WHAT IS WRONG WITH INTIMATE PARTNER ABUSE AND WHY ITS CRIMINALIZATION MIGHT NOT BE RIGHT

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Abstract

Considering a contemporary debate between United States ("US") and United Kingdom ("UK") approaches, this article probes the appropriateness of criminalizing non-violent abuse in intimate partner relationships. Criminal lawyers in the US and the UK are divided on prohibiting intimate partner abuse. Whereas US jurisdictions retain a traditional focus on physical injury, England and Wales enforce a novel prohibition on "controlling or coercive behavior," covering conduct such as micromanaging intimate partners' schedules or restricting their behaviors through rules. While the US approach has been criticized as conservative, this article questions the progressiveness of the UK approach. It suggests, first, that in prohibiting "controlling behavior," this approach presumes patriarchal control to be effective in the lives of intimate partners, notwithstanding its formal abolishment. Second, it suggests that such control is considered abusive because it manifests a supposedly oppressive use of authority. Drawing on these insights, the article reassesses the aptness of criminalizing non-violent, intimate partner abuse. It concludes that in prohibiting abuse of patriarchal authority, the law implicitly reaffirms its validity. Therefore, the UK approach might inadvertently result in the endurance rather than the disappearance of patriarchy, and in that, it is less consistent than is its US counterpart with criminal law's moral assumption of agency.

I. INTRODUCTION

A common complaint regarding the legal treatment of intimate partner violence ("IPV")[2] concerns the law enforcement agencies—the police, public prosecutors, and the courts—which, according to critics, fail to properly implement penal policies and often accord perpetrators with lenient treatment, thus denying victims the protection they deserve.[3] The historical narrative accompanying such

2 IPV is domestic violence by a current or former spouse or partner in an intimate relationship against the other spouse or partner. *Intimate Partner Violence*, WIKIPEDIA, https://en.wikipedia.org/wiki/Intimate_partner_violence (last visited Jan. 26, 2021). The term domestic violence is often used interchangeably with intimate partner violence, but domestic violence signifies a broader meaning in applying also to violence between parents and children, siblings, and so on. This article deals exclusively with violence between current or former partners, hence its use of the term IPV throughout. I do make a distinction between violence and abuse, which will be explained *infra*.

3 *See*, *e.g.*, Sarah Fenstermaker Berk & Donileen R. Loseke, "*Handling" Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances*, 15

complaints often refers to a quite recent past, in which husbandly violence was not prohibited under criminal (or other) laws, but rather authorized as part of husbands' prerogative of chastising their wives.[4] Accordingly, even after the legal system acknowledged IPV as a crime, enforcement agencies, including the courts, have for many years granted such conduct de-facto immunity, often guided by ideals of family privacy.[5] This article illuminates a different debate, which increasingly demands our attention, concerning not the (mis)application of the law or procedural reforms,[6] but rather the substance of criminal prohibitions. It traces recent developments in the criminalization of IPV and addresses a new controversy that questions the scope, meaning, and wrongfulness of IPV, rather than issues relating to law enforcement.

Until recently, to the extent that substantive criminal law debates addressed IPV, they primarily concentrated on the issue of battered women who killed their abusers, deliberating how the criminal justice system should judge defendants in these cases: Should they be convicted and labelled murderers? Should they be convicted for lesser

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Law & Soc'y Rev. 317, 319-20 (1980); Olivia A. Hess, *Ready to Bridge the Disconnect: Implementing England and Wales' Coercive Control Model for Criminalizing Domestic Abuse in the United States*, 30 IND. INT'L & COMP. L. REV. 383, 414 (2020)

(describing American feminist and domestic violence activists' critique of the traditional reluctance of law enforcement agencies to arrest and prosecute domestic violence offenders); Victor Tadros, *The Distinctiveness of Domestic Abuse: A Freedom-Based Account*, 65 LA. L. REV. 989 (2005).

4 Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117 (1996) [hereinafter Siegel, *The Rule of Love*]; Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV. 1614, 1661 (2001) (discussing chastisement as incorporated in a broader state of legal inferiority of wives within marriage. At a convention of the women's rights movement, assembled in New York in the mid-nineteenth century, a speaker described the situation as follows: "He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns. . . . In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master-the law giving him power to deprive her of her liberty, and to administer chastisement.").

5 *Id.*; For a different view that challenges the conventional narrative, *see* Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & L. 379 (2014).

6 In response to activists' critique of under-enforcement of domestic violence, procedural reforms were enacted at the end of the 20th century in both the US and the UK. Such reforms included mandatory arrest, limiting charging discretion, and providing government funding for community services. *See* Hess, *supra* note 3, at 413–15.

offenses? Should they be acquitted altogether, relying on self-defense?[7] At present, the debate encompasses broader areas, concerning not only *defenses* but also *offenses*. Rather than consider IPV as a background condition that should affect the judgment of victims-turned-offenders, current debates focus on IPV as an offense, pondering how it should be defined and what precisely is wrongful about it.

On its face, there is not much to debate. Supposedly, IPV is more of a sociological aphorism than a legal concept, and whenever IPV is prosecuted, it is easily translatable into known legal categories such as assault,[8] rape,[9] or murder.[10] Indeed, this has been the common legal approach in US jurisdictions, which routinely apply traditional violence offenses in the context of IPV, and consistently limit criminalization to incidents involving physical assault.[11] Yet in recent years, academics and policymakers have contested the aforementioned view, suggesting that IPV should also be acknowledged—and proscribed—as a unique criminal wrong, distinct from other violent crimes.[12] Often referring to such conduct as *abuse* rather than violence, these accounts have pointed out that IPV often goes beyond physical violence to include other types of abuse.[13] Moreover, they

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7 *See*, *e.g.*, Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y. L. SCH. L. REV. 387 (1993); Hava Dyan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model Penal Code*, 52 HARV. J. ON LEGIS., 17 (2015); Martha R. Mahoney, *Misunderstanding Judy Norman: Theory as Cause and Consequence*, 51 CONN. L. REV. 671 (2019).

8 *See, e.g.,* the offense of assault in the MODEL PENAL CODE § 211.1.

9 *See, e.g.,* the offense of rape in the MODEL PENAL CODE **§** 213.1.

10 *See, e.g.*, the offense of murder in the MODEL PENAL CODE § 210.1.

11 *See infra* notes 39–40 and accompanying text.

12 Tadros, *supra* note 3.

13 *See* Vanessa Bettinson & Charlotte Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?*, 66 N. IR. LEGAL Q. 179, 185 (2015). Moreover, recently the British Parliament enacted The Domestic Abuse Act of 2021, which adds enforcement mechanisms to existing offenses, among which are the offense of coercive or controlling behavior. The use of the word "abuse" in the title of the new act is telling. As it is stated in the government factsheet, the purpose of the act is to " create a statutory definition of domestic abuse, emphasising that domestic abuse is not just physical violence, but can also be emotional, controlling or coercive, and economic abuse." *Domestic Abuse Act 2021: Overarching Factsheet,* GOV.UK (July 28, 2021), https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-bill-2020-overarching-factsheet.

have emphasized that unlike discrete acts of violence that are perpetrated in other contexts, IPV is a recurring behavior.[14] Hence, traditional criminal offenses are ill-suited to capture the wrongdoing involved therein.[15] Finally, such advocates have stressed the psychological effects of IPV, which go far beyond physical injury.[16]

In 2015, following these shifts in emphasis, England and Wales[17]—pioneers in this field—introduced a novel criminal offense titled "coercive or controlling behavior,"[18] which punishes non-physical abuse between people who are "personally connected."[19] Other commonwealth jurisdictions have followed suit,[20] and more are considering adopting similar legislation.[21] Witnessing these developments, activists and academics have criticized the US's "incident-specific definition of physical assault," portraying it as old-fashioned and inefficient,[22] and urging US jurisdictions to "join in the

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14 *See* Hess, *supra* note 3, at 396.

15 Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004) [hereinafter Tuerkheimer, *Recognizing and Remedying the Harm of Battering*].

16 EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 23–24, 498–99 (2007) .

17 The article focuses on English law, but similar legislation has been initiated in additional jurisdictions, such as Scotland and Australia.

18 Serious Crimes Act 2015, c. 9 § 76 (UK).

19 *Id.*

20 Scotland: Domestic Abuse Act (Scot.) 2018 ASP 5, § 1; Ireland: Domestic Violence Act (Ir.) 2018 No. 6/2018.

21 Stephanie Boltje, NSW Labor Proposal Could See Domestic Violence Perpetrators Jailed for Up to 10 Years for Coercive Control, ABC NEWS (Sep. 14, 2020, 4:09pm), https://www.abc.net.au/news/2020-09-15/-drum-nsw-coercive-control-law/12662614; Carmen Gill & Mary Aspinall, Understanding Coercive Control in the Context of Intimate Partner Violence, in How to Address the Issue Through the Criminal Justice System?, OFF. OF FED. OMBUDSMAN FOR VICTIMS OF CRIME (Apr. 20, 2020), https://www.victimsfirst.gc.ca/res/cor/UCC-CCC/index.html#TOC-8; Liane Lee, Lana Wells, Shawna M. Gray, Elena Esina, Building a Case For Using "Coercive Control" in Alberta: Discussion Paper, SHIFT: THE PROJECT TO END DOMESTIC VIOLENCE (2020).

22 Hess, *supra* note 3, at 387 (stating the while other countries "have been applauded by domestic violence experts for their progressive reformative efforts to bridge the domestic abuse disconnect by implementing a coercive control model for criminalizing domestic violence, the United States' framework, which continues to apply the traditional violent incident model, is widely considered to be inefficient and outdated, remaining relatively unchanged since the end of the twentieth century."); Evan Stark, a prominent American scholar in the field of domestic violence, has championed the coercive control model leading to the English reform and has been one of the main critics of the US approach. *See* CASSANDRA WIENER, FROM SOCIAL CONSTRUCT TO LEGAL INNOVATION: THE OFFENCE OF CONTROLLING

global reform campaign . . . by criminalizing ongoing patterns of coercive or controlling behavior, as the United Kingdom did."[23]

Contrary to this dominant view, this article questions the progressiveness of the UK approach. While critics of the US approach stress its incompatibility with real-life experiences and its inability to capture the harm suffered by IPV victims,[24] this article explores the moral assumptions and the conception of wrongdoing underlying the UK approach, and critically examines its broader meaning.

Thus far, the mainstream theory offered to conceptualize IPV as a distinct wrong—as what may be termed intimate partner abuse ("IPA")—relied on a combination of psychological research and philosophical conceptions of domination. On a psychological-empirical level, it has been argued that IPA involves mental abuse and domination tactics that differ significantly from physical assault.[25] On a conceptual level, it has been suggested that IPA should be understood as a "liberty crime."[26] Abusers, it is argued, do not merely offend the negative liberty of victims, but rather control their lives and "compel obedience indirectly . . . through rules that remain in play even when the perpetrator is not present."[27] It has thus been submitted that IPA involves domination,[28] which is distinct from other offenses to autonomy[29] or infringements to negative liberty[30] traditionally recognized in criminal law as "offenses against the person."

