

Coercive Control Legislation: Using the Tort System to Empower Survivors of Domestic Violence

Sarah M. Garrett*

Trigger Warning: This Note describes aspects of domestic violence and sexual assault.

Over the last decade, anti-domestic violence scholars and activists have sought to recognize and punish a broad form of abuse in intimate partner relationships referred to as “coercive control.” Coercive control is characterized by any pattern of behavior that isolates, dominates, controls, or deprives the survivor of basic rights and liberty. Coercive control can, but need not, involve physical violence. Because the effects of coercive control are so devastating, several jurisdictions have taken steps to legislate against it, either by criminalizing the behavior or by including it in civil or family codes.

DOI: <https://doi.org/10.15779/Z385H7BV60>

Copyright © 2023 Sarah M. Garrett.

* J.D. 2023, University of California, Berkeley, School of Law. Thank you to Professor Nancy Lemon for creating the first-ever class on domestic violence law and for sparking my interest in writing this Note during her Domestic Violence Law Seminar in the fall of 2021. I am also grateful to Professors Catherine Fisk and Katerina Linos for their many thoughtful comments on earlier drafts of this Note during their Note Publishing Workshop in the spring of 2022. Finally, a tremendous thank you to the editors of the *California Law Review* for their patience, diligence, and thoughtfulness in editing this Note.

This Note analyzes the various approaches to legislating against coercive control and ultimately recommends against criminalizing the behavior, as such efforts could cause backlash against survivors and are likely to disproportionately affect marginalized communities. As an alternative approach, in 2021, California amended section 6320 of its Family Code to include coercive control as grounds for a domestic violence restraining order and to provide survivors of coercive control with a rebuttable presumption of child custody in their favor in the event that they have children with their abuser. While Family Code section 6320 has taken important steps in addressing coercive control, this Note argues that further reform is needed. As a solution, I recommend amending California's two domestic violence tort statutes to include coercive control as a cause of action, thereby allowing survivors of coercive control to sue their abusers in civil court.

Introduction	1603
I. Defining Coercive Control and Its Relationship to Physical Violence	1604
A. Definitions	1604
B. Relationship Between Coercive Control and Physical Violence.....	1606
1. The Relationship.....	1606
2. Policy Implications	1610
II. Approaches: Criminalization Versus Implementation in the Civil or Family Code.....	1611
A. Criminalization Efforts	1611
1. Coercive Control Criminalization Statutes	1611
B. Coercive Control in Civil and Family Codes.....	1617
1. California's S.B. 1141	1617
2. Hawai'i's H.B. 2425	1620
III. An Analysis of the Costs and Benefits of Legislative Efforts	1620
A. Criminalization	1621
B. Family Code.....	1624
IV. Recommendation: Remedies in the Tort System.....	1626
A. Amending California Civil Code Sections 1708.6 and 52.4	1626
B. Potential Issues with a Tort Solution	1629
1. Intentional Infliction of Emotional Distress Claims	1629
2. Accessibility of the Tort System.....	1630
Conclusion	1631

INTRODUCTION

For centuries, society viewed domestic violence as a private matter between a husband and wife that did not merit any punishment or involvement by the state.¹ This notion shifted in the 1970s, 1980s, and 1990s when the U.S. federal government and states began enacting laws against domestic violence.² The focus of the movement and the laws enacted during this time period placed tremendous emphasis on survivor safety and the physical injuries caused by abuse.³ However, over the last decade, a new aspect of the movement against domestic violence has emerged—one that seeks to recognize and punish a broader and overarching form of abuse in intimate partner relationships referred to as “coercive control.”⁴

The movement to recognize coercive control was designed to acknowledge the ongoing and multifaceted nature of the abuse experienced by survivors whose partners extend their oppression beyond physical and psychological abuse.⁵ Coercive control is characterized by a pattern of behavior that isolates, dominates, or controls the survivor or deprives them of basic rights and liberties.⁶ The effects of this abuse on survivors are devastating,⁷ but it was not until the last decade that any jurisdiction took steps to legislate against it.⁸

Part I of this Note provides a background of the coercive control framework and its relationship to physical violence. Part II explains two recent approaches to legislating against coercive control: one that criminalizes coercive control, and the other that provides civil remedies for coercive control, such as restraining orders. Part III analyzes the costs and benefits of the various approaches. Ultimately, Part IV of this Note argues that coercive control legislation should focus on increasing available civil remedies to survivors and leave the decision of which remedies to pursue up to the individual survivor, thereby increasing their agency and autonomy. Criminalizing coercive control fails to do this, and civil and family law approaches thus far are an insufficient remedy. Therefore, this Note recommends amending two California domestic violence tort statutes—California Civil Code sections 1708.6 and 52.4—to include coercive control as a cause of action on which survivors may sue their abusers.

1. *Domestic Violence in the 1970s*, U.S. NAT'L LIBR. OF MED., <https://circulatingnow.nlm.nih.gov/2015/10/15/domestic-violence-in-the-1970s/> [<https://perma.cc/78S7-558E>].

2. Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433, 443 (1998).

3. EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 219 (2007).

4. *See id.* at 198–227 (explaining the theory of coercive control).

5. Evan Stark, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. POLICE CRISIS NEGOTS. 199, 206 (2012) [hereinafter Stark, *Looking Beyond Domestic Violence*].

6. *See id.* at 201.

7. *See id.* at 212.

8. *See* Serious Crime Act 2015, c. 9, § 76 (UK); Domestic Abuse (Scotland) Act 2018, (ASP 5); CAL. FAM. CODE § 6320(c) (West 2021).

I.

DEFINING COERCIVE CONTROL AND ITS RELATIONSHIP TO PHYSICAL
VIOLENCEA. *Definitions*

To begin, it is important to understand the features of coercive control and its relationship with the cycle of violence and domestic violence. Dr. Evan Stark coined the term coercive control, which, as the name suggests, includes both coercion and control.⁹ Coercion entails the use of force or threats to compel a particular response.¹⁰ Control, on the other hand, consists of structural forms of deprivation, exploitation, and command that indirectly compel obedience.¹¹ The combination of coercion and control causes a victim to experience entrapment.¹²

Coercive control, broadly, is a pattern of behavior used by an abuser to dominate their partner and limit their freedom.¹³ Coercive control may, but need not, involve physical violence.¹⁴ Common coercive control tactics include isolation from friends and family, deprivation of basic needs, stalking, financial abuse, humiliation, threatening, gaslighting, and more.¹⁵ Coercive control relates to the Power and Control Wheel, a visual tool created in the 1980s that illustrates the elements of violence in abusive relationships.¹⁶ The wheel explains the systematic use of threats, intimidation, and coercion, with physical and sexual violence on the rim of the “wheel” holding the use of threats, intimidation, and coercion together.¹⁷ The wheel can be viewed as a precursor to the coercive control framework because it is rooted in the theory that abusers utilize violence and other means of abuse to exercise power and control over the survivors.¹⁸

9. Dr. Stark is a sociologist, forensic science worker, and widely published author on the policy and health dimensions of interpersonal violence. His work on coercive control has helped shape gender violence policies in the United States and other jurisdictions. *About*, EVAN STARK, <https://evanstark.weebly.com/about.html> [<https://perma.cc/GGP7-QL6U>].

10. STARK, *supra* note 3, at 228.

11. *Id.* at 229.

12. *Id.*

13. Shelley Flannery, *A Guide to Coercive Control: How to Recognize This Subtle Yet Dangerous Form of Domestic Abuse*, DOMESTIC SHELTERS (Aug. 4, 2021), <https://www.domesticshelters.org/articles/identifying-abuse/a-guide-to-coercive-control> [<https://perma.cc/V6R4-3EV3>]. Domestic Shelters is an online resource that provides information about domestic violence shelters, statistics, services, and hotlines across the country. *See id.*

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

15. Flannery, *supra* note 13.

16. *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> [<https://perma.cc/B78M-CHBU>].

17. *Id.*

18. Chelsea Brass & Abigail Hazlett, *The Power and Control Wheel*, COERCIVE CONTROL COLLECTIVE (Mar. 12, 2018), <https://coercivecontrolcollective.org/news/2018/3/12/the-power-and-control-wheel-1> [<https://perma.cc/QLK8-2BLV>].

The move to recognize coercive control as a form of abuse is grounded in the idea that in these relationships, acts of physical or emotional abuse take a secondary role to the greater struggle by the victim or survivor¹⁹ to preserve freedom against oppression by the abuser.²⁰ Further, recognizing domestic violence only as incidents of physical violence fails to account for the broader pattern of domination, control, and deprivation of liberties typically experienced by the victim.²¹ An increasing body of research also suggests that coercive control may be a more accurate measure of conflict, distress, and danger to survivors than is the presence of physical abuse.²²

In light of this, in recent years, various jurisdictions have begun including coercive control as a form of abuse defined by statute.²³ For example, a new amendment to section 6320 of the California Family Code, discussed at length in Part II.B.1, codifies coercive control as a form of abuse and defines it as “a pattern of behavior that in purpose or effect unreasonably interferes with a person’s free will and personal liberty.”²⁴ Specific instances of this behavior include isolating the survivor from friends and family; controlling or regulating a survivor’s movements, behavior, or access to finances; and compelling a survivor to engage in behavior by force or threat of force.²⁵

One final but important note on coercive control is its inherently gendered nature.²⁶ Domestic violence affects people of all gender identities.²⁷ When victims of domestic violence are women in heterosexual relationships,²⁸ coercive control may include gendered tactics, such as exploiting a woman’s sexuality by

19. Although both the terms “victim” and “survivor” are appropriate when referring to someone who has experienced domestic violence, the words serve different needs. Victim is commonly the word used when referencing a crime or the criminal justice system. Survivor often refers to a person who is recovering from experiencing domestic violence. Thus, this Note uses both victim and survivor at different times depending on the context. See SEXUAL ASSAULT KIT INITIATIVE, VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION 1–2, <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf> [<https://perma.cc/KA5P-CRWA>].

