2010 U.S. Census individuals that identify as black make up 1% of the Idaho population but they make up 3% of the incarcerated population.³⁰² Analyzing those numbers critically, African Americans are being incarcerated at three times the rate of their population. Idaho State Police crime data shows that Black or African American offenders of Aggravated Assault and Simple Assault are 3% of all assault offenders.³⁰³ Similarly, Native American offenders are 3% of the prison population

295. “[T]he police must make an arrest when they have reasonable cause to believe that a person has committed specific crimes against members of their family or household.” *Domestic Violence: Finding Safety and Support*, OFFICE FOR PREVENTION OF DOMESTIC VIOLENCE, <https://opdv.ny.gov/help/fss/part22.html> (last visited Mar. 7, 2020).

296. “No-drop policies do not give prosecutors, or victims, the right to dismiss the charges, but instead require following through with prosecuting the offender and actively involving the victims’ cooperation.” Jolene Vincent, *Domestic Violence & No-Drop Policies: Doing More Harm Than Good?*, 729 ELECTRONIC THESES AND DISSERTATIONS 9 (2015), <https://stars.library.ucf.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1728&context=etd>.

297. Meg Crager et al., *Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region*, KING COUNTY COALITION AGAINST DOMESTIC VIOLENCE, 10–11 (Apr. 2003), <http://endgv.org/wp-content/uploads/2016/03/victimdefendantfinalreport111.pdf>.

298. *Id.* at 7–8.

299. *Id.* at 11.

300. TK Logan & Rob Valente, *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses*, NAT’L DOMESTIC VIOLENCE HOTLINE, 8 (2015), www.thehotline.org/wp-content/uploads/sites/3/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf.

301. *Idaho Profile, Publications, PRISON POLICY INITIATIVE*, <https://www.prisonpolicy.org/profiles/ID.html> (last visited Oct. 30, 2020).

302. *Id.*

303. *Offense Distribution Report*, IDAHO STATE POLICE, <https://nibrs.isp.idaho.gov/CrimeInIdaho/Report/CrimeDistributionReport> (last visited Mar. 7, 2020). Under Offense Distribution Report author chose Incident Date, March 6, 2019, to Incident Date March 6, 2020. Distributed by offender race. Aggravated Assault reported 81 Black or African American offenders out of 2,539 total offenders. *Id.* Simple Assault reported 298 Black or African American offenders out of 9,047 total offenders. *Id.*

while they are 1% of the state population.³⁰⁴ Latino offenders make up 16% of the prison population when they are 11% of the state population.³⁰⁵ Comparatively, White offenders are 77% of the prison population but 84% of the state population.³⁰⁶

Although this data does not report on domestic violence, this data could suggest bias against people of color and how the criminal law is wielded against them. With these concerns in mind, broadening the domestic violence statute would logically effect men of color more intensely than any other demographic in the State.

Professor Leigh Goodmark advocates for decriminalizing intimate partner violence.³⁰⁷ She argues the cost of criminalization outweighs the benefit of using the criminal justice system.³⁰⁸ There is concern that research shows criminalization in fact does not deter and the rippling economic effect on the family and community are not worth agitating an already hyper incarcerated nation.³⁰⁹ Additionally, writing criminal law is an easy way for legislators to show they are addressing a problem without ever evaluating the effect of the legislation or creating real policy around systemic issues.³¹⁰ In the end, Professor Goodmark argues alternatives such as economic interventions, restorative justice, or other community-based alternatives would be more successful in the deterrence and rehabilitation of intimate partner violence.³¹¹ However, Professor Goodmark recognizes that there is expressive value to criminalization, especially against violence that causes serious harm, but “it has revealed is the need for a multidimensional response to intimate partner violence. Policies grounded in economics, public health, community, and human rights. . . .”³¹²

Despite these concerns, this author continues to advocate for coercive control to be criminalized in the state of Idaho. It all goes back to aligning the law with reality. The law is not a solve all and like the Idaho Coalition and Professor Goodmark this author believes that anti-violence community movements should be created and financially supported by the State of Idaho to address the root causes of violence. But the law has its place in addressing domestic violence, and if the law is insufficient then the whole judicial system is ineffective. This is not to disregard the issues of victim-defendants and overcriminalization; but not fixing the law is not in turn solving these issues. Instead, these issues have their own root causes that must be directly addressed rather than passively avoided through dormant criminal law. Therefore, enforcement of a coercive control as a criminal code should include intensive training to both law enforcement and the justice system. Reporting by law enforcement and the State should be mandatory to track who the alleged victims and offenders are and who is being successfully prosecuted.

304. PRISON POLICY INITIATIVE, *supra* note 3011.

305. PRISON POLICY INITIATIVE, *supra* note 3011.

306. PRISON POLICY INITIATIVE, *supra* note 3011.

307. See Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (University of California Press 2018).

308. *Id.* at 26–32.

309. *Id.* at 23–27.

310. *Id.* at 17–18.

311. *Id.* at 33.

312. *Id.* at 23, 31, 33.

VI. CONCLUSION

This Comment demonstrates the current deficiencies and why change is critically important. Even a small change, such as adding emotional abuse or financial abuse, to Idaho's domestic violence codes is better than remaining stagnant.³¹³

313. Thank you to Professor Shaakirrah Sanders for her mentorship and guidance throughout this paper. Thank you to Annie Hightower, Director of Law & Policy, and Molly Kafka, Social Change Attorney, of Idaho Coalition Against Sexual & Domestic Violence, for their time and the insight they provided while researching this issue.

Appendix A



DOMESTIC ABUSE INTERVENTION PROGRAMS
 202 East Superior Street
 Duluth, Minnesota 55802
 218-722-2781
www.theduluthmodel.org

Appendix B

Recommended Addition to Idaho Code § 18-918 Domestic Violence:

(2)(a) Any household member who in committing a battery . . . inflicts a traumatic injury upon any other household member is guilty of a felony. . . .

(3)(a) A household member who commits an assault . . . against another household member which does not result in traumatic injury is guilty of a misdemeanor domestic assault. . . .

(4)(a) *Any household member who engages in a course of conduct which constitutes intimidation, control, coercion and coercive control, emotional and psychological abuse and behavior, expressive and psychological aggression, financial abuse, harassment, tormenting behavior, distributing or alarming behavior, as would*

(i) cause a reasonable person substantial emotional distress; or

(ii) cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member.

Appendix C

Recommended Addition to Idaho Code § 39-6303 Definitions:

- (1) "Domestic violence" means
 - (a) the physical injury, sexual abuse or forced imprisonment or threat thereof of a family or household member, or of a minor child by a person with whom the minor child has had or is having a dating relationship, or of an adult by a person with whom the adult has had or is having a dating relationship
 - (b) *a course of conduct which constitutes intimidation, control, coercion and coercive control, emotional and psychological abuse and behavior, expressive and psychological aggression, financial abuse, harassment, tormenting behavior, distributing or alarming behavior, as would:*
 - (i) *cause a reasonable person substantial emotional distress; or*
 - (ii) *cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member, or of a minor child by a person with whom the minor child has had or is having a dating relationship, or of an adult by a person with whom the adult has had or is having a dating relationship.*