OR COERCIVE BEHAVIOUR IN ENGLAND AND WALES 159 (Marilyn McMahon and Paul McGorrery eds., 2020).

23 Hess, *supra* note 3, at 388.

24 "[T]he traditional violence framework produces a 'vast and significant' disconnect between domestic abuse as it is actually experienced and domestic abuse as it is punished by law."
Id. at 386 (citing Tuerkheimer, *supra* note 15, at 959).

25 *See infra* Section II.B.

26 STARK, *supra* note 16, at 13.

27 EVE S. BUZAWA, CARL G. BUZAWA & EVAN D. STARK, RESPONDING TO DOMESTIC VIOLENCE: THE INTEGRATION OF CRIMINAL JUSTICE AND HUMAN SERVICES 111 (5th ed. 2017) [hereinafter BUZAWA ET AL., RESPONDING TO DOMESTIC VIOLENCE]; Evan Stark, *Coercive Control*, ENCYCLOPEDIA OF DOMESTIC VIOLENCE 166, 168 (Nicky Ali Jackson ed., 2007) [hereinafter Stark, *Coercive Control*].

28 Tadros, *supra* note 3, at 999.

29 Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CALIF. L. REV. 759 (2000); Although Alan Brudner did not address specifically the problem of intimate-partner abuse, it is possible to utilize his Hegelian-inspired distinction between formal autonomy and real autonomy to claim that, while IPV offends formal autonomy, IPA should be conceived as offending real autonomy. *See generally* ALAN BRUDNER, PUNISHMENT AND FREEDOM (2009).

30 Tadros, *supra* note 3, at 996–998.

With psychological observation as their starting point, the UK approach's proponents have not explicated the underlying sociological conditions that allow intimate partners to dominate their partners in such a manner. They have, for the most part, attended to "domination tactics" as if those were pathological behaviors within pathological relationships, the victims of which could in principle be either male or female.[31] This attitude is also well-reflected in the gender-neutral language of the new "coercive or controlling behavior" offenses.[32] To be sure, there may be good reasons for branding this phenomenon as a gender-neutral intimacy-related pathology, and still better reasons for choosing gender-neutral terminology in phrasing the law.[33] Yet, it would be strange to assume that the contemporary preoccupation with nonviolent domination in intimate relationships is detached from the quite recent patriarchal history of spousal relationships, in which women were routinely subjected to the authority of men. Yet apart from recognizing generally that the new legislation is designed to augment the legal treatment of domestic violence[34]—a phenomenon whose gendered aspects are rarely denied[35]—existing accounts have

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31 The following description is a telling example of a gender-neutral choice of words: "The coercive control model of domestic abuse, championed by Professor Evan Stark, moves domestic abuse theory away from the misguided traditional 'incident-specific definition of physical assault' that has historically dominated domestic violence law, response, and research. Instead, coercive control characterizes domestic violence as an ongoing pattern *in which abusive partners employ various combinations of coercive or controlling tactics in order to subordinate their partners,* including, but not limited to, tactics of 'intimidation, isolation, humiliation, . . . control,' and violence." Hess, *supra* note 3, at 386 (emphasis added).

32 *Id.* Section 76 provides:

(1) A person (A) commits an offense if-
(a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
(b) At the time of the behaviour, A and B are personally connected,
(c) The behaviour has a serious effect on B, and
(d) A knows or ought to know that the behaviour will have a serious effect on B. *Id.*

33 For example, there might be constitutional limitations on gender-based legislation or government action.

34 The campaign leading to the new legislation in the UK explicitly addressed the problem of domestic violence.

35 Some argue that it is not exclusively men who are violent towards women and there may be an underreporting of female violence compared to male violence. There seems to be a consensus, however, that the former is considerably less frequent. *See* Samia Alhabib, Ula Nur, & Roger Jones, *Domestic Violence Against Women: Systematic Review of Prevalence Studies,* 25 J. FAM. VIOL. 369 (2009).

paid little attention to the specific connection between our current sensitivity to nonviolent forms of domination and the institution of patriarchy as an authoritarian form of domination.

This article aims to fill this gap by reading the contemporary "coercive or controlling behavior" jurisprudence, in light of sociohistorical accounts of patriarchy, as a form of authoritarian domination.[36] The association of domestic violence with patriarchy is very common. Patriarchy generally implies a form of structural inequality whereby men hold systematic power in society or in the family.[37] In this general sense, every manifestation of male power within intimate relationships may be labelled "patriarchal."[38] But this article aims to address patriarchy more particularly. What is required for analyzing the criminalization of IPA as a distinct legal wrong is an account of patriarchy as a structure of authority and an understanding of authority as a form of domination that typically operates *without* physical violence.

To this end, the article attends to Max Weber's sociological account of patriarchy, which he characterizes as a form of traditional authority relying on command and obedience, legitimized by all parties involved.[39] Following this inquiry, I suggest that in criminalizing "coercive or controlling behavior," the UK approach operates under the assumption that its formal abolishment notwithstanding, patriarchal authority is still effective in the lives of intimate partners. Its presences in the mind of contemporary intimate partners, the UK approach further assumes, allows male partners to act in an "authoritarian" manner and lead female partners into being "controlled." The word "abuse" has been recruited to replace

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36 In studying the socio-historical background of contemporary criminal doctrine I am inspired by the scholarship of mainly two theorists: Nicola Lacey and Lindsay Farmer. *See e.g.,* Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy and the Social Sciences in Criminal Law Theory,* 64 MOD. L. REV. 350 (2001); LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL LAW (2016).

37 MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE A PHILOSOPHICAL ANALYSIS 136 (Andrew Ashworth ed., 2009) (citing CAROLE PATEMAN, THE SEXUAL CONTRACT (1988)).

38 Herring uses this sense of "patriarchal" when he claims that domestic abuse is wrongful. *See* Jonathan Herring, *The Serious Wrong of Domestic Abuse, and the Loss of Control Defence*, *in* LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 65 (2011). *See also* Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283 (1995).

39 *See infra* notes 105-17 and accompanying text.

"violence" in this context,[40] to signify that offenders manage to abuse their partners by virtue of their residual power as authority figures, which constitutes abuse of authority.

This interpretation calls for a fresh normative assessment of the "special" (i.e., UK) approach. Since its enactment in 2015, the UK legislation has been considered by many to be a progressive model—an example to be followed by others.[41] To the extent that it was criticized at all, doubts mainly addressed pragmatic concerns, including whether, due to the complexities of the new offense, only cases involving physical violence would be prosecuted.[42] This article aims to pave the way for a more principled discussion, questioning whether holding male partners criminally liable for abusing an authority that has already been invalidated is appropriate, and asking what might be the unintended consequences of such a protective approach toward female victims.[43] While the US, i.e., "generic,"

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40 The main offense I discuss is the UK "coercive or controlling behavior." The Serious Crimes Act-2015 § 76. The statutory language of the offense does not explicitly include the word *abuse,* however, this wording is often used by commentators to signify the wrong of coercive or controlling behavior, as distinct from violence. *See, e.g.,* Bettinson & Bishop, *supra* note 13, at 185.

41 *E.g.,* Hess, *supra* note 3, at 388; Teresa Manring, *Minding the Gap in Domestic Violence Legislation: Should States Adopt Course of Conduct Laws?*, 111 J. CRIM. L. & CRIMINOLOGY 773 (2021); Ciara Nugent, *Abuse Is a Pattern: Why These Nations Took the Lead in Criminalizing Controlling Behavior in Relationships?*, TIME (June 21, 2019), https://time.com/5610016/coercive-control-domestic-violence.

42 Julia R. Tolmie, *Coercive Control: To Criminalize or Not to Criminalize?,* 18 CRIMINOLOGY & CRIM. JUST. 50, 59 (2018) [hereinafter Tolmie, *Coercive Control: To Criminalize or Not to Criminalize?*]; For initial findings as to the implementation of Sec. 76 since its enactment, *see* Hess, *supra* note 3, at 409 (citing commentators skeptical as to the effectiveness of the new offense, and data suggesting that a relatively low number of coercive control cases have resulted in charges).

43 In criticizing criminalization, the arguments made in this article bear a resemblance to the contemporary strand of feminist scholarship known as anti-carceral feminism. *See, e.g.*, LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (Claire M. Renzetti ed., 2018); AYA GRUBER, THE WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (Maura Moessner ed., 2020). Yet the analysis suggested here is distinct from anti-carceral accounts in several important respects. First, while much of the anti-carceral critique in domestic violence focuses on enforcement aspects such as mandatory arrests and no-drop prosecution, this article focuses on substantive criminal law and the internal contents of criminal prohibitions. Secondly, I do not share the abolitionist instinct that guides anti-carceral arguments. The argument developed here does not flow from a general critique of the criminal justice system or the use of the criminal law to address social problems. Therefore, unlike anti-carceral accounts that have

approach is often discredited as "traditional," it may be more consistent with the abolishment of patriarchal authority than the special approach is, since in assuming men can still dominate the minds of their female partners, the latter awkwardly stipulates that what has been abolished (patriarchal authority) is in fact still present and, moreover, valid.[44]

The remainder of this article proceeds as follows: Part II describes two distinct approaches to the criminalization of IPV under US and UK law and demonstrates their influence on the design of IPV offenses. The comparison between the US and UK approaches provides fruitful ground for this study, as these legal systems differ in their understandings of what is wrong with IPV and whether its wrongfulness should be conceived under generic terms or as a special type of wrongdoing. Part III focuses on the conceptual underpinnings of the special approach and constructs an abuse-of-authority theory drawing on Max Weber's sociological theory of authority as a form of domination. Part IV discusses the implications of the interpretative argument developed in Part III on the current debate between the general and the special approaches to the criminalization of IPV.

II. TWO APPROACHES TO CRIMINALIZING INTIMATE PARTNER VIOLENCE

A. The Generic Approach

After centuries in which domestic violence was not prohibited by criminal laws,[45] there is now consensus that it is wrongful and criminal. There is, however, a deep controversy surrounding the type

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broadly criticized the use of the criminal law to address domestic violence, the argument developed here distinguishes between different types of criminal offenses and refers its critique specifically to the criminalization of non-violent abuse. Thirdly, and perhaps most importantly, this article is part of a larger project which considers new regulations on the use and abuse of authority in various social contexts, which do not necessarily involve the victimization of women or other disadvantaged social groups. Therefore, while the specific conclusions of this article coincide with some of the contemporary feminist critiques on the criminalization of IPV, my research methodology does not derive from feminist conceptual tools and scholarship but draws on political and social theories of authority.

44 In developing a critical account of contemporary criminal doctrine in terms of its underlying assumptions and construction of vulnerability this article is inspired by the work of Peter Ramsay. *See infra* note 147 and accompanying text.

