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The Paradox of Progress: Translating Evan Stark's Coercive Control Into Legal Doctrine for Abused Women

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Abstract

This article examines Evan Stark's model of coercive control and what this paradigm shift might mean for the law. Coercive control can help redefine both criminal offenses involving domestic violence and defenses available to women who kill their abusers. This redefinition would shift the law away from incident-based violence and toward a more comprehensive and accurate paradigm that accounts for the deprivation of a woman's autonomy within the context of an abusive relationship. Such a change would likely provide more effective state intervention into what were once considered private relationships. Yet, this approach may also have some unintended consequences, including refocusing the law on a victim's mental state and complicity in her own abuse rather than on the harm caused by abusive men. Thus, although the law should more fully account for coercive control, lawyers must be cautiously optimistic in implementing Stark's proposed reforms.

Keywords

domestic violence, law, battered women

One of the most perplexing problems for the law has been how to curb men's violence against their intimate partners. Despite more than 30 years of reform, one and a half million women each year are battered or raped by an intimate partner. Although the legal system alone cannot end violence against women, its role in providing remedies to victims and deterring abusers is central to the greater social struggle. To the extent that the law is to be successful in these goals, it must base both legal doctrine and day-to-day practice on an accurate and meaningful understanding of what is really happening in these relationships. One of the major hurdles for lawyers is that we may not always understand, or agree about, those dynamics and thus may not get the rules or the implementation right.

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The value to lawyers of Evan Stark's *Coercive Control: How Men Entrap Women in Personal Life* is that it offers a theory of interpersonal violence that is more complex, and arguably more accurate, than that on which the law currently relies. As Stark so aptly illuminates, what is at stake for women in relationships involving interpersonal violence is freedom and autonomy, and the ability to actualize full citizenship. Yet, as he notes, the law is predominantly concerned with the physical abuse of women. Laws criminalizing domestic violence, for example, focus primarily on single incidents of assault and battery, not on the broader range of behaviors.

From a lawyer's perspective, the most important aspect of Stark's work is his redefinition of abuse from specific acts of violence to "an ongoing and gender-specific pattern of coercive and controlling behaviors that cause a range of harms in addition to injury" (pp. 99-100). For Stark, the focus should not be on episodic violence but on the continuous process of denying women physical integrity, autonomy, and citizenship. Coercive control is a political definition, highlighting the gender subordination that causes, organizes, and renders meaningful specific acts of violence and abuse. Thus, violence against women is not only a personal crisis for individual women but also a political crisis that the law has a deeper responsibility to remedy.

This article explores how the law might incorporate Stark's thesis into legal reform and what the consequences, both intended and unintended, might be. I focus on two questions: How can the law redefine the public harm from domestic violence to coercive control? How might Stark's theory of coercive control redefine the laws governing self-defense when women kill their abusers?

One place in which Stark's work can be translated is in legal doctrine, the formal rules that define public harms and the defenses to wrongdoing. For example, currently, to the extent abusers face criminal charges, those charges are most likely based on the narrow rule against assault and battery, not the deprivation of liberty more generally. Similarly, when women kill their abusers, the rules about self-defense that fact finders tend to focus on are questions of imminence and reasonableness, not on broader concepts of coercion. These distinctions are made primarily by legislators and judges in defining the rules and codes that govern our lives.

Stark's work can also be instructive to legal theory and the ways that lawyers and judges implement the rules. For example, should the state insist on proceeding in criminal cases in which the victim is reluctant? Under what circumstances should the state charge an abused woman with homicide when the prosecution knows about the ongoing history of abuse? What does it mean to be a reasonable battered woman? The answers to these questions require a deeper understanding of the dynamics of the intimate abuse of women and the appropriate interest and role of the state in ending it.

Stark's work is rich with both national statistics and anecdotes from his consulting practice. He has marshaled evidence that helps lawyers rethink assumptions with implications for both legal doctrine and its implementation. Stark has asked the law to see the broader dynamics of coercive control exerted by men—dynamics that dictate the lives and undermine the autonomy of women. For Stark, the broader context is critical to understanding how men entrap women. If the law were to account for the broader context, Stark argues, it would recognize the greater harm of the deprivation of autonomy for women and would render more just results when women kill their abusers.

Stark is likely correct that the law's understanding of intimate violence is too narrow and unsophisticated to accurately reflect women's lives. However, before the law fully translates coercive control, it is important to consider whether, in doing so, it may simply reinforce classic conundrums about women's own agency and complicity in the abuse. This is the central paradox of coercive control. By shifting the focus away from violence toward the broader dynamic of coercive control, we may be, albeit unintentionally, refocusing the law on the central question of "why didn't she leave?" Stark correctly wants the law to stop asking that question and instead ask, "why did *he* do it?" (p. 131). Yet, it is not entirely clear that focusing on the broader range of coercive behaviors will protect women from the kind of victim-blaming inquiries so common in the criminal process.

This concern becomes particularly important in this era of state intervention in abusive relationships. Indeed, the social and political context in which coercive control happens is changing. Part of that change includes increased state intervention into what were once considered private relationships. Like many scholars, Stark accepts that state intervention into intimate relationships is necessary if women are to be liberated from the kind of coercive male control he described. As with war hostages and victims of kidnapping, strategies of resistance may prolong or even save battered women's lives, but usually some outside force must intervene to free them. Thus, it is not state intervention, per se, that has stalled the progress in curbing men's violence against women. Rather, Stark argues, it has been the ineffectiveness of state intervention that is the problem. He argues that the state should account for coercive control so that its legal interventions are more responsive to victims, more predictable in outcome, and more effective in its resolve to end male privilege.

