De Facto Witness Tampering

Sarah M. Buel†

ABSTRACT

De facto witness tampering matters because it fuels increased victim despair and danger, and its omission from discourse animates much regressive case law. Although present statutes address the most virulent and direct manifestations of witness tampering (WT), they miss the nuanced and less overt, but still dangerous, conduct that achieves the same unlawful ends. Many perpetrators of intimate partner violence (IPV) and human trafficking (HT) are exceptionally resourceful in their efforts to prevent victims from testifying against them, thus necessitating the expansion of remedial statutory schemes to recognize de facto witness tampering.

After briefly examining the doctrinal and normative aspects of de facto witness tampering, the Article describes the concept in practice, including “tipping point” tampering—such as victim grooming, financial sabotage, and cyberharassment. The integration of human rights doctrine must be part of instrumental reform as criminalization of de facto WT comports with internationally recognized norms of state obligations to victims of gendered violence. Because IPV-HT offenders are not likely to admit their intent to silence witnesses, it is necessary to promulgate a presumptive intent standard that focuses on the resulting harm. To that end, I propose a rebuttable presumption of intent to silence a victim when a court finds that a person committed an IPV-HT act as part of a pattern of coercive control. The Rule of Law maxim must mean that the state is obligated to protect the civil and human rights of abuse survivors and this requires criminalizing the full scope of WT conduct.

† B.A., Harvard Extension School; J.D., Harvard Law School; Clinical Professor of Law, Arizona State University Sandra Day O’Connor College of Law; former domestic violence and juvenile prosecutor and advocate since 1977. For helpful comments, discussion, and advice I thank Michael Berch, Monalou Callery, Mike Denton, Margaret Drew, Zanita Fenton, Jack Getman, Kelly Gier, Eugene Hyman, Melissa Hamilton, George Schatzky, Ilene Seidman, Norm Stamper, and Deborah Tuerkheimer. I also thank faculty colloquium participants at the University of Maryland School of Law, the Arizona State University Sandra Day O’Connor College of Law, and the University of Texas School of Law readers for early suggestions. For research assistance I thank law students Tahda Ahtone, Tara Cahn, Krystle Fernandez, Adriana Ovalle, and Amber Qualls, and librarians Beth DeFelice and David Gay. Thanks, also, to Kai Haswell of the Berkeley Journal of Gender, Law & Justice for his editing assistance. This Article was supported by the Arizona State University Sandra Day O’Connor College of Law Dean’s Summer Research Stipend Program.
I. DE FACTO WITNESS TAMPERING IN PRACTICE .................................................. 79
   A. Tipping Point Tampering ............................................................................. 80
      1. Victim Grooming .................................................................................. 81
      2. Financial Sabotage ............................................................................... 82
      3. Custodial Interference ........................................................................... 87
      4. False Allegations ................................................................................... 90
   B. Cyber-Tampering ...................................................................................... 93
      1. Legal Atrophy ........................................................................................ 95
      2. Civil Rights Nexus ............................................................................... 98
   C. Accord and Satisfaction A.K.A. Bribery .................................................. 100
      1. A Legal Fiction ....................................................................................... 101
      2. Inequitable Practice ............................................................................. 102
      3. Jurisdictional Variation ......................................................................... 104
      4. An Ethical Dilemma ............................................................................. 106
II. HUMAN RIGHTS FRAMEWORK FOR INSTRUMENTAL REFORM ............ 108
   A. Employing Human Rights Treaties for Victim Protection .......... 109
   B. Expressive Raced, Gendered and Classed Witness Tampering .... 113
   C. Due Diligence Standard ........................................................................ 119
III. PRESumptive Intent ................................................................................... 122
   A. Intent to Silence Calculus .................................................................... 124
      1. Murder .................................................................................................. 125
      2. Pending Legal Proceedings ................................................................. 125
      3. Present Protective Order .................................................................... 126
      4. “Classic Abusive Relationship” ......................................................... 127
      5. Human Trafficking ............................................................................ 128
   B. Presumption of Probable Consequences ............................................ 129
IV. CONCLUSION ............................................................................................. 131

INTRODUCTION

A new discourse is needed to address de facto witness tampering.¹ This reform framework should acknowledge that, although witness tampering (WT) has been prohibited by common and statutory law since the early days of the Republic,² the doctrine has largely failed to serve its intended purpose of

1. ‘De facto’ is defined as “[a]ctual; existing in fact; having effect even though not formally or legally recognized.” BLACK’S LAW DICTIONARY (9th ed. 2009).
2. See, e.g., Harrison’s Case, 12 How. St. Tr. 833, 851 (H.L. 1692) (describing a case in which depositions were admissible because the trial judge ruled that the defendant had attempted to bribe or “spirit away” two witnesses); Lord Morley’s Case, 6 How. St. Tr. 769, 771 (H.L. 1666) (stating that if a witness testified and was later “detained by the means or procurement of the prisoner,” then such evidence could be used against defendant); Reynolds v. United States, 98 U.S. 145, 158 (1878).
penalizing perpetrators of intimate partner violence (IPV)\(^3\) and human trafficking (HT)\(^5\) who deter their victims from reporting crimes or taking part in court matters.\(^6\) WT statutes acknowledge the most virulent and direct

3. The terms batterer, abuser, offender, and perpetrator will be used interchangeably throughout this article to refer to those who commit intimate partner violence as defined infra note 4.

4. The Centers for Disease Control and Prevention define intimate partner violence (IPV) as “physical, sexual, or psychological harm by a current or former partner . . . [that] can occur among heterosexual or same-sex couples and does not require sexual intimacy.” Intimate Partner Violence: Definitions, CTRS. FOR DISEASE CONTROL AND PREVENTION, www.cdc.gov/ViolencePrevention/intimatepartnerviolence/definitions.html (last visited Dec. 17, 2013). The United States Department of Veterans Affairs offers a more nuanced definition on its website: “Intimate Partner Violence (IPV) occurs when a current or former partner uses behaviors or threats that can make you feel scared, controlled, or intimidated. A relationship in which IPV occurs is known as an abusive relationship.” Intimate Partner Violence, U.S. DEPT. OF VETERANS AFFAIRS, http://www ptsd.va.gov/public/pages/domestic-violence.asp (last visited Dec. 17, 2013). Intimate Partner Violence (IPV) herein refers not only to physical abuse, but also to sexual assault that may co-occur in a current or former intimate relationship. See Angela Browne, Violence Against Women by Male Partners: Prevalence, Outcomes, and Policy Implications, 48 AM. PSYCHOLOGIST 1077, 1078 (1993) (reporting that women battered by intimate partners also experienced high incidence of sexual assault). Most victims I worked with at some point disclosed that their partner frequently forced them to have sex. This is based on my experience as a victim advocate, prosecutor, and co-director and director of two domestic violence legal clinics from 1977 to the present. I have handled tens of thousands of family violence cases in New Hampshire, New York, Massachusetts, Colorado, Washington, Texas, and Arizona, and have provided related training in every state and in numerous foreign countries.

5. The federal Trafficking Victims Protection Act (TVPA) of 2000 defines ‘sex trafficking’ as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” 22 U.S.C. § 7102(9) (2006). TVPA defines ‘severe forms of trafficking in persons’ as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude,peonage, debt bondage, or slavery.” 22 U.S.C. § 7102(8) (2006). Sex trafficking is defined as ‘severe’ if the victim is under 18 years old. Id.

6. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 454(1) (West, Westlaw through 2013 1st Reg. Sess.) (defining witness tampering as the use of “force, violence or intimidation”); N.Y. PENAL LAW § 215.10 (West, Westlaw through L.2013, ch. 1 to 340) (“A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person.”); see also TEX. PENAL CODE ANN. § 36.05 (West, Westlaw through 2013 3d Sess.) (“A person commits [witness tampering] if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding, or coerces a witness or a prospective witness in an official proceeding: (1) to testify falsely; (2) to withhold any testimony, information, document, or thing; (3) to elude legal process summoning him to testify or supply evidence; (4) to absent himself from an official proceeding to which he has been legally summoned; or (5) to abstain from, discontinue, or delay the prosecution of another.”); State v. St. Clair, No. C3-97-1247, 1998 WL 313579 (Minn. Ct. App. June 16, 1998) (finding defendant guilty of first degree witness tampering for forcefully preventing or dissuading the complaining witness from testifying at his domestic assault trial, in violation of Minn. Stat. § 609.498(1)(a) (1996); the defendant beat the victim for refusing his order to leave the area to avoid testifying against him on a prior domestic assault charge); Sarah M. Buel, Putting Forfeiture to Work, 43 U.C. DAVIS L. REV. 1295 app. (2010) (listing all state
manifestations of witness tampering, yet they miss the nuanced and less overt, but still dangerous, conduct that achieves the same unlawful ends. As such, even with codification of some blatant aspects of this illegal conduct, witness tampering is one of the least charged, prosecuted, and sentenced offenses. The under-inclusiveness of current WT laws means that many abuse survivors continue to be harmed by tenacious offenders who are eager to avoid answering for their crimes.

State actors and non-governmental organization (NGO) activists are often unfamiliar with the commonalities between domestic violence and human trafficking, making informed interventions less likely. Batterer’s treatment experts define domestic violence as a planned pattern of coercive control. Similarly, traffickers use “force, fraud, or coercion” as part of their scheme to exert ongoing control of their victims. IPV-HT offenders additionally share prolific use of de facto and traditional WT as a highly effective means of retaining domination over their victims. Because WT occurs in the varying levels of overlapping IPV-HT victimization, this Article highlights the interconnectedness of these crimes in order to inspire needed reforms in the context of both.

Criminal law’s insistence on identifying discrete incidents of criminality fails to capture the fundamental nature of IPV and HT as ongoing patterns of abuse. IPV and HT are not principally legal incidents in the lives of their many victims. Rather, these crimes are often comprised of terrifying, ongoing experiences of coercive control that foretell a trauma-tainted future for the victims. Researchers report that the profoundly distressing impact of IPV-HT on victims and their children occurs irrespective of the frequency of abusive incidents; the harm instead correlates to the level of “isolation, intimidation, and control” achieved through a variety of violent and nonviolent means. Because

---

7. This article will focus on witness tampering in domestic violence, sexual assault, and human trafficking cases. But witness tampering it is also prolific in organized crime, gang, narcotics, prostitution, and related matters to which the author’s proposed reforms should also apply. See Kerry Murphy Healey, Victim and Witness Intimidation: New Developments and Emerging Responses, NAT’L INST. OF JUSTICE: RESEARCH IN ACTION, Oct. 1995, at 1-2, available at https://www.ncjrs.gov/pdffiles/witintim.pdf.

8. See LUNDY BANCOFF, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 113 (2002) (explaining that batterer’s violent behavior is most often deliberate and part of an ongoing scheme to control his partner).


10. See generally Dorchen A. Leidholdt, Human Trafficking and Domestic Violence: A Primer for Judges, 52 JUDGES’ J., no. 1, 2013, at 16 (describing the violent and coercive control exerted by those who traffic intimate partners and others).

11. See id. (describing the overlap and commonalities of domestic violence and human trafficking offenders).

12. EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 100 (2007) (discussing several studies indicating that “women’s experience of continuous abuse [is] independent of the frequency of abusive episodes”).

---
survivors most often experience IPV and HT as continuous harm.\textsuperscript{13} It is not surprising that de facto WT is understood by victims as a continuation of the abuse they are already suffering—simply more abuse with the express goal of ensuring compliance with an offender’s demands. It is thus necessary to reconceptualize IPV, HT, and all WT not as discrete events, but rather, as a continuous process of coercive control.\textsuperscript{14}

Statutory schemes must expand in order to recognize de facto witness tampering in cases in which offenders engage in behavior designed to silence victims—behavior that the law presently fails to recognize as criminal. I propose a statutory, rebuttable, presumptive intent of witness tampering when a court finds that a person committed an IPV-HT act as part of a pattern of coercive control.\textsuperscript{15} Foundational to the implementation of my rebuttable presumption provision is the enactment of criminal laws that acknowledge the scope of IPV, beyond a myopic focus on individual incidents. To that end, I enthusiastically support promulgation of Professor Deborah Tuerkheimer’s Coercive Domestic Violence statute, which calls for proof that the defendant’s conduct was “likely to result in substantial power or control over the [victim].”\textsuperscript{16}

My goal with this article is to inspire adoption of a rebuttable presumption provision in tandem with Professor Tuerkheimer’s Coercive Domestic Violence statute. Professor Tuerkheimer’s normative contribution is all the more significant because it reflects an understanding that law must integrate the lived distress of IPV survivors.\textsuperscript{17} Telling IPV-HT victims’ stories forces an interrogation of the status quo, bringing to light courts’ frequent failure to sanction offenders for underlying abuse as well as subsequent efforts to silence survivors.\textsuperscript{18} A discursive analysis of de facto WT in practice yields undisputed

\begin{itemize}
\item \textsuperscript{13} See id. at 100-01.
\item \textsuperscript{14} See Paige Hall Smith et al., Beyond the Measurement Trap: A Reconstructed Conceptualization and Measurement of Woman Battering, 23 PSYCHOL. OF WOMEN Q. 177, 178 (1999) (contrasting measurement trap with untrapped analysis to describe the continuous harm suffered by domestic violence victims).
\item \textsuperscript{15} See infra Part IV for full discussion; see also Stark, supra note 12, at 382 (arguing for criminal and civil law recognition of coercive control, which is defined as a “course-of-conduct crime” much like stalking, harassment, and kidnapping).
\item \textsuperscript{16} Deborah Tuerkheimer, Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence, 94 J. CRIM. L. & CRIMINOLOGY 959, 1019-20 (2004). The full proposal reads:
\begin{quote}
A person is guilty of battering when: (h) e or she intentionally engages in a course of conduct [defined as “a pattern of conduct comprised of a series of acts over a period of time, however short, evidencing a continuity of purpose”] directed at a family or household member; and (h) e or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member; and (a) least two acts comprising the course of conduct constitute a crime in this jurisdiction.
\end{quote}
\item \textsuperscript{17} Deborah Tuerkheimer, Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later, 75 GEO. WASH. L. REV. 613, 624 (2007) (describing how battered women are deterred from engaging the legal system when it becomes clear that their stories are not heard).
\item \textsuperscript{18} See Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87
\end{itemize}
DE FACTO WITNESS TAMPERING

Evidence of willful blindness by an alarmingly wide array of state and private actors. Reframing the state’s approach to de facto WT necessitates a more coherent narrative that recognizes the impact of race, gender, and class within the context of IPV-HT.

Survivors’ stories should inform the policies and practices of state actors. Because there is often a strong IPV connection before and during human trafficking, I use the IPV-HT link to provide a shared analysis. As conceptual background, researchers have identified at least three ‘push’ factors that can enhance IPV victims’ vulnerability to be targeted for human trafficking: 1) the immediate need to escape an abusive partner, 2) a higher likelihood of low self-esteem, and 3) possible poverty-related challenges starting in childhood.

Although other causative factors exist, ongoing coercion and threats play a pivotal role in keeping IPV-HT victims under the abuser’s control. And when victims turn to the legal system for help, the offender usually begins an intense campaign of de facto and recognized witness tampering. As a result, many survivors are coerced or forced to recant and perjure themselves, invoking the ire of those who then blame the victims for “failing to cooperate.”

Part II, which describes de facto WT in practice, begins with an account of “tipping point” tampering, i.e. offender conduct that has crossed the line with the motivation of silencing IPV-HT victims. Next, I explain victim grooming, financial sabotage, custodial interference, and false allegations as characteristics of de facto WT. Given its popularity with WT offenders, I also discuss burgeoning cyberharassment in the context of legal atrophy, and its nexus with civil rights.

I then consider reasons why WT laws should encompass conduct that fulfills the statutory elements of the offense and yet avoids detection due to present contorted legal fictions, such as framing bribery as accord and satisfaction. This unconstitutional practice presents in variations across

---

19. See, e.g., Sally F. Goldfarb, Violence Against Women and the Persistence of Privacy, 61 OHIO ST. L.J. 1, 18 (2000) (“[F]or most of the history of this country, legal recourse for violence against women has been unavailable or narrowly circumscribed.”).

20. Here, systemic reform is a process that requires coalition-building between states, social service providers, legislators, and community members in order to empower IPV-HT victims and their children through both proactive and reactive responses.


22. See, e.g., Linda Greenhouse, Justices Weigh In on Use of Tapes and Transcripts, N.Y. TIMES, Mar. 21, 2006, http://www.nytimes.com/2006/03/21/politics/21scotus.html?_r=1&oref=slogin (“In domestic violence cases, the scenario is common: in one study cited to the Supreme Court, as many as 90 percent of victims of domestic violence fail to cooperate with the prosecution because of fear of or misplaced loyalty to their abusive partners.”).

23. An accord and satisfaction is essentially a new contract drafted to resolve the parties’ dispute; it requires the contractual elements of offer, acceptance, and consideration. 1 AM.

---

MIC. L. REV. 2411, 2414, 2435-38 (1988) (calling for “counterstories” to challenge acceptance of race bias); see, e.g., Derrick Bell, The Power of Narrative, 23 LEGAL STUD. F. 315, 316-17 (1999) (describing his use of legal stories as part of teaching law in order to challenge presentations of civil rights law).
jurisdictions and poses ethical dilemmas when impoverished IPV-HT survivors desperately need the proffered bribes. I argue that the common law doctrine of accord and satisfaction was intended to resolve business disputes, not to permit violent offenders to circumvent the law.\(^{24}\)

Part III explores de facto WT through the human rights lens as a compelling mechanism for instrumental reform. Within the human rights framework, several treaties can be invoked by the state to improve victim protection. For example, I contend that the due diligence doctrine is rarely employed on behalf of abuse survivors, although it is well suited to be because it obligates states to prevent, investigate, sanction, and ensure restitution for offenses committed by non-state actors.\(^{25}\)

In Part IV, I argue for statutory adoption of presumptive intent when an offender has committed IPV-HT as part of a pattern of coercive control. First, I provide normative arguments based on the intent to silence calculus as articulated in recent Supreme Court jurisprudence. I claim that at least five case factors should likely be dispositive: murder, pending legal proceeding, active protective order, and evidence of a “classic abusive relationship”\(^{26}\) or of human trafficking. Second, I consider the presumption of probable consequences in light of criminal premises that hold a person responsible for setting in motion acts that culminate in harm.

One goal of codifying de facto WT is to amplify the voice of societal condemnation across a continuum of offender harm, from threats and stalking through rape and homicide. Valid concerns about overcriminalization should not preclude the expansion of weak victim-protection laws, such as underutilized and insufficient witness tampering statutes. Since most abusers will not readily admit that they intended to silence their victims, a more apt standard asks if a reasonable person knows or should know that such conduct will influence an

---

DE FACTO WITNESS TAMPERING

abuse victim to absent herself from legal recourse. I conclude by arguing that, because conduct constituting de facto WT meets legislative intent protecting against the silencing of victims, it must be codified and implemented in case law.