45 US courts have overturned the doctrine of chastisement (allowing husbands to physically discipline their wives) only at the end of the 19th century. *See* Siegel, *The Rule of Love*, *supra* note 4, at 2130. In England, the doctrine was abolished in 1829. *See* D. KELLY WEISBERG, DOMESTIC VIOLENCE: LEGAL AND SOCIAL REALITY 19 (2012).

of wrongfulness involved, and how best to capture it in legal terms. Reviewing existing laws and legal literatures reveals two distinct views of IPV, which are represented in two discrete criminalization approaches under US and UK laws—hereinafter, the generic and special approach, respectively. According to the former, IPV is to be defined and prosecuted using generic titles such as assault, battery, rape, and homicide (or murder).[46] These titles are "generic" in that they have not been designed with the specific problem of IPV in mind and serve to prosecute many other forms of violence.

To be sure, criminal justice systems in many jurisdictions have afforded, in recent years, distinct mechanisms for protecting victims of ongoing domestic violence by authorizing the courts to issue protective/preventive orders against offenders.[47] Notwithstanding the uniqueness of such preventive mechanisms, legal systems taking the generic approach to the criminalization of IPV prosecute it under the general rubrics such as assault, battery, rape, or homicide.[48] This approach prevails in US jurisdictions. According to a recent study, half of the states in the US prosecute IPV under their general statutes of "offenses against the person" (such as assault, battery, harassment, or stalking). The remaining states, although they have introduced separate provisions for dealing with domestic violence, merely repeat the language of general offenses against the person.[49] While these specific domestic violence offenses may increase the severity of punishment for general offenses in a domestic context,[50] they still

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46 In the UK, the generic legislation used to prosecute perpetrators of spousal violence includes the common law offenses of battery and assault, as well as the Offences Against the Person Act-1861. *See* Bettinson & Bishop, *supra* note 13, at 185.

47 For example, the 1994 Violence Against Women Act ("VAWA") is a federal legislation designed to help prevent domestic violence; it includes provisions such as the full faith and credit clause that renders a restraining order issued against an offender in one state enforceable nationwide. VAWA, Title IV of P.L. 103-322. The offense of violating a restraining order, however, does not broaden the scope or change the definition of the core offenses that criminalize and are used for the prosecution of IPV.

48 CLARE DALTON AND ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 564–65 (2001).

49 Hess, *supra* note 3, at 416 (citing Neal Miller, *Domestic Violence: A Review of State Legislation Defining Police and Prosecution Duties and Powers,* INST. L. & JUST. 5–6 (2004), http://www.ilj.org/publications/docs/Domestic_Violence_Legislation.pdf; Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 558 (2007).

50 This article concentrates on the laws in the US and the UK, but the two approaches described above are present in other legal systems as well. For example,

retain a traditional focus on physical violence, and still perceive IPV as essentially no different than assault, rape, or homicide taking place in other social contexts (i.e., gang assault, date rape, etc.).

In fact, the narrative that often accompanies the generic approach is that since spousal violence has been historically exempted from criminal liability,[51] there is now "an attempt to ensure that violence in the domestic context is taken 'as seriously' as violence in other contexts."[52] Particularly during the 1970s and 80s, feminist activists advanced a formal equality argument, asserting that domestic violence should be treated "*equally* with other forms of violence."[53] Activists thus concentrated their efforts on law enforcement, battling indifference or non-intervention policies.[54] The underlying assumption was that as far as substantive criminal law was concerned, using the generic criminal law offenses in the domestic context was precisely what was required to end years of exemption, with the remaining problems limited to the area of enforcement, not enactment.

B. The Special Approach

In recent years, the generic approach has been challenged by a different approach, which holds that IPV is a unique type of wrong, distinct from other forms of violence.[55] Proponents of this approach

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Israel's Penal Law includes a provision that aggravates the punishment whenever assault is perpetrated within the family. §353, Penal Law 5737-1977, Special Volume LSI 1 (1977), (as amended) (Isr.). Similar legislation was recently added with respect to homicide, as part of a comprehensive reform of homicide offenses in Israel's Penal Law that became effective in 2019. Penal Law, 5737-1977, SH No. 2779 p. 230 (Isr). Unlike the aggravated assault provision, the murder provision explicitly uses the term *abuse*, although it does not target abuse as an offense in and of itself, but rather a murder taking place as the culmination of ongoing abuse. This provision may still be considered therefore under the generic approach, although it does come closer to the special approach compared to assault offenses which repeat verbatim the definition of general assault offenses.

51 A well-known example of such exemption, which appeared in the black letter of the law, is the marital exemption of rape. Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351 (1995).

52 Tadros, *supra* note 3, at 992.

53 Hess, *supra* note 3, at 414; Similarly, Herring observes that "[e]arly feminist writing sought to establish that an act of violence at home was as serious an act of violence as an act of violence in the street by a stranger. The fact it was 'just a domestic' should not lead to its severity being diminished." Herring, *supra* note 38, at 69.

54 Burke, *supra* note 49, at 559.

55 Tadros, *supra* note 3.

often prefer the term *abuse*,[56] rather than the conventional terms of violence (such as assault, battery, causing bodily harm, etc.). They stress two situational factors that contribute to IPV's uniqueness, namely, its patterned nature[57] and the fact that it thrives in intimate relationships.[58] At first, the special approach was present mainly in academic circles, but since 2015 it became part of the practice of several legal systems.[59] Its main expression is supplementing the traditional offenses of assault and battery with novel criminal offenses, applicable exclusively in intimate or domestic contexts.

1. Creating a Special Offense for IPA

England and Wales have pioneered the special approach. In 2015, the British Parliament enacted the Serious Crimes Act,[60] introducing the new offense of "coercive or controlling behavior," which carries the punishment of five years' imprisonment.[61] Section 76 of the Act prohibits a person "from repeatedly or continuously engaging in behavior towards another person which is controlling or coercive" if the two are "personally connected."[62] The offense is clearly intended to capture non-physical forms of abuse,[63] focusing instead on behavior that is "coercive or controlling" in intimate relationships. According

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56 As Bettinson and Bishop observe, in popular language *domestic violence* usually signifies physical forms of violence, while *domestic abuse* has become more commonly associated with non-physical forms of abuse. *See* Bettinson & Bishop, *supra* note 13, at 184.

57 *See* Hess, *supra* note 3, at 396 ("[V]iolence used in coercive control is distinguished from other types of violent assault by: its duration and its frequency-often including hundreds of assaultive incidents-which contribute to its ongoing, rather than episodic, nature; its routine or even ritual nature; its cumulative, rather than incident-specific effects.").

58 Tadros, *supra* note 3, at 992.

59 Domestic Abuse Act 2018 ASP 5, § 1 (Scot.); Domestic Violence Act 2018 No. 6/2018 (Ir.).

60 Serious Crimes Act 2015, c. 9 § 76 (UK). The legislation was a result of extensive consultation by the Home Office. *See* HOME OFFICE, STRENGTHENING THE LAW ON DOMESTIC ABUSE CONSULTATION – SUMMARY OF RESPONSES (2014); HOME OFFICE, STRENGTHENING THE LAW ON DOMESTIC ABUSE – A CONSULTATION (2014).

61 Serious Crimes Act 2015, c. 9 § 76 (UK).

62 On top of the above, the prosecution has to prove that the behavior had a serious effect on the victim, and that the defendant knew, or ought to have known, that the behavior would have such an effect on the victim. *See generally* Sec. 76(c) & (d)B.

63 Bettinson & Bishop, *supra* note 13, at 180. It is however unclear whether the offense could be used to prosecute physical violence in addition to non-physical abuse.

to Section 76, people are "personally connected" if they have an intimate relationship, or if they live together and are family members or have formerly been intimately related.[64]

Several factors contributed to the 2015 reform in the UK. First, there was growing discontent with the way police were responding to domestic violence.[65] Even after considerable reforms relating to law enforcement had been implemented during the 1970s and 80s, including the adoption of mandatory arrest policies, arrest rates in domestic violence cases remained disappointingly low in the twenty-first century.[66] Second, policymakers began to dispel the common assumption that IPV is associated exclusively with physical violence.[67] A growing body of psychological and sociological studies suggested that in many abusive relationships physical violence was absent.[68] Even when present, its main effect was not physical but emotional, and its character was not episodic but programmatic.[69] Hence, reformers argued, traditional criminal offenses that focused on

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64 Section 76(2) states that A and B are 'personally connected' if: (a) A is in an intimate personal relationship with B; or (b) A and B live together; and;
(i) They are members of the same family; or(ii) They have previously been in an intimate personal relationship with
each other. Section 76 further states that it does not apply if the victim is younger than 16, to avoid overlap with provisions dealing with child abuse. The main purpose of the provision, thus, is to deal with intimate partner abuse. *See* Bettinson & Bishop, *supra* note 13, at 192.

65 Bettinson & Bishop, *supra* note 13, at 179; *see generally* HER MAJESTY'S INSPECTORATE OF CONSTABULARY AND FIRE & RESCUE SERVICES, EVERYONE'S BUSINESS: IMPROVING THE POLICE RESPONSE TO DOMESTIC ABUSE (2014).

66 Hess, *supra* note 3, at 391–93.

67 For example, the UK Domestic Abuse Statutory Guidance Draft states that "Domestic abuse can encompass a wide range of behaviours. It does not necessarily have to involve physical acts of violence and can include emotional, psychological, controlling, or coercive, sexual and/or economic abuse." *Domestic Abuse: Draft Statutory Guidance Framework,* UK.Gov (Aug. 6, 2021), https://www.gov.uk/government/consultations/domestic-abuse-act-statutory-guidance/domestic-abuse-draft-statutory-guidance-framework#fn:8.

68 Evan Stark showed that in twenty-five percent of abuse cases physical violence was absent or had ceased. *See* Evan Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*, *in* THE ROUTLEDGE HANDBOOK OF GENDER AND VIOLENCE 15, 21 (Nancy Lombard ed., 2018) [hereinafter Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*].

69 Bettinson & Bishop, *supra* note 13, at 180 (citing research by Emma Williamson*, Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control* 16(12), VIOLENCE AGAINST WOMEN 1412 (2010)); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much*, 22 BERKELEY J. GENDER L. & JUST. 2 (2007).

discrete acts of physical violence were ill suited to capture the wrongdoing involved in IPV cases.[70] Police responses were similarly (and unsurprisingly) lacking,[71] as they too subscribed to the profound misconceptions embedded in the substantive standards of criminal law.[72]

Perhaps most influential on the UK reform was the work of Evan Stark, an American sociologist and forensic social worker, who in 2007 published a seminal book on IPV.[73] Based on years of observations and reviews of studies that drew analogies between IPV and the experiences of persons undergoing acute restraint, such as hostages and prisoners of war,[74] Stark concluded that the main behavior involved in IPV was "coercive control."[75] Coercive control, he suggested, encompassed various forms of wrongdoing that could not be reduced to physical violence, mainly: regulation, isolation, and exploitation.[76] The abuser manages to achieve control over his partner through means such as monopolizing tangible and intangible resources and eliminating opportunities for the victim to garner outside support.[77] Moreover, while control may include forms of transparent confinement (such as locking a partner in her house), it is often mediated "by orchestrating a partner's behavior through 'rules.'"[78] As a forensic social worker, Stark was familiar with the standard legal framework for dealing with IPV, which he referred to as "incident-specific definition" of physical assault, and he perceived it as misguided. "The discrepancy between the pattern of abuse for which most women seek help and the prevailing equation of battering with incidents of physical violence," he wrote, "helps explain why such

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70 Tuerkheimer, *Recognizing and Remedying the Harm of Battering*, *supra* note 15.