Yet, with the growing emphasis on state intervention, particularly recourse to police and legal action, comes the expectation, however unrealistic, that women should willingly avail themselves to that intervention. Consequently, the more remedies the law offers for the harms of violence against women, the more an individual woman may find herself in a catch-22. If she seeks outside help, the argument that she was entrapped becomes less convincing. Similarly, if she kills to liberate herself, the notion that violent resistance was necessary becomes a less persuasive defense in a world in which state intervention was at least theoretically available.

These concerns are not criticisms of Stark's work. Rather, they highlight the difficulty of translating social science into legal doctrines. There is a complicated and often elusive relationship between state intervention and women's lives. Indeed, the more the law attempts to intervene to help women, the more it is likely that it will create new challenges and dilemmas for women. What may seem to be the right idea theoretically does not always translate straightforwardly into practice. That is not to say that we should not try. Rather, we should be cautiously optimistic in our attempts.

Toward a Legal Definition of Coercive Control

The law's transformation in response to domestic violence has been radical in both theory and practice. At the basis of this transformation has been the recognition of interpersonal violence as a public harm rather than a private matter. With this recognition, there has been

a corresponding shift toward gender equality. Stark argues that despite these changes, the entrapment of women in personal life remains as intractable as it did three decades ago.

The first question the law should ask is whether our definition of interpersonal violence is accurate and meaningful, and whether it limits the ability of the law to respond appropriately to women's political and social status in intimate relationships. Stark suggests that the criminal laws expand their definition of coercive control "as a course-of-conduct crime much like harassment, stalking, or kidnapping, rather than as a discrete act, and highlight its effects on liberty and autonomy" (p. 382). Reframing abuse to include the cumulative effect on victims might help better protect them. He cites, as an example, Missouri legislation that defines domestic violence as controlling behavior and purposeful isolation of victims.

Stark tells the story of Danielle DiMedici, who was murdered by her former boyfriend, James Parker. Parker had a history of severely abusing DiMedici, including beating her with a club and burning her feet. Yet, in a case involving a noninjurious assault, a judge released Parker on US$7,500 bail. Parker also kidnapped and held DiMedici captive for eight days. In contrast to her earlier cooperation with law enforcement, she claimed that Parker was affectionate and nonviolent, implicitly suggesting that the kidnapping was consensual. Despite police protection, Parker was able to break into DiMedici's home; he murdered her before killing himself. Stark suggests that a change in the law could have allowed the criminal justice system to respond more aggressively. In particular, he argues that if the law focused more on the cumulative impact of the abuse on DiMedici and her entrapment in the relationship, it would have understood why DiMedici cooperated with Parker in the kidnapping. Furthermore, if the court knew of the past abuse, it would likely have set bail higher. This case illustrates why the law, with its current focus on single acts of violence, misses the underlying deprivation of liberty and personhood that is at the heart of coercive control and therefore misconstrues the harm of partner-perpetrated abuse and reproduces the vulnerability of women like Danielle DiMedici.

From a theoretical perspective, Stark's suggestion has much appeal. He is absolutely correct that incident-based prohibitions focus primarily on physical harm at a moment in time—a slap, a stabbing, a sexual assault. These doctrines fail to capture the broad and continuous behaviors of coercive control. As a result, the law does not accurately reflect the dynamics of these relationships and consequently fails to fully provide women, including DiMedici, with adequate protection.

The best work on redefining interpersonal violence in the law is being done by Deborah Tuerkheimer and Alafair S. Burke. Both scholars rely on Stark's earlier work on coercive control in developing their theories. Tuerkheimer (2004, 2007) suggests a new crime of battering that would address the shortcomings of the current regime by expanding the definition of what constitutes a public harm. Similar to Stark's analysis, Tuerkheimer (2004) suggests, that a person is guilty of battering when

> he or she intentionally engages in a course of conduct directed at a family or household member; and he or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member;

> and at least two acts compromising the course of conduct constitute a crime. (pp. 1019-1020)

She argues that by employing such a definition, seemingly unconnected events become woven together by a thread of control. This doctrinal shift then focuses the judge and jury on the broader context of the relationship, rather than obsessing solely on whether and how an injury occurred.

This change could prove beneficial for prosecutors. For example, a defendant might hide a victim's car keys, smash her iPod, cancel a credit card, or lock her dog out of the home. None of these behaviors, in and of itself, is likely to be taken seriously by the criminal justice system, either because the behavior itself doesn't constitute an existing crime or because the crime is relatively minor when viewed in isolation. However, joining these behaviors into a single crime begins to paint a picture of coercive behavior that recognizes the ongoing loss of autonomy the victim suffers. From an evidentiary perspective, the complete narrative of the relationship becomes relevant. This then allows the victim to tell her story—the whole story—and have it matter.

Being able to tell one's story is incredibly important in this context. Telling one's story not only can create empathy and understanding but it also helps to reshape the law away from formal argumentation and toward the true human experience (Murphy, 1993; White, 1990). It connects the personal to the political and, in doing so, provides enormous opportunity to reshape the law not only in individual cases but also systemically.

Tuerkheimer's redefinition is important for two other reasons. First, the crime of battering is differentiated from assault and battery, which focuses solely on the physical harm to the victim. Many have suggested that domestic violence has always been a crime, in part to highlight why it should be taken seriously. Tuerkheimer's proposal intentionally shifts that argument to suggest that partner-perpetrated abuse is not just like stranger-perpetrated assault and battery, which can encompass anything from a bar fight to road rage. Those acts are often singular and incident-based crimes. In contrast, as Stark clearly sets forth, coercive control embodies a vast array of behaviors in which context is crucial.

