Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse

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By Jeffrey R. Baker

I. Introduction

Domestic abuse afflicts families across eras, cultures and economic strata. Since the 1960s, increasing awareness, study and advocacy have generated political, social and legal innovations to confront violence within intimate relationships. As a result, every state now has adopted civil protection systems for victims of domestic abuse.2

These laws typically provide emergency injunctive relief to extricate a person from a dangerous relationship and to prevent future abuse. Defining “abuse” is central to civil protection regimes because a court may not issue a protection order without finding that abuse has occurred or is likely to occur. Most civil protection statues limit their scope by defining abuse as physical violence or by referencing criminal laws with elements of physical violence. These regimes require a predicate episode of physical violence or imminent, tangible threat of violence before providing relief, which usually is an injunction against continued violence.

Physical violence consumes the analysis, so these statutes do not address the root cause of the problem. Domestic abuse arises from a disproportionate and imbalanced demand for power and control in an intimate relationship. Violence is a result, not the cause, of this power and control dynamic. The oppressive partner will exert power, by force, coercion or manipulation, to control the other’s finances, freedom of movement, work, recreation, sexual activity, chores, parenting, education, relationships and other facets of life. Actions and direction within the relationship are not the result of negotiations, shared decision making or mutual bargains but follow the assertion of forceful, total hegemony of one over the other. This imbalance often manifests and advances long before the relationship becomes physically violent. Physical violence often is a final resort for control or a reaction to the other’s desire for greater independence and autonomy.

Several empirical studies conclude that civil protection orders are effective in preventing renewed violence, but these orders are not necessarily successful because the victim actually receives an injunction. Rather, studies suggest that civil protection orders are effective because the victim seeks the protection in the first place. By petitioning for an order, the victim shifts the

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2 Within domestic violence literature, most writers refer to those people subject to abuse as “victims,” although some scholars prefer terms like “survivors” or “targets.” This article addresses people who are in the midst of domestic abuse and are in need of greater legal recourse, so “victim” is appropriate and accurate.
power dynamic in her relationship, signaling to her abuser that she demands liberation and inviting public scrutiny of her plight.\(^3\)

If civil protection regimes accommodated this reality, instead of relieving only symptomatic violence, they would be more effective in preventing all forms of domestic abuse. Rather than focusing on violence alone, civil protection regimes should provide relief for non-physical, oppressive coercion. By enjoining coercion, a civil protection regime could prevent the violence to which it now only reacts.

II. The Rise of Civil Protection Orders as Legal Remedy for Domestic Abuse

A. A Brief History of Contemporary Legal Responses to Domestic Abuse

Domestic abuse, under other guises such as “wife beating” or “chastisement,” is an ancient phenomenon, and laws have addressed it for ages.\(^4\) The Romans limited such practices, and the English common-law gave rise to the famous “Rule of Thumb.”\(^5\) American law condoned or ignored family violence through the mid-1800s, when a few jurisdictions began to eliminate virtual immunity for wife beaters and generated some punishments for abusers. Even

\(^3\) This article refers to victims generally as women and to perpetrators as men. Although women certainly do perpetrate domestic violence on men and although domestic violence exists in homosexual relationships, the overwhelming reported incidents of domestic violence occur between men and women, with men inflicting abuse on women. See, e.g., Evan Stark, Coercive Control: The Entrapment of Women in Personal Life, 91-92 (2007); Developments in the Law – Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498, 1501 fn. 2 (1992-1993).

\(^4\) See Judith Armatta, Getting Beyond the Law’s Complicity in Intimate Violence Against Women, 33 Willamette L. Rev. 773, 783-786 (1997) (surveying cultural and social factors that contribute to legal accommodation of domestic violence, quoting Blackstone’s Commentaries, “For as he [the husband] is to answer for her misbehaviors, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children. . . .”)

\(^5\) See Emily J. Sack, Battered Women and the State: The Struggle for the Future of Domestic Violence Policy, 2004 Wis. L. Rev. 1657 (2004); Developments in the Law, supra note 3, at 1502. See also James Martin Truss, The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence, 26 St. Mary’s L.J. 1149, 1157-1160 (1994-1995). Truss provides a useful history of common law tolerance and gradual objection to domestic violence. “[The Rule of Thumb] permitted men to beat their wives with a rod or stick ‘no larger than a man’s thumb’ or small enough to ‘pass through a wedding band’ . . . as a natural and necessary right of control, incident to the man’s role as head of the family.” Id. at 1157 (citations omitted). Truss observes the cultural dynamic of gender subjugation from which the “Rule of Thumb” sprang:

Compounding this tacit approval of violence against women were popular myths that obscured domestic abuse. The “unity of husband and wife” and the “sanctity of home” limited abused spouses’ remedies to divorce or criminal actions. The “unity of spouses” fiction ratified the husband’s domination and control of his wife and expressly precluded any possible tort recovery for injuries he had inflicted. Treating husband and wife as one within the context of a male-dominated society rendered women invisible from the eyes of the law. Moreover, emphasis on the sanctity of the home allowed courts to ignore domestic violence, and domination of, women as “private matters.” This traditional justification for non-action in private family matters – to avoid disturbing domestic harmony or tranquility – is all the more suspect within the context of domestic violence.

Id. at 1159-1160 (citations omitted).
so, until the 1960’s, courts and legislatures still were reluctant to interfere into “family matters,” leaving violence behind closed doors as a purely private province and denying useful legal remedies to victims.\(^6\)

With the emerging feminist movement, Americans began to examine and address the problem more forthrightly as a matter of criminal law and public health.\(^7\) Initially, activists, counselor and civil rights advocates promoted the “battered women’s movement,” but soon lawyers, scholars and courts began to advocate for clearer recognition of the problem and to propose legal innovations to overcome cultural reticence.\(^8\) Courts became increasingly willing to inquire into marital relationships and to impose sanctions for physical violence that would be a crime in any other context.