Like feminist postmodernists, I make no generalized claims about patriarchy and gender, instead choosing an inclusive model that recognizes all—male, female, lesbian, gay, bisexual, transgender, and questioning (LGBTQ)—IPV-HT victims. Political philosopher Martha Nussbaum applies an Aristotelian lens in arguing that a key right is that of “[b]odily integrity. Being able to move freely from place to place; being able to be secure against violent assault, including sexual assault . . .”27 Indeed, much legislative intent speaks to protecting against such harms, yet modest language and massive underenforcement belie these stated concerns.

To be sure, there are notable exceptions to state inaction that span the legislative, executive, and judicial branches, yet the tentacles of witness tampering threaten to sabotage those hard-won gains.28 Basic principles of equity demand that conduct constituting de facto witness tampering must be subsumed into the existing criminal framework, thus triggering corrective sanctions such as the doctrine of forfeiture by wrongdoing.29 The continuing struggle to have de facto witness tampering recognized as the crime that it is highlights system-imposed limitations to legal rights when these rights confront deeply entrenched cultural norms that absolve batterers of culpability for their crimes. IPV-HT victims’ rights are not likely to be internalized unless the legal paradigm is coherent and committed to both formal and substantive equality. The pernicious nature of de facto WT demands an effective remedy, particularly because of the inherent difficulties in understanding and proving its existence in IPV-HT cases.

I. DE FACTO WITNESS TAMPERING IN PRACTICE

In naming de facto witness tampering as sufficiently problematic to warrant remedial law reform, it is necessary to analyze the factors contributing to its prevalence. Although some conduct appears relatively innocuous at first glance, when the conduct crosses the line to cause victim harm it should be considered tipping point tampering. Although cyber-tampering is relatively new

29. “In response to prolific witness tampering, the doctrine of forfeiture by wrongdoing evolved as a necessary equitable remedy.” Buel, supra note 6, at 1299. It provides that, when a defendant coerces, threatens, or harms a witness with the intention of preventing her testimony against him, the forfeiture doctrine should permit admission of the absent witness’s statements at trial. See generally JOHN H. WIGMORE, EVIDENCE §1405 (Chadbourn rev. 1974) (stating that forfeiture is based on the premise that “any tampering with a witness should . . . estop the tamperer from making any objection based on the results of his own chicanery”); see also Buel, supra note 6, at 1303-07 (citing case law and statutory examples of the doctrine of forfeiture by wrongdoing in the context of family violence cases).
outside the context of international espionage circles, IPV-HT offenders have lost little time in becoming highly skilled at using new technologies to silence their victims. The willful blindness of state actors helps to explain the legal fiction of *accord and satisfaction*. Recognition of de facto witness tampering through a rebuttable presumption would permit intervention in the early stages of IPV-HT, obviating the need for expensive criminal justice and social services responses after grievous harm to victims and their children.

Implicit in deficient legal system responses to WT is the persistent adherence to false assumptions such as the fiction that if victims simply flee their offenders, the abuse will stop. This position assumes a notion of volition that IPV-HT survivors can simply choose to be empowered agents and that perpetrators will acquiesce. For some time, researchers have documented that abuse victims and their children face a significantly higher risk of harm after leaving their batterers.\(^{30}\) Many offenders who have not previously battered their children will do so when they no longer have access to their adult partners.\(^{31}\) Much of this post-separation abuse of adult and child victims is blatant witness tampering; yet too often courts minimize this post-separation IPV as endemic to, what they euphemistically call, “high-conflict” family law cases, as though the context and frequency of the crimes should make them any more acceptable.\(^{32}\)

### A. Tipping Point Tampering

The inquiry into whether an offender’s animus rises to the level of de facto witness tampering requires contextualization to justify state intervention. Given that most relationships have fluctuating elements of coercion, crossing the line into criminalization is done with trepidation, but it remains necessary for victim protection.\(^{33}\) The dynamics of IPV-HT are such that every nuance has potential significance, giving credence to the argument that case factors and context are likely to be dispositive. In IPV-HT cases, the victim and offender have a prior and/or current relationship that has given the defendant access to much personal and otherwise confidential information about the victim’s family, employment,

---


31. See id. (noting that children need to be protected from the abusive parent in custody and visitation arrangements).


33. From an ethical standpoint, I believe that the criminalization of conduct should be viewed as an option of last resort, such as when IPV-HT offenders continue to pose a danger to their victims and community.
children, habits, home, and resources. This knowledge usually affords an offender the means by which to coerce a victim under the state’s radar screen. If WT and its implicit harms are to be forestalled, it is necessary to establish inferences or presumptions of WT in certain circumstances, including each of the four following categories. I argue that these categories can potentially afford relevant constructs of coercive control sufficient to constitute de facto WT.

1. Victim Grooming

Grooming is a socialization process through which offenders engage in conduct designed to earn the victim’s trust. Skilled perpetrators are adept at tailoring their tactics in consideration of their victims’ age, gender, race, interests, and level of poverty, loneliness, confidence, and parental involvement. Gradually, the abuser’s coercive, aberrant behavior—whether domestic violence, sexual exploitation or child abuse—is normalized, making intervention more difficult. The Internet serves as an ideal mechanism through which predators can conduct the grooming process, since it permits access to vulnerable children and adults, while simultaneously providing the option of anonymity.

Predators may engage in presently recognized witness intimidation in the later stages of the grooming process, but are more likely to gradually approach tipping point de facto tampering early on. They often initially employ what might be termed ‘kind coercion’ in order to wear down victim resistance to the offender’s overtures. ‘Kind coercion’ is actualized with compliments, gifts, attention, professions of love, and promises to fulfill the victim’s dream future.

34. See Malcolm Gladwell, In Plain View: How Child Molestes Get Away with It, THE NEW YORKER, Sept. 24, 2012, at 84, 88 (reporting that psychologists characterize a key component of the pedophile’s grooming process as the selection of the most vulnerable children as targets).

35. Id. (describing some of the common characteristics of Jerry Sandusky’s victims, including that they were impoverished and grateful for his ability to provide access to Penn State football games, travel, and famous people); see Thomas D. Lyon & Julia A. Dente, Child Witnesses and the Confrontation Clause, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1204-08 (2012) (explaining that victim selection and the grooming process includes exploitation of vulnerable victims).

36. Kimberly J. Mitchell et al., Internet-Facilitated Commercial Exploitation of Children: Findings From a Nationally Representative Sample of Law Enforcement Agencies in the United States, 23 SEXUAL ABUSE: J. RES. & TREATMENT 43, 46-47 (2011) (describing how sex offenders use the Internet to exploit minors); see also Lyon & Dente, supra note 35, at 1205-06 (noting that as part of the grooming process, perpetrators gradually befriend and seduce their victims, sometimes using pornography, alcohol, and gifts).

37. See Danielle Keats Citron, Cyber Civil Rights, 89 B.U. L. REV. 61, 80 (2009) (“[T]he Internet’s anonymity disaggregates the threats from their social context, eliminating cues that might signal the extent of peril. Online anonymity also may prevent an effective law enforcement response.”).

The problem for policymakers and wary dating partners alike is that this behavior is also common within innocent courtship absent the coercive element. The public must therefore be taught how to discern the critical tipping point when kind behavior becomes a manipulative ploy to obtain control of a person.

At every stage of the process in which human trafficking victims are groomed, seduced, and enslaved, de facto and recognized witness tampering occur as part of reinforcing the “no snitch” credo. By framing help-seeking as snitching, pimps are able to harness the anti-snitch ideology that is customary among gangs and criminals, and within organized crime and impoverished communities. Since human traffickers generally operate in poor communities and often have criminal records, the existing subculture of silence and distrust is perpetuated as more gangs become involved in sex and labor trafficking.

2. Financial Sabotage

Criminal justice practitioners largely ignore the role of monetary deprivation in the lives of abuse and exploitation victims, and are likely to minimize its adverse impact. Predators know that financial coercion can be a sure means to continued control, particularly for a victim who is afraid of the offender and has few options. Many forms of financial abuse fit squarely within the purview of existing witness tampering laws, yet courts often disregard

---

Press Release] (describing a pimp’s practice of buying girls clothing and shoes to entice them into his trafficking business).


42. Del Quentin Wilber, MS-13 Gang Is Branching Into Underage Prostitution, Authorities Say, WASH. POST. (Nov. 14, 2011), http://www.washingtonpost.com/local/ms-13-gang-is-branching-into-prostitution-authorities-say/2011/11/04/gIQAAAtOyIN_story.html (describing a large international gang’s transition to more business-oriented activities, such as drug dealing and trafficking young girls).

43. See SHIRA GANS & TILOMA JAYASINGHE, OFFICE OF THE MANHATTAN BURGHOUD PRESIDENT, ECONOMIC ABUSE: THE UNTOLD COST OF DOMESTIC VIOLENCE 1 (2012) (“While disturbingly prevalent . . . economic abuse is currently unrecognized in State or City law as a form of domestic violence.”).

44. Id. at 4 (citing the devastating and long-term impact of economic abuse, and noting that financial “concerns are the most commonly cited barrier to leaving an abusive relationship”).
financial abuse in this context and instead focus on physical violence.  

Pimps and traffickers tend to target younger people who have low self-esteem or a troubled home life, quickly becoming the “boyfriend” and asserting control over their victim’s every move made and dollar earned. Snitching on a “boyfriend,” especially one who gives her money and a place to stay, is out of the question for many financially dependent victims. And if there is any indication that she may stray or disclose the criminal activity, she is typically threatened and/or physically beaten. Further, others in the pimp’s entourage discourage snitching. Because of the financial and emotional control that pimps hold over everyone in their criminal enterprise, many victims become defensive of their pimp if anyone appears to “get out of line.”

The human rights paradigm can inform American jurisprudence in order to purge the present hypocrisy of claiming to value freedom, yet discounting the basic economic and social rights that are foundational to liberty. This hypocrisy was not always present. In President Franklin D. Roosevelt’s famous “Four Freedoms” Speech, he linked freedom from want with freedom from war and violence; these normative concepts helped shape the 1948 Universal Declaration of Human Rights UDHR. For IPV-HT victims, courts in the United States too often minimize the assertion that economic rights as fundamental, even though financial sabotage is what prevents many victims from permanently escaping their abusers.

45. See Leah Goodmark, A Troubled Marriage: Domestic Violence and the Legal System 30-31 (2012) (emphasizing that the present legal system is predominantly focused on physical violence).

46. See Leidholdt, supra note 10, at 17 (explaining how intimate-partner traffickers seek victims without family support and control them with threats and violence, ensuring they will turn over the proceeds from their forced sex or labor).

47. Robin Erb & Roberta De Boer, Bold Teenage Prostitute Wanted Out of ‘Game’; Toledoan is Home Insisting She’s Not Afraid, THE BLADE (May 15, 2006), http://www.toledoblade.com/Police-Fire/2006/05/15/Bold-teenage-prostitute-wanted-out-of-game-Toledoan-is-home-insisting-she-s-not-afraid (describing the story of a young victim of trafficking, Jessica, who, after being arrested, was threatened by her pimp not to snitch and told that one of the other girls Jessica was arrested with was beaten for snitching; although, Jessica was instrumental in helping to convict her pimp, after his conviction she still seemed to defend him and to demonstrate an emotional attachment).

48. Isolde Raftery, Juvenile Prostitutes: Young Workers in the Oldest Profession, THE COLUMBIAN, Dec. 7, 2008 (describing how a young trafficking victim, Cherise, who had strayed from her pimp, was approached by another girl who had the same pimp and told, “[s]nitches die, you know”; this was to scare Cherise out of saying anything about the pimp, who was in prison at the time).

49. Id.

50. See Catherine Albisa, Economic and Social Rights in the United States: Six Rights, One Promise, in 2 Bringing Human Rights Home 25, 25 (Cynthia Soohoo et al. eds., 2008) (“Economic and social rights are the foundation for freedom.”).

51. Id. at 25-26.

52. Notions of economic justice have been slow to take root; only recently have there been attempts to locate these rights at the intersections of poverty, race, and human rights. Id. at 30 (describing the Southern Human Rights Organizers’ Conferences and related efforts linking human rights with economic and social rights).
Substantial recognized and de facto WT occurs in the context of child support enforcement when non-custodial parents try various means to avoid payment; these means range from threats and property damage, to assault and murder of mother and child.\textsuperscript{53} For many IPV-HT victims facing abuse, access to child support can mean the difference between adequate care for their children and poverty and homelessness.\textsuperscript{54} Since survivors often cite economic dependence as the “most common reason that survivors remain with or return to abusive partners,”\textsuperscript{55} much harm and state expense could be avoided if child support orders were enforced. Many batterers make good on their threats to sabotage the system, as they are less likely than non-batterers to pay child support fully, consistently, or at all.\textsuperscript{56} Harried or biased court staff may frustrate the abused custodial parent’s attempts to enforce child support orders,\textsuperscript{57} overlooking the fact that the unpaid monies are the non-custodial parent’s legal

\textsuperscript{53} See, e.g., Man Killed His Ex over Child Support, WIVB.COM (May 18, 2011, 4:38 PM), http://www.wivb.com/dpp/news/crime/Man-killed-his-ex-over-child-support (reporting that a man strangled his ex-girlfriend to death because he was upset about having to pay child support for his six year-old daughter); Cops: Dad Angry over Child Support Kills Son, NBCNEWS.COM (Jan. 4, 2009, 4:53 PM), www.msnbc.msn.com/id/28485556/ns/us_news-crime_andCourts/b/cops-dad-angry-over-child-support-kills-son/ (reporting that father admitted to killing his two-year-old son in anger over child support obligations); Prosecutor: Ocean Beach Man Killed Wife Over Child Support, 10NEWS (Feb. 24, 2010), http://www.10news.com/news/22656527/detail.html (reporting that in spite of being wealthy, a father followed up on a threat to murder his wife if she did not drop the child support case).

\textsuperscript{54} In addition to the author’s own experience and observing this impact among thousands of survivors, see Susan Notar & Vicki Turetsky, Models for Safe Child Support Enforcement, 8 AM. U. J. GENDER SOC. POL’Y & L. 657, 659 (2000) (“When combined with her earnings, the receipt of child support can be the deciding factor on whether a woman remains separated from an abusive partner or returns to him in order to support her child.”); Mary Ann Dutton et al., Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications, 7 GEO. J. ON POVERTY L. & POL’Y 245, 258 (2000) (reporting the average income for employed immigrant women in Washington, D.C. was under $9,000 per year). In Massachusetts, a study found that nearly all homeless women were survivors of severe physical or sexual violence during their lifetimes. See Martha F. Davis, The Economics of Abuse: How Violence Perpetuates Women’s Poverty, in BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: THE TIES THAT BIND 17, 25 (Ruth A. Brandwein ed., 1999) (citing E.L. Bassuk et al., Single Mothers and Welfare, 275 SCI. AM. 60, 60-67 (1996) (finding a violence rate of 92 percent against homeless women in Massachusetts)).


\textsuperscript{56} See Marsha B. Liss & Gerladine Stahly, Domestic Violence and Child Custody, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175, 179, 181 (Marsali Hansen & Michele Harway eds., 1993) (emphasizing the particular problems domestic violence victims face because their batterers tend not to pay child support).

obligation to their children as codified in every state.\(^58\)

Professor Margaret Drew, also an experienced family law attorney, notes that false promises of or token payment of child support arrearages may constitute de facto WT when used to silence the victim.\(^59\) An abuser’s refusal to pay child support may constitute de facto witness tampering when there is a pending legal proceeding related to IPV-HT or a present protective order, and there is evidence of a “classic abusive relationship.”\(^60\) With America’s children owed arrearages of $110 billion in 2010 (and that only represents those fortunate enough to have obtained a court order),\(^61\) abuse victims must repeatedly attempt to balance the need for assistance with the danger of enforcement.

As part of financial sabotage, offenders frequently attempt to compromise their victims’ housing as a means of ensuring noncooperation with authorities. Some landlords and housing authorities are complicit in the abusers’ tactics when they enforce ‘zero-tolerance’ policies that blame victims for their offenders’ violence.\(^62\) In 2011, the U.S. Department of Housing and Urban Development (HUD) issued a ten-page explanatory memo on *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHA) and the Violence Against Women Act (VAWA).*\(^63\) Local

\(^58\) See, e.g., ARIZ. REV. STAT. ANN. § 25-511 (West, Westlaw through 2013 1st Reg. Sess.) (‘[A]ny parent of a minor child who knowingly fails to furnish reasonable support for the parent’s child is guilty of a class 6 felony.’)

\(^59\) E-mail from Margaret Drew, Visiting Clinical Professor of Law, Northeastern University School of Law, to author (Mar. 14, 2013) (on file with the author).

\(^60\) See Giles, 554 U.S. at 380 (2008) (characterizing a “classic abusive relationship” as one that is intended to “isolate the victim from outside help, including the aid of law enforcement and the judicial process”); see also infra notes 315-21 and accompanying text (discussing “classic abusive relationship” and its correlation with de facto WT).


\(^62\) The U.S. Department of Housing and Urban Development (HUD) permits landlords and housing authorities to evict a tenant if any household member or guest commits a crime; this is generally referred to as the “One Strike” Rule. See Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28776 (May 24, 2001). In recognition of abuse victims’ particular vulnerability to housing discrimination, VAWA includes provisions designed to protect abuse survivors from denial of access, eviction, and termination of housing benefits; the Violence Against Women and Department of Justice Reauthorization Act of 2005 contains within its Title VI, a Section titled “Housing Opportunities and Safety for Battered Women and Children,” which is binding on Housing and Urban Development (HUD) Programs. The Violence Against Women and Dep’t of Justice Reauthorization Act of 2005: Applicability to HUD Programs, 51 Fed. Reg. 12696 (Mar. 16, 2007). The federal Violence Against Women Act of 1994 (VAWA) (Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355) was reauthorized in 2001, 2005, and 2013 to provide funds to help courts, shelters, police, and related programs address domestic violence, sexual assault, and stalking. VAWA, THE NAT’L DOMESTIC VIOLENCE HOTLINE, http://www.thehotline.org/about-us/vawa/ (last visited Dec. 19, 2013).

housing authority staff are responsible for implementing the HUD mandate to stop blaming and punishing victims for their offenders’ abusive conduct.64

Not surprisingly, offenders are likely to create danger and disturbances at the victims’ home when seeking to prevent them from reporting crimes, testifying truthfully at trials, and enlisting the assistance of social services. Although it may be illegal, abuse survivors are regularly evicted for calling the police, as landlords and housing authorities use the excuse that other tenants were disturbed by the perpetrators’ noise or destruction of property.65 Survivors are thus doubly penalized if they lose their homes subsequent to the unlawful acts of the abuser.66 Courts should be aware of the gendered, raced, and classed consequences of these controlling and abusive behaviors. Since IPV victims are overwhelmingly women,67 evicting them or denying them housing may give these survivors a valid claim for sex discrimination under the Fair Housing Act.68 And because women of color are more frequently IPV-HT victims,69 denial of their housing rights may trigger claims under the Fair Housing Act’s prohibition against discrimination based on race or national origin.70 If landlords and housing authorities can be sanctioned for their discriminatory actions, then abusers should also be held accountable for their myriad roles in sabotaging housing to silence their victims.