71 Hess, *supra* note 3, at 393 ("In light of the disappointing effect of arrest on the improvement of women's safety, commentators suggested that mandated arrest was not to blame; rather, increased arrest rates did not improve women's long-term safety because 'the framework that guide[d] intervention' focused on discrete acts of physical violence.").

72 *Id.*

73 STARK, *supra* note 16; Evan Stark, *Rethinking Coercive Control,* 15(12) VIOLENCE AGAINST WOMEN 1509 (2009).

74 For an argument that domestic violence should be viewed as a form of torture, *see* Tania Tetlow, *Criminalizing "Private" Torture*, 58 WM. & MARY L. R. 183 (2017).

75 *Id.* at 198–290.

76 Stark, *supra* note 27, at 168.

77 *Id.*

78 *Id.*

current policies as arrest, court protection orders, batterer intervention programs, and emergency shelter have largely failed to reduce the prevalence or incidence of woman battering."[79]

Acknowledging the coercive control concept, the UK Home Office published a new non-statutory definition of "domestic violence and abuse" in 2013, which included forms of non-physical abuse.[80] This definition ultimately led to the enactment of Section 76 of the Serious Crimes Act in 2015. While the statutory language abstains from defining "coercive or controlling behavior," it has been clear that the new offense set out to capture a unique wrongdoing, dissimilar to the ones recognized for decades by the old common law offenses of assault and battery or the Offenses Against the Person Act of 1861,[81] the generic offenses that cover physical assault and injury. Moreover, it is apparent that the new offense is designed to fill a legislative gap, namely, to cover instances neglected by the former law,[82] and that the term *abuse,* whilst missing from the statutory language of the Serious Crimes Act, well describes the spirit of this type of wrongdoing, as distinct from violence.[83]

Thus far, Evan Stark's coercive control model has not been as effective in advancing legal reform in US jurisdictions as it has been outside them. At the same time, researchers and activists are looking up to and applauding the UK model.[84] Section 76 of the Serious Crimes Act is not only new, it has also been described as pioneering,[85]

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79 *Id.* at 167.

80 HOME OFFICE, *New Definition of Domestic Violence* (2012), https://www.gov.uk/government/news/new-defmition-of-domestic-violence (noting that the definition stipulated that domestic violence is "any incident or patterns of incidents of controlling, coercive, or threatening behaviour, violence, or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexual orientation. This can encompass, but is not limited to, the following types of abuse: psychological; physical; sexual; financial; [or] emotional.").

81 Bettinson & Bishop, *supra* note 13, at 185.

82 *Id.*

83 Bettinson & Bishop, *supra* note 13, at 182.

84 Hess, supra note 3; Alexandra M. Ortiz, Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee, 71 VAND. L. REV. 681, 691–94 (2018); Erin L. Sheley, Criminalizing Coercive Control Within the Limits of Due Process, DUKE L. J. (forthcoming 2021) (suggesting the use of fraud offenses, and objecting to specialized legislation for domestic violence).

85 Ciara Nugent, *Abuse Is a Pattern: Why These Nations Took the Lead in Criminalizing Controlling Behavior in Relationships?*, TIME (June 21, 2019), https://time.com/5610016/coercive-control-domestic-violence.

and proponents of the special approach perceive it as progressive.[86] In contrast, the US generic approach is currently portrayed as "traditional" in the pejorative sense. According to critics, the main flaw of the generic approach lies in its detachment from the real lived experiences of IPV victims.[87] Hence, it has been suggested that "the principal goal in the modern reform of domestic violence law is to bridge the 'vast and significant' disconnect between domestic abuse as it is practiced and as it is criminalized."[88]

2. What is Special about IPA?

But what if there is more to the generic approach than conservatism? What if the story is not (or at least, not mainly) about one legal system being receptive to cutting-edge social-scientific knowledge while the other is not? To consider the controversy between the generic and the special approach, we first must reject any single approach's claim to representing the "bare reality" better than the other. Whenever legal institutions opt for a certain legal policy, any choice they make necessarily involves selecting certain aspects of reality as worthy of consideration to the neglect of others, which are perceived as immaterial/irrelevant or are intentionally ignored to complement the law's moral assumptions.[89] In addition, any such legal policy ascribes meaning to the facts. Put differently, the adoption of any legal policy requires not only observation of reality, but also judgment. It is thus never the case that one single approach reflects reality, and it is never the case that "the bare reality" dictates the adoption of one single legal policy. Therefore, in considering the appropriateness of any legal approach we must examine not only its

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86 For example, Jonathan Herring, an advocate for the special approach, observes that while "early feminist writing sought to establish that an act of violence in the home was as serious as an act of violence in the street by a stranger . . .now, a stronger claim can often be made that an act of violence or abuse in the home is a greater wrong than a similar act of violence in the street." *See* Herring, *supra* note 38, at 69.

87 Deborah Tuerkheimer, *The Real Crime of Domestic Violence, in* 3 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: CRIMINAL JUSTICE AND THE LAW 1, 1 (Evan Stark & Eve S. Buzawa eds., 2009).

88 Hess, *supra* note 3, at 422.

89 The construction of criminal responsibility under the modern criminal law routinely ignores various socioeconomic conditions. For example, while it has shown that poor socioeconomic circumstances affect people's inclination to commit crime, such conditions are unacceptable as an excuse or defense to criminal responsibility. *See generally* Galia Schneebaum & Shai J. Lavi, *Criminal Law and Sociology*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 152 (2014).

factual, real-life basis, but also its underlying political and moral assumptions—the assumptions under which certain observed behaviors are conceived as wrongful. We should also examine these assumptions in their socio-historical context.[90]

Accordingly, to decide in the controversy between the generic and special approach to the criminalization of IPV, we ought to examine the assumptions under which "coercive or controlling behavior" has been conceptualized as *a legal* w*rong*. Particularly, we need to review the theory under which such conduct has been considered appropriate for *criminalization*.

Ordinarily, criminalization theories consider two elements as affecting the appropriateness of criminalization: wrongfulness and harmfulness.[91] Inquiring as to the uniqueness of IPV, one could think of several characteristics that make IPV unique in terms of its harmfulness. For example, we could posit that physical battery in an intimate relationship is unique because it typically leads to severe emotional harm, in addition to any physical injury.[92] This type of uniqueness could be manifested in the creation of specific domestic violence offenses that consider the domestic context an aggravating circumstance of "regular" assault, leading to harsher punishment compared to assault perpetrated outside the domestic context.

We could also consider IPV unique in another respect, namely, in terms of its patterned or ongoing nature, leading to accumulating harm. This type of uniqueness could be manifested in a statutory definition or even judicial interpretation of existing offenses that would define IPV as a "course of conduct" offense such as stalking.[93] This could affect the evidentiary aspect in the judgment of IPV cases,

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90 I adopt here a socio-historical approach to the study of criminal offenses. For representative works in this school see LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW (2016); Nicola Lacey, In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory, 64 MODERN L. REV. 350 (2001); MARKUS D. DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT (2005); ARLIE LOUGHNAN, STATE, OTHERS AND THE STATE: RELATIONS OF CRIMINAL RESPONSIBILITY (2019); Chloe Kennedy, Criminalising Deceptive Sex: Sex, Identity and Recognition, 41 LEGAL STUDIES (2021).

91 *See generally* A.P. SIMESTER & ANDREAS VON HIRSCH, CRIMES, HARMS AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION (2011).

92 According to the U.S. Department of Justice, up to 88% of battered women in shelters have posttraumatic stress disorder (PTSD), 72% have depression, and 75% have severe anxiety. NAT'L INST. OF JUSTICE, U.S DEP'T OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 30 (2009).

93 STARK, *supra* note 16, at 382.

including the reliability of complainants and the appraisal of harm, which in turn could affect the severity of punishment.[94] As Deborah Tuerkheimer put it (referring to the generic approach to IPV), "abstracting of the injury avoids an assessment of the severity of the attack in the overall context of the relationship between the parties,"[95] so that "seemingly small and trivial incidents can be seen to have a detrimental effect on the victim."[96]

Yet the special approach does not settle for this relatively "weak" sense of uniqueness and does not remain in the field of harmfulness. Rather, it has a claim as to the wrongfulness of IPV, which is often reflected in the novel use of the word *abuse* to signify the wrong. What exactly does abuse mean? How is it distinct from violence? With only few exceptions, contemporary accounts have done little to address these questions. The next section reviews the few accounts that did attend to the unique wrongfulness of IPA and points to their insufficiency. It then offers an alternative interpretation of the underlying assumptions of conceiving IPA as a distinct criminal wrong. It argues that in IPA, abuse stands for a distinct type of *abuse of authority*. The uniqueness of this type of abuse is that, while as a formal legal matter husbandly authority is no longer valid, the new coercive or controlling behavior offense assumes that its shadows are still very much present in people's minds. The law thus prohibits the exploitation of a submissive authoritarian mindset in intimate relationships as a new type of criminal wrongdoing.

94 Tuerkheimer, *supra* note 15, at 1015.
95 Herring, *supra* note 38, at 69.
96 Bettinson & Bishop, *supra* note 13, at 186.

III. INTIMATE PARTNER ABUSE AND THE GHOSTS OF PATRIARCHAL AUTHORITY

A. The Contemporary Conceptualization of Intimate Partner Abuse

Contemporary accounts reflect two main currents in conceptualizing IPA as a legal wrong, outside the paradigm of physical violence. The first considers the wrong to be a breach of trust—that which is (presumably) typical of intimate relationships, and which is (arguably) a "thick[er] interpersonal trust."[97] Under this argument, trust is at the heart of intimacy. Through trusting an intimate partner, people disclose parts of themselves that they keep from others and allow themselves "to be completely honest and vulnerable with [their] partner."[98] In domestic abuse, the argument goes, intimate partners "exploit their knowledge of the particular vulnerabilities of the victim,"[99] and they betray the expectation that "the relationship is not used to take advantage of the other person."[100] IPA thus amounts to *abuse of trust*. In contemporary accounts it is however unclear whether "abuse of trust" stands for a distinct set of behaviors that should be counted as wrongful and be proscribed, or whether that wording is merely brought up to signify a type of harm or particular gravity of harm beyond the more conventional physical violence when it occurs in an intimate relationship. This theory has, in any case, the potential of relating to wrongfulness as well as harmfulness.

