SAFE-HAVEN REOPENING: LOWERING THE CUSTODY MODIFICATION STANDARD TO REOPEN AN INITIAL AGREEMENT IN CASES OF DOMESTIC VIOLENCE

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This article argues for a safe-haven reopening, which would consequently lower the custody modification standard that is currently required to reopen an initial custody order when evidence of domestic violence that was not before the court in the initial hearing phase, is plausibly alleged and corroborated. Further, in most jurisdictions in this country, the legal definition of domestic violence is too limited. The article argues that domestic violence definitions in this courtroom should be broadened to their nonphysical and/or unreported forms of violence, which some psychologists and researchers have labeled "coercive control."

Key Points for the Family Court Community:

- To expand the current legal definition of domestic violence, which is too limited in most jurisdictions. Instead, the court should apply the broadened definitions—nonphysical, unreported, psychological, and economic forms—which are widely accepted in the social science community and general public.
- To increase awareness in the courtroom and among legal practitioners that this kind of coercive control and domestic violence is adversely affecting custody outcomes to the detriment of the children, particularly in those negotiations and outcomes arising from out-of-court custody agreements.
- To interpret states' criminal duress and coercion statutes to include domestic violence which would permit judges to address and expand the legal definition of domestic violence without having to seek tedious and arduous legislative reform.
- To increase awareness that custody agreements made in cases of domestic violence may not have been in the best interests of the child because not all of the facts were before the court at the time of the initial order. Safe-haven reopening remedies this by permitting judges to take a second look once all of the facts have been safely brought before the court.

Keywords: *Best Interests of Child; Coercive Control; Custody Modification; Domestic Violence; Economic Domestic Violence; Initial Custody Orders; Nonphysical Domestic Violence; Out-of-Court Settlements; Safe-Haven Reopening; Substantial Change in Circumstances; and Material Change in Circumstances.*

I. INTRODUCTION

Consider this scenario: A married woman[1] has been a family homemaker for thirty years. She and her husband have three children together. They emigrated from India to the United States. Her husband is a wealthy man with a high-powered job in the business world—but she does not know anything about his work. He will not tell her. He has control of the credit cards, the checking accounts, the investments, the vehicles, the house, and the phone accounts. He does not want her to work and intervenes in her work so much that she cannot keep her job. She does not see her family or friends anymore because he accuses her of cheating on him when she is out. Once, after a repairman came by to fix the dishwasher, he became so angry that he punched a hole in the wall, added a tracking device to her phone, and told her that men could no longer be in the house when he was gone. He swears at her and demeans her, often in front of the children. Maybe he has hit her before, and maybe he has not. Maybe he just threatens her, or threatens her relationship with the children.

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She, trying to make the marriage work and avoid making matters worse, acquiesces to this control and tries to avoid his anger.

This scenario describes domestic violence. Though it does not describe a husband that beats his wife, it depicts abusive and controlling behaviors that are known collectively as "coercive control."[2] Nonphysical intimate partner violence, like this example, is prevalent and hidden in our society. In far too many situations, domestic violence tragically underpins divorce, particularly out-of-court divorces and custody settlements. Additionally, most of the time it is not seen, it is not heard, and it is not brought to the attention of the courts. Why? First, out-of-court custody arrangements are an efficient use of court resources. Such arrangements encourage courts to quickly push uncontested divorces through the legal system. Second, when domestic abuse occurs, the resulting trauma of the experiences, the likely overwhelming skepticism from courts, the financial dependency[3] on the partner, and the realistic fear of what abusers might still do, in combination, prevent women from making it known to the courts or anyone else, both during the divorce process and after it is over.[4] Often it is because they do not see the situation clearly for what it is until they have been out of the relationship (and have been relatively safe) for a while.

This dynamic contains the seeds of a long-term problem: An initial settlement is often negotiated at a time when the victim is still traumatized and afraid, and the abuser's manipulations can allow him to use the legal system—and the lawyers—against her. But once an initial child custody agreement is put into effect, modification is an uphill battle due to the applicable, burdensome legal standard necessary to change its terms.[5] Frequently, divorced women do not consult with an attorney until a year or two after entry of a decree and custody arrangement.[6] This is often her first actual opportunity to speak to an attorney—her husband, finally, is not tracking her or stalking her. As the law stands today though, she is too late. The agreement is already in place. Custody modification, an attorney will explain to her, is too difficult to obtain because most states require proof of "substantially changed circumstances" in the primary custodian's household to modify the agreement.[7]

This article proposes that courts evaluate modifications of custody in cases with domestic violence under a different lens, that is: criminal coercive control.[8] Then, when petitioners who wish to modify a custody agreement make plausible claims that the prior agreement was signed under duress and coercion, courts will be able to reopen the order without requiring petitioners to meet a substantially changed circumstances standard. This is what I refer to as a "safe-haven reopening."[9] Though a safe-haven reopening is not yet the norm in most states, there is recent jurisprudence in a handful of jurisdictions that supports the reform efforts proposed in this article. Certain states, such as New Jersey and New York, have revised their criminal statutes to acknowledge potential duress and coercion in domestic violence situations. As for case law, a recent appellate court decision in Hawaii[10] overturned the lower court's refusal to reopen the custody agreement in accordance with the safe-haven reopening standard that I urge courtrooms across the United States to adopt.

This article also addresses other imperative family law concerns that inevitably arise from domestic violence situations, as well as those issues that potentially arise as a result of this recommended safe-haven reopening approach. First, this proposed lower standard does not lose sight of the best interests of the child standard. The lowered standard is for the sole purpose of *reopening* the custody order and any incorporated agreement. Once reopened, a judge can review all of the facts under a best interests lens, as he did before. Second, this article acknowledges and is written to address a major safety concern. Due to trauma, fear, and pushback from the legal system as to the legitimacy of their experiences, often these victims are unable to bring all of the facts of the case to light in the initial proceeding.[11] My approach in lowering the standard to reopen an agreement permits women in such situations to bring a claim later, when they may feel more able to do so. A safe-haven reopening would also require that a modification petition would include both plausible claims and corroborating evidence, to avoid potentially frivolous suits and wasted court resources.

Third, this proposal is effective either through legislative reform or within the family courts' inherent authority to enact remedies; judges are in an excellent position to address domestic violence situations promptly and effectively[12] because courts are the venue at which individuals enter

into such custody arrangements every day. The purpose of this article is to provide family law attorneys with an effective tool with which to advocate for their clients in the courtroom. When these tragic situations arise, attorneys should argue for a safe-haven reopening in their petitions. Many of the laws in place, including the substantially changed circumstances modification standard, were put in place at a time when neither the legal system nor society recognized the pervasiveness and varieties of domestic violence.[13] Now we do.