20. STARK, *supra* note 3, at 389.

21. See *id.* at 291–361 (describing the constraints on victims’ liberties when living with coercive control); see also Candela, *supra* note 14, at 115.

22. Connie J.A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555, 556 (2010).

23. See Serious Crime Act 2015, c. 9, § 76 (UK); Domestic Abuse (Scotland) Act 2018, (ASP 5); CAL. FAM. CODE § 6320(c) (West 2021).

24. FAM. § 6320(c).

25. *Id.*

26. STARK, *supra* note 3, at 230.

27. *Domestic Abuse Is a Gendered Crime*, WOMEN’S AID, <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-is-a-gendered-crime/> [<https://perma.cc/RHA9-QRSX>].

28. Victims of domestic violence are overwhelmingly women. See Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER, SOC. POL’Y & L. 229, 231 (2009) (finding that “[w]omen are battered much more frequently, suffer much greater injuries, and are at much higher risk of being killed by their batterer than their male counterparts, particularly at separation”).

controlling what she wears or how she has sex, limiting or prohibiting a woman from securing a job and making money of her own, and pushing a woman into a traditional gender role like housewife or mother.²⁹ In these instances, coercive control involves the tangible and symbolic advantage that men accrue from dominating and exploiting their partners.³⁰ On the other hand, when victims of domestic violence are LGBTQ, coercive control may include stopping the victim from seeing their friends in the LGBTQ community, intentionally misgendering the victim, and preventing the victim from expressing their gender identity.³¹ Thus, regardless of the victim's gender, coercive control involves using the victim's gender or sexual identity to manipulate, control, or oppress them.

In sum, coercive control is a pattern of behavior that oppresses and limits the freedom of the victim.³² Coercive control may include many different tactics and forms of abuse (sometimes, though not always, involving physical abuse), but the specific instances of abuse or physical violence take a backseat role to the broader deprivation of rights and liberty imposed upon the survivor in these relationships. Accordingly, identifying and responding to coercive control in relationships is critical in mitigating overall abuse and protecting survivors from the physical, emotional, and social repercussions of domestic violence.

B. *Relationship Between Coercive Control and Physical Violence*

This Section will analyze the relationship between coercive control and physical violence. Coercive control does not require physical violence, although the two often coincide.³³ This Section will then pose and discuss a few policy questions regarding coercive control and physical violence: Is the ultimate goal of adding language regarding coercive control to statutes to reduce physical violence by stopping behavior that is likely to lead to physical violence? Or do policymakers want to limit *any* behavior, physical or not, that significantly limits the free will and liberty of a survivor?

1. *The Relationship*

First, advocates for recognizing coercive control as a form of abuse seek to demonstrate that domestic violence is more than just specific incidents of violent conduct.³⁴ Rather, domestic violence is characterized by a pattern of behavior

29. *What Is Coercive Control?*, COERCIVE CONTROL, <https://web.archive.org/web/20200815133551/http://www.coercivecontrol.us/what-is-coercive-control/> [https://perma.cc/PP32-Y6CZ].

30. STARK, *supra* note 3, at 231.

31. *Coercive Control in LGBTQIA+ Relationships*, YOUNG SCOT (Dec. 12, 2022), <https://young.scot/get-informed/national/thatsnotok-coercive-control-in-lgbtqiaplus-relationships> [https://perma.cc/JN6M-BDF9].

32. *See* STARK, *supra* note 3, at 291–361; COERCIVE CONTROL, *supra* note 29; Flannery, *supra* note 13.

33. Beck & Raghavan, *supra* note 22, at 561.

34. *See* STARK, *supra* note 3, at 228–29; Candela, *supra* note 14, at 115.

that controls, dominates, and maintains power over the survivor.³⁵ Thus, the term “coercive control” better encompasses all of the behavior and abuse in domestic violence relationships, regardless of whether those relationships involve any physical violence at all.³⁶

A 2010 study explored the ability of measuring coercive control to detect other potential signs of severe relationship distress, including physical abuse.³⁷ This study specifically analyzed the effects of coercive control on the efficacy of mediation, but its results are useful for this discussion as well.³⁸

Participants in the study were parents living in Arizona³⁹ who were court ordered to attend mediation to resolve custody and parenting time disputes and chose to attend the free, in-house court mediation service.⁴⁰ Nine hundred and seventy-six women participated in the study.⁴¹ Of the 808 women in the study who reported no to low physical abuse in their relationship, 356 (44 percent) reported low coercive control, 370 (46 percent) reported moderate coercive control, and 82 (10 percent) reported high coercive control.⁴² A total of 452 women were either moderately or highly coercively controlled but were not highly physically abused.⁴³ Of the eighty-two women who were highly physically abused, four (5 percent) women reported no coercive control, thirty-one (38 percent) reported moderate coercive control, and forty-seven (57 percent) reported high coercive control.⁴⁴ Seventy-eight of the eighty-two physically abused women reported moderate to high coercive control.⁴⁵

Based on these findings, the study concluded that women who experience high physical abuse likely also experience moderate to high levels of coercive control.⁴⁶ However, looking at only women who experienced high physical abuse excludes 457 women (nearly half of all the women who participated) who also experienced moderate to high coercive control but did not experience high physical abuse.⁴⁷

35. *What Is Domestic Abuse?*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse> [<https://perma.cc/L6LM-Q348>].

36. See STARK, *supra* note 3, at 228–29.

37. Beck & Raghavan, *supra* note 22, at 557.

38. *Id.*

39. Arizona, like California, mandates child custody mediation for those going through a divorce or legal separation who disagree about custody or visitation of their child(ren). See *Divorce Process Interview*, ARIZ. CT. HELP, <https://azcourthelp.org/browse-by-topic/divorce/divorce-process/divorce-interview/di23> [<https://perma.cc/VN4L-5KQK>].

40. Beck & Raghavan, *supra* note 22, at 558.

41. The study focused on the ability of a measure of coercive control to detect other potential signs of severe relationship distress that would make mediation challenging or dangerous for women in particular. Thus, the study’s sample included only women. *Id.* at 557.

42. *Id.* at 561.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

This study also examined how coercive control, as compared to physical abuse, might better indicate specific instances of severe relationship distress, such as physically forced sex, threats to life, and escalated physical violence.⁴⁸ For example, the vast majority of women who ever experienced either physically forced sex, threats to life, or escalated physical violence fell into the moderate or high coercive control group.⁴⁹ However, many of the women who experienced these behaviors reported infrequent or little physical abuse throughout their relationship.⁵⁰ In fact, the majority of women who experienced physically forced sex, threats to life, or escalated physical violence also reported no to low physical abuse.⁵¹ This means that of the women who experienced physically forced sex, threats to life, and escalated physical violence, a greater share of them experienced frequent or regular coercive control than frequent or regular physical abuse.⁵²

One important caveat of this study is that the sample consisted of people attending court mediation for custody disputes, so these couples likely experienced much higher rates of relationship distress than the general population.⁵³ However, since the purpose of this Note's analysis in this Section is to better understand the relationship between coercive control and physical violence in relationships with one or both of those issues present, the sample in this study remains useful.

First, nearly all the women experiencing high levels of physical abuse in the study reported moderate to high levels of coercive control.⁵⁴ This is not surprising, considering the fact that physical abuse in domestic violence relationships is typically only one aspect of a larger pattern of behavior, namely, coercive control.⁵⁵ Conversely, what is particularly interesting is that of the women who experienced no to low physical abuse, more than half experienced moderate to high coercive control.⁵⁶ This shows that efforts to address domestic violence that are limited to seeing such violence as isolated instances of physical abuse fail to account for a significant group of women who may not experience physical abuse, but are dominated and controlled by their abusers regularly.⁵⁷

48. *Id.*

49. Eighty to 82 percent of women who experienced any of these specific instances of severe relationship distress fell into the moderate or high coercive control group. *Id.*

50. *Id.*

51. Specifically, 76 percent of the women who experienced physically forced sex, 83 percent of women who experienced threats to life, and 80 percent of women who experienced escalated physical violence also reported no to low physical abuse. *Id.*

52. *Id.*

53. *See id.* at 558.

54. *Id.* at 561.

55. *See STARK, supra* note 3, at 228–29.