Second, many states have attempted to capture that difference in statutes that make it a separate crime when someone assaults a household member, dating partner, or present or former spouse. Even though the conduct itself would otherwise be criminal, the state pays special attention because of the relationship of the parties and, in some cases, ramps up punishment from a misdemeanor to a felony. Tuerkheimer's proposal similarly draws attention to the context of the relationship, but it does so in a way that accounts for the multitude of behaviors that happen within that relationship. Such a shift in the criminal law would arguably give juries a more complete picture of the abuse and lend credibility to the victim's own story. It maintains the notion that the offense against the state is greater when one abuses an intimate partner than when one abuses a stranger.

From Stark's perspective, this would seem particularly important. Coercive control is not just a crime against an individual, but it is a crime against the state in its deprivation of liberty and a manifestation of gender-based discrimination. It focuses the law on the

political, as well as personal, aspects of the crime. Tuerkheimer's proposal is thus consistent with Stark's insistence that the broader social structure matters.

Burke (2007) builds on Tuerkheimer's work. She proposes the following Coercive Domestic Violence Statute:

> (1) A person commits the crime of Coercive Domestic Violence if the person attempts to gain power or control over an intimate partner through a pattern of domestic violence.
>
> (2) As used in this Section,
>
> (a) "intimate partner" means a spouse; a former spouse; persons who have a child in common, whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship;
>
> (b) "to gain power or control" means to restrict another's freedom of action;
>
> (c) "pattern of domestic violence" means the commission of two or more incidents of assault, harassment, menacing, kidnapping, or any sexual offense, or any attempts to commit such offenses, committed against the same intimate partner. (pp. 601-602)

This proposal differs from Tuerkheimer's in that it focuses on the intent of the perpetrator as opposed to the psychological effect of that behavior on the victim. On the positive side, Burke's focus on the coercive motivations of the batterer arguably allows the state to highlight emotional abuse to prove the perpetrator's intent to limit the victim's autonomy. By emphasizing the defendant's intent, Burke's proposal is somewhat more consistent with the criminal law's emphasis on the defendant's mental state, rather than on the result of the actions. On the negative side, Burke reproduces the emphasis on physical violence to which Stark persuasively objects, and feminist critics have long lamented the problems caused by the androcentric epistemology of intent (see, e.g., MacKinnon, 1983). Although the proposals by Tuerkheimer and Burke each have advantages and disadvantages, both provide an excellent starting point for lawmakers to rethink intimate violence to reflect Stark's theory of coercive control.

Theoretically, redefining domestic violence as coercive control fulfills the desire to have the law more fully reflect the realities of women's lives. This may be particularly important for the kinds of cases that Stark describes. Stark has worked primarily with those women for whom the law has provided inadequate remedy because of its focus on incident-based violence. This narrow focus often excludes those women whose partners rule like dictators over their lives and significantly compromise their autonomy but who may not be able to prove significant physical harm. An alternative framework for examining these cases may provide greater protection for those women who would otherwise be dismissed or belittled or downright endangered by the law's current limitations.

Furthermore, translating Stark's work into legal doctrine may help the criminal justice system better differentiate between "fights" and those cases in which coercive control is the dominant paradigm (p. 378). As Stark notes, the law's growing insistence that every act of force may cause injury has led to an increasing number of dual arrests and an overburdened criminal justice system that is largely ineffective. If we were able to distinguish these cases, Stark argues, we would be able to reduce dual arrests and get a clearer sense of the incidence and prevalence of coercive control. As a practical matter, however, Stark has erred on the side of caution, suggesting that as we develop typologies to separate fights from coercive control, we assume every case of partner violence is a case of coercive control until proven otherwise.

Stark's analysis stands in some contrast to the recent work of Linda G. Mills (2008). In *Violent Partners,* Mills argues that there is often a complicated psychological dynamic between the parties when abuse is present. She describes much of what we often label *domestic violence* as *situational couple violence* (Mills, 2008, p. 112; see Johnson, 2008). She argues that this violence is largely personal, not political, and thus the criminal justice system is ill-equipped to sort out this dynamic due to its focus on guilt and innocence. Mills dismisses, to a large degree, the kinds of cases at the heart of Stark's work, and minimizes the broader range of coercive behaviors that Stark convincingly highlights. She prefers we err on the side of noncriminal intervention, seeing that most of these cases are better resolved through personal and couple therapy, community-based mediation, or both.

There are certainly cases considered "domestic violence" that lack an underlying pattern of coercive control but rather are more akin to situational couple violence. Stark's work may be enormously helpful in differentiating which cases warrant state intervention and which are best addressed in the private sphere. As a practical matter, cases involving physical violence may be a difference of degree rather than a difference of kind. However, Stark does provide a set of questions that the law might ask in trying to differentiate a pattern of coercive control—or what Johnson (2008) calls *intimate terrorism*—from situational couple violence. In particular, he asks that the law focus both on safety and on the material conditions of the relationship that may be contributing to the inability of the victim to escape her captivity.