Part II explains that the current legal standards for custody modification and domestic violence fail to recognize the full extent of nonphysical domestic violence. Currently, the law in most states[14] permits a modification to the initial order only after a showing of substantially changed circumstances. The petitioner must show a material change of circumstances of the custodial parent and must also prove that modification is necessary to ensure the welfare and continued stability of the child. All fifty states and the District of Columbia recognize the existence of domestic violence.[15] However, the current domestic violence laws are inadequate because of the large disparity between the definitions used in the social sciences and those that are applied in the legal system.

Part III proposes a solution: adopt a coercive control definition of domestic violence and petition for a safe-haven reopening that is premised on this broadened definition.[16] Coercive control focuses, properly, on the patterns and culmination of nonphysical violence that domestic violence perpetrators typically use against their victims. The definition of coercive control incorporates physical violence. As such, coercive control not only carries over and adopts what the current domestic violence framework already successfully protects, but it also improves the legal system's current definition.

While adopting coercive control as an alternative definition for domestic violence would successfully bring issues to the attention of the court, the remaining problem is that the change in circumstances standard is too burdensome for domestic violence victims. Part IV of this article argues for a safe-haven reopening of custody agreements under a lesser standard. Courts need to reopen these initial agreements when petitioners plausibly allege prior acts of criminal coercion and duress in their petitions for modification. This would permit domestic violence victims to request modifications when they are in a secure and safe position to do so. As long as the allegations are plausible and the corroborating evidence requirement is sufficiently met, a safe-haven reopening works. This plausibility standard would be effective for a limited purpose—to reopen the case and ensure that a court has made a best interests custody arrangement on a thorough and accurate investigation and assessment of the facts—*all* of the facts.

II. CURRENT CUSTODY STANDARDS' INADEQUACIES IN DOMESTIC VIOLENCE SITUATIONS

A. THE SUBSTANTIAL CHANGE IN CIRCUMSTANCES CUSTODY MODIFICATION STANDARD

In most states, the legal modification standard is a high bar: a "substantial" or "material" change in circumstances.[17] This standard was put in place to protect the child's best interests. However, more modern research has exposed the problem that domestic violence situations can be very harmful to children, even if they are not the intended targets of the abuse.[18] The idea behind the substantial change in circumstances standard was that substantial modifications to a child's living situation caused more harm than good by disturbing the child's life and daily patterns.[19] For this reason, to protect the child's well-being, the current legal standard was imposed as a barrier to custody modifications. This standard is implemented across the country, settled by the notion that "unnecessary changes of custody are harmful to children"[20] and that "continuation of the child's successful relationship with the primary caregiver normally provides stability that outweighs possible advantages that might result from a custodial change."[21] However, it is proven that many children can and do "suffer severe psychological effects"[22] when exposed to such abuse in the home. Exposure to

domestic violence has proven to be extremely damaging, even when the children are not the abuser's direct target.

Meeting the substantially changed circumstances standard is a state-based determination, dependent on that particular state's statutes and case law. The prevailing trend across the country, however, is that to modify a custody arrangement, "a trial court in most states must find: (i) that circumstances have changed substantially since the original decree was entered; and (ii) that the change in custody will serve the best interests of the child."[23] The standard for modification can be different depending on whether the initial agreement granted joint or sole physical custody.[24] For example, Alabama conducts a "best interest determination *ab initio* in subsequent modification proceedings."[25] Many states also require that the changed circumstances could not have been foreseeable at the time of the initial decree.[26] A handful of jurisdictions have waived the changed circumstances requirement and review the child's best interests *de novo.*[27] Finally, the substantial change in circumstances standard directs courts to evaluate whether the existing arrangement with the custodial parent is harmful to the child. Courts do not look at the noncustodial parent's improved living situation under the current standard.[28] For victims of domestic violence, this sole focus on the custodial parent and failure to consider the noncustodial parent's changes is damaging to the children's best interests because such a review potentially only considers half of the relevant facts. It fails to address, and even belies and ignores, domestic violence victims who could not bring these facts to light at the time of the initial proceedings.

B. DOMESTIC VIOLENCE AND ITS EFFECTS ON CHILDREN

1. Best Interests Standard

The best interests standard does not occur only in the context of custody modifications. It permeates virtually all proceedings and agreements when children are involved, in the hope that all outcomes, above all else, ensure that the child's interests are best protected and supported. While the policies behind the standard may be correct, this standard can reinforce competition between the parties. "The best interest standard purports to be for the child, but in essence it is a standard that creates a contest between competing parental rights and interests."[29]

Many states have codified statutes, which outline the state's best interests' factors. For example, Michigan enacted the Child Custody Act of 1970, which lists the following factors to determine best interests:

> (a) love, affection, and other emotions existing between the parties involved and the child;
>
> (b) the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any; and
>
> (c) the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care and other material needs.[30]

Other states, such as New York, use a "totality of the circumstances" to determine the best interests of the child[31] and emphasize the importance of reviewing the facts of each situation on a "case by case" basis.[32]

2. Children, Best Interests, and Domestic Violence

Even if children are not the immediate targets of domestic violence, they are harmed by it, and the current legal system does not fully address this problem. All fifty states and the District of

Columbia "require courts to consider domestic violence committed by one parent against the other in resolving a visitation or custody dispute between parents."[33] Whether the courts treat this to the level of a rebuttable presumption against awarding custody to the perpetrator or whether the situation is treated as a factor in a best interests' determination is split among the states.[34]

Historically, many courts have held that if the child was not abused, then spousal abuse was irrelevant.[35] For instance, in Alabama, sole custody was awarded to an abusive father despite evidence that he abused the mother and had abused another child, but not the one whose custody was being litigated.[36] However, children living in households where intimate partner violence takes place or who are living with the abuser are exposed to a parent "controlling the other by power, coercion, exploitation, put downs, threats, and/or physical or sexual violence,"[37] all of which can be detrimental to their well-being.