56. Beck & Raghavan, *supra* note 22, at 561.

57. *See id.*

Finally, the results of the study also suggest that coercive control may be a better indicator of severe relationship distress than physical abuse.⁵⁸ As mentioned above, the majority of women who reported experiencing any of the forms of severe relationship distress (i.e., physically forced sex, threats to life, or escalated physical violence) experienced moderate or high levels of coercive control. However, the majority of women who experienced any of these forms of severe relationship distress also reported no to low physical abuse.⁵⁹

This result is especially pertinent to this Note's discussion because, as aforementioned, criminal domestic violence responses seek to recognize and punish specific instances of violence.⁶⁰ Such instances indeed often include forced sex, threats to life, or escalated physical violence.⁶¹ But the results of the study suggest that coercive control is more predictive of serious violence or even death than is the frequency or severity of physical abuse.⁶² Thus, even legislation that attempts to criminalize or recognize patterns of physical abuse present in domestic violence relationships is likely to leave out a significant share of women who do not experience regular physical violence but may be subjected to instances of severe forms of physical abuse or threats at some point during their relationships.⁶³

Other studies have reached similar conclusions. A 2008 study found that men using coercive control assaulted women six times more often on average than men who used physical violence alone.⁶⁴ Another study showed that a higher level of control in an abusive relationship increased the risk of a fatality by a factor of nine.⁶⁵ Neither the frequency nor the severity of physical violence was predictive of fatality.⁶⁶ Finally, in 20 percent of domestic homicides, the murder was the first act of physical violence in the relationship, although the murder was almost always preceded by controlling and coercive behavior.⁶⁷

Stark sought to explain why coercive control predicts subsequent violence but not the reverse.⁶⁸ The answer, to him, lies in the fact that a woman's vulnerability to violence, including lethal violence, is typically a byproduct of an

58. *See id.*

59. *See id.*

60. *See, e.g.,* CAL. PENAL CODE §§ 273.5 (West 2014), 262 (West 2006) (repealed 2021), 422 (West 2011) (criminalizing domestic violence with injury, marital rape, and criminal threats, respectively).

61. *See id.* §§ 273.5 (West 2014), 262 (West 2006) (repealed 2021), 422 (West 2011).

62. Beck & Raghavan, *supra* note 22, at 561.

63. *See id.*

64. Stark, *Looking Beyond Domestic Violence*, *supra* note 5, at 207.

65. *Id.* at 212.

66. *Id.*

67. Lisa Aronson Fontes, *Coercive Control Laws in the US Should Cover These 10 Areas*, DOMESTIC SHELTERS (Aug. 1, 2022), <https://www.domesticshelters.org/articles/legal/USA-coercive-control-laws> [https://perma.cc/AL5K-49PA].

68. *Id.*

already established pattern of domination that has disabled her capacity to mobilize personal, material, and social resources to resist or escape.⁶⁹

2. Policy Implications

The foregoing analysis establishes that, in general, coercive control is more predictive of serious violence, or even death, than is the frequency or severity of physical abuse.⁷⁰ This helps explain why, in recent years, scholars and activists have pushed for recognition of coercive control as a very detrimental form of abuse.⁷¹ This Section will answer important policy questions about these findings and how the growing understanding of coercive control as an important component of domestic violence should affect legislative efforts.

First, the above findings provide a clear answer to a question laid out earlier in this Note. If the anti-domestic violence movement seeks to ensure the physical safety of survivors and decrease the amount of physical abuse, then surely reducing coercive control will help achieve that end.⁷² Efforts to reduce or eliminate coercive control in relationships will significantly protect survivors from physical harm.⁷³

However, relationships with coercive control, absent any past, present, or even future physical violence, still have devastating impacts on survivors.⁷⁴ Using coercive control legislation to only stop physical violence thus is not sufficient to protect survivors and increase their liberty and agency in all aspects of their lives. And while domestic violence permeates all aspects of our society and is harmful to more than just the survivors who suffer abuse on a personal level, this Note focuses on how best to address coercive control through legislation to increase survivor safety and agency.

The criminal legal response to domestic violence has focused on incidents of physical violence and largely ignored the broader pattern of power and control that an abuser has over the survivor. This broader pattern is more indicative of the risk of fatality and other severe forms of abuse than is physical violence alone.⁷⁵ The remainder of the Note will analyze two legislative approaches to combatting coercive control—criminalization and civil law efforts—and ultimately illustrate the gaps in these approaches, which could be filled by

69. *Id.*

70. See generally Beck & Raghavan, *supra* note 22; Stark, *Looking Beyond Domestic Violence*, *supra* note 5.

71. See STARK, *supra* note 3, at 362–63 (explaining the need to address and quell coercive control); Melena Ryzik & Katie Benner, *What Defines Domestic Abuse? Survivors Say It's More than Assault*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/cori-bush-fka-twigs-coercive-control.html> [<https://perma.cc/QRG3-L78Q>].

72. See Beck & Raghavan, *supra* note 22, at 560–62.

73. See *id.*

74. Stark, *Looking Beyond Domestic Violence*, *supra* note 5, at 212.

75. See Beck & Raghavan, *supra* note 22, at 561.

amending tort statutes to include coercive control as a cause of action for which survivors may sue their abusers.

II.

APPROACHES: CRIMINALIZATION VERSUS IMPLEMENTATION IN THE CIVIL OR FAMILY CODE

This Section will examine two legislative responses to coercive control: criminalization and implementation in civil or family codes. Both approaches codify coercive control as a form of abuse in some way. However, the two responses have very different effects both on perpetrators of coercive control and on survivors.

A. Criminalization Efforts

Understanding the rationales for criminalizing coercive control requires an initial understanding of the early domestic violence movement's efforts to criminalize domestic violence. At its onset, the early anti-domestic violence movement focused on ensuring that the state treated domestic violence like any other crime.⁷⁶ As mentioned in the Introduction, for centuries, domestic violence was considered a private matter between husband and wife that the state did not recognize as a crime.⁷⁷ The modern women's rights movement of the 1960s brought national attention to the issue of domestic violence, and states subsequently began to pass criminal laws against it.⁷⁸ The movement reached its peak with the passage of the Violence Against Women Act in 1994, which allocated hundreds of millions of dollars for training and support within the criminal justice system, creating a powerful motivation for law enforcement to be proactive in its anti-domestic violence efforts.⁷⁹ Today, all U.S. states and the federal government recognize at least some aspects of domestic violence as crimes.⁸⁰

1. Coercive Control Criminalization Statutes

This Section begins by describing three statutes that criminalize coercive control. I will then analyze the effects of these laws in the first few years of their implementation.

76. Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 60 (2017).

77. *Id.*

78. Murray, *supra* note 2, at 443.

79. See Goodmark, *supra* note 76, at 65.

80. *Legal Information, WOMEN'S L.*, <https://www.womenslaw.org/laws?reset-state=1> [<https://perma.cc/A7WL-9JTB>].

a. United Kingdom

In December 2015, the United Kingdom of Great Britain and Northern Ireland (United Kingdom) adopted section 76 of the Serious Crimes Act 2015, which is reproduced in relevant part below:

76. Controlling or coercive behaviour in an intimate or family relationship

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

- (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
- (b) at the time of the 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.⁸¹

The statute goes on to define relevant aspects of the law. For example, A and B are “personally connected” if they share an intimate personal relationship or if they live together and are members of the same family.⁸² Note that this definition of “personally connected” allows family members who are not in an intimate relationship to be found guilty of the crime, such as parents and their children, or siblings. The law also defines “serious effect” as behavior that either causes B to fear on at least two occasions that violence will be used against them or causes B serious alarm or distress that has a substantial adverse effect on B’s usual day-to-day activities.⁸³ Ultimately, a person found guilty of the offense is liable upon conviction to imprisonment for a term not exceeding five years, a fine, or both.⁸⁴

Section 76 was intended to supplement current legal responses to domestic violence by increasing the likelihood that chronically abusive partners would be identified and charged with a broad range of their offenses.⁸⁵ Because many survivors of physical domestic violence also experience coercive control, the law will in theory encourage the criminal justice system to recognize individual acts of violence as part of a broader pattern of abuse, making them harder to dismiss and easier to prosecute.⁸⁶ This new legal tool could also help shift attention away from victim safety to offender accountability and thus remove a context for

81. Serious Crime Act 2015, c. 9, § 76 (UK).

82. *Id.* § 76(2).

83. *Id.* § 76(4).

84. *Id.* § 76(11).

85. Evan Stark & Marianne Hester, *Coercive Control: Update and Review*, 25 VIOLENCE AGAINST WOMEN 81, 86 (2019). Dr. Stark played a role in the consultation that led to the drafting of this new law. *About*, EVAN STARK, *supra* note 9.

86. 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/> [<https://perma.cc/45KZ-S5SD>].

victim blaming (though victim safety, of course, remains a critical issue).⁸⁷ Finally, incorporating a definition of abuse that takes into account the survivors' lived experience of abuse broadens the legitimacy of legal remedies for domestic violence at large.⁸⁸

The guidelines for law enforcement to identify coercive control list a range of possible sources of evidence—phone records, social media accounts, emails, as well as testimony from friends, family members, neighbors, work colleagues, bosses, and teachers—to help build a better picture of what is going on in an individual's life and corroborate their allegations of abuse.⁸⁹ That said, law enforcement in the United Kingdom often relies too heavily on the survivor's testimony of their abuse, which is perceived as less persuasive at trial.⁹⁰

Nearly six years after the passage of section 76, there is now some data on the frequency of arrests, charges, and prosecutions for coercive control. By the end of the summer of 2016, there were fifty-nine convictions in all of the United Kingdom for “coercive and controlling” behavior.⁹¹ Sixteen percent of the 7,034 arrests made for coercive control between January 2016 and July 2018 resulted in charges being brought.⁹² And by June 2019, twelve of England's twenty-nine police forces had brought fewer than one charge of coercive and controlling behavior for every 100,000 people in their jurisdiction.⁹³

Proponents of section 76 attribute this lack in charging and prosecution of coercive control to insufficient training for police in implementing the new law.⁹⁴ Since women experiencing coercive control in a relationship often will not speak up about it, police need to be able to recognize the signs of coercive control, particularly absent physical violence, which may be more obvious.⁹⁵ However, even robust police training in identifying coercive control will likely not significantly impact the low charging and conviction rates for the crime.⁹⁶ As is the case with more traditional domestic violence crimes, evidentiary issues tend to make charging and prosecution of coercive control more difficult than other crimes.⁹⁷ For instance:

87. Stark & Hester, *supra* note 85, at 86.

88. *Id.*

89. Nugent, *supra* note 86.

90. *Id.*; see also CAROLYN C. HARTLEY & ROXANN RYAN, U.S. DEP'T OF JUST., PROSECUTION STRATEGIES IN DOMESTIC VIOLENCE FELONIES: TELLING THE STORY OF DOMESTIC VIOLENCE, EXECUTIVE SUMMARY 3 (1998), <https://www.ojp.gov/pdffiles1/nij/grants/194074.pdf> [<https://perma.cc/2NJY-GUWE>] (finding that “women, who make up the majority of domestic violence victims, are often seen as ‘less credible’ witnesses in the criminal justice system”).