As a practical matter, it is important to ponder whether such a doctrinal shift will ultimately lead to an increase in the number of prosecutions and appropriate punishment, which for Stark would include incarceration given his very valid criticisms of the current preference for batterer treatment programs. Victims are often very reluctant to cooperate with law enforcement for a variety of reasons, from fear and skepticism about the benefits of intervention to outright hostility toward the criminal justice system. State intervention results can vary depending on a multitude of factors, including one's racial, ethnic, religious, and class background. Stark's analysis also gives us another cause for concern as to why victims may not turn to the law for help. If women are victims of the kind of coercive control Stark describes, then their autonomy is significantly compromised. Although these women may continue to engage in small acts of resistance, fully embracing legal interventions to escape the relationship may be asking them to do something that may be nearly

impossible given their hostage-like existence. Providing an alternative legal framework may be of great help to some of those women, but a doctrinal shift alone is unlikely to make a practical difference.

Whether the law focuses on capturing the nature of the harm, as Tuerkheimer proposes, or the abuser's intent, as Burke proposes, reconceptualizing the law would require the prosecution to produce evidence beyond the physical harm itself. To meet its burden of proof, the prosecution would have to provide a more detailed narrative of the relationship. It would have to prove the iPod was smashed and the credit card was cancelled and that the victim was isolated from her friends as part of a larger pattern of coercive control. Here is the potential paradox. In order for the prosecution to successfully provide the evidence that it needs to meet its burden, it will almost always need the victim's own testimony. As a practical matter, the only person who can provide the narrative crucial to linking each independent act to the broader pattern is the victim herself. Stark's theory of coercive control takes for granted that the victim would provide a detailed narrative. Indeed, he has embraced the opportunity for the law to hear those stories and poses his consulting practice as an exemplary method for legitimately obtaining them.

The victim's testimony is not just crucial from an evidentiary standpoint but also from a constitutional standpoint. Beginning in the 1990s, many jurisdictions became increasingly sophisticated at prosecuting cases without reliance on the victim's testimony. Photographs and medical records, for example, were often sufficient to substantiate that there was an injury. This evidence, sometimes coupled with statements victims may have made to police officers, was often enough to prove that the defendant injured the victim. Evidence-based prosecutions transformed the criminal justice system and allowed the state to proceed in cases it would otherwise have had to dismiss (Hanna, 1996). Given that the vast majority of cases end in a plea bargain rather than a trial, evidence-based prosecutions allowed prosecutors to leverage plea bargains and reduced the likelihood that defendants would intimidate and coerce victims into dropping out of the process.

However, in 2004, the United States Supreme Court, in *Crawford v. Washington*, 541 U.S. 36, held that the Sixth Amendment right to confrontation requires that the defendant be able to cross-examine all witnesses who provide testimonial evidence. As a result of *Crawford* and subsequent cases, many of the statements victims make to law enforcement are no longer admissible. Increasingly, courts insist that the victim testify or the case be dismissed (Lininger, 2005). This development in Sixth Amendment jurisprudence has been a challenge for prosecutors to move forward in cases unless the victim is willing to participate in the proceedings. Indeed, the main reason cases are dismissed is because the victim decides she does not want to go forward with the case (Lininger, 2005).

Were the law to be reconceptualized to more accurately reflect coercive control, the fear is that fewer cases would be prosecuted because of the difficulty of proving such cases absent all but the most willing and able victims. Stark believes that if the law were to account for the broader context, victims would decide it is in their best interest to go forward. This position is both optimistic and naïve.

It is optimistic in a way that Stark may not fully appreciate. One of the reasons victims do not want to participate in the criminal process is that their abusers continue to try to

exert power over them by manipulating the court system. Take the recent case of *Vermont v. Brillon* (2009), which will be decided by the United States Supreme Court in its 2009 term. The defendant, Michael Brillon, was a habitual domestic violence offender. He faced life in prison for an assault on his partner. Brillon remained incarcerated but continued to exert control over the victim by continually firing his lawyers and delaying the trial. He fired his lawyers primarily because they refused to engage in unethical discovery intended to trash the victim and discourage her from participating in the criminal process. Despite being convicted, Brillon was released after he successfully claimed that his Sixth Amendment right to a speedy trial had been violated due to the length of time the case took to get to trial. The United States Supreme Court will decide whether delays caused by the defendant can violate the right to a speedy trial.

Unless one understands the paradigm of coercive control, it might be easy to assume, as did the Vermont Supreme Court, that Brillon was merely exercising his right to adequate counsel. Brillon's actions seemed reasonable and benevolent decontextualized from the underlying issue of men's abuse of women. Yet, viewed through Stark's sensitizing lens, Brillon's actions are understood as strategic coercion, intended to continue to deprive the victim of her liberty and autonomy. She is still being abused even though she is no longer beaten or raped. Stark's work is cited in the *amicus curiae* brief filed on behalf of the Vermont Network Against Domestic and Sexual Violence and other victims' organizations as providing a framework to help the court understand how the defendant is perpetuating his abuse using the legal system as a tool. Stark's work has also been cited in briefs in similar cases, such as in *Giles v. California* (2008), in which the defendant's motivation to continue to abuse the victim through nonviolent manipulation might be missed by courts focusing only on incident-based violence. The more courts become aware of this dynamic and better control the defendant's behavior, the more likely it is victims will decide to proceed as their trust in the criminal process will be enhanced.

However, it is also naïve to assume that providing the necessary testimony under a coercive control paradigm will make the criminal trial process less difficult for victims. For many women, it is much easier to describe how she suffered an injury than for her to provide a detailed narrative that, as Stark suggests, she herself may not yet understand. Furthermore, although Stark suggests that expert witnesses can help reframe narratives, he fails to acknowledge that the use of experts is impractical in most prosecutions for abusive behaviors (as opposed to prosecutions for homicide). Defense attorneys can easily gauge how willing a witness a victim is and thus may be far less likely to plea bargain if they sense any hesitation. This is not to say that these concerns cannot be mitigated by strong victim advocacy and support that include housing, employment, and health care that Stark argues are also essential, especially for low-income women. However, the law requires the state to prove its cases beyond a reasonable doubt. Nobody knows whether a doctrinal framework built on coercive control will make that burden easier or harder to meet.