The second conceptualization of IPA considers it an offense to freedom. Stark, who characterized IPV as coercive control, argued that it should be viewed as a "liberty crime."[101] His depiction of coercive control, moreover, clearly implies the degree to which it should be held distinct from "ordinary" physical violence, a dissimilarity that applies not only to harm, but also to the types of conduct involved and to the motivations behind them. Thus, Stark argues that abusers employ tactics of control such as "isolating victims, depriving them of vital resources, exploiting them, and micromanaging their behavior."[102] In terms of motivation and intent, "violence in coercive

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97 Herring, *supra* note 38, at 73 (referring to Dmitry Khodyakov, *Trust as Process: A Three-Dimensional Approach* 41 SOCIO. 115 (2007)).

98 *Id.*

99 Bettinson & Bishop, *supra* note 13, at 186.

100 *Id.*

101 STARK, *supra* note 16, at 380.

102 BUZAWA ET AL., *supra* note 27, at 111; Stark, *supra* note 27, at 169.

control is mainly used to punish disobedience, keep challenges from surfacing and express power."[103]

In a similar vein, legal scholar and a criminal law theorist Victor Tadros proposed a freedom-based account of domestic abuse,[104] drawing on Philip Pettit's political theory of domination.[105] In his analysis, whereas many criminal offenses protect individuals against infringement of liberty in the sense of reducing the options available to them, domestic abuse involves more than that—the options are being subjected to the unwarranted and arbitrary control of another person.[106] Tadros discusses the typical example of a perpetrator who responds with jealousy to the victim's meeting with other people, and who limits (or even completely bans) her social interactions.[107] The main effect of such behavior, he argues, is not merely that the victim is unable to interact with a particular person—"[a]fter all," he writes, "there may be those who live in isolated areas who suffer equally on that score"[108]—rather, the main effect of the abuse is that the abuser preserves exclusive control over the victim's social life.[109]

The freedom-based conceptualization of domestic abuse is more elaborate than the abuse-of-trust conceptualization in addressing the philosophical underpinnings of the wrong of IPA. Preceding the UK reform, Tadros's analysis seems appropriate for the type of conduct covered by the new "coercive or controlling behavior" offense. Recall that while the Serious Crimes Act itself is silent as to which types of behavior may be regarded as "coercive or controlling," the Secretary of State has issued a guidance to direct the investigation of offenses under the Act.[110] The guidance begins by referring to the cross-governmental definition of domestic abuse, which defines *coercive behavior* as a "continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim," and *controlling behavior* as a "range of acts designed to make a person subordinate and/or dependent by

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103 BUZAWA ET AL., *supra* note 27, at 109–10.

104 *See generally* Tadros, *supra* note 3.

105 *See generally* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

106 Tadros, *supra* note 3, at 998.

107 *Id.* at 998–99.

108 *Id.*

109 Tadros, *supra* note 3, at 999.

110 Serious Crimes Act 2015, c. 9 § 77 (UK) (stipulating that any "person investigating offences in relation to controlling or coercive behaviour under [S]ection 76 must have regard to [the Statutory Guidance].").

isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behavior."[111]

To further guide police and criminal justice agencies in investigating the offense, the statutory guidance enumerates a list of behaviors that might be regarded as coercive or controlling, which is not exhaustive, but illustrative.[112] Some of the behaviors are wrongful also under traditional conceptions of criminal wrongdoing, and they would probably constitute criminal offenses under the preceding common law or acts of parliament: for example, assault, threats to hurt or kill, threats to harm a child, or threats to reveal or publish private information. Many of the behaviors listed, however, do not correspond to existing offenses; what they share is indeed a "controlling" character, the precise nature of which the law does not expound, but the guideline aims to illustrate. For example:

> Isolating a person from their friends and family; *Monitoring* their time; *Monitoring* a person via online communication tools or using spyware; *Taking control over* aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep; *Enforcing rules* and activity which humiliate, degrade or dehumanise the victim; Financial abuse including *control of finances, such as only allowing* a person a punitive allowance.[113]

Thus, this list echoes Tadros's analysis, according to which domestic abuse is not merely about limiting a specific option but is rather about claiming control over the entire range of options available to the victim.

Yet one needs to pause and inquire what precisely it is that enables A to control B's life in this manner. While Tadros is right to point out the controlling *effect* of such behavior, as experienced by victims, we should inquire deeper into the type of assumptions the law has to make to label such conduct as controlling in a *legally wrongful manner*. Recall that in proscribing A's control over B, the law assumes that such control is not limited to physical coercion, nor is it typically or necessarily obtained through threats to use actual physical violence, or through forcibly or fraudulently withholding access to money. I

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111 HOME OFFICE, CONTROLLING OR COERCIVE BEHAVIOUR IN AN INTIMATE OR FAMILY RELATIONSHIP: STATUTORY GUIDANCE FRAMEWORK 3 (2015), https://perma.cc/XKE8-43WN [hereinafter STATUTORY GUIDANCE].

112 *Id.* at 4.

113 *Id.* (emphasis added).

argue that the behaviors mentioned above are not merely controlling, but correspond to a more specific type of domination, which is *authoritarian*.

B. An Alternative Conceptualization: Abuse of Authority

Although the word *abuse* is frequently used in IPA accounts, it is often not explained. The common understanding seems to be that abuse is an adverse effect, inflicted by the perpetrator and suffered by the victim.[114] Moreover, it is an effect heavily involving the victim's psyche,[115] rather than her body. In what follows, I argue that the word *abuse* stands not only for the effect on the victim but also the manner in which that effect is achieved—namely, *abuse of authority*. Looking at the behaviors enumerated in the statutory guidance, as well as the paradigmatic examples brought by Tadros and Stark, we can see that they are typically styled as authoritarian gestures. Those who perform them are presumed to possess authority and this authority is seen as enabling them to set rules and regulations, to expect compliance, and to achieve it without resorting to physical force. The authority position further allows the abuser to punish the "violator." To be sure, the new coercive or controlling offense does not assume the perpetrator's actions to be an *exercise of authority*. Rather, I argue, the law condemns it as *abuse of authority*. To better understand this particular type of abuse, we need to consider the fundamentals of authority as a form of domination, as well as be reminded of the specific recent history of spousal relationships as *patriarchal authority relations*.[116]

1. The Nature of Authoritarian Domination

Lawyers are accustomed to thinking and speaking about authority in relation to state and governmental institutions (i.e., political authority). Yet from a sociological viewpoint, the concept of authority

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114 The term abuse is therefore often used in the passive (abused), as is illustrated in the following title from *The Guardian*: "**Quarter of women and girls have been abused by a partner, says WHO**." Liz Ford, Quarter of Women and Girls Have Been Abused by a Partner, Says WHO, THE GUARDIAN (Mar. 9, 2021), https://www.theguardian.com/global-development/2021/mar/09/quarter-of-women-and-girls-have-been-abused-by-a-partner-says-who.

115 As Bettinson and Bishop observe, in common usage *domestic violence* usually signifies physical forms of violence, while *domestic abuse* has become more commonly associated with non-physical forms of abuse. *See* Bettinson & Bishop, *supra* note 13, at 184.

116 *See infra* notes 156-59 and accompanying text.

is relevant to a whole host of non-governmental social institutions and relationships, such as the workplace, education systems, and the family. Nevertheless, in recent decades the concept of authority has fallen out of fashion,[117] giving almost exclusive prominence to the notion of power. In the context of family and spousal relationships in particular, feminist thought dedicated much of its attention to critiquing male power.[118] Yet authority is a particular form of power.[119] Its peculiar characteristics are worth considering distinctly from power in many contexts, and specifically in the context of spousal and family relationships.

Max Weber's[120] and Hannah Arendt's[121] accounts of authority are invaluable in understanding the type of control the English law has in mind. Particularly, Weber's account of authority is relevant to the contemporary preoccupation with nonviolent IPA, since Weber considered authority to be a type of power in which one is able to exercise one's will over others without using physical coercion.[122] Moreover, Weber considered patriarchal relationships as a primary example of authority relations.[123] His understanding of how authority operates, however, is distinct in important ways from how patriarchy is commonly portrayed in feminist or in popular accounts of domestic

117 NANCY LUXON, CRISIS OF AUTHORITY: POLITICS, TRUST, AND TRUTH-TELLING IN FREUD AND FOUCAULT 3 (2013).

118 Catharine MacKinnon famously constructed a feminist theory of the state around the notion of male power. *See, e.g.*, Katherine T. Bartlett, *MacKinnon's Feminism: Power on Whose Terms?,* 75 CAL. L. REV. 1559, 1568 (1987).

119 *See infra* notes 128–137 and accompanying text.

120 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE IN INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., 1978).

121 Hannah Arendt, *What is Authority?*, *in* BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 92 (1st ed. 1954).

122 Weber considers authority as a specific type of domination. Domination signifies "the probability that certain specific commands (or all commands) will be obeyed by a given group of persons." WEBER, *supra* note 120, at 53. Authority, according to Weber, is a particular type of domination, which relies on legitimacy rather than physical force. As Kronman observes "Weber considers authority as a specific type of domination, which signifies "the hallmark of an authority relationship is the fact that it involves an exercise of power that is justified in the eyes of the person being dominated because he acknowledges the normative validity of the principle to which the party wielding power appeals as the warrant for his actions.**"** ANTHONY T. KRONMAN, MAX WEBER 39 (revised ed. 1983).

123 WEBER, *supra* note 120, at 231 ("Gerontocracy and primary patriarchalism are the most elementary types of traditional domination.").

violence.[124] This understanding, I argue, is imperative to the contemporary conceptualization of IPA as a criminal wrong.

Comprehending how authority operates without the use of force is both crucial and complex. As Arendt persuasively put it, "Since authority always demands obedience, it is commonly mistaken for some form of power or violence."[125] However, the concept of authority actually "precludes the use of external means of coercion; where force is used, authority itself has failed."[126] Nevertheless, authority is a hierarchical type of domination, which involves a routine of command and obedience.[127] It allows certain people to direct the actions of others subordinated to them.[128] What is it, however, that enables some people to dominate others in a routine, even mundane, fashion, without using physical force? Initially, it might seem as though authority figures manage to accomplish their rule through the mastery of words and gestures alone. They command and others submit. Yet Arendt insists that authority figures, while refraining from physical violence, similarly abstain from persuasion. "Authority, on the other hand, is incompatible with persuasion, which presupposes equality and works through a process of argumentation."[129] In conclusion, she writes, "[i]f authority is to be defined at all, then, it must be in contradistinction to both coercion by force and persuasion through arguments."[130]

Moreover, as Weber explains, authority relations are dissimilar to economic power relations and, hence, submission to authority does not necessarily reflect economic disparities and cannot be attributed (at

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124 *See generally* ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT (1987); CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

125 Arendt, *supra* note 121, at 92–93.

126 *Id.* at 92.