91. Stark & Hester, *supra* note 85, at 85.

92. Nugent, *supra* note 86.

93. *Id.*

94. *Id.*

95. *See id.*

96. *See id.*; Stark & Hester, *supra* note 85, at 85.

97. Paul Wallin, *He Said, She Said: The Difficulty of Evidence in Domestic Violence Cases*, WALLIN & KLARICH (May 22, 2015), <https://www.wklaw.com/he-said-she-said-the-difficulty-of-evidence-in-domestic-violence-cases/> [<https://perma.cc/4Q66-56T4>].

Most domestic violence cases happen in the privacy of a home. Usually, there are no other witnesses, and the only people who know what really happened will give different versions of the same event. More often than not, a domestic violence case pits the word of the alleged victim against that of the defendant, and a jury is asked to figure out which side is telling a version of the story that is closer to the actual truth.⁹⁸

A 2018 qualitative review of eighteen cases prosecuted under section 76 reached several notable conclusions: (1) the law was correctly applied to historical patterns of abuse that included multiple elements of coercion and control, (2) prosecutors used repetitive physical and sexual abuse to show the “serious effect” required by the law, and (3) the vast majority of convicted offenders received significant time in prison, up to a maximum of 6.6 years.⁹⁹ Further, while there was concern that section 76 could lead abusive men to claim that their female partners were using controlling and coercive behavior against them, at the time of the report, only one woman had actually been charged with the offense.¹⁰⁰

A perhaps less obvious benefit of section 76 is that it provides an additional defense to women who are charged with or convicted of forms of violence against their partners in response to coercive control. For example, Sally Challen, a survivor who beat her husband to death, was convicted of murder in 2011 and spent eight years in prison.¹⁰¹ However, in June 2019, Challen was released after judges quashed the conviction because they found she was suffering from a psychological “adjustment disorder,” which the defense argued was the result of decades of coercive control by her husband.¹⁰² The prosecution accepted Challen’s new plea to the lesser charge of manslaughter, resulting in her immediate release because she had already served more than the average manslaughter sentence.¹⁰³

b. Scotland

In February 2018, the Scottish Parliament unanimously passed the Domestic Abuse Act of 2018.¹⁰⁴ A portion of the law is reproduced below:

- (2) Behaviour which is abusive of B includes (in particular)—
- (a) behaviour directed at B that is violent, threatening or intimidating,
 - (b) behaviour directed at B, at a child of B or at another person that either—

98. *Id.*

99. Stark & Hester, *supra* note 85, at 87.

100. *Id.*

101. Nugent, *supra* note 86.

102. *Id.*

103. *Id.*

104. Stark & Hester, *supra* note 85, at 85; Domestic Abuse (Scotland) Act 2018 (ASP 5).

(i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or

(ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).

(3) The relevant effects are of—

(a) making B dependent on, or subordinate to, A,

(b) isolating B from friends, relatives or other sources of support,

(c) controlling, regulating or monitoring B’s day-to-day activities,

(d) depriving B of, or restricting B’s, freedom of action,

(e) frightening, humiliating, degrading or punishing B.¹⁰⁵

The Domestic Abuse Act carries a maximum penalty of fifteen years, and exposing children to the abuse is considered an aggravating factor in sentencing.¹⁰⁶ This “child aggravator” aspect of the law recognizes that, when a perpetrator chooses to abuse their partner, they are also choosing to abuse their children, who may witness the abuse firsthand or suffer from restrictions on their own freedom as well.¹⁰⁷ Also, notably, this Act considers whether a “reasonable” person would consider their behavior likely to cause the victim to suffer physical or psychological harm, rather than proof of those effects by the victim (as the U.K. law requires).¹⁰⁸ The Act also requires the courts to consider whether a non-harassment order is necessary to protect the survivor and children affected by the abuse.¹⁰⁹

In its first year in effect, 1,065 charges were reported under the Act.¹¹⁰ This number reflects just 3.5 percent of the total 30,718 domestic abuse charges during the same period.¹¹¹ The perpetrator was male in 88 percent of charges, and the child aggravating factor was recorded against 24 percent of charges.¹¹²

c. *Hawai‘i*

The Hawaiian legislature passed a bill in July of 2021 that criminalizes coercive control as a petty misdemeanor.¹¹³ The law amends subsection (6) of section 709-906 of the Hawai‘i Revised Statute to read as follows:

(6) It shall be a petty misdemeanor for a person to intentionally or

105. Domestic Abuse (Scotland) Act 2018 (ASP 5).

106. Stark & Hester, *supra* note 85, at 86.

107. *Living up to a Gold Standard? The Implementation of the Domestic Abuse (Scotland) Act*, IMPRODOVA (May 27, 2021) [hereinafter *Living up to a Gold Standard?*], https://www.improdova.eu/blog/detail.php?we_objectID=231 [https://perma.cc/7YXE-7BBB].

108. Stark & Hester, *supra* note 85, at 85–86.

109. *Living up to a Gold Standard?*, *supra* note 107.

110. *Id.*

111. *Id.*

112. *Id.* Note that this data does not include information on convictions or conviction rates because many of the charges reported from 2019–2020 had not yet reached the conviction stage when this research was published.

113. HAW. REV. STAT. § 709-906(6) (2021).

knowingly strike, shove, kick, or otherwise touch a family or household member in an offensive manner; subject the family member or household member to offensive physical contact; *or exercise coercive control, as defined in section 586-1, over a family or household member and the person shall be sentenced as provided in sections 706-640 and 706-663.*¹¹⁴

In 2020, Hawai‘i added coercive control to a list of types of abuse for which someone could seek a protective order.¹¹⁵ The 2021 statute, however, takes efforts a step further by allowing abusers to be prosecuted for coercive control.¹¹⁶ Abusers are permitted to take domestic violence prevention classes in lieu of jail time.¹¹⁷

While the bill was pending, it received a great deal of criticism from various criminal justice agencies, such as the Honolulu Prosecuting Attorney’s Office, the Honolulu Police Department, the Hawai‘i Office of the Public Defender, and the Hawai‘i Attorney General’s Office.¹¹⁸ Some critics have expressed concern that the law is too broad and could lead to normal disputes between couples being criminalized.¹¹⁹ Others have indicated that the law could lead to victims of coercive control being prosecuted for their own behavior.¹²⁰ For example, in a statement opposing the bill, the State of Hawai‘i Office of the Public Defender expressed concern that arguments between a couple about money, budgets, or debts could be considered coercive control if this sort of behavior occurred on more than a few occasions.¹²¹ Since the law is still relatively new, it is too early to tell whether these concerns will come to fruition.¹²²

A few other states have proposed similar legislation that would criminalize coercive control, though Hawai‘i is the only U.S. jurisdiction thus far to have passed a law criminalizing coercive control.¹²³ For instance, New York’s Senate Bill (S.B.) 6695, which is currently awaiting review by the legislature and

114. *Id.* (emphasis added).

115. HAW. REV. STAT. § 586-1 (2020); *see also* Anita Hofschneider, *Lawmakers Consider Adding “Coercive Control” in Domestic Violence Cases*, HONOLULU CIV. BEAT (Apr. 5, 2021), <https://www.civilbeat.org/2021/04/lawmakers-consider-adding-coercive-control-in-domestic-violence-cases/> [<https://perma.cc/F4QM-Y652>].

116. Hofschneider, *supra* note 115.

117. HAW. REV. STAT. § 586-1; *see also* Hofschneider, *supra* note 115.

118. Hofschneider, *supra* note 115. Note that it is highly unusual for both a prosecutor’s office and a public defender’s office to object to the same bill.

119. *Id.*

120. *Id.*

121. *Relating to Abuse of Family or Household Members: Hearing on H.B. 566, H.D.1 Before the Sen. Comm. on Judiciary*, 2021 Leg., 31st Sess. 2 (Haw. 2021) (testimony by Office of the Public Defender, State of Hawai‘i), https://www.capitol.hawaii.gov/Session2021/Testimony/HB566_HD1_TESTIMONY_JDC_03-19-21_PDF [<https://perma.cc/BT32-GRL7>].

122. *See* HAW. REV. STAT. § 709-906(6) (2021).

123. *See, e.g.*, S. 5306, 2019–2020 Leg., Reg. Sess. (N.Y. 2019); H. 5271, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

governor, would make coercive control a Class E felony.¹²⁴ A Class E felony, the lowest felony charge available in the state, may result in a maximum of a four-year sentence.¹²⁵ Finally, South Carolina has also proposed legislation that would criminalize coercive control as a felony.¹²⁶ This bill specifies that a person convicted of the offense “must be fined not more than ten thousand dollars or imprisoned not more than ten years, or both.”¹²⁷ The South Carolina bill was referred to the South Carolina House Committee on Judiciary in February 2020, and no action has been taken on it since.¹²⁸

All the legislation described in this Section takes a relatively similar approach to criminalizing coercive control. Each of the statutes requires either a fine, jail or prison time, or both, with the exception of Hawai‘i, which allows domestic violence prevention classes to be taken in lieu of incarceration.¹²⁹ The examples of legislation in the United Kingdom, Scotland, and Hawai‘i also define coercive control as some pattern of behavior that is controlling or coercive, isolating, frightening, or humiliating, though methods for proving such behavior vary.¹³⁰

B. Coercive Control in Civil and Family Codes

This Section will explain approaches to codifying coercive control in civil or family codes. These statutes do not make coercive control a crime punishable by the state, but rather allow coercive control to be a factor that courts can consider when granting other remedies, such as restraining orders and custody orders.