In many IPV cases, financial sabotage does not stop even after the victim obtains an order of protection. Some abusers resort to harassment that constitutes both a violation of the protective order and de facto witness tampering, yet rarely are these abusers sanctioned because they have astutely refrained from physically violent retaliation. The following scenarios are all too familiar: in the

---

survivor’s name, an offender opens new magazine subscriptions, home warranty contracts, and similar business arrangements, or orders large amounts of food for home-delivery, for which the victim is then dogged for payment, ultimately having her credit diminished—this is precisely the abuser’s goal. This conduct falls within the purview of de facto witness tampering because the offender is frequently retaliating against a victim for obtaining a protective order, hoping the harassment will result in a dismissal of the order and the victim’s refusal to testify in any accompanying criminal cases.

In custody disputes, consideration of each parent’s financial position usually disadvantages mothers, as judges highly value present income and traditional home arrangements, along with earning potential and marital status. Courts sometimes ignore that, but for the offender’s refusal to pay child support, the victim and children would not be impoverished. Given that a history of IPV has proven to be a fairly solid predictor of likely recidivism, courts should understand many offenders’ willingness to engage in witness intimidation throughout the legal process. Batterers may engage in renewed physical violence and withhold child support to exert control over custody decisions and during the course of visitation exchanges.

3. Custodial Interference

Most IPV-HT victims prioritize their children’s well-being above all else, making protracted custody litigation an optimal means by which offenders can retaliate against, intimidate, and control their partner. Courts and custody evaluators are sometimes so unduly impressed by a batterer’s professed interest in parenting that they minimize a history of violence and ignore the WT implications. Abusers may present a charismatic, trustworthy persona in court, 

71. See, e.g., Jeff Goldman, Cops: N.J. Man Harassed Ex-Girlfriend, Had 20 Pizzas Delivered to Her Home, STAR-LEDGER, Jan. 31, 2013, http://www.nj.com/ocean/index.ssf/2013/01/ (reporting that an ex-boyfriend ordered sizeable amounts of Chinese food, and on another date 20 pizzas to the home of his ex-girlfriend and her husband, threatening to also send strippers and prostitutes). This is also based on the author’s experience, in which numerous clients and colleagues have shared similar stories, and yet most were unable to convince courts that such conduct is in flagrant violation of a protective order.

72. See supra note 4 (detailing author’s experience).

73. See Susan Beth Jacobs, Comment, The Hidden Gender Bias Behind the Best Interest of the Child Standard in Custody Decisions, 13 GA. ST. U. L. REV. 845, 849-50 (1997) (“Many judges consider present income, future earning potential, housing, maintenance of the family home, and other marital advantages in making custody decisions. This has had a devastating effect on women, who generally do not earn as much as men because of disparity in wages, and because of a focus on raising children instead of advancing career opportunities.”)

74. Peter G. Jaffe et al., Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes, JUV. & FAM. CT. J. 57 (2003) (noting that a previously violent parent may use visitation exchanges of children to resume the abuse).

75. This is based on my extensive experience with and observations of battered women seeking custody, as well as discussions with scores of family law attorneys across the country. During the time that I directed the Halle Center for Family Justice, the Center took a child
thus persuading judges and custody evaluators to award them decision-making power over their children—even in the face of credible IPV evidence. Researchers caution that this disposition is fraught with danger, “given the likelihood that many abusers will use the arrangement to continue their harassment and manipulation through legal channels.” Batterers can force victims to engage with them over a contrived need to confer about the children, and to attend school events or doctor’s visits. A court-ordered co-parenting plan empowers an abuser to refuse consent for a child’s needed medical care, counseling, and extracurricular school activities.

It is difficult to accurately capture and convey the depth of terror many survivors feel at the prospect of their children being physically or emotionally harmed by a manipulative abuser. This fear can animate an IPV-HT victim’s silence even in the face of horrific abuse. Legal conceptions of adult and child victims’ harm as individualized must instead embrace the notion of social injury to remove the false dichotomy between public and private lives. The concept of social injury expands law’s limited value construction to secure an ethic of compassion that more accurately reflects expectations about how people should relate to one another. As applied here, the psychological and physical trauma resulting from the batterer’s de facto WT would be taken seriously by courts and given sufficient weight in determining case resolutions.

Legislative reforms designed to protect abuse victims may not be implemented in practice, as studies indicate that “domestic violence survivors are re-victimized and even endangered by child custody and visitation arrangements that allow batterers regular opportunities to renew threats and maintain power and control of former spouses.” Some abusers terrorize ex-partners into compliance by not returning the children after visitation, kidnapping them, or threatening to harm them.

sex trafficking case in which the pimp so impressed the court with his professions of love for the baby that the judge granted him full custody, citing that the teen mother was underage, and that the father lived with his mother.


77. Id.

78. Id.

79. This is based on the author’s more than 36 years of working with abuse survivors and hearing directly from thousands of victims about the terror that silences them.

80. See Leslie Bender, An Overview of Feminist Torts Scholarship, 78 CORNELL L. REV. 575, 580 (1993) (explaining that feminist scholars have advocated adherence to the concept of civil and criminal social injury as a means of addressing gender bias within the legal system).

81. Id.

82. Jaffe et al., supra note 30, at 58; see also Peter G. Jaffe et al., Custody Disputes Involving Allegations of Domestic Violence: Toward A Differentiated Approach to Parenting Plans, 46 FAM. CT. REV. 500, 503 (2008) (stating that sometimes these offenders appear pro se, increasing their chances of further harassing a former partner through cross-examination, unless a shrewd judge prevents this).

83. See Jaffe et al., supra note 82, at 502 (citations omitted) (providing examples).
to heroic lengths to protect their children, offenders know that custodial interference is likely to deter reporting of traditional and de facto WT.

Intervener and court practices in some jurisdictions continue to reflect the misconception that if children have not been physically battered, evidence of IPV exposure is irrelevant to custody and visitation decisions. Yet, it is now well-documented that children are adversely impacted by exposure to domestic violence, as empirical studies verify the increased likelihood of internalized and externalized trauma. Abuse victims may not be familiar with the empirical data, but they can attest to its validity, as their children evidence emotional and behavioral difficulties after interactions with their violent parents. Understanding that children are ideal pawns in some offenders’ coercive control schemes should prompt inclusion of custodial interference within the rubric of WT laws.

In the aftermath of an abuse survivor leaving her batterer, she and her children can face escalated retaliatory danger, sometimes in the form of kidnapping or custodial interference. To more accurately label nefarious custodial interference, Attorney Barry Goldstein suggests codification of a new offense he calls kidnapping by proxy: a crime that is committed when a person seeks custody with the intent of preventing a victim from leaving, coercing her to return, or retaliating against her after she leaves. An additional required

84. See Conner, supra note 32, at 226 (“Unfortunately, our legal system’s narrow focus on physical acts of violence, specifically those that result in injury or a threat of serious bodily harm, causes courts to lose sight of critical information about how domestic violence generally influences parenting.”).


87. See Catherine F. Klein et al., Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with Their Children, 39 Fam. L.Q. 109, 111 n.6 (2005) (explaining that parental kidnapping laws may also be called custodial interference, child snatching, or child abduction statutes); see also id. at app. (offering a compilation of parental kidnapping statutes current through November 2004).

88. Barry Goldstein, Legislation Needed to Help Protective Mothers, TIME’S UP BLOG (Feb. 14, 2012, 8:37 AM), http://timesupblog.blogspot.com/2012/02/legislation-needed-to-help-protective.html (explaining the scope of his legislative proposal for a kidnapping by proxy statute). The term “kidnapping by proxy” was probably coined by Herbert Spencer, a Victorian era political theorist, See 3 HERBERT SPENCER, THE PRINCIPLES OF SOCIOLOGY § 797 (D. Appleton & Co. 1920) (1986) (“[Christians] develop[ed], on a vast scale, a system of wholesale kidnapping by proxy—buying from slave-raiders multitudes of Negroes, who, if they survived the voyage, were set to work in gangs on plantations under the driver’s lash.”).
element is that an offender makes false allegations in furtherance of the harmful scheme. Such a statute could help judges make custody determinations by prompting them to question why people with a history of both domestic violence and sparse interest in their children are now seeking custody. Because many abusers execute kidnapping by proxy with the intentions of deterring their victims from seeking help and punishing them for engaging with the state, it epitomizes de facto WT.

4. False Allegations

Some abusers make false accusations of crimes or threaten to do so as another highly effective means of deterring victims from engaging with the legal system. When the offender knows his actions will likely scare the victim into silence, such conduct constitutes de facto WT. Some of these untruthful complaints meet the elements of existing crimes, yet are infrequently prosecuted. An abuser’s false report to Child Protective Services (CPS) triggers a mandatory, highly intrusive investigation of most aspects of the victim’s life, including unannounced home visits, demeaning interrogations, lifetime inclusion in a database, mandatory court and office hearings, and forced confrontations with the accuser. Similarly, fabricated police complaints may prompt arrest, a few nights in jail, losing one’s children to foster care, a protracted litany of pre-trial hearings, continuances, trials, appeals, and, ultimately, a prison sentence and a criminal record for the true victim, instead of for the perpetrator. Even if she is ultimately exonerated, a survivor may lose her job, home, friends, and savings in the process of proving her innocence.

For an abuse victim with a criminal record or one on probation or parole, a batterer’s threats to contact authorities are particularly terrifying, as the specter of prison and its horrific implications is ever-present. Survivors dealing with the challenges of substance abuse and mental illness are frequently vulnerable to threats, derision, and blame for the violence, making it more difficult to defend against the abusers’ lies. In response to offenders’ false accusations of criminal

89. Goldstein, supra note 88.
90. Id. (noting that this statute would put in context many abusers’ sudden interest in custody).
91. See, e.g., Nicholas Bala & John Schuman, Allegations of Sexual Abuse When Parents Have Separated, 17 CAN. FAM. L.Q. 191 (1999) (citing a large study which found that “allegations of abuse made by non-custodial fathers were less likely to be considered founded and more likely to be believed to have been made maliciously.”).
92. This is based on author’s experience working with many survivors whose partners falsely reported them to CPS; see also infra notes 107-13 (describing defendant Jimmy Saldivar’s repeated false reports to CPS).
93. See, e.g., infra notes 107-13 and accompanying text (describing Nina Olivo being fired from numerous jobs and incurring great expenses as a direct result of her ex-husband’s de facto WT).
94. Depending on case facts, it may be the victim’s community, abuser, the courts or all three exacerbating her harm. This is based on the author’s experience working with myriad survivors struggling with mental illness or addiction and witnessing their abusers vilify them; see supra note 4 (detailing author’s experience).
activity, adultery, or simply not being a “good” wife, survivors may face expulsion, violent punishment, and even death at the hands of those within their religious communities.\textsuperscript{95} IPV-HT offenders are empowered by centuries of challenges to the veracity of victims’ abuse and sexual assault claims.\textsuperscript{96} Societal norms of gender bias help perpetuate disproven stereotypes that attribute to the survivor motives of revenge, jealousy, and malice, thus cleverly shifting the focus from perpetrator to victim. In particular, survivors who are women, LGBTQ, people of color, poor, or from other marginalized groups face heightened suspicion when seeking the state’s protection.\textsuperscript{97} As expert and scholar Professor David Lisak notes, the polemics on victims’ false accounts of abuse rarely cite sound empirical research.\textsuperscript{98}

Some perpetrators make sure to call the police before the true victim is able to do so, and then claim to have been attacked, thus benefiting from the erroneous assumption that the first to seek help is being truthful.\textsuperscript{99} When charged with domestic violence offenses, the accused most often claim self-defense, causing some officers to arrest the true victim or both parties to avoid determining the primary aggressor.\textsuperscript{100} Once armed with the knowledge of the efficacy of this tactic, offenders can remind their victims that it could be a toss of the dice as to who will be arrested and held responsible for the harm, irrespective of visible injuries, size difference, history of abuse, and related evidentiary

\textsuperscript{95} Linda L. Ammons, What’s God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence, 51 Rutgers L. Rev. 1207, 1269 (1999) (describing the unsupportive, even hostile responses of their faith communities by Jewish and Christian battered women). This is also corroborated by the author’s experience assisting abuse survivors whose religious communities held them responsible for the abuse and chastised them for bringing shame on the family; see supra note 4 (detailing author’s experience).

\textsuperscript{96} See David Lisak et al., False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases, 16 VIOLENCE AGAINST WOMEN 1318, 1318 (2010) (“For centuries, it has been assumed and asserted that . . . a large proportion of rape allegations are maliciously concocted for purposes of revenge or other motives.”).

\textsuperscript{97} See discussion infra Part II.B.

\textsuperscript{98} Lisak et al., supra note 96, at 1319 (“The heated public discourse about the frequency of false rape allegations often makes no reference to actual research.”).

\textsuperscript{99} This is based on the author’s experience of this repeated occurrence. In 2012, the author assisted two abuse survivors whose partners assaulted them, called the police, and claimed to be the true victims. Of great concern, survivors with visible injuries were arrested and the prosecutors (in two different Arizona counties) said they could not dismiss the cases because the men had called first. By ensuring their victims were terrified of being convicted and losing their jobs, these batterers were able to deter the real victims from seeking any legal protections. See supra note 4 (detailing author’s experience); see also Njeri Mathis Rutledge, Looking A Gift Horse in the Mouth: The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims, 19 Duke J. Gender L. & Pol’y 223, 243 n.170 (2011) (“In my experience, it is also not unusual for a seasoned batterer to call 911 to preclude the actual victim from calling or at least undermine her credibility.”).

\textsuperscript{100} See Rutledge, supra note 99, at 243 (“If self-defense is used, and the officer is unable or unwilling to identify the primary aggressor, the victim may be charged under a dual arrest policy.”). This is also consistent with the author’s experience; see supra note 4 (detailing author’s experience).
Factors. Victims of sexual assault and human trafficking who contact law enforcement most often hear their abusers claim that all acts were consensual, striking a responsive chord with a body politic that typically does not want to believe the magnitude of sexual exploitation that occurs across social strata. Strongly held beliefs fuel the polemics about how “nonconsensual” sex should legally be defined, with many arguing for retention of a force element. This normatively misguided focus fails to capture the horrific array of sexual exploitation suffered by victims at the hands of their perpetrators, as well as the concomitant endemic coercion and threats. Although some sexual assault law reform has occurred over the past few decades, there appears to have been little progress in changing social norms about gendered violence, sexual autonomy, and the state’s obligation to protect victims.

At present, only a few states define WT to include intimidation that prevents a person from accurately reporting a crime to the police, and even then, some ration this remedy to felonies and a limited class of release conditions.

101 This is based on the author’s experience of victim reports over 36 years; see supra note 4 (detailing author’s experience).
102 See Walter S. DeKeseredy et al., Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge, 9 J. AGGRESSION & VIOLENT BEHAV. 675, 681-83 (2004) (reporting the high incidence of rape against women in the process of separation and after divorce). Between 64 and 96 percent of all rapes are not reported to law enforcement. David Lisak & Paul M. Miller, Repeat Rape and Multiple Offending Among Undetected Rapists, 17 VIOLENCE & VICTIMS 73, 73 (2002). Repeat rapists who are not apprehended share similar qualities with those convicted and incarcerated, namely “high levels of anger at women, the need to dominate women, hypermasculinity, lack of empathy, and psychopathy and antisocial traits.” Id. (citations omitted).
103 See Michal Buchhandler-Raphael, The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power, 18 MICH. J. GENDER & L. 147, 150 (2011) (reporting that a majority of U.S. jurisdictions have failed to recognize sexual assault without the element of force); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 2 (1998) (same); see also Kimberly A. Lonsway et al., False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault, 3 VOICE, no. 1, 2009, at 1, 10 (stating that prosecutors must address the issues of false reports in order to convict rapists).
104 See Ilene Seidman & Susan Vickers, The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform, 38 SUFFOLK U. L. REV. 467, 468 (2005) (arguing that although much rape law reform has taken place, “attitudes about sexual autonomy and gender roles in sexual relations have not”); see also ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 4 (2013) (noting that numerous scholars now agree that decades after the promising advent of the rape reform movement, justice for victims has been elusive, at least in part due to persistent doubting of allegations).
105 For example, New Mexico does not appear to include misdemeanors, unless they are within the last category. New Mexico’s WT law reads, in part:
Bribery or intimidation of a witness consists of any person knowingly: (3) intimidating or threatening any person or giving or offering to give anything of value to any person with the intent to keep the person from truthfully reporting to a law enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings.
Threatening harm for reporting one’s own victimization to police is de facto WT and this conduct should be incorporated into all state and federal WT laws. The New York statute prohibiting WT offers a preferred format as it specifies interference with a report to “any court, grand jury, prosecutor, police officer or peace officer.”\textsuperscript{106} The current statutory framework facilitates offenders’ false allegations against their victims, which allows them to wrongfully ensnare their victims in the legal system, and also permits offenders to accuse survivors of lying about the violence perpetrated against them. As a result, the status quo is quite effectual at silencing victims.

B. Cyber-Tampering

In a case epitomizing cyber-tampering, Jimmy Saldivar employed an array of intimidating, unlawful strategies for more than a decade in his efforts to dissuade his ex-wife, Nina, from obtaining orders of protection, testifying against him in the criminal trials for his abuse of her, and attempting to enforce the child support order for their three children.\textsuperscript{107} Prior to discovering the power of cyberstalking, Jimmy Saldivar committed de facto and traditional WT when he, among other abuses, stalked her on the highway (narrowly avoiding collisions), killed two of his children’s dogs (stabbing and shooting them), recruited his family and friends to threaten Nina with retaliation, and caused Nina to lose four jobs due to his vexatious litigation and harassment.\textsuperscript{108}

Then Jimmy Sadivar discovered that cyberstalking provided an ideal mechanism through which he could incessantly harass his ex-wife with impunity. He was able to avoid culpability by enlisting the aid of family members, who let him use their computers and online identities. Throughout September of 2009, Jimmy Saldivar assumed his ex-wife’s identity on MySpace and posted a message stating: “Want sum head? Call 326-1393 n ask 4 Nina!”\textsuperscript{109}

\textsuperscript{106}N.M. STAT. ANN. § 30-24-3 (West, Westlaw through 2013 1st Reg. Sess.) (emphasis added).