Another unintended consequence might involve the question of consent. The law provides no affirmative defense of consent to assault and battery, reflecting a normative decision that it is only the state that is empowered to use force (Hanna, 2001). At the same time, the law acknowledges individual autonomy and liberty to enter into intimate

relationships. Indeed, the United States Supreme Court affirmed the right of adults to enter into private consensual sexual relationships without fear of state interference in *Lawrence v. Texas* (2003). Theoretically, one should not be able to consent to the kind of coercive control described by Stark, but as a practical matter, the law draws the line between autonomy and coercion with consent. One can consent to have one's spouse control finances and to make major life decisions on one's behalf. One can consent to sexual relationships, to use or not use birth control, and to other intimate details of one's life. However, one cannot consent to physical violence. Thus, one benefit of the law's current focus on violence as opposed to coercive control is that consent is legally irrelevant and the harms committed against the state are doctrinally clear.

Stark does not discuss this concern about consent in detail, reflecting the difference in orientation between a social science analysis and a legal one. Yet, as a matter of proof, distinguishing those relationships in which the woman is truly under the abuser's control and those in which she is a willing participant can be extremely challenging. Of particular concern is that focusing on the broader pattern of coercive control may subject the victim to cross-examination about her mental state. Even though coercive control is not premised on a psychological profile, the concern is that defense attorneys will respond to claims of coercion by making an issue of the victim's own complicity and willingness in the relationship. Such could have been the case had Parker been prosecuted for kidnapping and assaulting DiMedici. Coercive control would have allowed the prosecution to introduce the entire history of the relationship and might have explained why DiMedici seemed to act in complicity with her assailant. However, this testimony also opens the door to cross-examination about her desire and psychological need to be controlled by her partner. As in the context of acquaintance rape, fear of such inquiries may deter many victims from coming forward and make prosecuting these cases even harder than is currently the case.

In addition, victims who do find the strength to come forward with support from the state may face difficulties proving their case. Those women who have resisted their abuser's coercion by availing themselves of legal intervention may be unable to convince fact finders that their autonomy and liberty were indeed compromised. This is the same kind of catch-22 that women who kill their abusers often face. As Leigh Goodmark (2008) has recently argued, resisting the violence by fighting back often undermines the credibility of the victim. Similarly, in the context of a culture that disdains and resists women's efforts at self-defense (Hollander, 2009), simply being willing to provide testimony could undermine the victim's claims that she was involved in a coercive relationship.

Furthermore, there are conceptual problems for the law in shifting legal doctrine from incident-based harms to broader patterns of coercion. As Tamara L. Kuennen (2007) recently argued, coercion is contextual and subjective and falls along a continuum. She gives the example of the decision of many prosecutors to proceed in cases against the victim's wishes. How do we know, she ponders, whether the decision to proceed in a criminal case against the victim's wishes protects the truly coerced victim or harms the not-so-coerced victim who would have had an important negotiating tool to get the abuser to leave her alone and pay child support? Practically, it can be very hard to know, even if prosecutors and advocates are well trained and devote the necessary time and resources to

these cases. Furthermore, she notes that all of us make decisions under some coercion, be it social or financial. As Kuennen (2007) argues,

> Separating the pressures that battered women experience in general versus that which they experience at the hands of the batterer is no easy task. The victim herself may be unable to allocate the weight she gives one factor over another, let alone one external influence versus the influence of the batterer. (p. 24)

Yet, the law forces the question of illegal coercion into a yes or no answer. The line between free choice and coercion gets drawn somewhere—and you are either coerced or not. This observation suggests further practical challenges to the criminal justice system's attempt to incorporate coercion as harm against the state.

Thinking back to Danielle DiMedici, it is clear that Parker committed numerous acts of violence that should have landed him a significant jail sentence. The reason he was never prosecuted for his physical violence against DiMedici likely had less to do with the legal doctrine and more to do with its enforcement. In the vast majority of cases before courts currently, the problem is not that the defendant's conduct did not violate the law. The problem is that the criminal justice system is overwhelmed and underfunded, and depending on the jurisdiction, underenlightened about the concept that men do not have a legal prerogative to beat their intimate partners. Even if the law evolves to incorporate coercive control, these other barriers to justice still require redress.

Thus, it may be most prudent for the law not to replace the current doctrinal framework with a concept of coercive control but rather to add that framework as an alternative basis for liability. This would give law enforcement options and flexibility based on the individual facts of cases. Just as the addition of laws like stalking and harassment broadened the availability of legal remedy, so too could the addition of laws criminalizing coercive control.

Fifteen years ago, the idea that the criminal justice system could successfully prosecute domestic violence cases without willing victims seemed far fetched. Today, because we have learned from experience, we see tremendous strides in the criminal justice system's ability to exert some control over abusive men, including incarcerating them. To continue to improve that response, policy makers must be convinced that coercion rather than incident-based violence is the central harm against women and the state, and that it is the deprivation of liberty, not just the physical assault, that is paramount to the analysis. Yet, even when this battle is won, the long-term impact on the criminal justice system remains less than clear. As we have seen with other criminal interventions, we must always be cognizant of the unintended consequences of our well-intended reforms. Stark's work is an important step in this journey, but it is not the resting place.