1. California’s S.B. 1141

California S.B. 1141 was passed in September 2020 and took effect in January 2021.¹³¹ Instead of criminalizing coercive control, the law amended section 6320 of the Family Code to read as follows:

(c) As used in this subdivision (a), “disturbing the peace of the other party” refers to conduct that, based on the totality of the circumstances,

124. S. 6695, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

125. N.Y. PENAL LAW § 70.00 (McKinney 2019); *see also* S. 5306, 2019–2020 Leg., Reg. Sess. § 1 (N.Y. 2019).

126. H. 5271, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

127. *Id.*

128. *Id.*

129. *See id.*; Serious Crime Act 2015, c. 9, § 76 (UK); Domestic Abuse (Scotland) Act 2018 (ASP 5); HAW. REV. STAT. § 709-906(6) (2021); S. 5306, Reg. Sess. (N.Y. 2019); *see also* Hofschneider, *supra* note 115.

130. *See sources cited supra* note 129.

131. S.B. 1141, 2021–2022 Leg., Reg. Sess. (Cal. 2020); CAL. FAM. CODE § 6320(c) (West 2021); *see also* Press Release, California State Senator Susan Rubio, Governor Newsom Signs Senator Rubio’s Coercive Control Bill, Increasing Domestic Violence Protections (Sept. 29, 2020), <https://sd22.senate.ca.gov/news/2020-09-29-governor-newsom-signs-senator-rubios-coercive-control-bill-increasing-domestic> [<https://perma.cc/427K-BAHA>].

destroys the mental or emotional calm of the other party. This conduct may be committed directly or indirectly, including through the use of a third party, and by any method or through any means including, but not limited to, telephone, online accounts, text messages, internet-connected devices, or other electronic technologies. This conduct includes, but is not limited to, *coercive control, which is a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty*. Examples of coercive control include, but are not limited to, unreasonably engaging in any of the following:

- (1) Isolating the other party from friends, relatives, or other sources of support.
 - (2) Depriving the other party of basic necessities.
 - (3) Controlling, regulating, or monitoring the other party's movements, communications, daily behavior, finances, economic resources, or access to services.
 - (4) Compelling the other party by force, threat of force, or intimidation, including threats based on actual or suspected immigration status, to engage in conduct from which the other party has a right to abstain or to abstain from conduct in which the other party has a right to engage.
- (d) This section does not limit any remedies available under this act or any other provision of law.¹³²

One of the most substantial effects of this law is on custody battles. In California custody cases, there is a rebuttable presumption that an award of custody to a person who has perpetrated domestic violence is detrimental to the best interests of the child.¹³³ The amended section 6320 essentially expands what is considered domestic violence for purposes of that rebuttable presumption. By adding coercive control to the bases for the ex parte orders described above, the bill creates a rebuttable presumption that an award of child custody to a party who has engaged in coercive control is detrimental to the best interests of the child.¹³⁴

The new language in section 6320 amended the definition of “disturbing the peace of the other party,” thus also expanding the grounds for obtaining a domestic violence restraining order.¹³⁵ And, finally, the statute now allows

132. FAM. § 6320(c) (emphasis added).

133. *Id.*; see also *id.* § 3044 (West 2021).

134. *Id.* § 6320(c).

135. *New CA Law Codifies What Victims and Experts Know: Coercive Control Is Domestic Violence*, ADZ L. [hereinafter *New CA Law*], <https://www.adzlaw.com/victim-advocacy/2020/10/06/new-ca-bill-to-codify-what-victims-and-experts-know-coercive-control-is-domestic-violence/> [https://perma.cc/V2CJ-ENFT].

“psychologically damaging and abusive behavior” to be used as evidence in criminal trials.¹³⁶

The extent to which the new language in section 6320 will actually help survivors of coercive control is still to be determined. Since the bill was passed, several survivors who sought restraining orders under the law were denied relief, which they felt was because the judges were skeptical of their testimonies of abuse.¹³⁷ Additionally, a new bill, S.B. 616, would have required judges to undergo additional training on the concept of coercive control, among other things, but the bill received strong opposition from a judges’ group in the state and was subsequently withdrawn.¹³⁸

Critics of an earlier version of S.B. 1141—which did not become law—defined coercive control as a pattern of behavior that interferes with the victim’s free will with the intent to cause severe emotional distress.¹³⁹ Arguably, this version of the bill would have created new hurdles for victims to obtain relief by requiring them to prove an abuser’s intent to cause harm, a pattern of abuse, and that the abusive acts were objectively unreasonable.¹⁴⁰ The version of S.B. 1141 that passed and became law, excerpted above, still retains the language defining coercive control as a pattern of behavior, although it removed the requirement of

136. Senate floor analysis of S.B. 1141 states that the bill “improves California’s domestic violence laws by bringing a range of coercive behaviors under a single statutory framework situated in the Family Code, with associated benefits in criminal proceedings.” OFF. OF SEN. FLOOR ANALYSES, THIRD READING: DOMESTIC VIOLENCE: COERCIVE CONTROL, S.B. 1141, 2019–2020 Reg. Sess., at 7 (Aug. 30, 2020), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB1141# [<https://perma.cc/A2ED-MJES>]. Violation of a protective order under Family Code section 6320 is a crime punishable by fine or jail time under Penal Code section 273.6. See Press Release, Rubio, *supra* note 131.

137. See Viji Sundaram, *Claims of Coercive Control Lost in the California Courthouse*, INDIA CURRENTS (Oct. 2, 2022), <https://indiacurrents.com/claims-of-coercive-control-lost-in-the-california-courthouse/> [<https://perma.cc/XF2M-TPSN>]; Sylvie Sturm, *Coercive Control Victims Face Skeptical Judges, Court Transcripts Show*, S.F. PUB. PRESS (Sept. 12, 2022), <https://www.sfpublicpress.org/coercive-control-victims-face-skeptical-judges-court-transcripts-show/> [<https://perma.cc/M4FG-XBKE>].

138. Viji Sundaram, *California Judges’ Group Helped Block Bill to Address Family Violence, Calling Training Mandate “Advocacy,”* S.F. PUB. PRESS (Sept. 14, 2022), <https://www.sfpublicpress.org/california-judges-group-helped-block-bill-to-address-family-violence-calling-training-mandate-advocacy/> [<https://perma.cc/F68Q-JUUT>].

139. Compare S.B. 1141, Reg. Sess. (Cal. 2020) (Sept. 29, 2020, version), with S.B. 1141, Reg. Sess. (Cal. 2020) (May 29, 2020, version), https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200SB1141&cversion=20190SB114197AMD [<https://perma.cc/Y4LE-Y6SL>]; see also Nancy K.D. Lemon & Cory Hernandez, “Coercive Control” Domestic Violence Bill: Well-Intentioned, but Need to Be Reworked, DAILY J. (June 11, 2020), <https://www.dailyjournal.com/articles/358091-coercive-control-domestic-violence-bill-well-intentioned-but-need-to-be-reworked> [<https://perma.cc/6XZK-FK4D>] (arguing that under the new bill, “[t]hose alleging ‘coercive control’ must prove an intent to cause harm, which is not required for any other type of emotional or psychological abuse under the DVPA”).

140. See S.B. 1141, Reg. Sess. (Cal. 2020) (May 29, 2020, version), https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200SB1141&cversion=20190SB114197AMD [<https://perma.cc/Y4LE-Y6SL>].

showing the perpetrator's intent. This alleviates the victim's burden of proof in bringing these claims.¹⁴¹

2. *Hawai'i's H.B. 2425*

Hawai'i House Bill (H.B.) 2425 was signed into law in Hawai'i in September 2020 and amended the definition of "domestic abuse" for purposes of a restraining order to include coercive control between family or household members.¹⁴² Hawai'i's definition of coercive control is similar to California's: it includes isolating the survivor from friends and family; controlling how the survivor accesses and spends money; monitoring the survivor's activities, communications, and movements; and more.¹⁴³ However, the Hawaiian law does not explicitly state any effect that coercive control may have on custody disputes.¹⁴⁴

California and Hawai'i are the only U.S. states thus far to have passed legislation regarding coercive control.¹⁴⁵ Both of these states' laws have also only been implemented within the last few years, so a thorough analysis of their effects is premature at this time.¹⁴⁶

To conclude, this Section provided examples of a wide array of coercive control legislation. The United Kingdom, Scotland, and Hawai'i have criminalized coercive control—in 2015, 2018, and 2021, respectively—and several states in the United States have attempted to do so as well. California and Hawai'i have both passed legislation allowing coercive control to be considered as a factor for restraining orders, among other civil remedies.

III.

AN ANALYSIS OF THE COSTS AND BENEFITS OF LEGISLATIVE EFFORTS

This Section will provide an in-depth analysis of the pros and cons of the two approaches to legislating against coercive control that this Note has already laid out, i.e., criminalization efforts and implementation in the family code. It should be recognized, however, that either approach takes a crucial step in recognizing coercive control as a form of abuse. Regardless of what effects either approach may have on reducing coercive control, protecting survivors, holding abusers accountable, etc., an important step forward is recognizing coercive control as the detrimental abuse that it is.