C. THE LEGAL SYSTEM AND SOCIAL SCIENCE DEFINITIONS OF DOMESTIC VIOLENCE ARE WIDELY DISPARATE

The way public policy and social sciences usually define domestic violence is not at all consistent with the definition that family courts usually apply to cases. This is potentially harmful and courts need to take immediate steps toward closing this gap. Researchers, psychologists, and social scientists have defined domestic violence to include violence in all of its forms.[38] This includes not only physical but also emotional, psychological, and economic forms of control over a partner. In fact, the domestic violence field has long recognized that, due to modernized female agency, perpetrators today more often resort to nonphysical abuse to secure control over their partner in ways that traditional violence alone cannot secure.[39]

The legal system usually does not give considerable weight to domestic violence allegations unless the allegations (i) include physical violence and (ii) have been documented or previously reported to law enforcement.[40] While severe physical violence, including homicides, has decreased in recent years, nonphysical violence has dramatically increased.[41] At the same time that we are seeing a decline in "severe partner violence," there has been a rapid increase in violence that is minor, frequent, and cumulative, which "can be more devastating than injurious assault."[42] Further, while spousal homicide has decreased in recent years, the "risk to women who are single, separated, or divorced has risen."[43] This means that most women who are victims will never have an opportunity for redress because the law requires them to meet a burden that, if they attempted to carry out, could place them in greater harm. And, it means they can never try to remedy the problems due to the currently high legal standard required to reopen a custody agreement.

1. Nonphysical Forms of Domestic Violence Established in Social Sciences

Expert sociologist Evan Stark has placed coercive control on the map for the legal community as a very real and nationwide epidemic in the modern domestic home that demands immediate acknowledgement and an avenue for redress in the legal system. Building on his work, Diane R. Follingstad, psychologist and director of the Center on Violence Against Women at the University of Kentucky, and Dana D. DeHart, social psychologist at the University of South Carolina, conducted a study in 2000 examining psychological abuse in intimate partner violence. Among the 102 psychologically abusive behaviors that were listed in the study, the participants identified threats to physical health and well-being, restriction of personal freedom, and intimidation/degradation as the three most prevalent behaviors that they considered psychologically abusive.[44] The study also notes that psychologically abused victims have the most difficulty in identifying that abuse is present.[45]

Psychologist Richard M. Tolman's Psychological Maltreatment of Women Inventory (S-PMWI)[46] further substantiates this research on nonphysical abuse. Tolman surveyed 207 abused women and 407 abusive men. Importantly, Tolman's S-PMWI results distinguished between verbal

abuses and the coercive control–type abuses discussed in this article. Examples of Tolman's identified coercive control abuses include dominance/isolation situations such as monitoring her; preventing her from seeing friends and family; treating her as a subservient; and forbidding her from seeking help, going to work, and leaving the house.[47] Despite the ever-present concerns that these perpetrators' financial[48] pockets and years of coercion hamstring mothers into giving in to their abusers, as of 2011, only one third of the states in this country recognize and remedy economic, psychological, and emotional abuses.[49]

2. Custody Courts and Their Governing Statutes Largely Fail to Expand the Definition of Domestic Violence to Include Nonphysical Abuse

Despite the overwhelming consensus among social science researchers that nonphysical violence is domestic violence, "the law continues to define domestic violence largely around physical abuse: assaults, threats, sexual abuse and forcible restraint."[50] The Department of Justice defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner […] whether those behaviors are 'physical, sexual, emotional, economic, or psychological.'"[51] Despite that broad statement, what we see in reality is that when a domestic violence allegation is reviewed in the legal system, physical abuse is usually required to make a successful case.[52] "The law currently leaves unregulated a wide swath of behavior that many would consider abusive, because as it stands the behavior must be accompanied by some form of physical violence. Absent that one slap or punch, years of emotional, economic, and other forms of abuse go unaddressed."[53] Most family courts continue to treat intimate partner violence as requiring a physical "beating" or "inflicting pain" to give it weight in a custody matter. By perpetuating these outdated opinions of domestic violence, true and injurious allegations are not being given due weight. Further, the courts, law enforcement, and other agents of the legal system are demonstrating complicity in the violence by allowing the same abuse to perpetuate without acknowledgement, never mind the imposition of a sanction.

a. Judges' Current Applications of Domestic Violence Laws. Studies show that judges do award custody to suspected abusers, even in cases where domestic abuse has been expressly alleged. Judges are often inclined to seek a "fair" outcome between the adults in custody proceedings when domestic violence is alleged. "Numerous studies have shown that 'courts often award (joint custody) and unsupervised visitation to abusers,' perhaps in part because 'many evaluators,' like many judges, 'know nothing about domestic violence and insist that it does not harm children.'"[54] In the situations addressed in this article, none of these women would have made any prior domestic violence allegations. However, even if she had taken that risk, it may not have helped her. In fact, when women in custody cases do make abuse allegations, the response from many judges is to ignore, avoid, and even sometimes react with hostility.[55]

A family court judge's reluctance to acknowledge domestic violence is at odds with our legal system's usual protocol.[56] For example, in criminal cases, the jury or judge assesses the facts and reaches a verdict either in favor of or against the defendant.[57] In criminal matters, physical and psychological harm to the victim can be considered at sentencing, whether the harm is domestically related or not. Some states have already made such progress by acknowledging domestic violence as a criminal act. These states have implemented new statutory changes that recognize nonphysical abuses and will incorporate these definitions into custody proceedings. For example, Missouri criminalized "knowingly isolating a victim" and Nevada's criminal domestic violence statute recognizes harassment.[58] As to civil protection order laws, a handful of states' abuse definitions recognize conduct causing the victim "emotional distress or injury."[59] Despite this, most state courts continue to require physical violence and a chain of prior reporting to move forward on a domestic violence allegation in custody cases.

b. Mediators, Guardians ad Litem (GALs), and Experts. It is not simply family court judges who are pushing normative "neutrality."[60] Many have raised questions regarding the legal system's treatment of domestic violence situations far earlier than the judge's signed custody order. Sometimes

the end result of an out-of-court settlement begins with a litigious, fault-based complaint. After a complaint is filed in a divorce action, the judge in many jurisdictions will order mediation; if children are involved, the judge may, and often does, appoint a GAL to represent the child's interests. Because of the tremendous weight that a judge will place on the opinions of mediators, GALs, and experts, these persons also play a very large role in how domestic violence allegations are handled or, unfortunately, mishandled.[61] Mandatory mediation is meant to give parties equal bargaining power. In practice, though, a coercive control victim is placed into an unequal position. For example, the abused parent may agree to trade her custodial rights away to avoid threats of further harm or litigation.[62] Some state legislatures, such as California, have recognized this problem and implemented "special requirements" in mediation cases when domestic violence is suspected.[63] However, this only addresses situations where domestic violence is known. Many domestic violence victims do not report the violence, so most of those cases that would otherwise benefit from such statutory reform go unabated.

c. Unreported Violence—Restraining Orders and Police Officers. Currently, victims usually only succeed in convincing a court to treat their abuse allegations seriously in the context of a custody dispute when they have documented the violence by making prior complaints to the police or to the court. This is a troubling problem. On the one hand, requiring that domestic violence victims back up the allegations with prior documentation belies how we as a society actually understand domestic violence—that often these women live under fear and control. They cannot feasibly make such a complaint without fear of harmful repercussions by their abusers. On the other hand, without prior evidence, it is hard for courts to differentiate between legitimate allegations and frivolous or false claims made by angry ex-spouses. Even when prior reports have been made, police and third-party investigatory agencies may have failed to properly respond to the allegations. This is not only an immediate failure to protect the well-being of those in harm's way, but it is also an administrative burden—failures of these agencies to understand all of the types of domestic violence mean that a complaint will not be recorded and the victim has no subsequent documentation to use in a later divorce proceeding.