New York appears to offer a more comprehensive framework:

\begin{quote}
Intimidating a victim or witness in the third degree, 1. Wrongfully compels or attempts to compel such other person to refrain from communicating such information to any court, grand jury, prosecutor, police officer or peace officer by means of instilling in him a fear that the actor will cause physical injury to such other person or another person.
\end{quote}

\textsuperscript{107}N.Y. PEN. LAW § 215.15 (West, Westlaw through L.2013) (emphasis added). As an example of states lacking such provisions, see ARK. CODE ANN. §§ 5-53-109, 5-53-114 (West, Westlaw through 2013 Reg. Sess).

\textsuperscript{108}N.Y. PEN. LAW § 215.15 (West, Westlaw through L.2013).

\textsuperscript{109}See id. (giving further details of this case).

\textsuperscript{106}See Sarah M. Buel, \textit{Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders}, 83 OR. L. REV. 945, 1030-31 (2004) (describing more fully Jimmy Saldivar’s ongoing harassment, assaults, and abuse against his ex-wife and their children up to 2003). I began assisting and then representing Jimmy Saldivar’s ex-wife Nina in 1999, and have evidence of these offenses on file (photos, police reports, and court documents). All information is shared at Nina’s request; she said, “I hope it helps change laws so nobody else had [sic] to go through what my children and I have.”
After numerous calls to the Internet Service Provider (ISP), the message was finally removed in early October of 2009, only to soon be replaced with a new message stating “Nina the 2 timing slut, Like mother like daughter, $2 hooker,” and included her unlisted phone number and address. In response to these online posts, strange men relentlessly called Nina and came by her home throughout the night, honking their horns and banging on the door. Nina and her children were understandably terrified and forced to barricade themselves in their home. When she called the Austin Police Department, they said there was nothing they could do, unless she could prove that Jimmy Saldivar was posting the messages.

When I called the Austin Police Department, an officer explained that their hands were tied because Jimmy had not threatened anyone, and thus, no crime had been committed. I explained to the officer that Jimmy was engaging in classic witness tampering because he had a pending criminal case for violating Nina’s protective order against him, and he had previously threatened to retaliate when Nina sought to enforce her child support order. The officer said he was sympathetic, but absent proof that it was Jimmy posting the messages, there was nothing he could do. At my law students’ suggestion, I implored him to persuade the ISP to provide the source’s identifying information, but he declined to do so.

The Internet has proven to be an astonishingly powerful weapon in the arsenals of abusers who want to dissuade victims from accessing legal remedies. Internet victimization is also strongly correlated with offline harm, making it essential for interveners to screen adults and children for both locations of criminal activity. Every state has now enacted or amended cyberstalking,

10. Photograph of MySpace page with this message, dated October 16, 2009, on file with author.
11. See supra note 107 and accompanying text (detailing my relationship with and representation of Nina Olivo).
12. Interview with Nina Olivo in Austin, Tex. (Oct. 18, 2009).
13. Telephone Interview with the Austin Police Department (Oct. 19, 2009). Nina has asked that I not name the officer for fear of retaliation. Jimmy Saldivar has continued his cyberstalking and harassment of Nina, repeatedly posting messages accusing Nina of being “a convicted sex offender” and inviting people to her home for sexual encounters. Telephone Interview with Nina Olivo (Mar. 2, 2012).
14. See Kimberly J. Mitchell et al., Youth Internet Victimization in a Broader Victimization Context. 48 J. ADOLESCENT HEALTH 128, 128-31 (2011); see also KATRINA BAUM ET AL., NATIONAL CRIME VICTIMIZATION SURVEY, STALKING VICTIMIZATION IN THE UNITED STATES 1 (2009) (“Approximately 1 in 4 stalking victims reported some form of cyberstalking such as e-mail (83%) or instant messaging (35%).”). Ninety-six percent of all youth who report online victimization (e.g. sex predation, cyberbullying) also report offline victimization. Mitchell et al., supra, at 114. Online victimization is strongly associated with offline victimization, especially sexual victimization (in the form of sexual harassment, flashing, and rape) and psychological and emotional abuse. See id. at 130 tbl.2. Online victims also report higher rates of trauma symptomatology, delinquency, and life adversity. See id. at 130 tbl.3.
cyberharassment, and/or cyberbullying laws to prohibit electronic communications designed to harm the targets. But absent direct threats to inflict immediate violence, most law enforcement and judges minimize the danger, resulting in an unwillingness to identify cyber crimes as witness tampering. Even the more comprehensive statutes afford scant victim protection, as they are constrained by perceived First Amendment and jurisdictional restrictions, as well as almost blanket immunity for ISPs. With the proliferation of cyberharassment, it is not surprising that IPV-HT offenders have discovered the many benefits of using the Internet to terrorize and silence their victims.

1. Legal Atrophy

Recent analysis reveals weak enforcement of these laws in many jurisdictions. Some states, such as Mississippi, do not collect cyberstalking and cyberharassment data, nor do they use the laws for their intended purpose of protecting victims. In spite of his state promulgating a cyberstalking statute in.

116. Cyberharassment generally does not include a credible threat of physical harm. For example, Arizona law defines the crime of harassment as follows:

A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, the person: 1. Anonymously or otherwise communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses. . . . For the purposes of this section, “harassment” means conduct that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person. ARIZ. REV. STAT. ANN. § 13-2921(A)(1), (E) (2008).

117. Cyberbullying encompasses “electronic harassment or bullying among minors within a school context.” See State Cyberstalking and Cyberharassment Laws, supra note 115. Although cyberbullying presents an escalating challenge, this article will focus on cyberstalking and cyberharassment.

118. See id. (providing a fifty-state chart with types of laws and statutory cites).

119. See Citron, supra note 37, at 66-67 (noting that judges may be unable to understand the scope of cyberharassment); see also Danielle Keats Citron, Law’s Expressive Value in Combating Cyber Gender Harassment, 108 MICH. L. REV. 373, 375 (2009) [hereinafter Citron, Combating Cyber Gender Harassment] (stating that, even in the face of severe cyber gender harassment, the public is apt to make light of the resulting harm).

120. See, e.g., Citron, supra note 119, at 405 (noting that, contrary to the views of those opposing a cyber civil rights agenda, threats are not protected by the First Amendment).


122. See generally Citron, supra note 119 (citing studies and discussing the scope of cyberharassment).

123. See Micah Green, Cyberstalking Cases Are Hard to Prosecute, THE DISPATCH, June 11, 2012, http://www.cdispatch.com/news/article.asp?aid=17437 (reporting that recent research on several states’ efforts to enforce cyberstalking laws revealed that Mississippi was not gathering such data).
2003, Mississippi Attorney General Jim Hood explained that his office is hesitant to charge perpetrators because of the challenges in proving the elements of intent and knowledge. Since proving intent is a requisite in the vast majority of criminal cases, it is puzzling why this is deemed an acceptable excuse for not protecting victims of cyber crimes. Detective Kenny Watkins from Starksville, Mississippi, said that very few cyberstalking cases are prosecuted, though the police department receives three to four reports of cyberstalking each month. The low prosecution rates are even more startling because the crime consists of just two basic requirements: “threat of serious bodily harm and repeated communication.” The Mississippi cyberstalking statute offers a broader remedial scope by prohibiting the use of electronic communication to threaten “to inflict bodily harm . . . or physical injury to the property of any person, or . . . to knowingly make any false statement concerning death . . . or criminal conduct . . . ” Federal statutory schemes have also evolved to address cyber crimes.

Given the prevalence of cyber-tampering, teaching survivors how to collect, preserve, and submit evidence should be considered an essential part of witness interviewing and safety planning. When interveners engage with survivors in a compassionate manner (that is, focused on the safety concerns of the victim), far more evidence about witness tampering is likely to be revealed. Rather than declining to handle challenging prosecutions, Detective Kenny Watkins offers practical guidance for victims to collect and save the needed proof:

Document everything . . . . If you are dealing with texts . . . take a screen shot. If it’s e-mails, print and save them, and do the same thing with sites like Facebook. Record all the dates and times. You can bring this to the department and that evidence can be everything they need to start pursuing it.

Privacy rights are arguably implicated when offenders use social media for data mining and surveillance, and definitely so when these efforts are part of coercive patterns to stalk, harass, and intimidate survivors seeking legal

124. *Id.* (“The report stated that Hood’s office is reluctant to charge offenders because of the number of elements that must be proven, and the difficulty in proving those elements, citing the need to show knowledge and intent as the most difficult aspects to establish.”).

125. *Id.*


128. Green, supra note 123.

remedies. Cyberstalkers use the Internet to find, monitor, and harass their victims by tracking browser history, attaching spyware, and intercepting e-mails. Some offenders establish web sites specifically to harass their victims and then persuade others to join by posting false, inflammatory accusations. Numerous cyberstalking offenders impersonate their victims and send large quantities of e-mail messages and social media postings that cause a range of long-lasting harm from embarrassment, job loss, and family estrangement, to danger, fear, and mental illness.

Legal atrophy here refers to the competing rights discourse with some urging greater protection for cyberstalking/harassment victims and others calling for increased balancing of ISP and offender rights. IPV-HT offenders increasingly commit cyberharassment with the intent to silence or punish their victims, yet rarely is it recognized as part of the abuser’s WT and retaliation scheme. This is due, in part, to a legal system that does too little to protect victims of cyber harm and too much to protect its perpetrators and enablers. Courts have provided a perverse incentive for ISPs to ignore victims’ pleas for removal of offending photos and text messages except in narrowly construed circumstances.

The Ninth Circuit Court of Appeal’s decision in Barnes v. Yahoo!, Inc. exemplifies the Court’s unwillingness to provide strong protection for cyberharassment victims. In that case, Cecilia Barnes’ ex-boyfriend posted nude photos of her on a Yahoo! Inc.-hosted web page, including an invitation for sex and her work address, phone, and e-mail addresses. He then impersonated her on a Yahoo online chat room, again providing her contact information and inviting those interested in sexual encounters to come to her workplace. In response to these posts, men soon harassed Ms. Barnes at her office with visits, calls, and e-mails, seeking to accept the online-offered sex. After several months of Ms. Barnes imploring Yahoo to delete the profiles to no avail, she filed suit. The Barnes opinion starts with the auspicious statement: “This case stems from a dangerous, cruel, and highly indecent use of the internet for the apparent purpose of revenge.” Yet the Ninth Circuit Court of Appeals later made clear that it only found that Ms. Barnes could sue Yahoo because its representative promised Barnes that Yahoo would delete the offending pictures, and then failed to do so.

131. Id. at 170.
133. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098 (9th Cir. 2009) (noting that the photos were taken without Ms. Barnes’ consent, as was the posting of her personal information).
134. Id.
As Barnes and numerous other cyber-tampering victims have discovered, courts view the Communications Decency Act (CDA) as affording ISPs protection from liability for the postings of third parties. Members can use Porn 2.0 interactive websites to post pornographic content as a means of intimidation, harassment, and retaliation against abuse victims who at present have little recourse. Engaging in online criticism of another person is not prohibited activity, unless, as is relevant for this inquiry, it is reasonable to assume that the victim will be persuaded to forgo reporting a crime or taking part in the prosecution: i.e. classic WT. Instead of falling prey to defense counsels’ promotion of defendants’ First Amendment rights, the prosecutorial paradigm must shift the burden and prioritize purpose, effect, and controlling patterns of humiliation and abuse.

2. Civil Rights Nexus

IPV-HT offenders sometimes use the Internet to silence their victims in ways that constitute civil rights violations coupled with gender discrimination. That IPV-HT manifests as bias against women in the vast majority of cases informs the analysis of gendered abuse and provision of services. Nonetheless, because this framework excludes some LGBTQ and other victims, it is necessary to also identify IPV-HT offenses as civil rights and human rights violations—

135. Id. at 1108-09.
137. See Jacqui Cheng, Porn 2.0 is Stiff Competition for Pro Pornographers, Ars Technica (June 6, 2007), http://arstechnica.com/news.ars/post/20070606-porn-2-0-is-stiff-competition-for-pro-pronographers.html. (explaining that “Porn 2.0” refers to websites in which users create and post their own pornography).
138. See Ann Bartow, Pornography, Coercion, and Copyright Law 2.0, 10 VAND. J. ENT. & TECH. L. 799, 801 (2008) (describing how the ease of manufacturing and distributing digital pornography “incentivize[s] abuse and coercion in pornography production”); see also Citron, Combating Cyber Gender Harassment, supra note 119, at 380-83 (giving examples of how offenders use social media to intimidate and harass women); Ariel Ronneburger, Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0, 21 SYRACUSE SCI. & TECH. L. REP. 1, 2 (2009) (“With Porn 2.0, it is increasingly easy for Internet users to post pornographic images or videos of people who did not consent to the materials’ circulation.”).
139. See generally Aimee Fukuchi, Note, A Balance of Convenience: The Use of Burden-Shifting Devices in Criminal Cyberharassment Law, 52 B.C. L. REV. 289 (2011) (arguing that present cyberharassment laws fail to protect victims safety rights and that a burden-shifting approach can protect the First and Fourteenth Amendment rights of victims and the accused).
141. See Julie Goldscheid, Reconsidering Domestic Violence Services and Advocacy, 29 PACE L. REV. 227, 240 (2009) (book review) (noting that “gender plays a dominant role in many, if not most, instances of the abuse that services are designed to target”).
DE FACTO WITNESS TAMPERING

recognition of which is required to achieve formal equality.\textsuperscript{142} Civil rights remedies were included in the 1994 Violence Against Women Act (VAWA) after four years of hearings, during which Congress accumulated a massive record documenting that domestic abuse deprived victims of their civil rights.\textsuperscript{143} Although in \textit{United States v. Morrison}, the U. S. Supreme Court struck VAWA’s civil rights provision, the Court’s reasoning hinged on Congress exceeding its authority under the Commerce Clause, and it did not deny that battered women’s civil rights were violated by their offenders.\textsuperscript{144}

The nexus between de facto cyber-tampering and civil rights violations is that the former is often the means by which an increasing number of IPV-HT offenders accomplish the latter. First, an enhanced regulatory scheme for de facto WT is necessary to capture cyber-tampering at its intersection with civil rights. Robust statutory and case law maintain civil rights protections against disparate treatment for those in legally protected classes, including gender, race, disability, and age. Given that numerous abusers engage in cyberharassment to prevent their victims from obtaining and maintaining employment, plaintiffs’ lawyers should seek remedies under applicable laws. For example, Title VII of the Civil Rights Act of 1964 prohibits intentionally hindering a person’s employment through the use or threatened use of intimidation, coercion, or threats because of that person’s gender.\textsuperscript{145}

Second, many IPV-HT victims are targeted for cyber abuse constituting WT because they possess immutable characteristics and their perpetrators know the Internet will provide the anonymity necessary to avoid sanctions. For example, abuse victims with physical and mental disabilities are at greater risk for cyber-tampering because their abusers know that it will be especially difficult for their targets to access help due to their isolation and difficulty navigating the social, legal, and law enforcement services milieu. For this population, the Internet is a crucial emotional and physical lifeline since transportation and related challenges persist. Civil rights remedies should be utilized to rectify this imbalance of power through which cyber-perpetrators are able to enhance their abuse with seeming impunity.\textsuperscript{146} The civil rights harm is ripe for prosecutors to advance when advocating an expanded, rational view of WT.

A third reason to view cyber-tampering through a civil rights lens is to encourage the legal system to recognize the magnitude of harm possible, particularly when offenders amass co-conspirators with the intent of amplifying the victims’ fear of ruinous consequences.\textsuperscript{147} Abusers can aggregate their power

\textsuperscript{142} See infra Part II.B. for analysis of human rights implications.

\textsuperscript{143} Dragiewicz & Lindgren, supra note 140, at 264-65.

\textsuperscript{144} See \textit{id.} at 265.


\textsuperscript{146} See Citron, supra note 37, at 66 (arguing that cyber offenders possess disproportionate power because they “strike under cloak of anonymity, without fear of consequences”).

\textsuperscript{147} See \textit{id.} (“[A] cyber civil rights agenda must convince a legal community still firmly rooted
online by recruiting others, as even a few are sufficient to magnify the terror experienced by their victims—exemplified when Jimmy Saldivar recruited his family and friends to engage in cyber-tampering against his ex-wife. \(^\text{148}\) With the help of ISP-protective laws, offenders are further able to disaggregate their online and offline identities to avoid being held responsible for their abuse. \(^\text{149}\) These traits are necessary to the success of online perpetrators, as both exacerbate remedial efforts of targeted vulnerable victims. \(^\text{150}\)

The lexicon of civil rights jurisprudence has profound implications and should be harnessed to better protect IPV-HT victims seeking state protection from abuse and de facto WT. Finally, because cyberstalkers often successfully employ a First Amendment free speech defense, victims of cyber-tampering need the power of civil rights doctrine to more accurately frame the competing interests. \(^\text{151}\) Civil and criminal law must recognize cyber-tampering as a component of many abusers’ coercive control strategy designed to harass, terrify, and silence their victims.

### C. Accord and Satisfaction A.K.A. Bribery

The state’s acquiescence, accord and satisfaction in criminal matters involves the state and the crime victim agreeing that the offender will pay the victim a sum of money in exchange for her not testifying against him. \(^\text{152}\) Accord and satisfaction is an ethically troubling outcome in many cases, but particularly so in IPV-HT cases, because it is nothing less than bribery. Some jurisdictions continue to permit accord and satisfaction dispositions in IPV matters, despite the implicit WT in such agreements. \(^\text{153}\)

---

\(^\text{148}\) See, e.g., supra notes 107–13 and accompanying text (describing the ways in which twice convicted domestic violence offender Jimmy Saldivar retained the ongoing assistance of his extended family and friends to cyberharass his ex-wife and children); see also Citron, supra note 119, at 63 (describing the aggregate efforts of some who harass their victims online).

\(^\text{149}\) See Citron, supra note 37, at 63 (“They can disaggregate their offline identities from their online presence, escaping social opprobrium and legal liability for destructive acts.”).

\(^\text{150}\) Id. at 64 (stating that unidentified online groups use these tools to target women, lesbians, gays, people of color, and other marginalized people).

\(^\text{151}\) See id. at 67 (noting that free speech norms are revered and must be addressed in the context of cyber civil rights violations, just as previously black subjugation was rationalized as permissible within the premise of states’ rights).