141. See CAL. FAM. CODE § 6320(c) (West 2021).

142. HAW. REV. STAT. § 432D-27(e) (2020).

143. *Id.* § 586-1 (2020).

144. *Id.* § 432D-27(e) (2020).

145. See CAL. FAM. CODE § 6320; HAW. REV. STAT. §§ 586-1 (2020), 709-906(6) (2021).

146. See CAL. FAM. CODE § 6320; HAW. REV. STAT. §§ 586-1, 709-906(6) (2021).

A. Criminalization

The primary advantage of criminalizing coercive control is holding perpetrators accountable in the form of criminal liability for all forms of abuse, rather than just physical violence. For example, as mentioned earlier, the statutes in Scotland and the United Kingdom were intended to supplement the existing legal responses to domestic violence by increasing the likelihood that abusive partners would be identified and charged with a broader range of offenses.¹⁴⁷ Legislators also intended that the statutes would shift the focus away from victim safety alone to abuser accountability and survivor empowerment.¹⁴⁸ When the focus of anti-domestic violence efforts is on victim safety, too much weight is often assigned to the physical injury, deeming incidents of domestic violence that do not leave physical marks like bruises, scars, etc., to be less serious.¹⁴⁹ A failure to punish for more “minor” incidents of domestic violence means that no intervention will occur in the vast majority of domestic violence incidents.¹⁵⁰ Thus, criminalizing coercive control helps hold perpetrators accountable for a larger body of abuse and recognizes the harm done to survivors in all cases of domestic violence.¹⁵¹

Additionally, criminalizing coercive control might prevent the sorts of behaviors that could eventually lead to physical violence. Now, such a claim requires the assumption that the creation and enforcement of crimes has a deterrent effect, which is an incredibly complicated issue, both in domestic violence cases and in criminal law generally.¹⁵² For example, one study in Minnesota found that arrests—when optional—in domestic violence cases reduced future violence, whereas another study found that mandatory arrest laws actually increased intimate partner homicides.¹⁵³ This difference is likely due, at least in part, to optional versus mandatory arrest laws, although evidence is still varied as to how these criminal justice responses impact domestic violence.¹⁵⁴ And while overall rates of domestic violence have declined since 1994,¹⁵⁵ there

147. Stark & Hester, *supra* note 85, at 86.

148. *Id.*

149. See Stark, *Looking Beyond Domestic Violence*, *supra* note 5, at 204.

150. *Id.*

151. See *id.*

152. See BEN JOHNSON, MINN. HOUSE RSCH., DO CRIMINAL LAWS DETER CRIME? DETERRENCE THEORY IN CRIMINAL JUSTICE POLICY: A PRIMER 8–15 (2019), <https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf> [<https://perma.cc/RP2A-2VZL>] (discussing the theory of criminal deterrence as a factor in changing criminal justice policy); see also Goodmark, *supra* note 76, at 79.

153. Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 13186, 2007).

154. *Id.*

155. Although overall rates of domestic violence have declined since 1994, surveys around the world show that domestic abuse spiked during the COVID-19 pandemic. See Goodmark, *supra* note 76, at 55; Jeffrey Kluger, *Domestic Violence Is a Pandemic Within the COVID-19 Pandemic*, TIME (Feb. 3, 2021), <https://time.com/5928539/domestic-violence-covid-19/> [<https://perma.cc/SR7X-SLNW>].

is no reliable social science data that ties the drop in rates of intimate partner violence to criminalization or to increased funding for the criminal justice system.¹⁵⁶ Thus, it is not clear that laws criminalizing coercive control would actually have a significant deterrent effect on either coercive control itself or physical violence in intimate partner relationships.

There are several key drawbacks of criminalizing coercive control. Domestic violence scholars and advocates have already expressed concern regarding the criminal justice system's ability to respond to domestic violence,¹⁵⁷ and many of these concerns apply to coercive control criminalization laws as well. The criminal legal response to domestic violence generally has been critiqued on the grounds that it is ineffective, disproportionately affects people of color and low-income people, ignores structural issues that drive intimate partner violence, deprives survivors of autonomy, and ignores the economic and social needs of survivors.¹⁵⁸ Such criticism would indeed apply to coercive control criminalization laws. I will now discuss some of this criticism in more detail with respect to coercive control criminalization laws.

Criminal laws almost uniformly have a disproportionate impact on people of color, and domestic violence laws are no exception to this pattern.¹⁵⁹ In one study in Milwaukee County, for instance, men of color represented 24 percent of the population but 66 percent of defendants in domestic violence cases.¹⁶⁰ It would be foolish to think that coercive control criminalization laws would have a different effect on people of color given how consistent the disproportionate impact of criminalization is on people of color across jurisdictions and for different crimes.¹⁶¹ Relying on the criminal justice system to put an end to coercive control—or to domestic violence generally—will not put an end to violence against women, just as mass incarceration and imprisonment has not put an end to “crime.”¹⁶² Instead, prosecuting these crimes will disproportionately impact people and communities of color while doing little to protect survivors in the process.¹⁶³

156. Goodmark, *supra* note 76, at 55–56.

157. See generally Goodmark, *supra* note 76 (calling into question the criminal justice system as an appropriate response to domestic violence); Leigh Goodmark, *Stop Treating Domestic Violence Differently from Other Crimes*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/opinion/domestic-violence-criminal-justice-reform-too.html> [https://perma.cc/2L8X-UZZ9].

158. Goodmark, *supra* note 76, at 58.

159. Matt Clarke, *U.S. DOJ Statistics on Race and Ethnicity of Violent Crime Perpetrators*, PRISON LEGAL NEWS (June 1, 2021), <https://www.prisonlegalnews.org/news/2021/jun/1/us-doj-statistics-race-and-ethnicity-violent-crime-perpetrators/> [https://perma.cc/C5LJ-6PU2]; Goodmark, *supra* note 76, at 70–71.

160. Goodmark, *supra* note 76, at 71.

161. Brett E. Garland, Cassia Spohn & Eric J. Wodahl, *Racial Disproportionality in the American Prison Population: Using the Blumstein Method to Address the Critical Race and Justice Issue of the 21st Century*, 5 JUST. POL'Y J. 1, 4 (2008).

162. Goodmark, *supra* note 76, at 70.

163. See generally *id.*

Regarding survivors, the other major issue with the criminalization of domestic violence generally is the harm it has done to women who were originally intended as the beneficiaries of these policies.¹⁶⁴ For example, more stringent arrest policies such as mandatory arrests have substantially increased arrest rates among women in domestic violence cases.¹⁶⁵ Increased criminalization of domestic violence has also left abused mothers at risk of being reported to child protective services for failing to protect their children from being exposed to domestic violence.¹⁶⁶ And, of course, once an arrest is made, it is up to the prosecutors whether or not to bring the charge against the abuser, regardless of the survivor's wishes, thus depriving the survivor of agency in ending or escaping her abuse.¹⁶⁷

All these harmful consequences for survivors would likely persist in implementing coercive control criminalization laws. For example, when making arrests for coercive control, police officers may be even more likely to arrest a woman who is actually a survivor of abuse. This is because coercive control does not require any physical harm or injury done to the other party, and absent any injuries (which are more often inflicted upon the woman in heterosexual abusive relationships), officers may not know whom to arrest.¹⁶⁸ It may also be more difficult for officers to determine who the “dominant aggressor” is in cases without physical violence, thus leading officers to arrest both parties for coercive control.¹⁶⁹ And finally, as mentioned above, criminalization of coercive control will completely deprive survivors of the ability to decide how, if at all, their cases go forward.¹⁷⁰ Once an arrest is made, it will be up to the prosecutor to decide whether to charge the abuser and/or the survivor with the crime, preventing the survivor from making such a difficult decision on their own and based on their individual circumstances.¹⁷¹

164. *See id.* at 71.

165. *Id.*

166. *Id.* at 71–72.

167. *See, e.g., Prosecuting DV Cases*, CONTRA COSTA DIST. ATT'Y, <https://www.contracosta.ca.gov/7002/Prosecuting-DV-Cases> [https://perma.cc/4WKL-V3MZ] (“While victim’s feelings on [charging] are very important—the evidence is the primary focus when determining whether a case can be prosecuted. If the police investigation shows that there is enough evidence to prove domestic violence charges beyond a reasonable doubt at trial, then those charges will be filed.”).

168. *See, e.g., DAVID HIRSCHTEL, OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., DOMESTIC VIOLENCE CASES: WHAT RESEARCH SHOWS ABOUT ARREST AND DUAL ARREST RATES 13–14 (2008)*, <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/222679.pdf> [https://perma.cc/JZ49-4634] (finding that if officers cannot tell who is at fault for domestic violence, they may arrest both individuals in a dual arrest); *see also* Serious Crime Act 2015, c. 9, § 76 (UK); Domestic Abuse (Scotland) Act 2018 (ASP 5); HAW. REV. STAT. § 709-906(6) (2021).

169. *See generally* NAT’L CTR. ON PROT. ORDS. & FULL FAITH & CREDIT, PREDOMINANT AGGRESSOR ARREST STATUTES, <https://www.bwjp.org/assets/2020-predominant-aggressor.pdf> [https://perma.cc/7FJJ-ZLYN].

170. *See* CONTRA COSTA DIST. ATT'Y, *supra* note 167.