An example of how an inadequate response to domestic violence allegations can lead to tragedy is found in the 2005 U.S. Supreme Court case of *Town of Castle Rock v. Gonzales*.[64] In this case that came up from the state court in Colorado, the husband made many threats of violence to Jessica Gonzales and her two daughters. Jessica went to her local police department and received a temporary restraining order. Later, her husband kidnapped the girls by not returning them to Jessica when his visitation was over. Jessica asked police officers to enforce her restraining order and they refused. The husband killed her daughters that evening. Sadly, our country's court system gave Jessica little solace. The Court held that Jessica did not have a constitutionally protected right to the restraining order's enforcement because the officers maintained discretion in choosing to respond.[65] The *Gonzales* case later reached the Inter-American Commission of Human Rights (IACHR), which condemned the Supreme Court's ruling and held in favor of Jessica, highlighting Justice Stevens' dissenting opinion from the Supreme Court decision. The IACHR held that the officers failed to employ due diligence in their investigations because Jessica's restraining order gave her a property interest. Reform does not require more steps than the officers already take. It is a minimum benchmark. Officers can be trained to even rephrase their questions to foster communication, assist these women, and prevent future violence.

III. DOMESTIC VIOLENCE REEXAMINED THROUGH THE DEFINITION OF CRIMINAL COERCIVE CONTROL

Nonphysical abuse should be treated as substantiated domestic abuse—a form that may need to fall under the definition of criminal coercive control, not domestic violence, to gain immediate traction in family courts. Importantly, psychologist Richard Tolman's S-PMWI study distinguishes between two

subscales—verbal arguments and emotional behavior on one subscale and patterns of behavior that control and entrap the victim on the second subscale.[66] Nonphysical violence in which one partner overly regulates another partner's behaviors and life is abuse—and it has been recognized as such. "Referred to as coercive control, this involves nonphysical behaviors that are often subtle, are hard to detect and prove, and seem more forgivable to people unfamiliar with the dynamics of violence against women."[67] Coercive control typically occurs through minor but collective behaviors and tactics meant to "intimidate, isolate, humiliate, exploit, regulate, and micromanage women's enactment of everyday life."[68] Abusers implement coercive control to "restrict a woman's liberties."[69]

It is easier to pinpoint what coercive control is than why men engage in these behaviors. Although situations are always unique, and typically complex, Evan Stark has offered a substantiated theory for these behaviors. He establishes that the *why* behind coercive control abuse has a lot to do with the progression of women's rights—and men's reactions to these social, cultural, legal, and personal developments.[70] Stark posits that coercive control is birthed from a sexist, traditionalistic reaction to women's modern gains in our society, and "its deployment today is designed to stifle and co-opt women's gains[.]"[71] Stark makes the necessary jump that the control men traditionally "inherited with their biology" they now must "reconstruct from within relationships, *de novo*" to sustain traditional notions of dominance and subjugation over women. Importantly, these psychologically abusive patterns do not end when the partners separate.[72] Stark explains that in most cases, perpetrators of coercive control simply do not leave their victims free to live their lives. Thus, victimized mothers who fear their abusers will "make good" on their threats and that the court will not protect them and their children[73] if they do not sign a custody agreement are perfectly rational.

A. PROTECTING THOSE MOST IN DANGER UNDER CURRENT LAW

The U.S. Supreme Court has not used the term "coercive control," but it has recognized and ruled on the exact types of behaviors that coercive control embodies. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[74] the doctors argued that Pennsylvania's abortion law, requiring a woman to obtain her husband's consent prior to undergoing an abortion, unconstitutionally infringed on the woman's liberty. In holding that the state statute was invalid, the majority opinion expounded that the right of privacy was an individual right, free from the archaic presumption that a man owned his wife as property and that the mother's place was in the home. "This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal."[75] The *Casey* court relied heavily on its prior ruling in *Planned Parenthood of Central Mo. v. Danforth*,[76] that when there is disagreement between a husband and wife regarding a pregnancy, a woman's interest in the child is more heavily favored than the husband's interest.[77] The *Casey* court says this:

> For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. … [T]he notice requirement will often be tantamount to the veto found unconstitutional in *Danforth.* The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.[78]

This binding authority should directly apply to abuse allegations in custody proceedings. State statutes that require a default standard of substantially changed circumstances to open a modification agreement when plausible domestic violence allegations are brought place those most in fear of the consequences of bringing an earlier domestic violence claim in the "gravest danger."

B. INCORPORATING COERCIVE CONTROL INTO CUSTODY MODIFICATION PROCEEDINGS IS A NATURAL PROGRESSION OF THE LAW

A handful of courts are beginning to recognize that coercive control behaviors are criminal forms of domestic partner violence. Two examples of these are *In re N.Y. Nourn*,[79] a recent 2006 California Court of Appeals decision, and a New Jersey Superior Court's interpretation of New Jersey's domestic violence statute in *C.G. v. E.G.*[80] *In re N.Y. Nourn* sheds light on the fact that some judges are recognizing that these coercive control abuses, even when nonphysical and unreported, are indeed criminal and need to be treated as such. *C.G. v. E.G.* demonstrates how a broadened definition of domestic violence, which includes coercion and duress, works effectively when judges interpret the statute and apply it to circumstances of coercive control.