\(^\text{152}\) Accord and satisfaction is a widely recognized defense in civil contract and tort matters, releasing the defendant from liability by showing he has provided some means of corrective justice to make the victim whole. See Glenda K. Harnad, Accord and Satisfaction, 1 C.J.S. ACCORD AND SATISFACTION § 17 (2011).

\(^\text{153}\) See, e.g., Commonwealth v. Guzman, 845 N.E.2d 270, 272 (Mass. 2006) (upholding accord and satisfaction and ruling that, even if the prosecutor is against this disposition, the court can nonetheless permit it).
1. A Legal Fiction

In an archetypal case, a batterer grabbed his nine-months-pregnant partner by the neck, scratched her face, and punched her in the side as she attempted to keep the defendant from harming her five-year-old son. A Massachusetts district court dismissed the defendant’s criminal case after he paid the victim an “undisclosed sum,” permitted under Massachusetts accord and satisfaction provisions. Asked for comment, former Massachusetts Bar President Edward Ryan explained, “[Accord and satisfaction] is clearly a useful tool. It provides people who are in agreement a vehicle to avoid further government interference in their lives.” This stance is in peculiar juxtaposition to the extreme potential danger posed by many domestic violence offenders whose tactics obviously meet the elements of WT. Under the guise of resolution, accord and satisfaction in domestic violence cases marginalizes the very abuse the state is legislatively mandated to protect against.

Ryan’s position also indicates a regression toward re-privatizing violence against women, the status quo that for centuries allowed perpetrators to avoid public responsibility for their conduct. Massachusetts conditions case dismissal on the victim telling the court she has received satisfaction from the defendant. In Commonwealth v. Guzman, the court noted that the “satisfaction need not be monetary and may be de minimis, and need not appear in the accord and satisfaction itself, but could be proffered in an affidavit or at a hearing.”


156. Id. Massachusetts’s accord and satisfaction law specifies:

If a person committed to jail is under indictment or complaint for . . . a charge of assault and battery or other misdemeanor for which he is liable in a civil action . . . and the person injured appears before the court . . . and acknowledges in writing that he has received satisfaction for the injury, the court or justice may in its or his discretion . . . discharge the recognizance or supersed the commitment, or discharge the defendant from the indictment or complaint, and may also discharge all recognizances and supersed the commitment of all witnesses in the case.


157. Ranalli & Gedan, supra note 155.

158. See, e.g., MASS. GEN. LAWS ANN. ch. 209A (1978); see also Corrado v. Hedrick, 841 N.E.2d 723, 727 (2006) (noting that abuse prevention statutes provide a statutory mechanism by which family violence victims can procure the state’s assistance aid to prevent further abuse).


160. See supra note 156 for statutory language of MASS. GEN. LAWS ANN. ch. 276 § 55; see also supra note 23 for definition of “satisfaction.”

This 2006 case appears to encourage de facto WT by opportunistic batterers who seek to ensure their victims’ silence.\textsuperscript{162}

\section*{2. Inequitable Practice}

Sound public policy and equal protection of the laws weigh against allowing accord and satisfaction agreements in IPV matters. First, not only does the practice discriminate against low-income offenders who cannot afford to pay off their victims, but it also results in wealthier batterers escaping the range of sanctions specified by the legislature for those committing crimes against intimate partners.

Second, because domestic violence is a crime against the state, the victim should not shoulder the burden of negotiating a settlement that absolves the defendant of accountability for his crimes. This paradigm invites WT, as the batterer rightly sees the victim as controlling whether the criminal case goes forward. By promising money that he may have no intention of paying, the offender buys himself absolution of criminal charges and additional time to intimidate the victim from pursuing other remedies.

Third, the premise of accord and satisfaction is that the civil plaintiff is “satisfied” by payment that makes her whole or places her at least close to her position prior to the defendant’s harm.\textsuperscript{163} Satisfaction for most victims entails a promise of future safety and recognition by the batterer that what he did was wrong. Monetary payments fail to address either victim concern.\textsuperscript{164}

Fourth, if the role of historical court practice is unpacked, accord and satisfaction has been prohibited in assault cases for at least a century as being contrary to public policy, because justice is subverted at the discretion of the offender. In the 1876 case of \textit{Partridge v. Hood}, a Massachusetts court explained:

\begin{quote}
The reason that a private agreement, made in consideration of the suppression of a prosecution for crime, is illegal, is that it tends to benefit an individual at the expense of defeating the course of public justice. The doctrine has never been doubted as applied to felonies, and the English authorities before our
\end{quote}

162. Professor Margaret Drew argues that this practice also promotes later victimization by the legal system as batterers may contend that allegations of abuse were made only for the alleged victim’s financial or other gain, thus promoting the prostitute archetype with which many women are labeled and discredited in later criminal and family law proceedings. E-mail from Margaret Drew, Professor, Univ. of Cincinnati Coll. of Law, to Sarah M. Buel, Clinical Professor of Law, Ariz. State Univ. Sandra Day O’Connor Coll. of Law (Mar. 15, 2013) (on file with author).

163. See supra note 23 for definition of “satisfaction.”

164. It is my experience that the vast majority of victims receive little or none of the promised monetary compensation unless the probate court monitors payments; see also, e.g., Commonwealth v. Gonzalez, 448 N.E.2d 759, 762 (Mass. 1983) (reporting that the defendant in a rape case agreed to pay the victim $2,000, with $1,500 going to her lawyer, but he paid just $300 and defaulted on the remainder).
DE FACTO WITNESS TAMPERING

165

Revolution extended it to all crimes.165

Although not an IPV or human trafficking case, the defendant was attempting to avoid criminal prosecution by paying the government’s primary witness not to testify.166 In an 1874 assault and battery case, Massachusetts’ highest court ruled that “the acknowledgment of satisfaction by the party injured does not entitle the defendant to be discharged.”167

Fifth, accord and satisfaction has been deemed unlawful in sexual assault matters, as affirmed in Commonwealth v. Gonzalez.168 This case epitomizes the dangers of permitting all forms of legal gymnastics under the rubric of accord and satisfaction. Although the judge stated on the record that sufficient facts were found for probable cause to believe that defendant Gonzalez did rape the complainant, he dismissed the rape charge and entered a complaint for assault and battery; he then continued the case for six months to give the accused time to pay the victim.169 Under a court-sanctioned accord and satisfaction agreement, Gonzalez promised to give the victim $2,000, with $1,500 going to her lawyer.170 Because the defendant defaulted on all but $300, he was later indicted and convicted of the rape, which he appealed on double jeopardy grounds.171 The appellate court noted that the initial agreement was in violation of the statutory prohibition against accord and satisfaction deals in sexual assault cases, stating that “[i]t is improper for a judge or district attorney to sanction such an agreement attempting to discharge a complaint of rape, and it was inappropriate for the complainant’s lawyer to arrange it.”172 Given the extent of sexual assault within intimate relationships and as part of human trafficking, permitting accord and satisfaction cannot be coherently rationalized.173

Sixth, the same legislative intent seeking to prevent WT and obstruction during pretrial release should apply equally when considering the advisability of employing accord and satisfaction for misdemeanor and felony crimes. The statutory conditions of pretrial release for felonies in Massachusetts mandate that the court consider several factors in its decision to allow accord and satisfaction agreements in such cases:

166. Id. at 404.
168. See Gonzalez, 448 N.E.2d at 761 n.4.
169. See id. at 761.
170. Id.
171. Id. at 762.
172. Id. at 761 n.4 (noting that accord and satisfaction agreements in rape cases are unlawful).
[A] justice, shall, on the basis of any information he can reasonably obtain, take into account the nature and seriousness of the danger posed to any person or the community that would result by the person’s release, . . . the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness. . . .

The plain meaning of this law is to signal the court that it should give weight to this list of factors when deciding whom to release. That it specifies felonies should not constrain judges from applying its conditions in misdemeanor IPV-HT cases as well.

Finally, given the levels of overt and subtle coercion implicit in IPV cases, the victim cannot validly assent to a resolution that provides security only for the offender. Former Massachusetts Secretary of Public Safety Jane Perlov asserted, “[A]ccord and satisfaction] is nothing more than another means for abusers to exploit their victims, by coercing them into accepting payment in exchange for not pursuing their complaint. The idea that a batterer can still literally buy his way out of an abuse charge, under the blessing of our legal system, is outrageous.” That Massachusetts’ courts have given batterers a green light to bribe witnesses and thereby sabotage the state’s criminal cases speaks to endemic denial about the dangers of IPV. Since offenders in other states may accomplish dismissal through less formal means, state actors must redefine WT to acknowledge and eliminate the bribery implicit in such arrangements, particularly in IPV-HT matters.

3. Jurisdictional Variation

Triumphant batterers who are not held responsible for their crimes often feel emboldened to recidivate. To condone accord and satisfaction dispositions does batterers no favor, for the violence usually increases in severity over time and what could have been resolved with a non-jail disposition can eventually become a felony-level offense with prison time. Worse, victims are set up for further harm—certainly not the legislative intent of any state’s abuse prevention


175. See STARK, supra note 12, at 104-06.

176. Ranalli & Gedan, supra note 155. Secretary Perlov was testifying before the Massachusetts legislature, seeking to pass a reform bill that would prohibit courts accepting accord and satisfaction agreements in domestic violence cases. See id. Unfortunately, the bill did not pass.


DE FACTO WITNESS TAMPERING

laws.

Arizona, for example, prohibits accord and satisfaction in cases involving a law enforcement officer, commission of a felony, or incidents of assault, threats, or intimidation, absent a prosecutor’s permission.\(^{179}\) It is thus even more troubling that at least one state, Massachusetts, appears to be taking regressive steps. *Guzman* upheld the practice of accord and satisfaction in misdemeanor criminal cases, including those involving domestic violence, and emphasized that the decision to accept the agreement rested with the judge alone; the prosecutor could be overruled.\(^{180}\) Massachusetts is permitting judges to usurp the prosecutorial role while empowering offenders to bribe and intimidate witnesses.

In *Guzman*, police responded to a call for help and, because they saw that the defendant’s wife had an injured eye and the husband admitted to hitting her, he was arrested, and then released on his own recognizance.\(^{181}\) Within a few months, the defendant filed an accord and satisfaction agreement, signed by his wife. The prosecutor objected to the state’s criminal case being resolved by a private agreement and requested a hearing.\(^{182}\) At the hearing, the judge asked the wife if she signed the accord and satisfaction agreement voluntarily, and she replied in the affirmative.\(^{183}\) Based on the victim’s statement, the trial court judge dismissed the case.\(^{184}\)

The Massachusetts Supreme Judicial Court stated, “We understand the Commonwealth’s concern that in cases like this one, where the assault and battery occurs in the context of domestic violence, that the abuser may be able to intimidate the partner or spouse into signing an accord and satisfaction.”\(^{185}\) Although the court specifically recognized the dynamic of witness intimidation likely in domestic violence cases, it nonetheless affirmed the practice without explaining distinctions between domestic violence and sexual assault that would justify the state condoning what appears to be classic bribery. For all the legislative rhetoric about abuse prevention, the court’s nonchalant dismissal of potential harm by known perpetrators is reminiscent of the castigating finding of ‘intentional ignorance.’

Some state statutes can be used as a proxy for accord and satisfaction. For example, although Texas law does not appear to condone civil resolution of criminal matters, Texas Penal Code Section 36.05(c) provides that it is a defense

\(^{179}\) See, e.g., ARIZ. REV. STAT. ANN. § 13-3981 (2008). Under Arizona law, a victim may “compromise” a misdemeanor or petty offense unless: (1) the offense is committed by or upon any officer of justice in the line of duty; (2) the offense is committed riotously; or (3) the offense is committed with intent to perpetrate a felony. *Id.* However, the law specifies that any offense involving assault, threats, or intimidation cannot be compromised except on recommendation of the prosecuting attorney. *Id.*

\(^{180}\) *Guzman*, 845 N.E.2d at 274.

\(^{181}\) *Id.* at 271.

\(^{182}\) *Id.*

\(^{183}\) *Id.* at 272 n.1.

\(^{184}\) *Id.* at 271.

\(^{185}\) *Id.* at 274.
for WT if “the benefit received was: (1) reasonable restitution for damages suffered by the complaining witness as a result of the offense; and (2) a result of an agreement negotiated with the assistance or acquiescence of an attorney for the state who represented the state in the case.”

Codifying prosecutor acquiescence presumes that victims’ best interests are served, but that is not necessarily the case. Crushing caseloads, burnout, ignorance, and corruption may factor into a prosecutor’s assenting to an accord and satisfaction disposition that is contrary to the victim’s safety needs. Requiring prosecutor approval does at least offer the opportunity for a check on judges’ decisions that may run counter to victim protection, though at least in Massachusetts, the voices of prosecutors have also been muffled.

Stephen Page, an Australian attorney practicing in Queensland, notes that accord and satisfaction is anathema in criminal prosecutions in his jurisdiction, although a victim can separately pursue a tort remedy. A criminal case disposition may result in an offender compensating the victim for costs directly attributed to the crime, but that exchange of money cannot compromise the criminal disposition. Because of a “corruption busting inquiry many years ago,” dismissing an IPV case now takes the approval of the investigating officer, his supervisor (the Inspector), and the prosecuting officer, with complete written reports explaining the decision. This is a sensible approach because it institutionalizes state transparency and accountability, thus addressing the IPV-HT dynamics of intimidation and coercive control. The state in this scheme is expected to consider the forces behind dismissal, including bribery and other WT acts such as threats and vexatious litigation seeking custody of any children.

4. An Ethical Dilemma

An ethical quandary arises when a victim pleads that she needs the offered money and that she should control her decision, because there is no guarantee that the batterer will be convicted and serve jail time. There is also no assurance that a sentence will bring safety or financial security. Often the victim needs the bribe money to provide necessities for her children as the batterer is not paying child support and her financial situation has been greatly diminished by prolonged abuse. One response is for courts to facilitate victim access to

---

186. TEX. PENAL CODE ANN. § 36.05 (West, Westlaw through 2013 3d Sess.).
187. This is based on the author’s experiences and observations as an advocate, prosecutor, and clinical professor in close contact with many prosecutors over the past 36 years; see also Sarah M. Buel, Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct, 26 HARV. WOMEN’S L.J. 217, 217-18 nn.26-29 (2003) (describing an attorney who was disbarred for taking bribes to dismiss batterers’ cases).
188. E-mail from Stephen Page, Accredited Family Law Specialist in Brisbane, Australia (March 15, 2009) (on file with the author).
189. Id.
190. Id. Attorney Page further notes that a prosecutor always handles sexual assault cases and brings them before a jury.
191. This is based on the author’s experience in working with and observing indigent battered
economic empowerment services such as timely payment of child support, childcare, transportation, job training, and employment with benefits to prevent the victim’s poverty from pressuring her into accepting a bribe. As a Massachusetts prosecutor, I handled a case involving a wealthy physician who taught at the Harvard School of Public Health while brutalizing his wife, a psychotherapist. Because of the prolonged abuse (spanning seven and a half years of marriage), the wife was diagnosed with acute post-traumatic stress disorder and she could neither see patients nor work outside the home. Barely able to care for their five and six year-old sons, the wife (“G.J.”) was determined to put her life back together, if only for them. However, finding employment proved difficult in her compromised state and since her husband frequently failed to pay the court-ordered child support, she became destitute and depressed. He then obtained legal counsel and filed for custody in family court. Because she was penniless and unable to afford representation, he won custody while she received only limited visitation. As the trial for assault and battery neared, the physician’s witness tampering increased, ranging from overt threats to bribes. On the morning of trial, the physician’s attorney conveyed to me that if G.J. wanted increased visitation and even a portion of the money her husband owed her, she must agree to put her life back together, if only for them. 


193. Equally important in the effort to thwart WT is the court taking responsibility for enforcing protective orders that keep the batterer from interfering with the victim’s ability to find and maintain employment. See Jody Raphael, Keeping Women Poor: How Domestic Violence Prevents Women from Leaving Welfare and Entering the World of Work, in Battered Women, Children, and Welfare Reform, at 31.

194. At the end of the marriage, the physician did not permit his wife to use the phone; he was only apprehended for assaulting her because a truck driver delivering a package to their home heard her screams in the midst of an attack, and called the police.

195. The husband’s lawyer was able to characterize the battered wife as neurotic, based on her depression, and the doctor as a stable, loving father. The wife reported that the attorney badgered her relentlessly in cross-examination, not allowing her to describe the abuse and focusing only on her difficulty coping with the aftermath of the divorce.

196. “To their credit, the Brookline, Massachusetts police, correctly assessing the batterer’s dangerous proclivities, were both helpful and fast in their response to the physician’s many threatening phone calls. She recalls the officers telling her, ‘We will do all we can to protect you,’ and their support made a great difference in her fragile state.
not to testify in the criminal case. Although I was outraged at the suggestion of an accord and satisfaction agreement, I did not realize that the attorney’s conduct was unethical and that the physician was guilty of WT.\textsuperscript{197}

Impoverished and discouraged, G.J. agreed to withhold her testimony for four additional hours of visitation per week and a paltry $350 as full compensation for her many years of abuse. The judge was not pleased with the resolution and agreed to dismiss the case without prejudice, in the event she wanted to testify within the statute of limitations. Ten years later, in 2002, G.J. contacted me again to ask for help, relating that her ex-husband had continued, over the ensuing decade, using the courts to harass her. She now regrets agreeing to the bribe as it seems only to have emboldened her abusive ex-husband. She relayed that the sons, as older teens, reported the father’s abuse of them, resulting in the mother winning back custody, but they were struggling financially as the still-wealthy physician refused to pay timely child support.\textsuperscript{198}

All these years later, I can recall with sadness and clarity holding G.J. in court as she quietly cried, explaining how desperate she was to see more of her sons, for the $350 that could go toward past due bills, for the case to conclude, and for the chance for her to get on with her life. Because accord and satisfaction is a direct means of deterring an abuse victim from testifying and fits squarely within the definition of bribery, it should be prohibited in all IPV criminal cases—as codified in Arizona.\textsuperscript{199}

\section*{II. Human Rights Framework for Instrumental Reform}

Although present WT laws are inadequate for their designated purpose, human rights doctrine offers an enormously rich framework from which to craft workable remedies. This Part focuses on the use of human rights treaties for survivor protection and application of due diligence standards to engender improved state response. International human rights treaties clarify the U.S. government’s obligation to prevent and prosecute IPV-HT crimes, but also to protect survivors. Finally, I argue for a necessary and appropriate presumptive intent standard within WT laws as an optimal means to achieve the ends of victim safety and offender accountability. Presumptive intent seeks to empower IPV-HT victims with a viable means of recourse against their perpetrators as well as the means with which to galvanize state actors when they might otherwise act as a proxy for abusive persons.

\begin{itemize}
\item \textsuperscript{197} I do not excuse my ignorance, but only explain that I was two years out of law school and do not recall anyone discussing WT in law school or in any of the three district attorneys’ offices in which I worked during and after law school.
\item \textsuperscript{198} The husband had also never paid the $350. E-mails from G.J. to Sarah M. Buel (on file with author).
\item \textsuperscript{199} See \textit{ARIZ. REV. STAT. ANN.} § 13-3981 (2008); \textit{see also supra} note 180 and accompanying text. This is not to say the victim should forgo compensation for her harm, but that it should be pursued in a civil tort action and not take the place of the state’s case against the perpetrator.
\end{itemize}
A. Employing Human Rights Treaties for Victim Protection

The Constitution’s Supremacy Clause is unequivocal in providing that ratified treaties are to be given full effect as the “supreme law of the land.” Contrary to the insistence of most U.S. courts, ratified treaties should be judicially enforceable with a presumption that they are self-executing. Fueling this misinterpretation with the human rights treaties it has ratified, the Senate insisted that each one must include declarations of non-self-execution. Some scholars purport that labeling a treaty as non-self-executing means only that private causes of action are precluded while judicial enforcement is allowed. Judicial invocation of human rights treaties in fulfillment of state obligations to protect IPV-HT victims carries the promise of dramatically altering intervention norms and practices, including recognition of de facto WT.