171. *See id.*

The primary advantages of criminalizing coercive control are holding perpetrators accountable for their actions and potentially stopping the sorts of behaviors that could ultimately lead to physical violence. But the deterrent effect of these policies is not supported by strong evidence. And as discussed above, disadvantages of this approach include ineffectiveness, disproportionate impact on people of color, and negative consequences for the survivors whom the laws are intended to protect.

B. Family Code

This Section will now analyze the benefits and drawbacks of family code approaches to legislating against coercive control, such as California's S.B. 1141. Again, these sorts of approaches do not make coercive control a crime punishable by the state, but rather provide a different avenue for survivors to obtain relief, such as in the forms of restraining orders or custody battles. This section will use S.B. 1141 as a model for this approach and assess the advantages and disadvantages of it.

One aforementioned benefit of S.B. 1141 is that it provides a legal remedy for survivors of coercive control that is almost entirely in the hands of the survivor to use how she sees fit.¹⁷² For example, if a survivor of coercive control decides she wants to pursue a restraining order against her abuser, it is up to her to file for an order on that basis.¹⁷³ Similarly, should a survivor of coercive control have children with her abuser, she need not raise the coercive control issue during a custody dispute if she does not want to.¹⁷⁴ This provides tremendous agency to the survivor—something that the criminal legal response to domestic violence often fails to do.¹⁷⁵

There are two main criticisms of S.B. 1141. The first is that S.B. 1141, in practice, does not actually change much of anything for survivors.¹⁷⁶ And second, there is concern that S.B. 1141 does not do enough to protect survivors from coercive control.¹⁷⁷

Regarding the first piece of criticism, California appellate courts had already concluded, prior to S.B. 1141, that the definition of “abuse” under the Domestic Violence Prevention Act (DVPA) is broad enough to encompass a wide range of abuse, not merely physical abuse.¹⁷⁸ For more than a decade, this

172. See CAL. FAM. CODE § 6320(c) (West 2021).

173. See *id.* §§ 6200–6361.

174. See *id.*

175. See, e.g., CONTRA COSTA DIST. ATT'Y, *supra* note 167.

176. See Lemon & Hernandez, *supra* note 139 (noting that “appellate courts have already concluded the definition of ‘abuse’ is broad enough to encompass ‘coercive control’”).

177. Email from Evan Stark, Professor Emeritus, Rutgers Univ., Sch. of Pub. Affs. and Admin., to author (Oct. 27, 2021) (on file with author).

178. See, e.g., *In re Marriage of Evilsizor & Sweeney*, 189 Cal. Rptr. 3d 1, 12–13 (Cal. Ct. App. 2015); *In re Marriage of Nadkarni*, 93 Cal. Rptr. 3d 723, 733–34 (Cal. Ct. App. 2009); *McCord v. Smith*,

has allowed survivors to seek and be granted domestic violence restraining orders for behavior that destroys the survivor's "mental or emotional calm."¹⁷⁹ Thus, prior to the enactment of S.B. 1141, survivors in California could already receive domestic violence restraining orders on the basis of emotional abuse.¹⁸⁰ That being said, there is still great benefit in enacting legislation on this issue, as it helps ensure uniformity of appropriate responses at the trial level, where most survivors interact with the courts.¹⁸¹ Recognition of coercive control by the California legislature also helps to relay the gravity of the issue to the public and empowers survivors.¹⁸²

As to the second piece of criticism, it is true that S.B. 1141 cannot protect survivors from all the harms and consequences that coercive control may bring them. S.B. 1141 is relatively limited in scope; it offers survivors protection in the form of restraining orders based on coercive control, and it provides survivors with a rebuttable presumption of custody in their favor if children are involved in the relationship.¹⁸³ Restraining orders, of course, are not always effective.¹⁸⁴ And even if survivors leave the relationship and have full custody of their children, the abuser may continue to control and coerce their behavior.¹⁸⁵ And after successfully leaving the relationship, survivors may experience long-lasting emotional trauma and may have lost important things in their lives like their jobs, friends, etc.¹⁸⁶ S.B. 1141 is an important step forward, but it has holes that leave survivors vulnerable.

Taking into consideration the above analysis, I argue that criminalizing coercive control is neither an effective nor beneficial approach to legislating

264 Cal. Rptr. 3d 270, 276 (Cal. Ct. App. 2020) ("The trial court's findings that McCord's statements and actions were a means of exercising control and dominion over Smith and threatening her were amply supported by evidence. Those acts were sufficient to constitute a disturbance of her peace, as well as stalking, threatening, and harassing.")

179. See *Nadkarni*, 93 Cal. Rptr. 3d at 733–34.

180. See *id.*

181. *New CA Law*, *supra* note 135.

182. See Susan Rubio, *Legislation Would Expand Protections for Survivors of Domestic Violence*, CALMATTERS (Aug. 27, 2020), <https://calmatters.org/commentary/my-turn/2020/08/legislation-would-expand-protections-for-survivors-of-domestic-violence/> [<https://perma.cc/S7FP-4P8C>] ("This bill will not only help victims by allowing them to escape abusive relationships but will have a positive, rippling effect for many of our communities.")

183. See CAL. FAM. CODE §§ 6320(c), 3044 (West 2021).

184. UNIV. OF KY. CTR. FOR RSCH. ON VIOLENCE AGAINST WOMEN, DO PROTECTIVE ORDERS WORK? WHO VIOLATES PROTECTIVE ORDERS THE MOST? 1 (2011), https://web.archive.org/web/20210511225741/https://opsvaw.as.uky.edu/sites/default/files/04_Protective_Orders.pdf [<https://perma.cc/YMH6-UNRT>] ("2 in 5 women experience a violation of their protective order.")

185. See *11 Reasons Why People in Abusive Relationships Can't "Just Leave,"* ONE LOVE, https://www.joinonelove.org/learn/why_leaving_abuse_is_hard/ [<https://perma.cc/P8SE-SBCW>] ("It's not just hard to breakup safely, it's also hard to escape the cycle of control.")

186. See *Why Don't Women Leave Abusive Relationships?*, WOMEN'S AID, <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/women-leave/> [<https://perma.cc/BD3V-3F9R>] (noting that perpetrators weaken a survivor's connections with family and friends and make it impossible to have a job or financial independence).

against it. Criminalizing domestic violence was important early on in the movement of the 1970s, 1980s, and 1990s, as criminalization allowed the State to treat these crimes against women the same as other crimes.¹⁸⁷ And while I do not argue that these current criminal statutes should be repealed, further criminalization of intimate partner violence, especially of coercive control in particular, is problematic for a number of reasons, namely, its disproportionate impact on people of color, the agency it strips from survivors, and its potential to harm survivors by leading them to be arrested for the abuse they suffer from.¹⁸⁸ An approach like S.B. 1141 is much preferable, though imperfect.

The next Section of this Note will provide a formal recommendation for legislating against coercive control without criminalizing it.

IV.

RECOMMENDATION: REMEDIES IN THE TORT SYSTEM

Historically speaking, the anti-domestic violence movement has relied too heavily on the criminal justice system as the primary or only avenue to provide survivors with legal relief.¹⁸⁹ S.B. 1141 has taken a critical step forward by providing survivors of coercive control with a legal remedy for their abuse that does not involve the criminal justice system. However, this law is not sufficient.¹⁹⁰ S.B. 1141 prioritizes short-term safety and protection of children over long-term financial stability, survivor empowerment, and abuser accountability.¹⁹¹ Legislative responses to coercive control should provide a wide range of forms of relief for survivors to choose from depending on their specific needs and circumstances. S.B. 1141 provides two forms, but this is not enough.¹⁹²

A. *Amending California Civil Code Sections 1708.6 and 52.4*

Ultimately, this Note recommends expanding the definition of “abuse” used in state tort statutes to allow survivors to sue their abusers for coercive control in civil court.¹⁹³ Indeed, California appellate courts have already held that survivors may sue their abusers for coercive control.¹⁹⁴ However, enacting a tort statute with the explicit mention of coercive control would provide a more straightforward and uniform method of legal relief to survivors, just as previously creating a domestic violence tort statute helped survivors, instead of leaving them with only traditional tort causes of action, such as battery, assault,

187. See Murray, *supra* note 2, at 443.

188. See generally Goodmark, *supra* note 76.

189. See *id.* at 58.

190. See CAL. FAM. CODE § 6320(c) (West 2021).

191. Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 U. KAN. L. REV. 695, 756 (2014).

192. See *id.*

193. See CAL. CIV. CODE § 1708.6 (West 2002).

194. See, e.g., Pugliese v. Super. Ct., 53 Cal. Rptr. 3d 681, 689 (Cal. Ct. App. 2007).

and, in limited circumstances, intentional infliction of emotional distress (IIED).¹⁹⁵ There are two California tort statutes for domestic violence, the first of which, California Civil Code section 1708.6, reads as follows:

(a) A person is liable for the tort of domestic violence if the plaintiff proves both of the following elements:

(1) The infliction of injury upon the plaintiff resulting from abuse, as defined in subdivision (a) of Section 13700 of the Penal Code.

(2) The abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in subdivision (b) of Section 13700 of the Penal Code.

(b) A person who commits an act of domestic violence upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.