The *Nourn* petitioner filed her writ on the grounds of ineffective assistance of counsel before the California Court of Appeals of the Fourth Appellate District to challenge a superior court ruling convicting her of murder in San Diego County. The petitioner argued that years of intimate partner duress and coercion forced her to kill another. She successfully argued that coercive control is criminal duress and that duress undermined the intent element required to find her guilty of murder. Dr. Mindy Mechanic, a psychologist who specializes in intimate partner violence, served as an expert witness in *In re N.Y. Nourn.* Dr. Mechanic wrote, "It is notable that no physically violent acts were perpetrated against Ms. Nourn prior to the evening of December 23, 1998 […]. However, Mr. Barker's use of coercive control tactics […] functioned effectively to dominate and control Ms. Nourn without his having to resort to the use of physically violent tactics."[81]

While states with progressive policies do recognize that domestic violence exists, most states still require some type of physical violence. However, one state making progress in this area is New Jersey. New Jersey's domestic violence statute lists criminal coercion as an enumerated offense, defining the act as:

> A person who, with purpose unlawfully to restrict another's freedom of action to engage or refrain from engaging in conduct, threatens to:
>
> (1) inflict bodily injury on anyone or commit any other offense;
> (2) accuse anyone of an offense;
> (3) expose any secret which would tend to subject any person to hatred, contempt, or ridicule or to impair credit or business repute;
> (4) take or withhold action as an official or cause an official to take or withhold action;
> (5) bring about or continue a strike, boycott, or other collective action except that such a threat shall not be deemed coercive when the restriction compelled is demanded in the course of negotiation for the benefit of the group in whose interest the defendant acts;
> (6) testify or provide information or withhold testimony or information with respect to another person's legal claim or defense; or
> (7) perform any other act which would not in itself substantially benefit the defendant but which is calculated to harm another person with respect to his health, safety, business, career, financial condition, reputation or personal relationships.[82]

Importantly, the statute, which provides "maximum protection for victims," recognizes that abuse can have both direct and indirect effects on children. The statute identifies a positive correlation between domestic violence of the partner and domestic violence of a child.[83] On June 4, 2015, the New Jersey Assembly Judiciary Committee indicated that criminal coercion can occur if the abuser threatens such offenses, "regardless of the immediacy of the threat."[84] By taking away this timing requirement, New Jersey's state legislature acknowledged that coercive control occurs usually over a long period of time. The abuse builds over the course of a relationship, and the extended duration is a strong reason that the abuser is able to have the type and level of control that he ends up creating over her.

Last year, a New Jersey Superior Court directly upheld these statutory amendments. In *C.G. v. E.G.*, the court held that an ex-husband's persistent threats and harassment, which intervened with the ex-wife's employment, were considered economic domestic violence, criminal harassment, and coercion per New Jersey's 2015 amendments to its domestic violence statute. The court upheld the statute, as well as social policy, when it held that domestic violence is often nonphysical. "By enacting [subsection seven of the Domestic Violence Act], the legislature has inferentially emphasized the reality that in the realm of domestic violence, a defendant may attempt to wrongfully coerce, intimidate, control, and harass a target through not only physical abuse, but through economic abuse as well."[85]

New Jersey's approach to defining domestic violence as criminal coercive control provides a model to other states as an approach to broadening the definition and interpreting the reformed statutes in the court system. It will be interesting to watch how courts in New Jersey continue to interpret its reformed domestic violence statute. Other states should take notice of New Jersey's approach.

IV. REOPENING THE CASE AND MAKING WAY FOR A SAFE HAVEN

Under a safe-haven reopening, plausible allegations of coercive control should permit the reopening of custody agreements to assess modification under a best interests standard, given the new facts before the court. A 2016 ruling from the highest court in Hawaii ordered exactly that.[86] The *Tumaneng* court overturned the lower court's ruling and required that the mother's prior domestic violence claims be heard in a request for modification. The ruling makes four important points that are directly applicable to a safe-haven reopening: (1) it indicates that a substantial change in circumstances is not the proper standard for modification; (2) it holds that a "history" of an abuser's domestic violence was relevant to a modification proceeding, which includes predecree abuse allegations; (3) it identifies that domestic violence statutes are in place because the parties are not on equal footing; and (4) it takes the initiative, even though the facts were not in the case, to identify that domestic violence includes nonphysical violence.

A. COERCIVE CONTROL APPLIED TO CUSTODY MODIFICATION—A CASE STUDY OF *TUMANENG V. TUMANENG*

In *Tumaneng,* the mother had petitioned for a custody modification, claiming domestic violence allegations and that she was under duress when she signed the initial custody agreement. This custody determination was uncontested and out of court, finalized through a settlement agreement subsequently incorporated into a final decree of divorce. In moving to modify the agreement, she argued that the initial agreement had been signed under coercion and duress. The mother had not made any prior allegations of domestic violence. The *Tumaneng* court held that the trial court erred when it did not consider the mother's evidence of domestic violence, which she did not allege prior to the filing of her motion to modify the custody terms from her initial final decree.[87] It found that the mother's pre-agreement domestic violence allegations must be heard because the perpetrator's history involved past instances of abuse, so these allegations were relevant to a just custody decision.

First, the *Tumaneng* court overrules the trial court's implementation of a substantial change in circumstances standard for modification. The court found that Hawaii courts have rejected this higher standard when reviewing a modification and that the correct standard is through the best interests of the child.[88] Under best interests, the standard is that all relevant evidence is admissible. Of note, the court expressly underscores "history," which makes the petitioner's allegations of prior abuse relevant, and thus admissible, under a best interests standard.[89] By reviewing the facts *de novo* in a modification proceeding, a purview of the history of the perpetrator's violence would include the "specific and direct allegations of abuse before making its custody determination."[90]

The *Tumaneng* court recognized also that domestic violence statutes are in place to protect victims of abuse because these persons are on unequal footing in separation and divorce proceedings. The court held that predecree abuse allegations were relevant because Hawaii courts have a rebuttable presumption against awarding sole custody to domestic violence perpetrators. Hawaii's legislative history identifies that the presumption is premised on the fact that in most cases, divorcing couples are on equal ground; so, the presumption is in place to protect children and spouses who are in families with a history of violence.[91]

Finally, while this case involved allegations of physical violence, the court went out of its way to address nonphysical violence: "We note that this definition of family violence is not limited to physical acts of domestic violence, which are alleged by the Mother in this case, but also includes nonphysical acts, such as threats."[92] By moving toward defining these abuses as criminal duress and coercion, with a definition that envelops economic, psychological, and emotional abuse, abuses like the ones laid out in *C.G. v. E.G.* and *Tumaneng* can be brought to the attention of the courts when reviewing petitions for custody modification.