Defenses Available to Women in Coercive Relationships

One of the unexpected consequences of increased state intervention into intimate relationships is that women have many safer options to leaving an abusive relationship than killing their abusers. An important result of the increase in women's options is that between 1976

and 2004, the number of men killed by an intimate partner declined by 70% (Stark, 2007; U.S. Department of Justice, 2004). Yet, even though increased options mean that fewer women kill their abusers and therefore must rely on legal doctrines surrounding self-defense, defenses available to women who have been battered remain of great importance, both theoretically and practically.

Much of Stark's analysis is informed by his work as an expert witness in cases involving women who have killed their abusers, and thus he has particularly astute insight into how the legal system responds to battering. Stark argues that the law of self-defense also needs to encompass a theory of coercive control. He joins other scholars in suggesting that the law's reliance on psychological profiling of women obscures and mischaracterizes the reality of women's lives. He argues,

> A defense theory based on coercive control builds its narrative around two complementary themes: the unfolding of a woman's life projects and their denial through the deployment of illegitimate authority. In this story, physical and psychological injury take a secondary role to the struggle to preserve freedom against oppression, connection against isolation, self-respect against humiliation, and intimidation, autonomy and independence against agency denied. . . . Context is everything. (pp. 389-390)

It is this shift from individualized, psychological examination to broader dynamics that Stark argues will aid women in accessing justice.

The current law of self-defense is indeed inadequate, especially in those rare cases when the killing occurs in nonconfrontational settings. Stark details the case of Donna Balis, an Albanian immigrant who, after 4 years of being abused and controlled by her husband, shot him while he lay sleeping. Balis's husband isolated her, controlled her finances, and used both physical and sexual violence to secure his dominance over her. Yet, Balis had neither contacted police nor sought outside intervention. There were no witnesses to the abuse. Thus, Balis had to overcome the legal hurdle of proving she reasonably believed that further harm by her husband would be imminent and that she was thus justified in killing him.

Stark correctly argues that testimony that Balis was suffering from posttraumatic stress disorder or battered women's syndrome (BWS) would only have mitigated her guilt to a lesser charge. He also correctly observes that facts about the prior abuse could be used by the state to prove premeditation. Thus, rather than focus on Balis's psychological state, his testimony as an expert witness focused on the overall pattern of domination and control. His testimony was bolstered by the fact that Balis's husband had forced her to keep a log book of every detail of her day. This physical evidence corroborated Balis's testimony. Stark provided the informed narrative to then explain how Balis came to be controlled and why it was that she killed her husband. Balis was acquitted and spent only a short stay in a program for battered women before resuming her life. Stark's description of Balis's case bolsters his argument that we need a new concept of self-defense that is not premised on BWS or other psychological defenses. He also makes a compelling case as to why expert testimony on coercive control is essential in these cases.

At the heart of Stark's argument is that when Balis killed her husband, she was legally and morally justified in doing so. Herein lies the central debate over how to reframe the law to account for cases like Balis's. Should the law accept that Balis's killing was justified, should it condemn the killing but allow her to be excused, or should it hold her legally and morally accountable?

In a recent and controversial article, Joshua Dressler (2006) argues that advocates for battered women should reconceive the law to provide for a duress defense. Like self-defense, duress requires a present and immediate threat of serious bodily injury or death and also requires that the circumstances be such that the actor has no reasonable way of escaping the situation. Dressler argues that the Model Penal Code (MPC) provides for a defense that encompasses coercion.

> The Code provides a defense if a person is coerced to commit a crime—including murder—as the result of prior use of unlawful force on the person (there is a lot of that in domestic violence cases) and/or imminent or nonimminent threats by the aggressor to use unlawful force on the person in the future, if a person of reasonable firmness in the actor's situation would have been unable to resist committing the crime. (p. 470)

Although currently duress is not a defense to homicide against the coercer, Dressler argues that it could be extended to do so. Such an extension would send the message that while we do not want women killing in nonconfrontational situations, we will excuse them under extreme circumstances.

In contrast to Dressler, Stark argues that such killings are morally justified not only because of the circumstances that a particular person like Balis faces but also because these cases are rooted in a broader system of sex discrimination that deprives women of full autonomy. Although Stark does not go as far as suggesting that such killings are politically desirable, he does locate the need for reforms for battered women who kill in a broader political context of gender equality. Stark's argument is more appealing when one considers the cultural pressure to stay in a relationship that a woman like Balis faces as well as the few truly meaningful options she has to leave the relationship.

Even if the law were to consider a justification based on coercion, judges and juries may still focus on the question of "why didn't she leave?" This is not a failure of Stark's paradigm but rather a seemingly intractable problem that no legal doctrine may be able to overcome. Nevertheless, Stark's work highlights how expert testimony may play a critical role in reframing the question. Dressler (2006) believes that expert testimony is not necessary, as the jury ought to be able to evaluate if a person of reasonable firmness would be able to resist. He believes these concepts are within the average person's understanding. In contrast, it is clear from Stark's own work how central testimony has been in aiding judges and juries. As Joan H. Krause (2007) argues about BWS,

> To put it bluntly, if judges and jurors inherently were able to understand the exigencies of these situations, advocates would never have needed to introduce evidence of BWS in the first place. Indeed, the fact that the majority of failed self-defense

> claims by battered women involve killings that occur during traditional confrontations, rather than under nonconfrontational circumstances, suggests how difficult it is to move beyond longstanding assumptions about gender roles in violent relationships. (p. 569)

Krause (2007) argues that any change in the law must still account for the inability of fact finders to fully comprehend the dynamics of these relationships absent testimony akin to that Stark provided in Donna Balis's case. Thus, for Stark's work to be translated into the law, the availability of expert testimony is of paramount importance.