(c) The court, in an action pursuant to this section, may grant to a prevailing plaintiff equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney's fees.¹⁹⁶

The definition of “abuse” in section 13700 of the California Penal Code, which Civil Code section 1708.6 incorporates by reference, means “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.”¹⁹⁷ This is, of course, not the same definition of abuse provided in California Family Code section 6320 and is much more narrow.¹⁹⁸ Thus, this Note recommends amending section 1708.6 of the Civil Code to read as follows, showing the new language in italics:

(a) A person is liable for the tort of domestic violence if the plaintiff proves both of the following elements:

(1) The infliction of *emotional or physical* injury upon the plaintiff resulting from abuse, as defined in *any of the following*: subdivision (a) of Section 13700 of the Penal Code, *subdivision (c) of Section 6320 of the Family Code, or Section 6203 of the Family Code.*¹⁹⁹

(2) The abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in subdivision (b) of

195. See *Can You Sue Someone for Emotional Abuse in California?*, ADZ L., <https://www.adzlaw.com/civil-lawsuits/2020/06/02/can-you-sue-someone-for-emotional-abuse-in-california/> [<https://perma.cc/TM7V-WJ8H>].

196. CAL. CIV. CODE § 1708.6.

197. CAL. PENAL CODE § 13700 (West 2016).

198. See CAL. FAM. CODE § 6320(c) (West 2021).

199. Section 6203 of the Family Code provides definitions of abuse that may qualify for a restraining order in addition to those in Family Code section 6320. I have recommended including both sections 6203 and 6320 of the Family Code in my proposed statute so that all forms of abuse that qualify for a restraining order may also serve as grounds for a tort suit against the domestic abuser.

Section 13700 of the Penal Code.

Amending the tort statute definition of abuse in this way will allow survivors to recover civil damages from a broader range of abuse—not solely physical abuse. It has already been recognized, both in the Family Code and by California appellate courts, that abuse includes much more than physical injuries,²⁰⁰ and therefore the domestic violence tort statutes should be amended accordingly. The issue of damages may be more complicated under this proposed revision since survivors of coercive control may not have physical injuries and medical expenses for which to recover costs. However, a survivor of coercive control could recoup costs for emotional pain and suffering, therapy, and lost wages if their abuser prevented them from working. Injunctive relief and punitive damages may also be available.²⁰¹

The second current California tort statute allowing recovery for survivors of domestic violence deals with gender violence. The statute, section 52.4 of the Civil Code, is reproduced below:

(a) Any person who has been subjected to gender violence may bring a civil action for damages against any responsible party. The plaintiff may seek actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorney's fees and costs.

...

(c) For purposes of this section, "gender violence" is a form of sex discrimination and means either of the following:

(1) One or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.

(2) A physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.

(d) For purposes of this section, "gender" has the meaning set forth in Section 51.²⁰²

Similar to the current version of section 1708.6, section 52.4 also relies on the Penal Code's definition of abuse. Thus, to ensure that all current domestic violence tort causes of action include a broader definition of abuse, this Note also

200. See FAM. § 6320(c); *In re Marriage of Nadkarni*, 93 Cal. Rptr. 3d 723, 733–34 (Cal. Ct. App. 2009); *McCord v. Smith*, 264 Cal. Rptr. 3d 270, 276 (Cal. Ct. App. 2020).

201. Carey, *supra* note 191, at 716.

202. CAL. CIV. CODE § 52.4 (West 2015).

recommends amending section 52.4 as follows, showing the new language in italics:

(c) For purposes of this section, “gender violence” is a form of sex discrimination and means *any* of the following:

(1) One or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.

(2) A physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.

(3) *Abuse as defined in Sections 6203 or 6320 of the Family Code.*

Criminalizing coercive control is not an effective solution for survivors, but S.B. 1141, as it currently stands, provides insufficient remedies for coercive control. Providing a civil remedy under state tort statutes gives survivors a new avenue to recover for coercive control, and one that is completely on their own terms should they decide it is best. It also provides survivors with the therapeutic benefits of having their “day in court” without having to utilize the criminal justice system.²⁰³

B. Potential Issues with a Tort Solution

1. Intentional Infliction of Emotional Distress Claims

As mentioned, IIED claims have historically been available to survivors of domestic violence who have suffered from emotional abuse.²⁰⁴ So why the need to include coercive control in the Civil Code if survivors already can sue their abusers for emotional abuse under IIED? First, IIED claims carry a high burden of proof: the plaintiff must demonstrate “extreme and outrageous conduct” to prevail.²⁰⁵ Second, most successful IIED claims in the domestic violence context have been brought by plaintiffs who either experienced or were threatened with physical violence.²⁰⁶ Thus, IIED claims, as they currently stand, are not broad enough to encompass the wide range of abuse that can occur in coercive and controlling relationships. A new civil remedy—one that explicitly codifies coercive control as a tort—is much better suited for survivors of coercive control.

203. Carey, *supra* note 191, at 742 (explaining how the very act of being a plaintiff in a tort suit can help provide closure and empowerment and dissipate negative feelings).

204. *See id.* at 702.

205. *See id.*

206. *Id.*

2. *Accessibility of the Tort System*

Perhaps the biggest issue with the tort system is its lack of accessibility, particularly for survivors. Most survivors of domestic violence do not have the financial resources to pay for a lawyer.²⁰⁷ While a contingency fee agreement is possible for a plaintiff's attorney, the possibility of recovery in a domestic violence tort case may be too low for an attorney to take on that kind of risk.²⁰⁸ And although the current California domestic violence tort statutes include attorney's fees provisions, this only helps if the plaintiff's suit actually prevails.²⁰⁹

But these facts should not preclude expanding tort remedies for survivors of domestic violence. In reality, the tort system is primarily dominated by negligence and strict liability cases.²¹⁰ Intentional torts such as assault, battery, and IIED, even outside of the domestic violence context, constitute a small minority of all state tort claims.²¹¹ Despite the underutilization of these claims, they still exist, and they still provide a remedy for plaintiffs with viable claims, even if that number is small.²¹²

Codifying coercive control as a tort is by no means a perfect solution that will put an end to all coercive control. Many survivors of coercive control will be unable to bring their claims due to lack of knowledge about the tort system as a remedy, insufficient resources, lack of access to a lawyer, and more. But some survivors can and will prevail with coercive control claims, just as many plaintiffs have already successfully recovered from their abusers under California's current domestic violence tort statutes.²¹³

Ultimately, legislating against domestic violence and coercive control should focus on providing survivors with options to recover from or escape their abuse depending on their specific needs and circumstances. Criminalization fails to do this. But S.B. 1141, combined with this Note's proposed amendments to domestic violence tort statutes, would give survivors several legal remedies for coercive control outside of the criminal justice system. It would be up to the survivor to choose which, if any, legal remedy to use, thus giving them greater agency and autonomy in handling their abuse.

207. *Id.* at 733.

208. *Id.*

209. *See* CAL. CIV. CODE §§ 1708.6 (West 2002), 52.4 (West 2015).

210. Carey, *supra* note 191, at 731.

211. *Id.*

212. *See id.*

213. *See id.* at 717.

CONCLUSION

Recognizing coercive control as abuse is critical.²¹⁴ Coercive control deprives a survivor of basic rights and liberty at the hands of their abuser.²¹⁵ And research suggests that coercive control is more predictive of serious violence or even death than the frequency or severity of physical abuse in intimate partner relationships.²¹⁶ Thus, in recent years, several jurisdictions have sought to legislate against coercive control.²¹⁷ However, this Note has argued that legislative efforts against coercive control need to provide survivors with a wide range of remedies and leave the individual survivor to decide which path is best. Criminalization of coercive control deprives survivors of agency and may even backfire by increasing the likelihood that survivors themselves will be found criminally liable for coercive control of their abusers.²¹⁸ California's S.B. 1141 has created new avenues for relief for survivors of coercive control, but the law as it stands is not sufficient.²¹⁹

Since providing survivors with a broad range of remedies is so important, jurisdictions should amend their tort statutes to provide survivors of coercive control with relief through the tort system. California could easily amend its two domestic violence tort statutes to change the definition of abuse to include coercive control, which the State has already done in the Family Code.²²⁰ If such statutes were enacted in California, a survivor of coercive control would be able to (1) seek a restraining order based on coercive control, (2) receive a rebuttable presumption of custody in their favor during a custody battle, and (3) sue their abuser for damages and injunctive relief resulting from coercive control.²²¹ And none of these remedies would force involvement of the legal system upon the survivor as criminalization would. Instead, the survivor would be able to choose which, if any, remedies to pursue based on their individual situation.

Even the most carefully curtailed and thought-out legislation will not put an end to coercive control. But this Note's proposed legislation is critical for two reasons. First, it recognizes coercive control as a form of abuse, which sends an important message to the community and the state that such behavior is intolerable. Second, legislation such as S.B. 1141 provides a remedy that is in the hands of the survivor.

Survivors have already had so much liberty and agency taken from them during their abuse. The legal system should focus on helping return agency to

214. See generally STARK, *supra* note 3 (explaining that coercive control is one of the most widespread and devastating forms of abuse).

215. See *id.* at 389.

216. Beck & Raghavan, *supra* note 22, at 561.

217. See Serious Crime Act 2015, c. 9, § 76 (UK); Domestic Abuse (Scotland) Act 2018 (ASP 5); CAL. FAM. CODE § 6320(c) (West 2021).

218. See NAT'L CTR. ON PROT. ORDS. & FULL FAITH & CREDIT, *supra* note 169.

219. See CAL. FAM. CODE § 6320(c).

220. See *id.*; CAL. CIV. CODE §§ 52.4 (West 2015), 1708.6 (West 2002).

221. See CAL. FAM. CODE § 6320(c); CIV. §§ 52.4, 1708.6.

survivors by providing them with options to end or escape their abuse. Criminalization of coercive control forces a one-size-fits-all remedy onto each individual survivor. But S.B. 1141, combined with this Note's proposed coercive control tort provisions, increases the remedies available to survivors should they decide to use them. This would be the most effective and empowering solution to the devastating consequences of coercive control.