As international human rights doctrine has been embraced throughout the world, the U.S. remains isolated and obstinate in its refusal to ratify seminal treaties calling for an end to gendered violence, such as the Convention on the Elimination of Discrimination Against Women (CEDAW). Many Americans hold the ethnocentric notion that state-sanctioned human rights abuses only occur in foreign countries and are likely taken aback when Amnesty International and Human Rights Watch declared that some of the worst human rights violations in the world occur within U.S. women’s prisons. Not

---

200. The Supremacy Clause states: “This Constitution, and the Laws of the United States which shall be made Pursuance thereof; and all Treaties mad, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby.” U.S. CONST. art. VI., cl. 2.

201. Carlos Manuel Vázquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 HARV. L. REV. 599, 602 (2008) (“By virtue of this clause, treaties are presumptively enforceable in court in the same circumstances as constitutional and statutory provisions of like content.”).


surprisingly, the path of many American women to prison is rife with poverty, child abuse, intimate partner violence, and human trafficking—with strong implications of raced and gendered discrimination.\textsuperscript{206}

Human rights precepts of dignity, safety, and equality support expansion of present law to recognize de facto WT as a means of improving security for IPV-HT survivors.\textsuperscript{207} One gift of human rights doctrine is its insistence that abuse victims should not be blamed for their harm, but rather that their broader communities and the state should assume responsibility for protecting them. Viewing gendered violence through a human rights lens can help shift norms to ameliorate the pejorative connotations associated with abuse victims. IPV-HT activists have set their sights on transnational law to engender domestic law reform and emphasize the intersectionality of women’s rights to physical and economic security with those for employment, child care, and reproductive choice.\textsuperscript{208}

A number of international human rights treaties can be marshaled as part of the legal toolkit necessary to shield IPV-HT victims from de facto WT by first, applying a due diligence standard to state response and second, presuming intent with certain offender conduct. Diplomats and scholars understand international human rights law as applicable even within countries that have not ratified the relevant treaties, such as the U.S. If most countries condemn a practice, then the prohibition of the practice becomes binding as customary international law: for example, arrest and detention without due process.\textsuperscript{209} In the same vein, the rulings of some institutions may not be directly binding on U.S. courts, but are applicable to rights enforcement work such as eradication of all forms of WT. The path-breaking jurisprudence of the European Court on Human Rights and the Inter-American Commission and Court on Human Rights can profoundly improve U.S. practices if appropriately utilized.

\textsuperscript{206} Randall, \textit{ supra} note 205 (citing greatly disproportionate racial bias).


\textsuperscript{208} \textit{See ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING} 53-56 (2000).

\textsuperscript{209} \textit{See generally} Paul Gordon Lauren, \textit{A Human Rights Lens on U.S. History: Human Rights at Home and Human Rights Abroad}, in \textit{BRINGING HUMAN RIGHTS HOME} 8 (Cynthia Soohoo, Catherine Albisa, & Martha F. Davis, eds., 2011).
Since no legally binding international instrument deals solely with gendered violence, domestic human rights advocates must use existing treaties and may want to start with those few already ratified by the U.S. The U.S. has ratified five human rights protocols and treaties: 1) International Covenant on Civil and Political Rights (1992), 2) International Convention on the Elimination of All Forms of Racial Discrimination (1994), 3) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1994), 4) Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2002), and 5) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002). These documents can be marshaled to improve state response with victims of IPV-HT, including protection from de facto WT. It is beyond the scope of this article to specify each treaty’s possible uses, but the article will briefly discuss application of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and The International Covenant on Civil and Political Rights (ICCPR).

For two decades, Professor Rhonda Copelon has argued that IPV must be viewed as torture, thus triggering domestic and international obligations, for although “[t]hrough a conventional human rights lens this appears as a “hard case”; from women’s experience, however, it is an obvious one.” She notes that the title of CAT is intentionally expansive as is necessary to capture the range of brutal physical, sexual, and psychological harm perpetrated against IPV-HT victims by private actors. The devastating mental trauma most IPV

---

215. See, e.g., State v. White, 668 N.W.2d 850, 856 (Iowa 2003) (citing the Convention against Torture in upholding a defendant’s conviction under Iowa’s torture statute for holding a gun to his wife’s head while he forced her to watch a videotape of the husband threatening to kill her).
216. Rhonda Copelon, Recognizing the Egregious in the Everyday: Domestic Violence as Torture, 25 COLUM. HUM. RTS. L. REV. 291, 295 (1994); see also Felice D. Gaer, Rape as a Form of Torture: The Experience of the Committee Against Torture, 15 CUNY L. REV. 293 (2012) (describing how several human rights mechanisms have recognized violence against women as a form of torture, particularly since the Committee Against Torture’s 2007 adoption of General Comment No. 2).
survivors suffer is akin to that endured by torture victims.\textsuperscript{218} Importantly, Professor Copelon maintains that because IPV-HT fits within the parameters of CAT, the state is responsible for protecting survivors from witness tampering and providing mechanisms for restitution and therapeutic assistance.\textsuperscript{219}

The International Covenant on Civil and Political Rights (ICCPR), ratified by the U.S. in 1992,\textsuperscript{220} obligates the government to afford IPV-HT victims protection from harm as well as remedies in response to violation of their civil rights.\textsuperscript{221} Since de facto and traditional WT are the most common crimes committed against IPV-HT victims, violating their civil rights and frequently sabotaging their access to help, all judicial training should include instruction on the critical role of the court in enforcement of human rights treaties.\textsuperscript{222} Likely unknown to most judges and lawyers, these five ratified treaties include duties of state enforcement.\textsuperscript{223} Specific to de facto WT, ICCPR requires states to promulgate legislation necessary to ensure the Covenant’s enumerated rights.\textsuperscript{224}

It is laudable that the U.S. government voices interest in protecting the human rights of women in other countries, but it has been largely silent on the home front. However, in a progressive move, the U.S. promised corrective action to decrease violence against women in a statement before the U.N. in September of 2012.\textsuperscript{225} To avoid continuation of grave rights violations, the U.S. must publicize the ways in which IPV-HT policies and laws will be reformed.\textsuperscript{226}

\textsuperscript{218} Copelon, \textit{supra} note 216, at 316 (“The mental suffering women endure as a consequence of living in a battering relationship is, as with torture, profound.”).

\textsuperscript{219} Id. at 358 (stating that under the CAT Convention, survivors “would be entitled to protection against retaliation and to fair and adequate compensation, including that needed for rehabilitation”).


\textsuperscript{222} “Traditional witness tampering” refers to present statutory codification as described \textit{supra} note 6.

\textsuperscript{223} Carter, \textit{supra} note 203 at 371-72 (stating that the treaties ratified by the United States “textually require domestic implementation.”)

\textsuperscript{224} ICCPR, \textit{supra} note 211, at 53 (“Where not already provided for by existing [domestic law], each State Party . . . undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”).


\textsuperscript{226} Letter from the American Civil Liberties Union to the U.N. Commission on the Status of Women re: Elimination & Prevention of All Forms of Violence Against Women and Girls, at 2 (Nov. 15, 2012) [hereinafter ACLU Letter], \textit{available at} https://www.aclu.org/files/assets/121115_csw_final.pdf (“[T]he U.S. lacks any coordinated mechanisms to communicate how its human rights commitments and obligations should shape domestic violence policy, programming, education and outreach to governmental and
Logically, this effort should be located within the U.S. Dept. of Homeland Security (DHS), given its high visibility and mandate to “lead the unified national effort to secure America . . . prevent and deter terrorist attacks and protect against and respond to threats and hazards to the nation.”

Since high numbers of children and adults in the U.S. are terrorized, threatened, and harmed by WT in the context of IPV-HT, it seems appropriate that DHS assume a leadership role in coordinating remedial efforts. Furthermore, DHS is already engaged in multi-pronged initiatives to stop human trafficking; its efforts include providing comprehensive training to personnel in all levels of state government, victims’ services, emergency medicine, and related community groups.

By coordinating with U.S. Dept. of Justice, Dept. of Health and Human Services, and other relevant entities, DHS could ensure that international human rights treaty obligations are integrated into grant procurement, training curricula, policies, and practices throughout federal, state, and local governments. A focus on the nefarious impact of de facto and traditional WT would not only assist victims of IPV-HT, but also those of recognized criminal and terrorist offenses. It is beyond the scope of this article to address the many commonalities of IPV-HT, de facto WT, and the offenses that occur in international relations and organized crime, but certainly a coordinating mechanism would improve prevention and intervention efforts among all.

B. Expressive Raced, Gendered and Classed Witness Tampering

Law’s expressive messaging can significantly impact social norms, as shown by historical and present state empowerment of IPV-HT offenders’ raced, gendered, and classed WT. It is hoped that instrumental reform can be achieved through integration of reformed U.S. laws with human rights treaties. This article expresses the hope that all five U.S. ratified treaties and conventions discussed above will be used to counter the adverse impact of race, gender, and class as IPV-HT survivors seek protection from de facto WT. In 1994, the U.S. ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), but it has yet to be invoked to remedy racial bias within the legal system.

Structural inequalities permit state actors to perpetuate raced, gendered, and classed collusion with IPV-HT perpetrators’ de facto WT. A case in point is that of Native American IPV-HT survivors who disclose high rates of abuse, nongovernmental actors within the U.S. The failure to communicate these standards and their value in designing policy compounds the likelihood that serious violations will persist.”


often accompanied by risk factors of substance abuse, mental illness, isolation, and extreme poverty. A confusing, unjust labyrinth of federal laws often leaves Native American victims without recourse and particularly incentivizes non-Indian abusers to recidivate with virtual impunity. Until March 7, 2013, when President Obama signed the reauthorization of VAWA, the U.S. Supreme Court had denied Tribal Courts criminal jurisdiction over the many non-Indian perpetrators who live on the reservation and commit crimes there.

This doctrine not only abrogated tribal sovereign authority, but also was particularly problematic given that 76 percent or 3.5 million of the 4.6 million residents on American Indian reservations are non-Native. Indigent women of color face disproportionately high rates of victimization, with Native Americans greatly over-represented. For example, to escape her violent husband, Maggie fled from the Rosebud Reservation in South Dakota to Minneapolis, but soon found herself indebted to her boyfriend, Joker, an active gang member. He forced her into prostitution, demanding that she contribute to the gang’s coffers. “He said if I really loved him, I would do...”

230. See Nicole P. Yuan et al., Risk Factors for Physical Assault and Rape Among Six Native American Tribes, 21 J. INTERPERSONAL VIOLENCE 1566, 1568-69 (2006). Furthermore, a history of child maltreatment (physical, sexual, and psychological) increases the risk of adult perpetration and victimization. Id. at 1582.

231. See Rebecca A. Hart & M. Alexander Lowther, Comment, Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence, 96 CALIF. L. REV. 185, 190, 194 (2008) (noting although that 75 percent of Native American women are battered by non-Indians, “tribes’ ability to respond effectively to domestic violence is severely hampered by substantial jurisdictional gaps in tribal authority and the American legal community’s rejection of non-Western mechanisms of tribal redress and jurisdiction”).

If a Native American commits an offense in Indian Country that falls within the federal Major Crimes Act (“MCA”), the local U.S. Attorney’s Office has jurisdiction over the case. 18 U.S.C. § 1153 (2000) (granting jurisdiction over “murder, manslaughter, kidnapping, maiming, [sexual abuse], incest, [felony assault], arson, burglary, robbery, and [embezzlement and theft]”).

232. See Jackie Calmes, Obama Signs Expanded Anti-Violence Law, N.Y. TIMES, Mar. 7, 2013, available at http://thecaucus.blogs.nytimes.com/2013/03/07/obama-signs-expanded-violence-law/. Although not a panacea, this change is an essential step in improving IPV-HT victim protection as distant federal prosecutors who too frequently refused to take non-homicide IPV-HT cases involving Native American victims including felony WT and must now do so.


235. See Yuan et al., supra note 230, at 1568-69 (noting that for Native American IPV survivors, high rates of abuse are often accompanied by risk factors of substance abuse, mental illness, isolation, and extreme poverty).

236. Mary Annette Pember, Sex Trafficking at Home, DAILY YONDER (Oct. 14, 2010), http://www.dailyyonder.com/sex-trafficking-home/2010/10/13/2989 (“He told me he loves me and that all his friends did the same thing with their girlfriends.”).

237. Id.
anything for him,” she said after admitting that sometimes she lured other Indian girls into the gang’s sex trafficking network.\footnote{Id.} Child Protective Services (CPS) removed her children for neglect, and Maggie says that losing them is at the core of her hopelessness. She now takes part in a local counseling program designed to help chronic substance abusers, but says that sobriety brings almost unbearable guilt and shame.\footnote{Id.}

Abusers commonly use this process of grooming, followed by coercion and violence, to lure vulnerable girls and boys into sex trafficking.\footnote{See infra Part I.A.1.} De facto WT likely occurs at some point on the continuum of coercion and violence. Some offenders employ threats and violence early on to give an unequivocal message that any “snitching” will be viewed as betrayal warranting extreme repercussions.\footnote{This is based on the author’s experience working on human trafficking cases. See also ROBERT E. CLEARY, JR., GA. CRIMINAL OFFENSES AND DEFENSES P77 (2013) (explaining that statutory revisions to the Georgia pandering law were “obviously designed to punish the pimp who rules his ‘employees’ by threats or actual violence”).} Classed collusion encompasses the many state actors who hear indigent victims’ heartrending stories, yet are dismissive of their expressed fears of poverty, homelessness, and violence—particularly in the initial stages of abuse.\footnote{This is based on the author’s extensive experience working with, training, and observing state actors over the past 36 years; see supra note 4 (detailing author’s experience).} It is precisely during the early grooming process that de facto WT is likely to occur and when authorities could take action to stop the offender and prevent further harm.\footnote{State actors may overstate available economic protections and services, exhausting victims by sending them to the wrong agencies or advising that they apply to programs for which they do not qualify. This is based on the author’s observations of and experience working with literally thousands of abuse victims across the country reporting this treatment; see supra note 4 (detailing author’s experience). Note that misinformation is often distributed out of ignorance rather than malice.}

Especially troubling are those state actors who, even as tax-paid public servants, deem themselves at liberty to provide substandard or no help to victims they judge as undeserving by virtue of their race, gender, class, disabilities or circumstances. In too many jurisdictions, flagrant bias continues against IPV-HT victims, in particular those who are impoverished, people of color, undocumented immigrants, LGBTQ people, and individuals who have criminal records, substance abuse challenges, or mental health afflictions.\footnote{See infra notes 260 – 265 and accompanying text.} For some time, empirically sound studies have documented that low-income women of color are disproportionately victims of IPV-HT.\footnote{See Matthew J. Breiding et al., Prevalence and Risk Factors of Intimate Partner Violence in Eighteen U.S. States/Territories, 2005, 34 AM. J. PREVENTIVE MED. 112, 114-15 (2008) (describing by race, age, income, and education prevalence rates for intimate partner violence and reporting substantially higher rates of victimization against women of color and those of lower income); see also Susan F. Grossman & Marta Lundy, Domestic Violence Across Race and Ethnicity: Implications for Social Work Practice and Policy, 13 VIOLENCE AGAINST
racial bias contributes to many adults and children of color being reluctant to seek help from state entities that reflect racialized social policies enforcing what Professor Michelle Alexander calls a new caste system.\footnote{Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 191-97 (2010).}

In \textit{Town of Castle Rock v. Gonzales}, raced, classed, and gendered collusion are juxtaposed with state actors’ years of willful blindness, culminating in catastrophic results.\footnote{See Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).} The Castle Rock (CO.) Police Department refused to respond to Jessica Gonzales’s seven pleas for help over a six hour period after her estranged, violent husband kidnapped their three young daughters.\footnote{Id. at 753-54. The plaintiff, Jessica Gonzales, did exactly what the Family Court instructed her to do when her husband violated her restraining order: she called the police and begged them to retrieve her three young daughters (ages 7, 9 and 10), citing her estranged husband’s extremely violent and unstable history—to no avail. Id.} Ten hours after he had taken the girls from their front yard, her husband drove to the Castle Rock Police Department and was killed by officers when he shot at them with a semiautomatic handgun.\footnote{Id. at 754. Evidence showed he had purchased the gun that day, in spite of being the respondent in a domestic violence restraining order. Id.} That Jessica Gonzales is a Native American, Latina, lower-income abuse victim may explain the deficient response of the Castle Rock Police Department, including their inaction even after finding the bodies of the three little girls in the back of their father’s truck.\footnote{Id.}

Just as police have sometimes been complicit with violent civil rights offenders,\footnote{See Lisa Magarrell & Joya Wesley, Learning from Greensboro: Truth and Reconciliation in the United States 118-31 (2008) (describing that the Greensboro Truth and Reconciliation Commission found new evidence documenting the complicity of the FBI and local police in several Klan killings from 1979—including delaying pursuit of the perpetrators and then attempting to cover up their prior misdeeds); see also Greensboro Truth & Reconciliation Comm’n, Final Report (2006), available at http://www.greensborotrc.org/}. some have also delayed or refused to respond to IPV-HT victims’ pleas for help. Even after Jessica Gonzales provided substantial information to the Castle Rock Police Department about the grave danger her estranged husband, Simon Gonzales, posed to their daughters (whom he had kidnapped), the officers looked for a lost dog, had three officers respond to a routine traffic stop and went out for dinner.\footnote{Max Siegel, Surviving Castle Rock: The Human Rights of Domestic Violence, 18 Cardozo J. L. & Gender 727, 727-28 (2010) (recounting the facts of the night in which Simon Gonzales murdered his three daughters after Jessica Gonzales told the police his location and repeatedly begged them for help). With the pending divorce case, Jessica Gonzales’s numerous reports of Simon’s domestic violence offenses, and a permanent restraining order in effect, Simon’s conduct should logically have
triggered aggravated witness intimidation and retaliation charges under Colorado law.