127 Weber defined domination: "the probability that certain specific commands (or all commands) will be obeyed by a given group of persons"; and he defined "authority" as a species of domination which is sustained through a belief in legitimacy. WEBER, *supra* note 120, at 53.

128 In Arendt's words, "The authoritarian relation between the one who commands and the one who obeys rests neither on common reason nor on the power of the one who commands; what they have in common is the hierarchy itself, whose rightness and legitimacy both recognize and where both have their predetermined stable place." Arendt, *supra* note 121, at 93.

129 *Id.* at 93.

130 *Id.*

least not exclusively) to an inferior bargaining position.[131] Rather, authority is a social order in which domination is achieved through belief in *legitimacy*.[132] In Arendt's words, the "authoritarian relation between the one who commands and the one who obeys rests neither on common reason nor on the power of the one who commands; what they have in common is the hierarchy itself, whose rightness and legitimacy both recognize and where both have their predetermined stable place."[133]

Not only is legitimacy central to any system of authority, but different types of legitimacy also support distinct models of authority. Famously outlining a typology of three such models—traditional, legal-rational, and charismatic authority—Weber considered patriarchy as a primary example of traditional authority.[134] Traditional authority rests on "an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them."[135] To be sure, Weber did not dedicate much attention to spousal relationships within patriarchy, but rather addressed more generally the position of the head of the household as one of authority over children and women alike.[136] And yet, Weber's fundamental understanding of patriarchy as an authority relation calls our attention

131 "We shall not speak of formal domination [i.e., authority] if a monopolistic position permits a person to exert economic power, that is, to dictate the terms of exchange to contractual partners. Taken by itself, this does not constitute authority any more than any kind of influence which is derived from some kind of superiority, as by virtue of erotic attractiveness, skill in sport or in discussion… Even if a big bank is in a position to force other banks into a cartel arrangement, this alone will not justify calling it an authority. But if there is an immediate relation of command and obedience such that the management of the first bank can give orders to the others with the claim that they shall, and probably that they will, be obeyed regardless of their particular content, and if their carrying out is supervised, it is another matter." WEBER, *supra* note 120, at 214.

132 "Experience shows that in no instance does domination voluntarily limit itself to the appeal to material or affectual or ideal motives as basis for its continuance. In addition every such system attempts to establish and cultivate a belief in *legitimacy*." *Id.* at 213.

133 Arendt, *supra* note 121, at 93.

134 WEBER, *supra* note 120.

135 *Id.* at 215.

136 Weber observed that among the traditional forms of authority, "the most important one by far is patriarchal domination" and "the roots of patriarchal domination grow out of the master's authority over his household." He further observed that "in the case of domestic authority the belief in authority is based on personal relations that are perceived as natural. This belief is rooted in filial piety, in the close and permanent living together of all dependents of the household which results in an external and spiritual 'community of fate.'" *Id.* at 1006–07.

to some features of it, which are absent from contemporary accounts of domestic abuse despite being vital for the conceptualization of IPA as a legal wrong.[137]

2. *Intimate Partner Abuse as Abuse of Patriarchal Authority*

Naturally, introducing patriarchal authority into the debate regarding the criminalization of IPA conflicts with the gender-neutral language of the new coercive or controlling behavior offense, as well as with some of its legal theory. Whether and to what extent gender should be regarded explicitly in describing domestic abuse as a social phenomenon, or in its treatment by criminal justice agencies, are under discussion if not controversy.[138] According to one position, domestic abuse is yet another manifestation of patriarchy—understood as structural inequality between men and women in society, particularly in the family, where men have exercised power and control over women for centuries.[139] According to this position, while IPA is phrased in gender-neutral terms, it actually refers to a highly gendered phenomenon, as it is mostly men who abuse women rather than vice versa.[140]

Another position, while not ignoring the historical background or empirical reality of women's abuse, nevertheless prefers turning to abstract-philosophical reasoning[141] in conceptualizing abuse as a legal wrong.[142] As a non-positivist thinker, Weber's account of authority

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137 An important work that does treat spousal relationships as patriarchal authority relations is R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (1979). This classic book, however, offers a sociological account of spousal violence and does not focus on legal doctrine, let alone contemporary laws. Moreover, while it relies on Weberian sociological research methodology, it does not address Weber's theory of authority but rather relies on other accounts of patriarchy.

138 Although Stark obviously speaks to the gendered character of coercive control, he has been criticized for not considering the multilevel aspects of gender inequality. *See* Kristin L. Anderson, *Gendering Coercive Control*, 15(12) VIOLENCE AGAINST WOMEN 1444 (2009). Helen Reece similarly criticizes the tendency to treat prohibitions against domestic violence in a gender-neutral fashion. *See* Helen Reece, *The End of Domestic Violence*, 69 MOD. L. REV. 770 (2006).

139 *See, e.g.*, DOBASH & DOBASH, *supra* note 138.

140 *See*, *e.g.,* Tuerkheimer, *supra* note 15, at 960 n.5 ("In the vast majority of cases, women are the victims of domestic violence and men the perpetrators. Approximately eighty-five to ninety percent of heterosexual partner violence reported to law enforcement is perpetrated by men.").

141 Tadros, *supra* note 3.

142 It could therefore be argued that once the law has been phrased in gender-neutral terms, it can no longer be said to reflect patriarchal-authoritarian

offers a middle ground between these two positions. While attending to patriarchy as a specific, historically contingent structure of authority, in which men typically dominate women (and children), the categories of male and female are not at the center of his analysis, and he considers many other types of authority.[143] Weber's analysis thus suggests, on the one hand, that IPA is closely connected to the specific social conditions in which men and women interact within the family, but at the same time, it also raises the possibility that as a conception of wrongdoing, *abuse* may not be unique to male-female relationships.

Conceiving IPA as a legal wrong, we should take note of it being part of a broader trend to criminalize abuse in various social relationships, which presently are or historically have been relations of authority.[144] For example, US jurisdictions have criminalized *sexual abuse* in various authority relations such as parent/guardian-child, teacher-student, doctor-patient, supervisor-employee, commander-soldier, or prison guard-inmate.[145] I have suggested that in these types of relationships, the law deals with abuse of what I referred to as *bureaucratic authority relations*.[146] This article suggests that a distinct type of abuse of authority is acknowledged in the context of intimate-partner relationships as well, although in this context, the prohibition is not limited to sexual abuse.[147]

In order to see how *abuse* is about *abuse of authority* in the context of intimate relationships, we should pay attention to some of the peculiar characteristics of authority as a form of power. In authority, domination operates through ascribing legitimacy. Namely,

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assumptions. Yet tackling female abuse was asserted very explicitly as the primary goal of criminalizing "coercive or controlling behavior" throughout the legislative process. Under these circumstances we should not be satisfied, nor calmed down, by the pretense of neutral statutory language as I show *infra*.

143 *See, e.g.*, WEBER, *supra* note 120, at 231 (discussing gerontocracy, a form of traditional authority in which the rule is entrusted in the hands of elders).

144 *See generally* Galia Schneebaum, *Making Abuse Offenses in the Modern Criminal Law,* 4 CRITICAL ANALYSIS L. 42 (2017).

145 Galia Schneebaum, *What is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345 (2016) [hereinafter Schneebaum, *What is Wrong with Sex in Authority Relations?*]; STUART P. GREEN, CRIMINALIZING SEX: A UNIFIED LIBERAL THEORY (2020).

146 Schneebaum, *supra* note 146, at 373.

147 Another important difference between sexual abuse offenses and IPA is that while authority is legally valid in the relations between parents and children or between workplace supervisors and employees, it has been formally abolished in marital relationships. *See infra* (explaining that this difference is of much significance in terms of the appropriateness of the criminalization of abuse of authority in each context).

it significantly assumes that the people subordinated to authority are dominated largely through their own consciousness.[148] Contemporary accounts assume that the offender's rule-setting and restriction of the victim's social interactions or access to financial resources are "controlling," but one could challenge this assumption by asking why the victim has accepted such limitations upon herself in the first place. Challenges of a similar tone are familiar in the debates over the legal treatment of women who have killed their abusers, famously framed in the disingenuous question, "Why did she not leave?"

While Tadros's and Stark's accounts of women's micromanagement and control are essentially ahistorical, it would be odd to ignore the proximate history of spousal relationships as authority relations. In these relations, women routinely obeyed, indeed, were legally required to obey, their husbands' dictates. They did so not necessarily due to any individual weakness,[149] but rather due to the legitimacy accorded by all those involved in patriarchy as a social institution, and specifically to the institution of marriage, in which wives were considered legitimately subordinated to the authority of their husbands. Moreover, since the concept of legitimacy is central to authority, the possibility of *illegitimacy* is always present with regard to exercising authority. From this perspective, the term *abuse* acquires the meaning of transgressing the legitimate boundaries of one's authority or *abusing* it.

A common use of the term abuse in recent criminal law language is in relation to the category of "offenses against the person." Thus, apart from the context of IPV, abuse is used in the context of child molestation—to connote either sexual molestation ("sexual abuse") specifically or molestation of a more general nature ("child abuse").[150] It is also occasionally used in the context of offending vulnerable

148 Weber thus observes that "[u]nder patriarchal domination the legitimacy of the master's orders is guaranteed by personal subjection . . . . The fact that this concrete master is indeed their ruler is always uppermost in the minds of his subjects[.]" WEBER, *supra* note 120, at 1006.

149 Weber explains the difference between individual submissiveness and submission to authority: "[P]eople may submit from individual weakness and helplessness because there is no acceptable alternative. But these considerations are not decisive for the classification of types of domination. What is important is the fact that in a given case the particular claim to legitimacy is to a significant degree and according to its type treated as 'valid'; that this fact confirms the position of the persons claiming authority and that it helps to determine the choice of means of its exercise." WEBER, *supra* note 120, at 214.

150 Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L. J. 913, 942–43 (2004).

people (e.g. "elder abuse").[151] Yet as I show below, the word abuse is strongly linked to authority. It is therefore odd that existing accounts have largely ignored the history of spousal relationships as *authority relations*. Nevertheless, the concept of authority is pivotal to the concept of abuse. Abuse—literally meaning using (-use) away (ab-)[152]—connotes a wrong taking place through a corrupt use of some practice, or by using something excessively or inappropriately.[153] Relations of authority represent a central context when we speak of abuse,[154] encapsulating the misuse of power by an authority figure.

A legal context in which the word "abuse" has been traditionally used with relation to authority is one that might appear far removed from our present inquiry: public administration offenses. In this area of law, a central type of wrongdoing is titled *misconduct in office*,[155] *abuse of office*,[156] or indeed *abuse of authority*.[157] Offenses under this category refer to various kinds of misconduct in office, namely conduct by someone in connection with their official duties,[158]

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151 Sheley, *supra* note 84, at 266.