B. SAFE-HAVEN REOPENINGS STRENGTHEN THE BEST INTERESTS STANDARD

The *Tumaneng* court's holding is dispositive proof that this article's reform recommendations work. A safe-haven reopening can effectively remedy a specific problem without upsetting the best interests of the child standard. In fact, such a reopening bolsters the best interests model by demanding that custody decisions be based on evidence that is more relevant, more investigated, and more accurate. If evidence of domestic violence is presented, it must still be weighed as evidence in determining whether the current custody arrangement no longer serves the best interests of the child. The petition must include evidence that the other parent's conduct "has a substantial adverse effect on the child."[93] With this framework in place, the spouse requesting the modification still carries the burden to prove that the child is better off with a different custody situation. Importantly, though, if that standard of proof is met, that proof should be sufficient to presume that the abuse has an adverse effect on the child.[94]

C. ADDRESSING "PANDORA'S BOX": CORROBORATING EVIDENCE

A corroborating evidence requirement would help counter the risk that this lowered modification standard would cause an influx of frivolous petitions and false domestic violence claims. This article's suggested proposal, to redefine domestic violence as coercive control and lower the standard required to open a custody agreement in a modification proceeding, cannot be suggested without acknowledging its potential weaknesses. These likely include the concern of frivolous lawsuits and false allegations. Indeed, it appears on its face that lowering the modification standard would create an easy avenue for bitter, noncustodial parents to allege, on the bare threads of their own testimony, past-occurring domestic violence to take custody away from their ex-spouses. First, it should be noted from the outset that "parent alienation syndrome" has been largely debunked.[95] A good way to handle this potential problem, however, is to require that advocates do their due diligence in filing a modification petition that includes corroborating evidence. Including an affidavit from a friend, a neighbor, or a child's teacher who has witnessed incriminating interactions would substantially increase the likelihood that the mother can sufficiently allege these abuse claims.

Another possibility is to find an expert who can assess the parents and develop a report. Again, though, there is stigma attached to party-hired experts in family law—the idea that one can pay for a favorable expert. However, if the petition for modification is filed, corroborating evidence is indeed integral to making a successful case once the agreement is opened and under review. It will require a conscientious lawyer to ensure that an expert is truly an expert in the field of domestic violence. Appropriately qualified and objective experts should suppress initial concerns from the bench. Clearly, judges bring to the bench their backgrounds, childhood, morals, education, and

implicit biases. Good lawyering and fair judges who are willing to listen case by case should help progress the legal system's understanding of domestic violence.

D. THE SIGNIFICANCE OF JUDGE-MADE LAW

This article proposes that, although legislative reform is a valid and substantial avenue for redress, judges have the ability to address coercive control situations already, without statutory changes. Judges can permit a safe-haven reopening in their courtrooms immediately by finding that, in some situations where a safe-haven reopening should be applied, the initial custody arrangement was procured through criminal duress or coercion. In most if not all states, duress and coercion are already in the state statutes. As such, judges can ameliorate current legal inadequacies efficiently and review safe-haven reopening petitions for modification, without requiring fundamental legislative reform. This article also proposes maintaining accountability by requiring that petitioners' advocates bring meritorious claims on behalf of their clients. The judge's role in divorce and custody proceedings can be a particularly subjective and discretionary one, often much more so than one finds in other areas of the law. "During the past two decades, judicial discretion in divorce cases has expanded. […] The adoption of gender-neutral divorce laws has similarly enhanced the role of judicial discretion in custody and alimony decisions."[96] Beyond certain constitutional precedent[97] and state-based statutory law,[98] family law judges carry broad discretion to weigh factors and evaluate facts on a case-by-case basis. Many have critiqued this expansive discretionary reach, and with good reason.[99] A judge's implicit bias can affect a custody proceeding dramatically, and this includes those judges who use their personal beliefs rather than evidence to determine whether there is a case of domestic violence before them. However, just as this discretion can be injurious, so too can a judge's inherent discretion offer opportunities for effective and progressive change when it comes to domestic violence reform.

V. CONCLUSION

Refining the family court's approach to domestic violence by recognizing coercive control as a catalyst to a safe-haven reopening would help resolve many of the dilemmas that the women described in this article face. A lowered modification standard gives domestic violence victims a leg to stand on to protect the well-being of their children. A lowered standard permits a lawyer to hold an entirely different consultation with a mother. It can be a constructive conversation during which an attorney can gather a fuller picture of past domestic violence and identify a potential remedy for much more than physical or sexual violence. This ensures competent lawyer advocacy and accountability. Safe-haven reopening petitions must be specific and must include corroborating evidence to ensure that there is a good-faith basis that can be investigated further once reopened.[100] This also requires attorneys and judges to recognize that domestic violence goes much further than physical abuse and documented restraining orders.[101]

Certainly, this might be the first time that these facts are being discussed. But, that is exactly the point. These facts need to make their way into a petition—and they may not be capable of doing so until after an initial agreement is signed. These facts need to make their way onto the desk of a judge in his chambers to ensure that the current custody arrangement was not coerced and that the facts tell the entire story. Each situation is different. Some petitions may not bring sufficient facts to change the custodial arrangement. Some petitions, however, will. A safe-haven reopening exposes and addresses a particular problem intrinsic to domestic violence and how it intersects with the law, and it does so narrowly. It ensures also that a petitioner and her lawyer are held accountable by properly raising the issues and pleading the case with sufficient facts and corroborating evidence. Importantly, a safe-haven reopening permits a just opportunity and avenue for redress when these facts are sufficiently raised.

NOTES

*First place winner of Family Law Writing Competition.

1. Throughout this article, I refer to the victim as a female and refer to the abuser as a male. While the historical trend was to treat men as the primary abuser, modern studies and knowledge have certainly brought to light the fact that domestic violence can happen to anyone. Men can be, and are, also victims of domestic violence. The same applies to those in civil unions and anyone in the lesbian/gay/bsexual/transgender/queer community. My reference to women is not to ignore other situations but rather to propose my argument more concisely in this article. A safe-haven reopening can apply to any victim of domestic violence, male, female, and/or a civil union partner, following divorce. For more information on the subject, see generally Melody M. Crick, *Access Denied: The Problem of Abused Men in Washington*, 27 Seattle U.L. Rev. 1035 (2004).

2. *See* Evan Stark, Coercive Control: How Men Entrap Women in Personal Life 79 (2007). Evan Stark, Rutgers professor and forensic social worker, has spearheaded the development of understanding among peers that coercive control is not only nonphysical violence but also a violation of human rights that must be addressed in this society and, importantly, in our legal system.

3. *See* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 Juv. & Fam. Ct. J. 21–22 (2003) (explaining that an abused mother might also agree to a reduced financial settlement in exchange for custody of her children. *See also* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. Cal. Rev. L. & Women's Stud. 133, 191 (1992).

4. *See* Sharon K. Araji & Rebecca L. Bosek, *Domestic Violence, Contested Child Custody, and the Court: Findings from Five Studies*, *in* Domestic Violence Abuse, and Child Custody Legal Strategies and Policy Issues 6–1–6-5 (Mo Theresa Hannah & Barry Goldstein eds., 2010) (the psychological effects of domestic violence are often worse than any physical abuses and can coerce the partner into being forced to cooperate due to fears of losing her children or economic hardship).