Indigent victims and those of color who express reluctance to call law enforcement attribute this to myriad factors, often focusing on a fear of offender retaliation and prior negative experiences with police. In some cases, law enforcement refused to arrest offenders even with uncontroverted evidence of criminal conduct, such as protective order violations and physical injury. Worse yet, survivor reluctance to seek help can also be ascribed to their fear of being arrested if the offender’s untruthful stories are believed, especially when a victim has fought the perpetrator in self-defense. White women in affluent areas were more likely to report faster police response times and more courteous treatment. In contrast, less privileged survivors conveyed concerns that bias about ethnicity, language, socio-economic status, and sexual orientation would hinder accurate identification of the offender, thorough investigation, and effective case follow up. Other victims of color were loath to call law enforcement, as they feared that CPS might then take their children and charge

254. See Colo. Rev. Stat. §18-8-705 (West, Westlaw through 2013 1st Reg. Sess.). Under this statute, aggravated intimidation of a witness or victim is defined as follows: “(1) A person . . . commits aggravated intimidation of a witness or victim if, during the act of intimidating, he: (a) Is armed with a deadly weapon with the intent, if resisted, to kill, maim, or wound the person being intimidated or any other person. . . .”

255. Colo. Rev. Stat. § 18-8-706 (West, Westlaw through 2013 1st Reg. Sess.). Retaliation against a witness or victim is defined as follows:

   An individual commits retaliation against a . . . victim if such person uses a threat, act of harassment . . . or act of harm or injury upon any person or property, which action is directed to or committed upon . . . a victim to any crime, an individual whom the person believes has been or would have been called to testify as a witness or victim, a member of the witness’ family, [or] a member of the victim’s family. . . .

256. See Marsha E. Wolf et al., Barriers to Seeking Police Help for Intimate Partner Violence, 18 J. FAM. VIOLENCE 121 (2003). Some victims hesitated to call the police again because, in previous contacts when an arrest did not occur, they were left “in a more dangerous environment had they not called the police.” Id. at 124.

257. Id.

258. See Leslye E. Orloff et al., Battered Immigrant Women’s Willingness to Call for Help and Police Response, UCLA WOMEN’S L.J. 43, 73 (2003) (listing survey responses from battered immigrant and non-immigrant women who reported police failing to arrest even when victims had visible injuries).

259. See ACLU Files Lawsuit Over City’s Police Deployments to Minority Neighborhoods, HUFFINGTON POST, Oct. 27, 2011, http://www.huffingtonpost.com/2011/10/27/aclu-files-lawsuit-over-c_n_1060249.html (reporting that the Illinois ACLU filed suit against the Chicago Police Department, alleging that the department’s response times to emergency calls from largely black and Hispanic communities are slower than to calls in white-majority districts); see also Cord Jefferson, Cleveland Home Reminds Us Some Police Don’t Rush to Poor Neighborhoods, GAWKER, May 9, 2013, http://gawker.com/cleveland-home-reminds-us-some-police-dont-rush-to-poo-496838235 (noting charges that police officers in Cleveland, Detroit, New York City, and Washington, D.C. are sluggish when responding to calls for aid from people in low-income communities versus those in higher-income areas).

260. Wolf et al., supra note 256, at 125 (noting victims’ concern that prejudice could also result in offenders being excessively penalized).
them with failure to protect.261 Survivors of color must turn to family and the community when the state has proven it cannot be relied upon for access to legal remedies, including those designed to maintain safety.262

Police misconduct against LGBTQ victims of IPV-HT is generally not limited to a few officers deviating from policy, but instead reflects institutional gendered bias along with implicit expectations of compliance with these unlawful norms.263 Because law enforcement often erroneously labels IPV between same-sex partners as mutual combat,264 LGBTQ survivors may be denied access to victim services, making them more vulnerable to further harm and witness tampering. Many state actors’ conduct constitutes de facto WT as the officers know LGBTQ victims could be called as witnesses if the cases were brought forward; yet too often threats, coercion, and inaction are used to silence LGBTQ victims.265

Recognition of male victims is important for this analysis, notwithstanding the lower rates of male abuse.266 Until 2012, the federal government’s national crime reports neither recognized nor gathered data on male rape victims,267 although 1.4 percent of men said they had been raped at some time during their lives.268 Other studies indicate higher rates of male victimization, but experts attribute low reporting to societal norms about masculinity and fears of being perceived as gay or weak—fears which exacerbate their Post Traumatic Stress Disorder (PTSD) and depression.269 Within the scholarship and media attention

261. Id. at 126 (giving narratives from Native American women who experienced this phenomenon as children).
263. JOEY L. MOGIUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 42, 51 (Michael Bronski ed., 2011) (stating that unlawful police conduct against LGBT people is condoned within legal institutions that are rife with “racialized presumptions of deviance and criminality”).
264. Id. at 134.
265. See generally Adrien Leavitt, Queering Jury Nullification: Using Jury Nullification as a Tool to Fight Against the Criminalization Of Queer and Transgender People, 10 SEATTLE J. FOR SOC. JUST. 709 (2012) (giving scores of examples of police misconduct, harassment, and inaction when dealing with LGBT crime victims).
266. See M.C. BLACK ET AL., supra note 69, at 43 (reporting that one in seven men reported physical abuse by an intimate partner compared to one in four women).
267. Roni Caryn Rabin, Men Struggle for Rape Awareness, N.Y. TIMES, Jan. 24, 2012, at D1 (citing The Center for Disease Control and Prevention study finding that one in 71 men said they had been the victim of attempted or completed rape, typically by a man known to them, once the definition included oral or anal penetration).
268. See M.C. BLACK ET AL., supra note 69, at 18.
269. Rabin, supra note 267, at D1. Neil Irvin, executive director of the organization Men Can Stop Rape, states, “If you’re sexually assaulted, there’s this idea that you’re no longer a man. The violence is ignored, and your sexual orientation and gender are confronted.” Id.; see also Elizabeth J. Kramer, Note, When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape, 73 N.Y.U. L. REV. 293, 294 (1998) (listing a number of reasons male rape
about human trafficking, male victims are often excluded from the discourse.\footnote{270} Similarly, most of the coverage on military sexual assault has focused on female victims, although the Pentagon released that 53 percent of the 2012 reports implicate male-on-male offenses.\footnote{271} When male survivors do not see themselves included in sexual assault, domestic violence, and human trafficking literature, it can result in their decreased reporting and help-seeking.\footnote{272}

\textbf{C. Due Diligence Standard}

Although it is a largely underutilized tool in the U.S., the due diligence doctrine is widely accepted in international human rights law as obligating states to employ the necessary means to prevent IPV-HT, adequately investigate offenses, prosecute its public and private offenders, and protect victims.\footnote{273} Significantly, in 2011, the Inter-American Commission on Human Rights (IACHR) applied the due diligence standard in ruling that state failure to properly respond to the domestic violence perpetrated against Jessica Gonzales Lenehan and her three daughters constituted a violation of their human rights under the American Declaration on the Rights and Duties of Man.\footnote{274} Since due diligence mandates are firmly rooted in American law regarding commercial transactions and litigation,\footnote{275} it is puzzling why the U.S. government claims confusion about its obligations when the standard is invoked to measure the adequacy of state response to IPV-HT victims.

Foundational international law and human rights doctrine specify that states’ due diligence obligations include prevention, investigation, punishment, and reparations for IPV-HT committed by non-state offenders.\footnote{276} In Castle Rock, victims did not want to prosecute, including fear of being thought gay).\footnote{270} See Samuel Vincent Jones, The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking, 2010 UTAH L. REV. 1143, 1145-46 (2010) (arguing that “the systematic neglect of male victims in the publicity of human trafficking” extends to their omission within academic scholarship as well).

\footnote{271} See James Dao, In Debate Over Military Sexual Assault, Men Are Overlooked Victims, N.Y. TIMES, June 23, 2013, http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?_r=0 (citing a Pentagon report showing that 53 percent of sexual assaults against service members were committed against men, largely by other men).

\footnote{272} Jones, supra note 270, at 1167.

\footnote{273} See ACLU Letter, supra note 226, at 2-3.


\footnote{275} See generally Joseph K. Leahy, What Due Diligence Dilemma? Re-Envisioning Underwriters’ Continuous Due Diligence After WorldCom, 30 CARDOZO L. REV. 2001 (2001) (discussing that a reasonable investigation must be conducted to satisfy the due diligence requirement for underwriters); Marilyn E. Phelan, Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork, 23 SEATTLE U. L. REV. 631, 729 (2000) (“[B]ecause the substantive content of the due diligence requirement is necessarily informed by currently available investigative tools, the due diligence rule encourages the development of additional resources for ascertaining whether a particular art object has been stolen.”).

\footnote{276} Lisa Gormley, Violence Against Women by Non-State Actors, A Responsibility for the State
the majority opinion included Colorado’s statutory notice of “peace officers’ duties” pre-printed in capital letters on all restraining orders:

**NOTICE TO LAW ENFORCEMENT OFFICIALS . . . YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPrACTICAL . . . SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER . . .**

Putting aside for a moment that Justice Scalia glossed over the statute’s unequivocal meaning regarding mandatory arrest, the majority ignored the implicit due diligence necessary to determine probable cause and how best to ensure enforcement of the court’s order. In finding that abuse victims are entitled to enforcement of restraining orders, the Court of Appeals cited Colorado’s legislative intent to remedy police inaction and it concluded that any other interpretation “would render domestic abuse restraining orders utterly valueless.”278 In his dissent, Justice Stevens cited the majority’s refusal to enforce this due diligence standard when he noted that it is “certainly plausible to construe ‘shall use every reasonable means to enforce a restraining order’ and ‘shall arrest’ as conveying mandatory directives to the police.”279

Justice Scalia placed great weight in the Colorado statute’s civil contempt option that could be initiated by an abuse survivor if her restraining order was violated.280 However, since Simon Gonzales kidnapped his daughters at 5 p.m. and they were found murdered at 3 a.m., Jessica Gonzales had no opportunity to invoke contempt of court or criminal prosecution. Given that courts are generally open 9 a.m. to 5 p.m., a contempt order would appear to have offered her a Pyrrhic victory at best. Adding to the inappropriateness of the advice, civil contempt orders are not the enforcement purview of the police. Suggestions of legal recourse that bear no relation to realistic options and have no likelihood of achieving legislatively intended outcomes are contrary to state due diligence requirements.

---

277. *Id. at 775* (citation omitted).

278. *Id. at 775* (citation omitted).

279. *Id. at 775* (citation omitted).

280. *Id. at 766* (“Perhaps most importantly, the statute spoke directly to the protected person’s power to ‘initiate contempt proceedings against the restrained person if the order [was] issued in a civil action’ . . . .”).
DE FACTO WITNESS TAMPERING

Under the Alien Tort Claims Act, corporations lacking proper investigative procedures can be held liable for violations that due diligence would have prevented. 281 Corporate entities are urged to fully implement procedures to identify, analyze, and deal appropriately with “negative human rights impacts”. 282 State entities, too, are obligated to implement standards of due diligence as explained by the Inter-American Commission on Human Rights in Jessica Lenahan (Gonzales) v. United States. 283 Absent proper police investigation, a harmed abuse survivor is severely hampered in her efforts to seek criminal or civil remedies, punishment, and reparations.

Had the Castle Rock police officers engaged in due diligence immediately after Jessica Gonzales reported that her estranged husband had violated her restraining order by kidnapping her daughters, it is certainly possible that the girls would still be alive. The state’s expressive collusion with Simon Gonzales extends to his early de facto WT and through all his terroristic threats, assaults, vexatious litigation, and finally, murder.

Establishing a due diligence standard for law enforcement, prosecutors, judges, and legal system professionals responding to IPV-HT would be simple, but could have significant results. De facto witness tampering succeeds in invidiously sabotaging the human rights of IPV-HT survivors when key state actors fail to employ meaningful due diligence in the investigation and prosecution of these matters. State actors’ decisions not to enforce laws and treaties to protect IPV-HT victims are political choices that contravene legislative imperatives to advance victim safety. The due diligence standard for law enforcement, prosecutors, judges, and legal system professionals responding to IPV-HT can be analogous to that of healthcare providers. In medical malpractice cases, an expert often testifies as to what constitutes the standard of practice in treating a particular malady. 284 Pharmacists, too, are obligated to warn patients about possible negative consequences of drug combinations because they possess the specific knowledge, and thus, the ability to prevent harm. 285

281. See Lucien J. Dhooge, Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute, 22 EMORY INT’L L. REV. 455, 476 (2008) (“[C]orporations failing to adopt appropriate investigative measures risk the imposition of liability when violations that could have been discovered or prevented in the exercise of due diligence occur.”).

282. Id. (“Additionally, corporations should adopt procedures that are created in good faith and reasonably designed to identify, assess, and address negative human rights impacts; and then they should implement them fully.”).

283. See Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Com’n H.R., Report No. 80/11, ¶ 5 (2011) (“The [United States] failed to act with due diligence to protect Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales from domestic violence, which violated the [United States’] obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration.”).

284. See 61 AM. JUR. 2D Physicians, Surgeons, Etc. § 187 (1981) (explaining that a doctor is “required to exercise the average degree of skill, care, and diligence exercised by members of the same medical specialty”).

285. See Dooley v. Everett, 805 S.W.2d 380, 384 (Tenn. Ct. App. 1990) (“Revco owes a duty to its customer to refrain from negligently doing or failing to do an act which would injure its customer.”).
Here, too, the primary state actors responding to IPV-HT victims undergo varying levels of training such that they have specialized knowledge designed to prevent further harm.\textsuperscript{286} Accordingly, establishing a standard for the utilization of that training could improve enforcement of the law and provide safeguards for IPV-HT survivors.

III. PRESUMPTIVE INTENT

In recognition of the conflict between IPV-HT dynamics and legal norms, effective reform requires the establishment of a presumptive intent standard. The \textit{Giles} majority ruled that, to prove WT, the only two types of admissible testimonial statements are (1) dying declarations, and (2) statements from a witness whom the defendant prevented from testifying at trial.\textsuperscript{287} Writing for the majority, Justice Scalia said that even if a batterer murders his victim, he can invoke his Sixth Amendment confrontation rights to keep her past statements out of trial unless the state can prove he killed with the intent of preventing her testimony.\textsuperscript{288} Since it is highly unlikely that offenders will admit to this purpose, I advocate for a statutory, rebuttable presumption of WT consistent with the compelling state interest of ensuring public safety. This provision could be framed as: \textit{If the court determines that a person has committed an act of IPV-HT as part of a pattern of coercive control (as described below), there is a rebuttable presumption of witness tampering and the state may invoke the doctrine of forfeiture by wrongdoing.} I am thus proposing two rebuttable presumptions: my primary focus is one that operates as a mens rea presumption of witness tampering as part of a pattern of coercive control (as described below) and (2) statements from a witness whom the defendant prevented from testifying at trial.

As an evidentiary rule applied in the context of de facto WT, a rebuttable presumption means that once a court determines that IPV-HT conduct was committed as described herein, it must presume that the defendant has intentionally engaged in WT.\textsuperscript{289} Rebuttable presumptions are found in civil and

\textsuperscript{286} See, e.g., \textsc{Meg Townsend et al.}, U.S. DEP’T OF JUSTICE, LAW ENFORCEMENT RESPONSE TO EMERGENCY DOMESTIC VIOLENCE CALLS FOR SERVICE 35-36 (2005) (finding that 74 percent of police departments mandate domestic violence training, although most devote fewer than eight hours to this topic during in-service and recruit sessions); see also, e.g., \textsc{Alaska Stat. Ann.} \S 18.65.510 (2010); \textsc{Cal. Penal Code} \S 13519 (West, Westlaw through ch. 800 of 2013 Reg. Sess.); \textsc{Conn. Gen. Stat. Ann.} \S 7-294g (West 2008); \textsc{Fla. Stat. Ann.} \S 943.1701 (West 2006); \textsc{50 Ill. Comp. Stat. Ann.} 705/7 (West 2005); \textsc{Iowa Code Ann.} \S 80B.11(1)(a)-(b); \textsc{Mass. Gen. Laws Ann. ch. 6, \S 116A} (West Supp. 2012); \textsc{N.J. Stat. Ann.} \S 2C:25-20 (West 2005); \textsc{N.Y. Exec. Law} \S 214-b (McKinney 2010); \textsc{Tenn. Code Ann.} \S 38-8-112(37) (2003); \textsc{Wash. Rev. Code Ann.} \S 10.99.030 (West 2012).


\textsuperscript{288} \textit{Id.} at 377.

\textsuperscript{289} \textsc{1 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence} \S 301.02[1] (Joseph M. McLaughlin ed., 2d ed. 2000) (detailing presumptive inferences in civil contexts); see also Charles R. Nesson, \textit{Reasonable Doubt and Permissive Inferences}:
criminal matters ranging from environmental protection, child custody, and insider trading to bail and firearms law. Policy reasons for promulgating a rebuttable presumption for de facto and traditional WT offenses include rectifying the power imbalance between victim and offender, engendering faster resolution of cases, and cuing the body politic that such deference is necessary to facilitate justice. Furthermore, legislatures have the opportunity to curtail state and lawyer collusion with abusers (as discussed herein) by providing rebuttable presumptions. Though opponents of this proposal may be concerned that the burden-shifting effect damages criminal law principles of innocence until proven guilty, the accused would have an adequate chance to persuade the court that his conduct does not meet the standards of coercive control and WT while enhancing the legislative intent of abuse prevention and accountability. The

The Value of Complexity, 92 Harv. L. Rev. 1187, 1187-88 n.4 (1979) (listing thirteen examples of statutorily created permissive inferences).


See, e.g., Jack M. Dalgleish, Jr., Annotation, Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children, 51 A.L.R. 5th 241 (1997) (providing an overview of laws mandating consideration of domestic violence when determining child custody. Arizona’s law, for example, provides:

If the court determines that a parent who is seeking sole or joint legal decision-making has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed the act of domestic violence is contrary to the child’s best interests.

ARIZ. REV. STAT. § 25-403.03(D) (West, Westlaw through 2013 1st. Reg. Sess.).