152 The etymology of "abuse" is described in the Merriam-Webster dictionary as follows: "Middle English, borrowed from Anglo-French, borrowed from Latin *abūsus*, 'misuse, waste', noun derivative from *abūtī*, 'to exhaust, use up, misuse', from *ab-* AB- + *ūtī*, 'to USE'." *Abuse*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/abuse (last visited Oct. 4, 2021).

153 Merriam-Webster dictionary defines abuse as "a corrupt practice or custom" or the "improper or excessive use or treatment." *Id.*

154 In Wikipedia, "Abuse of authority" is mentioned as a primary context of abuse. *Abuse*, WIKIPEDIA, https://en.wikipedia.org/wiki/Abuse (last visited Aug. 30, 2021).

155 *See, e.g.,* JEREMY HORDER, CRIMINAL MISCONDUCT IN OFFICE: LAW AND POLITICS (2018).

156 "Misconduct in office," "abuse of office," "official misconduct," and "misbehavior in office" are all used as sort of synonyms under criminal law, although some sources prefer one expression rather than the other. Perkins, for example, uses the term "misconduct in office" to include various offences, among which are common law extortion, official oppression, malfeasance, misfeasance, and nonfeasance in office. The Model Penal Code, on the other hand, includes official oppression under the title "abuse of office." For a description of the multiplicity of terminology in this field. *See* ROBERT M. PERKINS, PERKINS ON CRIMINAL LAW 485 (2d ed. 1969).

157 *See, e.g.,* David L. Carter, *Theoretical Dimensions in the Abuse of Authority by Police Officers*, 7 POLICE STUD., 224 (1984).

158 Perkins thus observes that "the mere coincidence that crime has been committed by one who happens to be a public officer is not sufficient to establish official misconduct. For this offence it is necessary not only that the offender be an officer, or one who presumes to act as an officer, but the misconduct, if not actually in the exercise of the duties of his office, must be done under color of his office." PERKINS, *supra* note 157, at 483.

typically out of a corrupt motive,[159] which is criminalized for being harmful either to individuals or to society as a whole. Some offenses under this category are "victimless crimes," directed toward the protection of public interests (such as securing the proper function of government institutions), while others are concerned with the impact that official misconduct has on individual victims. Bribery is illustrative of the first category. Oppression is illustrative of the latter, as it aims to protect the people who are subordinated to authority figures against abuse of authority.[160] The crime of oppression was indeed described by Blackstone as "a crime of deep malignity,"[161] consisting of "the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the color of their office."[162] It has come to be known in the US as a civil rights offense,[163] and it is currently employed mostly to tackle instances of police brutality.[164] I posit that the offense of oppression is a useful analogy to IPA. While oppression addresses mainly physical brutality, the adjective "tyrannical" used by Blackstone captures a primary feature of this type of wrongdoing, namely its hierarchical nature and its being perpetrated by an authority figure against a subordinate.

In the context of contemporary intimate relationships, considering abuse as *abuse of authority* might seem strange at first, since we no longer accept that husbands possess legitimate authority over their wives (as opposed to the position of authority that police

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159 Perkins thus defines misconduct in office as "*corrupt* behavior by an officer in the exercise of the duties of his office or while acting under the color of his office." *Id.* at 485 (emphasis added). As he later specifies, certain abuse-of-office provisions are satisfied with negligence, but this is the exception to the rule and, by doing so, these provisions go beyond the traditional common law doctrine of abuse of office. *Id*. at 484.

160 ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW (3d ed. 1982) 491 (observing that "Official misconduct which is harmful to some individual is either extortion or oppression.").

161 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140.

162 *Id*. The Model Penal Code went even further and included a broad definition of official oppression so as to apply to any "person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity if knowing that his conduct is illegal," he "denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity." MODEL PENAL CODE § 243.1(2) (AM. L. INST., Proposed Official Draft 1962).

163 MODEL PENAL CODE § 243.1(2) (AM. L. INST. 1985).

164 *See, e.g.,* David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at a Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 185 (1996).

officers hold over citizens). What is more, our conception of IPA is not limited to formal marital relationships but extends to every type of intimate family connection, even if the partners merely cohabitate. Nevertheless, our contemporary conception of IPA cannot be properly understood without reference to the concept of abuse of authority. Moreover, I suggest that the contemporary criminalization of IPA is essentially responsive to the recent past, in which authority was not only valid as a formal legal regime, but also constituted the socio-legal consciousnesses of both men and women in spousal relationships.

Accounts of the history of marriage are most relevant to contemporary conceptions of spousal abuse. These accounts show that patriarchy does not merely stand for a general social inequality between men and women.[165] It is rather a legal institution—a cluster of rights, duties, and prerogatives. Through the common law doctrine of coverture, for example, husband and wife became "one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything."[166] To be a wife meant taking a subordinate position in a hierarchy and being bound, both morally and legally, to obey her husband.[167] Husbands, moreover, were authorized to physically discipline their wives, as part of their general role of educating them.[168] Sociohistorical accounts of marriage further deepen our understanding of how husbands and wives perceived their roles and duties in marriage, how they possessed a marital consciousness that endured even after formal patriarchal rights and prerogatives had been abolished. Hendrik Hartog, for example, shows how in nineteenth century America, a period of feminist activism and transition in the traditional law of marriage, both men and women tended to adhere to inherited notions of patriarchy even if certain, or even important, aspects of them had already been altered by the positive laws of their time.[169]

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165 For a thoughtful account of the numerous ways in which people use the term "patriarchy," *see generally* MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE A PHILOSOPHICAL ANALYSIS (2009).

166 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *442.

167 *See, e.g.,* DOBASH & DOBASH, *supra* note 138, at 33.

168 Siegel, *supra* note 4; HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2000).

169 For a more detailed account of Hartog's description of married people's consciousness in nineteenth century America, *see* Galia Schneebaum, *Marital*

The ghosts of patriarchy are present in the contemporary conceptualization of IPA. Perceiving such violence as abusive, contemporary accounts assume that there is more to this type of wrongdoing than physical injury. What they actually assume, I argue, is that abuse takes place or becomes possible not solely due to perpetrators' superior physical strength, but also due to their authoritative power over victims' minds. What they assume is the enduring normative power of patriarchy as a legal-societal regime, wherein female spouses still consider themselves subjected to the authority of husbands, who are thus able to perform "coercive or controlling behavior."

Interestingly, while violence has historically been authorized as part of husbands' marital prerogatives, as of the eighteenth and nineteenth century, it provided grounds for divorce if it was shown that the husband had used excessive force or demonstrated cruelty.[170] It was prohibited, in fact, as a form of abuse of authority. The contemporary conception of IPA is still very much connected to the notion of authority. While historical prohibitions of domestic violence have considered abuse as the *excessive* use of *valid* patriarchal power, contemporary prohibitions consider abuse as the exercise of *excessive control* over an intimate partner's schedule, social life, finances, and so on.[171] The term "allowing" implies that the control is exercised through submission to the offender's "rule," thereby implicitly assuming that he is indeed entitled to set the rules. Thus, the husband's control over his wife is conceptualized as taking advantage of the residues, or shadows, of past patriarchal powers that still haunt the minds of many, both women and men, even if—or perhaps precisely because—such powers have formally been abolished.

IV. QUESTIONING THE PROGRESSIVENESS OF CRIMINALIZING

Consciousness and the Criminalization of Spousal Abuse, 44 LAW & SOC. INQUIRY 512, 514 (2019).

170 "[T]he availability of divorce on grounds of cruelty, more so as the nineteenth century progressed, provided some concrete limits on the husband's 'right' to control his wife. The grounds for divorce-on the books and in practice-delineated between acceptable control, which the law might have permitted, and cruelty *or abuse*, which it forbade . . . . By 1886, nearly four-fifths of the states permitted absolute divorce on the basis of cruelty." Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV 1614, 1633 (2001) (emphasis added).

171 *See generally* ELY AARONSON, FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY (2014) (exposing the connection between the contemporary criminalization of hate crimes, and historical prohibitions against slave abuse).

The interpretative account developed above offers three insights. First, in criminalizing "coercive or controlling behavior," the UK approach operates under the assumption that patriarchal authority is still effective in the lives of intimate partners, notwithstanding its formal abolishment. Second, it assumes that male partners can achieve nonviolent control over female partners due to the latter's submissive consciousness, namely, their tendency to submit to authoritarian gestures. Third, the special approach labels such conduct abusive not simply because it offends victims, but also because it manifests excessive (or oppressive) use of authority. IPA is thus criminalized as a peculiar type of abuse of authority. These insights carry important implications for the debate between the generic and the special approach to the criminalization of IPV.

The UK approach is praised by many as progressive, and American scholars are looking to incentivize US jurisdictions to apply it by broadening the criminalization of IPV beyond the traditional offenses of assault, battery, and homicide.[172] The debate is also raging in non-academic forums.[173] Yet acknowledging that under the special approach the offender is presumed to control the victim mainly through her submissive consciousness sheds new light on the position of the state in criminalizing coercive or controlling behavior. Fundamentally, criminalizing such behavior assigns the state the role of protecting women against the dangers of their own submissive consciousness. It is questionable whether this kind of overprotectiveness is consistent with the proper limits of criminal law in a liberal state.[174] Moreover, it is doubtful whether such policy would indeed serve the purpose of its own architects, namely, to advance women's freedom and equality.[175]

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172 Hess, *supra* note 3, at 388; Ortiz, *supra* note 84; Sheley, *supra* note 84.

173 Nora Mabie, Coercive Control: It's a Legal Term But Should It Be Criminalized?, SJNN (June 12, 2019), https://sjnnchicago.medill.northwestern.edu/blog/2019/06/12/coercive-control-its-a-legal-term-but-should-it-be-criminalized/.

174 *See* JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW (1986) (arguing that it may be subject to the criticism of paternalistic criminalization).

175 For a similar toned, anti-carceral critique, *see* Sheley, *supra* note 84, at 61 (citing Aya Gruber's critique on formalizing trauma narrative of rape, and arguing that a similar adverse consequence – namely, causing women to perceive themselves as victims where they would not otherwise have done so – is pertinent to the criminalization of coercive or controlling behavior).