Assuming we can move beyond both questions of justification and expert testimony, Dressler's (2006) proposal is consistent with Stark's new paradigm. Like Stark, Dressler agrees that the law should shift away from internal disabilities of the battered woman to the external circumstances that give rise to her decision, asking whether the defendant had a fair opportunity to conform to the law. Under both Dressler's and Stark's proposals, context matters.

Yet, even were the law to adopt the doctrinal theory of duress as a defense to homicide, we are still left with the normative question of how a person of reasonable fitness ought to resist the abuse. Stark frames this question as what would a reasonable battered woman do? Although there is no empirical evidence to yet support this assertion, it is important to speculate as to whether the increased availability of legal interventions for abused women makes it less likely that lawmakers, prosecutors, judges, and juries will exercise some sympathetic understanding of the limited choices that a victim may face. Stark's paradigm does not exacerbate this problem and may mitigate it to some degree by explaining why a woman would be unable to seek outside help because of the fundamental infringement on her autonomy. However, a legal focus on coercive control does not completely relieve the jury or judge from making a normative determination of what is reasonable in an age of expanded availability of state intervention.

In the 1970s and 1980s, when most of the cases defining the scope of defenses available to battered women were argued, there were fewer legal options available to assist women in leaving a relationship than there are today. The availability of restraining orders, increased police training and policies requiring mandatory or preferred arrest, enhanced prosecution efforts, and coordinated community responses, although imperfect remedies, are evidence of enormous progress in the state response to battering.

That progress presents the central paradox for women who kill their abusers. If context matters, part of that context includes the availability of legal remedies other than homicide to gain back her autonomy. This is especially important were the law to allow for a duress defense to homicide. The MPC provides that the defense is unavailable if the actor "recklessly placed himself in the situation in which it was probable that he would be subjected to duress" (MPC §2.09). What does it mean to be reckless in the context of increased availability of state intervention? For that matter, what might it mean to be reckless in getting involved with an abusive partner in the first place? Here again, the concern is that the inquiry will refocus on blaming the woman.

A historical understanding may aid this inquiry. In a recent study, Carolyn B. Ramsey (2006) examined homicide data from 1880 to 1920 in New York and Colorado. She found that women who murdered their spouses were almost always exonerated on the basis of insanity or convicted of lesser included offenses. She suggests that juries were able to reach compassionate decisions, especially when women were able to construct their own narratives about the abuse. Women's narratives during that time period would not contain facts such as "the neighbors called the police," or "I sought a restraining order," or "I knew I could testify but chose not to." When state intervention was virtually nonexistent, sympathy arose in the context of the lack of available legal options. In contrast, in cases today, it is far more likely that the victim would know of or have had some prior contact with the legal system. Failure to exhaust those legal options may make her case far less compelling. Now that progress has been made, the law may expect victims to exhaust the use of legal interventions. Arguments that they do not work would seem to threaten the very existence of state intervention that Stark advocates.

This question of the normative expectations of victims in an age of increased state intervention is a central tension in the law. What happens when a victim does not seek any outside intervention? *State v. Hagerty* (2002) is a case in which the defendant was charged with first-degree murder of her intimate partner. The trial court refused to appoint an expert witness to determine whether the victim suffered from BWS. The trial court based its decision in part on its characterization that because the defendant voluntarily stayed in a bad relationship instead of leaving or prosecuting the victim for assault, she was not a battered woman. On remand, the appellate court rejected that characterization; yet the case alerts us to expectation by courts that a woman, if really victimized, will seek legal help. The availability of legal interventions heightens this normative expectation.

Not all courts follow the reasoning of *Hagerty*. For example, in *Thigpen v. State* (2001), Debra Thigpen shot at her ex-husband and was convicted of aggravated assault and possession of a firearm. She appealed on the grounds that her trial counsel was ineffective because he failed to introduce evidence that she suffered from BWS. The court recognized BWS as a potential defense but then found Thigpen could not possibly suffer from it. Because Thigpen sought both a restraining order and an arrest warrant for her ex-husband, she "f[ell] far short of demonstrating the 'psychological paralysis' that is the hallmark of battered women syndrome" (p. 61).

The differing outcomes in these cases certainly bolster Stark's argument that coercive control, not psychological syndromes, ought to be the primary legal narrative. Stark would likely argue that Hagerty stayed in the abusive relationship because her autonomy was diminished, making her decision to stay not a choice but a survival tactic. Similarly, regardless of the number of times Thigpen was physically assaulted by her husband, we do not know the extent to which Thigpen's ex-husband undermined her autonomy through other coercive and controlling behaviors. Seeking legal intervention was part of her resistance, her struggle to regain autonomy. Coercive control, particularly when introduced by expert testimony, provides an explanation as to why, regardless of whether a victim seeks legal intervention, she may be justified and rational in her actions. Coercive control may help resolve the law's current contradictory approach to explaining state intervention

within the context of psychological theories like BWS by focusing us on the broader context rather than the particular mental state. This shift would be an enormous step forward for battered women.

Yet, even were the law to adopt a theory of coercive control, it is not clear that legal decision makers will not still insist that victims initiate legal interventions. In a recent article, Leigh Goodmark (2007) discusses the case of Dixie Shanahan. This case illustrates the dilemma for victims in an age of increasingly aggressive state intervention. Dixie Shanahan shot and killed her husband while he lay in bed. She was convicted of second-degree murder and was sentenced to 50 years. There was ample evidence that Shanahan had been the victim of horrendous abuse throughout the 19-year relationship. Furthermore, there had been numerous attempts by the legal system to help Shanahan leave the relationship and hold her abusive husband accountable.