5. Most states require a substantial change in circumstances standard in any parent's custody modification request.

6. Or, if she had an attorney, there is also the troubling scenario where the initial attorney told her to sign that agreement over her deep concerns that the agreement was not in the best interests of the children.

7. *See* Douglas E. Abrams et al., Contemporary Family Law 937 (4th ed. 2015).

8. *See* Leigh Goodmark, A Troubled Marriage: Domestic Violence and the Legal System 34–35 (2012).

9. I refer to this reform proposal as a "safe-haven reopening" throughout the article for ease of communication and as a familiar reference point for readers.

10. Tumaneng v. Tumaneng, 382 P.3d 280 (Haw. 2016).

11. *See, e.g.,* Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation,* 35 Law & Inequality 311 (2017).

12. *See* Marsha Garrison, *How Do Judges Decide Divorce Cases?: An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. Rev. 401, 404 (1996).

13. *See generally* Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, 7(1) Online J. Issues in Nursing 3 (Jan. 31, 2002), http://ojin.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.html (reviewing the criminal justice response to domestic violence in this country, Erez notes that most adjudicated domestic violence cases involve physical battering, yet defense attorney strategies and discourse focus on the battered woman and coercive control defense); *see also Psychiatry: The Wife Beater & His Wife*, Time (Sept. 25, 1964), *available at* http://content.time.com/time/subscriber/article/0,33009,876203,00.html (examining the research of psychiatrists John E. Snell, Richard J. Rosenwald, and Ames Robey of domestic violence situations caused by the husband's alcoholism).

14. *See, e.g.,* Dintruff v. McGreevy, 34 N.Y.2d 887 (N.Y. 1974); Rosenthal v. Maney, 745 N.E.2d 350, 355 (Mass. App. Ct. 2001); Weinstein v. Weinstein, 934 A.2d 306 (Conn. App. Ct. 2007); *In re* Marriage of Armstrong, 805 N.E.2d 743 (Ill. App. 4 Dist. 2004); Berry-Tatum v. Berry, No. 2138, Sept. Term, 2015, 2016 WL 3976553 (Md. Ct. Spec. App. July 25, 2016); Sullivan v. Jones, 595 S.E.2d 36 (Va. Ct. App. 2004); *In re* Marriage of Brown and Yana, 127 P.3d 28 (Cal. 2006) (showing that in California, minor visitation changes that do not modify custody can be petitioned for under the lesser best interests standard). *See In re* Marriage of Lucio, 161 Cal. App. 4th 1068, 1079 (Cal. 2008); Enrique M. v. Angelina V., 121 Cal. App. 4th 1371, 1379, 1380 (Cal. 2004); Wade v. Hirschman, 903 So. 2d 928 (Fla. 2005).

15. Leslie Joan Harris, *Failure to Protect from Exposure to Domestic Violence in Private Custody Contests*, 44 Fam. L.Q. 169, 170 (2010).

16. *See* Stark, *supra* note 2, at 79.

17. Linda D. Elrod, Child Custody Prac. & Proc. § 17:1 (2018).

18. Megan Shipley, *Reviled Mothers: Custody Modification Cases Involving Domestic Violence*, 86 Ind. L.J. 1587, 1610 (2011).

19. *See, e.g.*, Newsome v. Newsome, 256 S.E.2d 849 (N.C. Ct. App. 1979).

20. Shipley, *supra* note 18, at 1610 (explaining that psychologists in the late 1960s and early 1970s even pushed to make custody orders permanent and nonmodifiable). *See generally* Joseph Goldstein et al., Beyond the Best Interests of the Child (1973). *See also* Andrew *S. Watson*, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 - Syracuse L. Rev. 55, 64 (1969) (showing that a child requires stability to develop a sense of identity).

21. Shipley, *supra* note 18, at 1610.

22. *Id.* (arguing that injustice that occurs when courts trend toward awarding custody to the abuser, rather than the victimized mother, because the mother is treated as "dysfunctional" and likely to enter into another abusive relationship).

23. *See* Abrams et al., *supra* note 7, at 937.

24. *See* Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.15, cmt. a (Am. Law Inst. 2018).

25. Abrams et al., *supra* note 7, at 944. *See* Knight v Knight, 53 So. 3d 942, 953 (Ala. Civ. App. 2010).

26. Abrams et al., *supra* note 7, at 944.

27. *See id.* (reflecting laws in Georgia, Kansas, and New Hampshire).

28. Harris, *supra* note 15, at 173.

29. Toby G. Kleinman & Daniel Pollack, Domestic Abuse, Child Custody, and Visitation: Winning in Family Court 128 (2017).

30. Abrams et al., *supra* note 7, at 815. *See also* Cal. Fam. Code Ann. § 3011 (West 2013).

31. Abrams et al., *supra* note 7, at 816.

32. *See* John A. v. Bridget M., 791 N.Y.S.2d 421, 429 (N.Y. App. Div. 2005) (Sullivan, J., concurring). According to the Uniform Marriage and Divorce Act Section 402 (1998), the best interests of the child factors include the following: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.

33. Abrams et al., *supra* note 7, at 859 (citing Harris, *supra* note 15, at 170).

34. *See* Wissink v Wissink, 749 N.Y.S.2d 550 (N.Y. 2002) (domestic violence is a factor to consider in awarding child custody but did not reach the level of rebuttable presumption against awarding custody to domestic violence perpetrators).

35. *See* Elizabeth Schneider et al., Domestic Violence and the Law 535 (2nd ed. 2008).

36. Lamb v. Lamb, 939 So. 2d 918 (Ala. Civ. App. 2006).

37. Kleinman & Pollack, *supra* note 29, at 107.

38. *See* Goodmark, *supra* note 8, at 45 ("existing legal definitions fail to capture the scope and complexity of domestic violence").

39. Stark, *supra* note 2, at 180.

40. According to the National Coalition Against Domestic Violence, only twenty-five percent of physical assaults, twenty percent of rapes, and fifty percent of stalking by the victim's partner are reported to the police. Nat'l Coalition Against Dom. Violence*, National Statistics,* https://ncadv.org/statistics (last visited August 21, 2018); Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization*, 63 Morbidity and Mortality Weekly Report: Surveillance Summaries 1–18 (Div. of Violence Prevention, Nat. Ctr. for Injury Prevention and Control, Sept. 5, 2014); *see also* Enrique Garcia, *Unreported Cases of Domestic Violence Against Women: Towards an Epidemiology of Social Science, Tolerance, and Inhibition*, 58 J. Epidemiology & Community Health 536 (Valencia, Spain, 2004), *available at* www.jech.com.