The following discussion is not an exhaustive inquiry into the appropriateness of criminalizing coercive or controlling behavior. My goal, rather, is to examine the normative implications of the abuse-of-authority interpretation developed above for the contemporary debate between the general and special approach. To understand the contribution of the abuse-of-authority interpretation to the normative debate between the generic and the special approach, we should situate it within the larger context of the contemporary critiques of the special approach. While many laud the UK model as discussed above, others—including many from within the UK—voice a variety of doubts and critiques concerning the new offense. For the most part, however, these critiques do not question the fundamental appropriateness of criminalizing coercive or controlling behavior, but rather raise pragmatic difficulties in its enforcement or adjudication, or otherwise point to certain elements of the new offense as problematic. For example, Julia Tolmie expressed concerns that due to the complexities involved in applying the concept of coercive control, this offense would in practice be charged only in cases where physical violence could be established.[176] A related concern expressed by Walklate, Fitz-Gibbon, and McCulloch is that the new offense would distract law enforcement agencies from prosecuting domestic violence through the traditional assault and battery offenses or from implementing civil orders aiming to prevent the escalation of violence.[177] Additional concerns refer to the courts' ability to judge emotional relationships and distinguish abusive from non-abusive relationships,[178] the vagueness of the offense and due process difficulties,[179] the appropriate mens rea,[180] and the possibility that the objective standard adopted in the English offense would lead to low levels of punishment.[181]

Against this backdrop of the current conversation, the abuse-of-authority account offered above gives rise to a major misgiving regarding the criminalization of IPA. It raises a fundamental concern, the addressing of which may require more than specific amendments

176 Tolmie, *supra* note 42, at 59.

177 Sandra Walklate, Kate Fitz-Gibbon & Jude McCulloch, *Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence Through the Reform of Legal Categories*, 18 CRIMINOLOGY & CRIM. JUST. 115, 120 (2018).

178 *Id.*

179 Sheley, *supra* note 84.

180 Jennifer Youngs, *Domestic Violence, and the Criminal Law: Reconceptualising Reform*, 79 J. CRIM. L. 55, 68 (2015).

181 Bettinson & Bishop, *supra* note 13, at 195.

or adjustments to the existing legal scheme. The profound problem with the criminalization of IPA is that it labels "coercive or controlling behavior" as abuse, relying on an assumption regarding the enduring presence of patriarchal authority in contemporary intimate relationships. Men are no longer thought to possess authority over their wives, and wives are no longer thought to be obliged to obey them.[182] By prohibiting the (so-called) abuse of patriarchal authority, the criminal law thus implicitly reaffirms its validity.

The problem with such a policy becomes apparent when we compare the criminalization of abuse in intimate-partner relationships with the criminalization of abuse-of-authority in other types of relationships, in which authority is indeed legally recognized as valid—for example, in the context of parents (or other guardians) and children. While the authority of parents over their children is more regulated today than ever before, the law still recognizes parents' authority over their children and intervenes in the relationship only when parents are suspected of abusing their authority.[183] Recognizing through the criminal law a (typically male) abuse of authority over a (typically female) partner is vastly inconsistent with the abolishment of the very same authority.

We are already familiar with a special approach to IPV—that which has granted in previous decades special defenses to abused women who kill their abusers. The special approach in this context of victims-turned-offenders relies in large part on a (highly controversial) psychological theory, positing that abused women in spousal relationships often develop a unique syndrome called the battered woman syndrome ("BWS"),[184] which supposedly renders them helpless and typically prevents them from leaving abusive relationships. These defenses are costly in terms of portraying women

182 Another manifestation of the abolishment of patriarchy as a formal legal regime is that criminal laws in the US, the UK, and elsewhere, no longer endorse the marital exemption of rape, because it is no longer assumed that wives are "under oath to love, honour, and obey, and therefore obliged to do the husband's bidding." MODEL PENAL CODE § 342 (AM. L. INST. 1985) (discussing the marital exemption of rape as grounded in the superior status of the husband, and the subordinate status of the wife, within marriage).

183 Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1073 (2003).

184 LENORE E. WALKER, THE BATTERED WOMAN (1979).

as helpless non-agents and have been heavily criticized on this ground.[185]

This article engages a new version of specialism that is manifest primarily with respect to *offenses* rather than *defenses*.[186] This variation does not primarily conceptualize abuse as a psychological pathology or harm, but rather as a liberty crime—a wrongful domination in intimate relationships.[187] It therefore could be argued that this novel type of specialism has managed to evade the danger of pathologizing women, as it focuses on the wrongdoing of the offender rather than on the harm of the victim, and speaks the gender-neutral, universal, language of liberty and domination.

Yet, the abstract language of liberty is disingenuously detached from the history of domination in spousal relationships. It is questionable whether it successfully escapes the pitfall of pathologizing women. The gender-neutral façade of the English law's statutory language comes across as unreliable, as unsuccessfully camouflaging a deeper truth.[188] In proscribing "controlling and coercive behavior" the law discloses its underlying assumption that the residues of historical patriarchal authority relations are taken to be effective in present, since only they still enable men to "coerce and control" their partners without, or with very little, resistance. As the title of Stark's influential book suggests,[189] the coercive control model purports to explain why women remain in abusive relationships—how they are entrapped—but it does so by referencing their entrapment to a submissive consciousness, a residue of a long history of authoritarianism.

Granted, men take advantage of this perceived submissiveness; however, do we want the law to reinforce the assumption that men's authority is still present? Is it possible to maintain an idea of abuse of authority while still committing to the idea of its abolishment? While it may be true that authority is sometimes present on a socio-

185 *See, e.g.,* Anne M. Coughlin, *Excusing Women,* 82 CAL. L. REV. 1 (1994); Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y. L. SCH. L. REV. 387 (1993).

186 The two, however, are interconnected. *See* Vanessa Bettinson, *Aligning Partial Defences to Murder with the Offence of Coercive or Controlling Behaviour*, 38 J. CRIM. L. 71 (2019).

187 Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995).

188 For a general view that objects to the use of gender-neutral terms in the context of domestic violence, *see generally* Reece, *supra* note 139.

189 STARK, *supra* note 16.

psychological level, do we want to design our laws to reflect that assumption?[190] While criminalizing IPA may be motivated by the best of intentions, it might actually disempower victims by keeping alive the fantasy that spousal authority is still there, valid today as it was decades ago, valid de facto even if not de jure.

Proponents of the special approach might argue that the offense of coercive or controlling behavior is required to defend women's autonomy. They would be right to suggest that many criminal offenses are enforced to prevent people from violating the autonomy of others (implying that the criminalization of IPA, too, is justified). However, there are major differences between defending autonomy through criminalizing physical assault and defending autonomy through criminalizing a capture of the mind. Importantly, while in the generic assault offenses, the law presupposes a fundamental equality between human beings, which is disturbed by the act of assault, the criminalization of "coercive or controlling behavior" presupposes an authoritarian hierarchy, which may be exacerbated through the criminal act—when it is considered abuse—but is constantly present regardless. If the law assumes it, this might reinforce that assumption on the broader, societal level.

Moreover, in criminalizing nonviolent domination, the state takes the dubious position of what may be termed paternalistic emancipation—emancipating those who had already been emancipated but are now assumed to be incapable of internalizing their own emancipation. The criminalization of IPA as a special legal wrong is thus exposed to the critique that it might sabotage rather than promote women's emancipation.[191] Following these insights, the portrayal of the special approach as progressive and that of the generic approach as traditionalist is misguided. And US jurisdictions are right in not rushing into reforming the law in this field.[192]

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190 "While the harm induced by the lack of freedom implied and captured by the concept of coercive control is present in women's testimonies (Velonis, 2016), translating those experiences and acknowledging them in law is, we argue, fraught with difficulties." Walklate et al., *supra* note 178, at 118.

191 Another way to put the argument is to draw attention to the assumptions of vulnerability underlying the new offenses of coercive or controlling behavior. It may be thought of as based on what Peter Ramsay critically referred to as *vulnerable autonomy*. *See* PETER RAMSAY, THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW (2012).

192 The argument here does not presume to provide a factual, historically accurate account of US jurisdictions' inactivity or the motivation/ideology behind it. Rather, it aims to rethink its possible significance and normative desirability vis-à-vis the UK approach.

V. CONCLUSION

In the past few years, we have witnessed disparate approaches to the criminalization of IPV in the US and in the UK. While the dissimilarity between them has been noted before, this article suggests viewing them as representing a generic and a special approach, respectively, to the criminalization of IPV, and to rethink the debate between them. Introducing a new offense, the special approach has been commonly praised for endorsing a novel legal approach, supposedly long overdue. However, while the offense of "coercive or controlling behavior" has been conceptualized through the universal, gender-neutral terminology of "liberty crime," this article suggests that its underlying assumptions have to do with a contingent social problem, namely, the abuse of patriarchal domination by men against women. Once we understand that under the guise of a universal crime lurks the age-old authoritarian patriarchy, we should discuss the social and legal costs of recognizing IPA as a distinct criminal offense. This insight, moreover, may lead to a profound reassessment of the desirability of the UK special approach as opposed to the generic approach to the criminalization of IPV prevalent in the US.

The point is less about which approach should ultimately be preferred, and more about rethinking the very terms of the controversy between them. In contemporary accounts, the US approach is portrayed as dormant, whereas its UK counterpart is described as pioneering. Yet as suggested above, the debate between the special and generic approach should not be viewed as a contest between lawyers who are open to cutting-edge psycho-sociological knowledge on the one hand, and those who conservatively guard the law against its influence. Rather, the debate should be understood in terms of their respective attitudes towards recognizing the residues of patriarchal authority through contemporary criminal laws.

The generic approach assumes that since patriarchy had been abolished, whatever immunities had been accorded to violent husbands historically are clearly inappropriate, and therefore IPV should be treated as seriously, and equally, as any other crimes of violence. The special approach assumes that patriarchal authority was abolished de jure but not de facto, and that accordingly, the law should recognize its abuse in intimate relationships as a distinct wrong.

Without denying the presence of abuse in the lived experiences of intimate partners, this article suggests that acknowledging the abuse of patriarchal authority through criminal law might come with a heavy price. Obviously, men exercising effective control over women is an

acute social problem. Yet what is at stake in the debate between the generic and the special approach is not *whether*, but *how* to address it, and whether the criminal law is the appropriate means to do it. Legal institutions face the choice of responding to this reality in multiple ways—the creation of a core of criminal offense being but one of them.[193]

This article suggests that insofar as criminal law recognizes the abuse of authority in intimate relationships, it might inadvertently reinforce patriarchy. Proponents of the special approach might argue that acknowledging patriarchal abuse through the criminal law is imperative to women's autonomy. Yet the law never merely reflects reality, it also constructs it.[194] Criminal law, in particular, reinforces moral assumptions of agency, equality, and free will.[195] The assumption that women's minds are captured through the authoritarian rule of men is inconsistent with the abolishment of patriarchy. The assumption that criminal law should or could be entrusted with the emancipation of women from the authority of men, is incompatible with women's agency. In any case, the dispute between the generic and special approaches to criminalizing IPV should not be reduced to a rivalry between conservatives and progressives. Rather, these approaches represent two different visions of how to move away from patriarchy and what emancipation entails in this context.

193 For example, acknowledging the psychological experience of mental abuse in intimate relationships could affect welfare policy, arrest policy, child custody laws, and so on.

194 At times, the criminal law overtly ignores the empirical reality. For example, it assumes that people are in principle equal even if we know that there are huge differences among them. It assumes that people are responsible for their actions, even if we know that various socioeconomic conditions significantly contribute to people's inclination to commit crimes, and that people vastly differ in their socioeconomic backgrounds.

195 Galia Schneebaum & Shai J. Lavi, *Criminal Law and Sociology*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 152, 153 (2014).