Goodmark (2007) details one of the most disturbing aspects of this case. As one of its witnesses against Shanahan, the state called Susan Christensen, an assistant county attorney who prosecuted misdemeanor domestic violence cases. Christensen testified to three prior cases against Shanahan's husband. In the first, Shanahan was cooperative and her husband pled guilty. In the second case, which was just 3 months after the first, Shanahan sent a letter to the court claiming that she exaggerated the injuries. However, the state was able to obtain a conviction without her cooperation (something less likely after the *Crawford* decision, discussed above). Three years later, her husband was charged with a felony. Shanahan refused to return to the state to testify and that case was dismissed. As Goodmark (2007) details,

> Susan Christensen testified that she believed that if Dixie Shanahan had cooperated with the third prosecution, the legal system would have protected her, would have stopped the violence. Christensen stated, "[T]here were choices that we gave Dixie, in particular, that she chose not to take and those choices have been proven over and over to be effective if allowed to take their course." (p. 285)

Goodmark (2007) argues that the evidence showed that Shanahan's husband was not deterred by an arguably minimalist criminal intervention. Rather, the violence increased in severity and frequency after Shanahan's husband spent only 6 days in jail and was ordered to attend counseling. Goodmark concludes that Shanahan reasonably believed that the legal system would not protect her, and thus she was justified in her killing. Goodmark further argues that the reason that Shanahan and others like her receive such harsh sentences is that courts fail to understand the context and fear legitimating women's "killing sprees" (pp. 317-318). Like Stark, she argues both that context matters and that the fear that women will now take the law into their own hands is exaggerated.

What is striking about the case of Dixie Shanahan is that the state knows of the abuse the defendant was suffering, yet it charges her anyway. Those sympathetic prosecutors who are willing to proceed against the victim's wishes because they fear for her life are the same ones who argue that Shanahan should spend the rest of her life in prison. The very

decision makers who perhaps best understand the dynamics of coercive control are not willing or able to exercise their discretion by not charging or charging a lesser included offense that would likely result in probation instead of incarceration.

Aside from the usual tough-on-crime considerations facing public prosecutors, one reason the state decides to go forward may be to legitimize and reinforce state intervention. Of course, had Shanahan proceeded in the earlier criminal cases, the state might still have insisted on proceeding against her, refusing to acknowledge its own failure to free Shanahan from her abuser. In either case, when battered women kill, it undermines the centrality of the kind of state invention Stark advocates. Increased state intervention at earlier stages in the relationship may ultimately complicate the ability of women to mount an adequate defense if she kills to regain her autonomy. If earlier intervention decreases the likelihood that a woman will kill her abuser in a nonconfrontational setting, then the state may place additional normative expectations on how victims ought to respond. State intervention, while preferable to homicide, is no guarantee in any particular case that the victim will be freed. Thus, it would be unjust for a victim to lose her ability to defend herself in a homicide prosecution if she failed to exhaust other legal remedies. However, it is important to at least consider the state's own desire to maintain its own control over coercive abusers and insist on it own role as liberator when it sets the rules.

Conclusion

Stark's work is critically important for the law. It provides an alternative framework for examining intimate relationships and reintroduces a feminist notion of gender power or sexual politics back into the discussion of partner-perpetrated violence. The concept of coercive control has enormous potential to reshape the law both in doctrine and practice by more accurately reflecting the realities of women's lives and by linking the personal to the political, a concept that has sadly been lost in much discourse on intimate violence against women.

However, there are inherent risks to any change in the law. A focus on coercion rather than physical violence may reinforce, however unintentionally, questions about the victim's own agency and complicity in the abuse. In an era of increased state intervention, victims may find themselves in a catch-22. By accessing the legal system, she may discredit claims that she was a victim of coercive control. Yet, by not accessing state intervention, she may forfeit her right to claim reasonable resistance to the coercion when she engages in acts of violent resistance. Neither of these dilemmas is a direct result of Stark's paradigm, and indeed much of his work may help the law overcome its obsession with the question of "why didn't she leave?" Nevertheless, despite undeniable progress in providing battered women with access to and remedy in the law, there remains enormous resistance in legal doctrine and practice to providing women with full equality and citizenship, and corresponding power struggles in the law about its own role in freeing women from men who entrap them. Stark's work, which is both radical and reasonable in its approach, helps to move this progress forward, and for that, the law should be grateful.

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Bio

Cheryl Hanna received her BA in sociology and anthropology, magna cum laude, from Kalamazoo College and her Juris Doctor, cum laude, from Harvard University. She served as an assistant state's attorney in Baltimore City before joining the Vermont Law School faculty. She has also been a visiting professor at the University of California, Hastings College of Law. Her numerous publications on women and violence include *Domestic Violence and the Law: Theory and Practice* (2008, with E. Schneider, J. Greenberg, & C. Dalton). Her work is widely cited by scholars and the courts, including the U.S. Supreme Court, as well as by the *New York Times*, the *Boston Globe*, *Newsweek*, *Glamour*, and other national news sources. She is active in national law reform and litigation, most recently serving as counsel in an amicus brief filed on behalf of domestic violence advocacy organizations in *Vermont v. Brillon* (2009). She is a regular commentator for Vermont Public Radio and WCAX-News.