41. Stark, *supra* note 2, at 79.

42. *Id.*

43. *Id.* Equal protection violations have also been litigated regarding statutes' failures to provide similar programs for abused men and abused cohabitants. *See, e.g.,* Woods v. Horton, 167 Cal. App. 4th 658, 84 Cal. Rptr. 3d 332 (Cal. Ct. App. 2008). For information about domestic violence in nonmarital relationships, see also Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 Wm. & Mary L. Rev. 1841 (2006).

44. Diane R. Follingstad & Dana D. DeHart, *Defining Psychological Abuse of Husbands Toward Wives: Contexts, Behaviors, and Typologies*, 15 J. Interpersonal Violence 891 (2000).

45. *Id.*

46. Richard M. Tolman, *The Validation of the Psychological Maltreatment of Women Inventory*, 14 Violence Vict. 25 (1999).

47. Stark, *supra* note 2, at 275. According to Tolman's assessment, eighty-two percent of male perpetrators kept their partners from leaving the house, seventy-six percent forbade her to seek self-help, and seventy percent prevented her from leaving the house.

48. For more information on economic domestic violence, see Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, N.Y.S. B. Ass'n J. 41 (Feb. 2011).

49. *Id.* at 43. *See also* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. Davis L. Rev. 1107, 1134 (2008–2009) (arguing that control is at the center of all forms of abuse and that civil protection orders should address it).

50. Goodmark, *supra* note 8, at 40.

51. *About Domestic Violence*, U.S. Dep't of Just., Off. on Violence Against Women (2017), https://www.justice.gov/ovw/domestic-violence.

52. *See* Schneider et al., *supra* note 35, at 542.

53. Goodmark, *supra* note 8, at 41.

54. Abrams et al., *supra* note 7, at 860 (quoting Lynn Hecht Schafran, *Domestic Violence, Developing Brains and the Lifespan: New Knowledge from Neuroscience*, 53 Judges J. 32, 35 (2014)).

55. *See, e.g.,* Meier & Dickson, *supra* note 11, at 311.

56. *See, e.g.,* Zoe Garvin, *Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases*, 50 Fam. l.q. 173-192 (Mar. 2016).

57. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imaging the Solutions*, 11 Am. Univ. J. Gender Soc. Pol'y & L. 21 (2003).

58. Goodmark, *supra* note 8, at 41.

59. These states are Delaware, Hawaii, Illinois, and New Mexico.

60. *Id.*

61. The failures of, and lack of oversight in, other agencies, such as child protective services, have also contributed to why the current legal system fails to adequately address domestic violence situations. When mothers make domestic violence allegations in family court, courts often employ third-party investigatory and child protection agencies to investigate the abuse. There is no public policy underpinning, nor oversight over, the agencies' procedure for investigation. *See* Kleinman & Pollack, *supra* note 29, at 41.

62. A.B.A., *supra* note 56; *see also* Marriage of Schropp, No. H025384, 2004 WL 831259 (Cal. Ct. App. Apr. 19, 2004).

63. *See* Cal. Fam. Code § 3181. Repealed and added by Stats. 1993, Ch. 219, Sec. 116.87. Effective Jan. 1, 1994.

64. Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).

65. *See id.*; Pearson v. Callahan, 555 U.S. 223 (2009); Deshaney v. Winnebago County Dept. of Social Services, 489 U. S. 189 (1989).

66. Suzanne C. Swan et al., *Different Factor Structures for Women's Aggression and Victimization Among Women who used Aggression Against Male Partners*, 18 Violence Against Women 1045, 1048 (2012).

67. Walter S. DeKeseredy et al., Abusive Endings: Separation and Divorce Violence Against Women 15 (2017).

68. Stark, *supra* note 2, at 171–72.

69. DeKeseredy et al., *supra* note 67, at 15.

70. Stark, *supra* note 2, at 194.

71. *Id.*

72. DeKeseredy et al., *supra* note 67, at 15 (citing Kimberly A. Crossman et al., *"He Could Scare Me Without Laying a Hand on Me": Mothers' Experiences of Nonviolent Coercive Control During Marriage and After Separation*, Violence Against Women 454 (2016) ("exiting a relationship with a patriarchal, controlling man does not necessarily end the process of coercive control").

73. *See* Meier & Dickson, *supra* note 11, at 311.

74. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791 (1992).

75. *Id.* at 901, 2833.

76. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976).

77. *Id.* at 74.

78. Casey, 505 U.S. at 897, 2831.

79. *In re* N.Y. Nourn, Judgment, File No. D046347, 52 Cal. Rptr. 3d 31 (Cal. Ct. App. Dec. 14, 2006) (review denied and ordered not to be officially published Apr. 11, 2007).

80. C.G. v. E.G., Docket No. FV-1921-16 (N.J. Super. Ct. Ch. Div. June 30, 2016).

81. *Id.* at 22.

82. N.J. Stat. Ann. § 2C: 13–5 (2013).

83. *Id.*

84. Statement to Assembly No. 4016, State of N.J., Assembly Jud. Committee (June 4, 2015).

85. *See C.G.*, Docket No. FV-1921-16, at 13; s*ee also* Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. (2007) (treating domestic violence as criminal behavior); Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959 (2003–2004).

86. *See* Tumaneng v. Tumaneng*,* 382 P.3d 280 (Haw. 2016).

87. *See id.* at 468.

88. *Id.* at 474.

89. *Id.* at 476.

90. *Id.*

91. *Id.*

92. *Id.* at 475.

93. Kleinman & Pollack, *supra* note 29, at 53. For example, there will be cases where the allegations are insufficient to prove duress. *E.g., compare* Baker v. Baker, 862 So. 2d 659 (Ala. Civ. App. 2003) *with* Delchamps v. Delchamps, 449 So. 2d 1249 (Ala. Civ. App. 1984).

94. Kleinman at 53. To do otherwise would be a "mockery of public policy."

95. Kleinman & Pollack, *supra* note 29, at 57.

96. Garrison, *supra* note 12, at 404.

97. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979), in which an alimony statute proscribed only for wives was unconstitutional.

98. Child support is determined by state statute, a result of a federal government directive.

99. Garrison, after conducting her own research on family judges' discretionary ability, concluded that the "discretionary decision making at divorce is not clearly inferior to rule-based decision making." Garrison, *supra* note 12, at 514.

100. KLEINMAN & POLLACK, *supra* note 29, at 70.

101. *See* Pollet, *supra* 48, at 42 (citing Michael Satz & Elizabeth Barker Brandt, *Representing Victims of Domestic Violence in Property Distribution Proceedings After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 41 FAM. L.Q. 275, 278 (2007–09)).

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