See, e.g., Joan MacLeod Heminway, Just Do It!: Specific Rulemaking on Materiality Guidance in Insider Trading, 72 La. L. Rev. 999, 1004-05 (2012) (offering “materiality guidance-sets of alternating presumptions and per se rules” for insider trading).

See, e.g., 18 U.S.C. § 3142(e)(2) (stating there is a rebuttable presumption of detention if a person has committed certain offenses and “no condition or combination of conditions will reasonably assure the safety of any other person and the community”); see also Robin C. Lanier, Annotation, What Constitutes a Risk of Flight so as to Render a Federal Criminal Defendant Ineligible for Bail Prior to Sentence or Pending Appeal, 79 A.L.R. Fed. 460 (1986).

See, e.g., 18 U.S.C. § 3142(f)(1)(E) (stating that “any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device . . . or any other dangerous weapon . . . ” is presumed to pose a danger to the community); see also Matthew S. Miner, Hearing the Danger of an Armed Felon—Allowing For a Detention Hearing Under the Bail Reform Act For Those Who Unlawfully Possess Firearms, 37 U. Mich. J.L. Reform 705, 741-42 (2004) (discussing Congressional intent behind implementing a rebuttal presumption for detention in the Bail Reform Act).


See C. McCormick, Evidence § 336, at 783-84 (2d ed. 1972) (describing the necessary burdens of production and persuasion); see also Christopher A. Andreoff, A Primer on Federal Criminal Procedure, 72 Mich. B.J. 60, 61 (1993) (noting that in criminal cases involving presumption, the burden of production shifts to the defendant, but the burden of persuasion remains with the state).
proposed rebuttable presumption is consistent with prior Supreme Court decisions expressly sanctioning permissive inferences as long as the proposed conclusion is “one that reason and common sense justify in light of the proven facts before the jury.” Furthermore, in Giles, Justice Scalia did not disagree with the argument in Justice Souter’s concurrence that “the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship . . .”

There are a number of sound arguments for a framework of presumptive intent with de facto and traditional WT crimes committed in IPV-HT cases, but the focus here is on two robust, normative bases. First, the intent-to-silence calculus is analyzed for its indubitable role as articulated in the Giles opinion, and for its potential as a mechanism to re-order accountability in IPV-HT cases. Second, the presumption of probable consequences is considered in light of criminal and tort law principles that a person ought to be held responsible for setting in motion acts that culminate in harm. Allowing an offender to both cause a victim’s nonappearance and preclude that victim’s previous statements makes the court complicit with the defendant’s crimes.

A. Intent to Silence Calculus

In Giles, Justice Scalia opined that domestic violence is often intended to persuade a victim not to seek help, speak with police, and take part in criminal prosecutions. He elaborated, “Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine.” Because Giles requires that the state prove a defendant’s animus when he committed the charged crime and the offender is not likely to admit his purpose, prosecutors are stymied and victims are without legal recourse absent presumed intent. Justice Souter’s concurrence, however, appears to espouse the position that the state should not have to prove a defendant said he intended to dissuade a witness from testifying if it can be presumed from the totality of his actions.

Crawford, Davis and Giles afforded neither a realistic definition of testimonial statements nor sufficient guidance for determining offender intent.

298. Giles, 554 U.S. at 353.
299. Giles, 554 U.S. at 377 (“Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.”).
300. Id. (emphasis added). Note that Scalia personifies “the crime” by having it, rather than the defendant, express intent to silence a victim.
301. Id. at 379-80 (stating that “the element of intention [will] normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship”).
DE FACTO WITNESS TAMPERING

As such, offered below are presumptively dispositive case factors, intended to provide helpful direction, albeit far from exhaustive. IPV-HT offenders’ creativity in silencing their victims necessitates that presumed intent must be based on flexible legal standards and human rights doctrine.

1. Murder

As a matter of equity, courts should presume that if a defendant murders his IPV-HT victim, a rebuttable presumption of intent to silence applies. In *Giles*, Justice Scalia stated that when an abusive relationship ends in murder, “the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine.”

And as Justice Souter persuasively argues, “If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger.”

Consistent with *Reynolds v. United States*, the 1898 case enshrining the forfeiture doctrine, federal common law pre-*Crawford* held that murdering a witness presumes the defendant intended to prevent the testimony and was successful in doing so, thereby admitting the declarant’s statements.

2. Pending Legal Proceedings

It is logical that a defendant’s coercive conduct during the pendency of a relevant legal proceeding supports a presumptive intent of witness tampering.

In *Giles*, Justice Scalia deemed “evidence of ongoing criminal proceedings at which the victim would have been expected to testify” as “highly relevant to this inquiry.”

A fact finder may reasonably conclude that preventive or retaliatory animus was a factor motivating a defendant to coerce the witness. This is a fair assumption in part because at arraignment or in a protective order hearing, the offender receives notice that 1) his conduct was unlawful, 2) he is not to commit any crimes during the pendency of the case, and 3) he is not to contact the victim.

---

303. *Id.* at 380.
305. *See* Tim Donaldson & Karen Olson, “Classic Abusive Relationships” and the Inference of Witness Tampering in Family Violence Cases After *Giles* v. California, 36 LINCOLN L. REV. 45, 73 n.136 (2008) (citing numerous cases holding that the doctrine of forfeiture by wrongdoing applies if a defendant eliminates a witness to prevent testimony at any proceeding).
by any means. Thus afforded full due process, the offender has heightened knowledge of the legal system’s expectations, including that he refrain from all forms of WT in the instant case and any other pending matters. In the aftermath of Giles, courts have followed the premise that if an offender kills a person while criminal cases are pending, then an inference of intent to silence can be made.

3. Present Protective Order

If an IPV-HT offender violates a protective order, the court should presume the intent to silence, for this correctly acknowledges the act of silencing as a form of WT. Issuance of a protective order is predicated on an applicant proving that a domestic violence offense was committed and, in some states, that it is likely to happen again. Most IPV-HT victims are reluctant to seek protective orders, and the majority of those who do seek a protective order cite serious abuse ranging from assault and threats to kill, to kidnapping and harming children. With the infliction of repeated trauma, the offender is often able to instill such fear that the victim cannot fathom facing him in court or taking any action that could bring further harm to herself and her children.

The legislative intent of protective order laws is to prevent further harm to

307. In every state, protective orders are not in effect until properly served. See, e.g., Klein & Orloff, supra note 55, at 877-78 (describing the various state provisions for service of protective orders on respondents); Ronald B. Adrine & Alexandria M. Ruden, Issuance of a Civil Protection Order, OHIO DOMESTIC VIOLENCE L. §11.11 (Nov. 2013) (stating that a protective order is void if not served on the respondent); see also Lee H. Elkins et al., Temporary Orders of Protection, N.Y. L. DOMESTIC VIOLENCE §2.30 (Nov. 2012) (stating that protective orders are enforceable only after service on the respondent). Based on my 36 years’ experience in the courts, I have seen that judges routinely apprise defendants of the charged crimes, no-contact orders, and pretrial release conditions. In rare cases, the court permits limited contact regarding arrangements with shared children.

308. See Buel, supra note 6, at 1365 (explaining that forfeiture may also be triggered where the missing witness was to testify in another case); see also United States v. Johnson, 495 F.3d 951, 971-72 (8th Cir. 2007) (discussing an example of such a case).


310. See, e.g., TEX. FAM. CODE ANN. §85.001(a) (Vernon 2009) (providing that, at the end of hearing on application for protective order, the court must determine whether family violence has occurred and whether it is likely to happen again in the future); see also ARIZ. R. PROTECTIVE ORDER PROC. 8(F) (stating that Order of Protection may issue if, by preponderance of evidence, the court finds that domestic violence has occurred within year (or longer if there is good cause)); OHIO REV. CODE § 3113.31(C) (stating that an order of protection may be obtained if the applicant persuades the court that the respondent committed an act of domestic violence against a family or household member).


312. Adam M. Krischer, Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases, PROSECUTOR, Nov.-Dec. 2004, at 14, 15 (reporting that if victims were assisting prosecution, almost half of IPV batterers threatened victim with violence and one fourth warned that their children would be kidnapped or taken away).
IPV victims and create a rational mechanism for enforcement. In practice, however, oversight of protective orders is left to an array of societal actors ranging from police, judges, prosecutors, and advocates to employers, family, and community members, who may impose their own arbitrary biases about which victims deserve attention. An IPV-HT perpetrator’s willingness to violate a protective order signals disrespect for the court’s authority as well as for the safety and privacy rights of the victim. This type of brazen disregard for the rule of law compounded by lax police enforcement caused all states to make the violation of a protective order a criminal offense. Some courts and law enforcement accord a minimal level of deference to enforcement of their own protective orders, thus emboldening offenders to perpetuate the all too common abusive relationship.

4. “Classic Abusive Relationship”

Although the Giles court did not specifically define either “classic abusive relationship” or “abuse,” legislative and scholarly recognition of the full spectrum of maltreatment should inform courts’ assessments of harm. Four other justices appear to have agreed with Justice Souter’s argument in his Giles concurrence that intent to silence should be inferred with evidence of a “classic abusive relationship” in which the offender interferes with the victim’s help-seeking, such as going to the courts or police. Justice Scalia’s majority opinion seems to indicate that he is looking for discrete acts of a batterer to indicate presence of an abusive relationship: “Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry . . . .” To meet the intent to silence standard, a definition of abuse must include the varied texture and scope of IPV-HT offenders’ continuous harm: the roller coaster of coercive control that often spans physical,

313. See Leigh Goodmark, Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women, 23 ST. LOUIS U. PUB. L. REV. 7, 10 (2004) (describing protective order laws and their legislative purpose); see also, e.g., KAN. STAT. ANN. §60-3101(b) (LexisNexis 2008). Kansas’s Protection from Abuse Act states: “This act shall be liberally construed to promote the protection of victims of domestic violence from bodily injury or threats of bodily injury and to facilitate access to judicial protection for the victims, whether represented by counsel or proceeding pro se.” Id.; see also KY. REV. STAT. ANN. §403.715 (LexisNexis 2010) (stating that purpose is to “allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible”).

314. See Klein & Orloff, supra note 55, at 1103-04 (explaining that beyond violation of the protective order being a crime, a wide swath of violent conduct can also be charged).

315. Giles, 554 U.S. at 353 (“[T]he element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”)

316. Id. at 377.
sexual, psychological, and verbal abuse. This breadth of coercion encompasses Souter’s understanding of a classic abusive relationship.

Importantly, scholars and practitioners alike have urged inclusion of coercive control as within the rubric of abuse and indicative of the batterer’s intent to silence his victim. Professor Evan Stark persuasively argues for coercive control to be viewed in the same manner as stalking, kidnapping, and harassment as a course-of-conduct crime that permits evidence of its impact on autonomy and freedom. Within their criminal and civil statutes, a number of states are codifying a definition of IPV that is inclusive of “a pattern of assaultive, coercive, and controlling behaviors directed at achieving compliance from or control over, that partner.” Many facets of the Giles decision seemingly beckon the state to prove intent to silence and presence of a “classic abusive relationship” through use of substantive evidence other than a victim’s direct testimony, be it circumstantial, based on acceptable hearsay, or otherwise performing the function of truth-seeking.

Protection should also be afforded to those victims not murdered by their partners but rendered physically or mentally incapacitated by the continuum of abuse. Although the defendant murdered his ex-girlfriend in Giles, none of the opinions limited their contextual analysis to preclude other types of IPV-HT offenses, especially in light of studies documenting that proximity to a trauma center often determines who lives. The Giles Court has signaled that evidence of prior abuse should be admissible if it deterred the witness from seeking help or from testifying.

5. Human Trafficking

It may seem hyperbolic to characterize sex and labor trafficking as modern day slavery, but its veracity is evident with application of the Thirteenth

317. See supra notes 8-14 and accompanying text (discussing the continuous harm phenomenon); see also Donaldson & Olson, supra note 305, at 86 (noting that a batterer’s exercise of control “may be much more subtle than the examples listed by Justice Scalia”).


319. STARK, supra note 12, at 382 (“A new body of criminal and civil law is needed to identify coercive control as a public wrong . . . and highlight its effects on liberty and autonomy.”).

320. See, e.g., CAL. PENAL CODE § 13823.15(f)(15)(A) (West 2012) (“‘Domestic violence’ means the infliction or threat of physical harm against past or present adult or adolescent intimate partners, including physical, sexual, and psychological abuse against the partner, and is a part of a pattern of assaultive, coercive, and controlling behaviors directed at achieving compliance from or control over that person.”).

Amendment’s negative prohibitions. Slavery exists when humans are used as chattel, forced into a subservient role with dominance and degradation exercised by an enforcer. In sex trafficking, the pimp or trafficker maintains control through brutal modes of violence, often after first feigning romantic interest toward the vulnerable, targeted person. To further convey the message of complete subjugation and “ownership,” many pimps tattoo their nickname on the victims. These severe forms of coercive control are the HT analogue to the “classic abusive relationship” for IPV and should prompt a rebuttable presumption of WT.

A formal rebuttable presumption would help mitigate the caste system within human trafficking operations and upend the societal and state judging of crime victims that it appears to reflect. The divisions begin with often underage prostitutes cast as criminals, unworthy of protection and thus fair game for assault, rape, and righteous scorn. The powerful taxonomy of ‘prostitute’ is then enflamed with the even more derisive labels of ‘slut’ and ‘whore’ so frequently used against victims of incest, sexual assault, domestic violence, sexual harassment, and certainly, human trafficking. The oppositional framing of good vs. bad victim confers significant weight as it usually determines whether legal and social services help will be forthcoming. By formalizing presumptive intent, all parties are alerted to changing norms that prioritize survivor safety and offender accountability.

B. Presumption of Probable Consequences

Post-Giles, a defendant charged with WT in an IPV-HT case will likely

322. U.S. CONST. amend. XIII, §1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

323. See Akhil Reed Amar and Daniel Widawsky, Comment, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 HARV. L. REV. 1359, 1365 (1992) (defining slavery as “[a] power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons”).

324. See supra Part I.A.1; see also FBI Press Release, supra note 38 (describing the pimp’s pretense of romantic interest as a recruitment tool and later use of drugs and alcohol to coerce the girls into continuing to be raped for his financial gain).

325. See, e.g., FBI Press Release, supra note 38 (describing the pimp’s practice of tattooing his nickname “Boo” on the girls he forced to work for him).


327. See Margaret A. Baldwin, Split at the Root: Prostitution and Feminist Discourses of Law Reform, 5 YALE J.L. & FEMINISM 47, 48 (1992) ("Declared to be ‘whores’ and ‘sluts’ by the men who abuse them, women then confront a legal system which puts the same issue in the form of a question: was she in fact a ‘slut’ who deserved it, as the perpetrator claims, or not-a-slut, deserving of some redress?").
assert that although he caused the harm, his intent was not to silence the victim and thus, forfeiture by wrongdoing remedies cannot be permitted. That argument is contrary to equitable legal principles articulated since the founding. Furthermore, in Davis, Justice Scalia acknowledged that IPV cases are “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial” and “[w]hen this occurs, the Confrontation Clause gives the criminal a windfall.” In his Giles concurrence, Justice Souter argues that in requiring the state to show purpose or knowledge, the Court contravenes the intent of equitable forfeiture and essentially rewards the defendant, noting that he “can find no history, no underlying purpose, no administrative consideration, and no constitutional principle that requires this result.”

Centuries-old precedent in criminal (and tort) law is premised on an individual being held responsible for setting in motion an act that culminates in harm. Justice Scalia said in his dissent in United States v. Aguilar, “[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts.” Justice Breyer, in his Giles dissent (joined by Justices Stevens and Kennedy), persuasively argued that Supreme Court precedent “holds an individual responsible for consequences known likely to follow just as if that individual had intended to achieve them.”

This principle holds in many criminal acts, such as drunk driving: it matters not that the intoxicated person claims he only had a few drinks and had no intention of driving erratically or causing injury. Indeed, more than a century ago, the Supreme Court held that a “man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it.” Allowing an offender to cause a victim’s nonappearance

---

328. Harm here includes the trauma resulting from threats and the other relevant crimes discussed herein.
329. Silence here is inclusive of all defendant actions that cause the victim to avoid help from not disclosing to authorities and fleeing the jurisdiction, to recanting earlier testimony and lying on the witness stand. See supra note 299-300 and accompanying text (discussing Justice Scalia’s relevant ruling in Giles).
330. This timeframe is relevant because Justice Scalia held that with reference to the Confrontation Clause, “only those exceptions established at the time of the founding” should be admitted. Giles v. California, 544 U.S. at 354; see also 1 G. GILBERT, LAW OF EVIDENCE 214-15 (1791) (affirming that out of court statements are admissible where it can be shown that a victim or witness was “kept back from appearing by the means and procurement of the prisoner.”).
334. Giles, 554 U.S. at 386.
335. See 61A C.J.S. MOTOR VEHICLES § 1584 (2013) (“Generally, the essential elements of the offense, under the statutes, are driving or operating an automobile, upon a public street or highway, while intoxicated or under the influence of intoxicating liquors.”) (citations omitted).
DE FACTO WITNESS TAMPERING

and then precluding that victim’s previous statements would make the court complicit with the defendant’s crimes. 337

For the vast majority of offenses committed against IPV-HT victims under the rubric of de facto WT, the offender could logically expect harm to occur. As part of engendering a more robust WT doctrine, it is necessary to focus on an offender’s acts and the logical outcome of initiating that conduct, rather than admitted intent. 338 It is thus reasonable to hold an abuser responsible for the result of his actions regardless of his claimed lack of intent.

IV. CONCLUSION

This Article provides a new discourse for de facto witness tampering in the context of intimate partner violence and human trafficking cases. By first unpacking the doctrinal and normative aspects of de facto witness tampering in practice and then describing how a human rights framework can be utilized for instrumental reform, I lay the groundwork for proposing a statutory presumptive intent provision for a finding of witness tampering. This presumption is anchored within the rubric of coercive control and evidence of the abuser’s intent to silence the victim as discussed in the Supreme Court’s trilogy of Crawford, Davis and Giles. The goal is to provide legislative, executive, and judicial stakeholders with a deeper understanding of the dynamics of de facto witness tampering and inspire their adoption of this specific remedial statute to help pierce the minimization veil that still shrouds perceptions of intimate partner violence and human trafficking.

337. See Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244-45 (1933) (stating that to follow defendant’s request in that situation “would make this court the abetter of iniquity”).

338. See, e.g., OHIO REV. CODE ANN. § 2905.01 (2013) (stating that, although for kidnapping the perpetrator must be aware that his conduct puts the victim at risk of serious physical harm, “the offender’s purpose is irrelevant since the key factor here is the special danger in which the victim is placed”).