Among these reforms, state legislatures have considered mandatory arrest policies in which police are bound to arrest someone on a domestic violence scene, and prosecutors have promoted “no drop” prosecutions in attempts to prevent victim-witnesses from coercion by their abusers in court. States began to recognize tort actions between spouses, abolished marital rape exemption, enhanced stalking crimes and crafted counseling diversion programs.\(^9\) In 1994, the federal government enacted the Violence Against Women Act of 1994 ("VAWA") which federalized some interstate domestic violence crimes and established federal grants and policy preferences for states to address legal and community responses to domestic abuse.\(^10\)

Civil protections orders are perhaps the most popular and commonly used legal tool to emerge from this era. Before the creation of civil protection orders, abuse victims could obtain injunctive relief or restraining orders only within the context of a larger action. In 1970, Congress passed the Intrafamily Offenses Act for the District of Columbia, which included the first form of civil protection orders.\(^11\) By 1992, every state had established civil protection statutes to provide civil and equitable remedies for people vulnerable to domestic abuse.\(^12\)\(^13\)

\(^6\) See Developments in the Law, supra note 3, at 1502-1503.

\(^7\) Id. at 1502 (discussing the tension between reformed legal remedies and continuing cultural biases against state interference in these intimate relationships). See Sack, supra note 5, at 1666 (“Feminists, particularly women who formerly had been in abusive relationships, developed the first safe houses and shelters for battered women attempting to flee their abusers. The early battered women’s advocacy movement was a grassroots effort to provide services and shelter to domestic violence victims.”)

\(^8\) See Jane C. Murphy, Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women, 11 AM. U. J. GENDER SOC. POL’Y & L. 499, 500-503 (2002-2003) (By the 1980s, “[t]he movement became dominated by lawyers, elected officials and courts. The work shifted from establishing shelters, safe houses, and hotlines, to drafting legislation, lobbying elected officials, and litigating cases to create and expand legal protections for battered women.”)

\(^9\) See Developments in the Law, supra note 3, at 1530-1543(detailed review of these innovations in state law).


\(^12\) See Murphy, supra note 8, at 502.

\(^13\) Every state and the District of Columbia provide for civil protection orders for victims of domestic violence:

B. Purposes of Civil Protection Statutes

States intend for civil protection regimes to provide an easily accessible, free-standing civil cause of action for a victim to obtain immediate, temporary, injunctive relief from physical violence. These statutes aspire to provide victims with safety, space, time and the wherewithal to escape and to establish herself independently and safely.

Many states include express policy provisions declaring their intent to prevent physical violence in domestic relationships. For example, Kansas’s Protection from Abuse Act includes this statutory direction: “This act shall be liberally construed to promote the protection of victims of domestic violence from bodily injury or threats of bodily injury and to facilitate access to judicial protection for the victims, whether represented by counsel or proceeding pro se.” Louisiana includes a statement of societal repentance, resolving to provide “immediate and easily accessible protection”:

The purpose of this Part is to recognize and address the complex legal and social problems created by domestic violence. The legislature finds that existing laws which regulate the dissolution of marriage do not adequately address problems of protecting and assisting the victims of domestic abuse. The legislature further finds that previous societal attitudes have been reflected in the policies and practices of law enforcement agencies and prosecutors which have resulted in different treatment of crimes occurring between family or household members and those occurring between strangers. It is the intent of the legislature to provide a civil remedy for domestic violence which will afford the victim immediate and easily accessible protection. Furthermore, it is the intent of the legislature that the official response of law enforcement agencies to cases of domestic violence shall stress the enforcement of laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated.

The Idaho legislature included a lengthy finding to support the statute and guide its interpretation:

14 Statutes refer to civil protection orders variously as no-contact orders, restraining orders, personal protection orders or protection from abuse orders, among other terms.
16 KAN. STAT. ANN. § 60-3101(b); see also, e.g., KY. REV. STAT. ANN. § 403.715.
17 LA. REV. STAT. ANN. § 46:2131.
Additionally, the legislature finds that a significant number of homicides, aggravated assaults, and assaults and batteries occur within the home between adult members of families. Furthermore, research shows that domestic violence is a crime which can be deterred, prevented or reduced by legal intervention. Domestic violence can also be deterred, prevented or reduced by vigorous prosecution by law enforcement agencies and prosecutors and by appropriate attention and concern by the courts whenever reasonable cause exists for arrest and prosecution.

The purpose of this act is to address domestic violence as a serious crime against society and to assure the victims of domestic violence the protection from abuse which the law and those who enforce the law can provide.

It is the intent of the legislature to expand the ability of the courts to assist victims by providing a legal means for victims of domestic violence to seek protection orders to prevent such further incidents of abuse. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior in the home is criminal behavior and will not be tolerated. It is the intent of the legislature to presume the validity of protection orders issued by courts in all states, the District of Columbia, United States territories and all federally recognized Indian tribes within the United States, and to afford full faith and credit to those orders. The provisions of this chapter are to be construed liberally to promote these purposes.  

C. Common Features of Civil Protection Statutes

Civil protection regimes provide standing to a narrow class of petitioners who may seek an emergency injunction. Typical civil protection regimes afford standing to spouses, cohabitating couples, couples with biological children in common, household members, minor children and adults petitioning on behalf of minor children.

Civil protection proceedings generally include two phases. First, designated courts have power to issue ex parte, emergency orders, without a hearing or notice to the defendant, if the court finds on the face of the petition that abuse has occurred. Then, with proper notice to the defendant and after an evidentiary hearing, the court may issue a final protection order.

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. . . . [A]n individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or having resided in the same household as the petitioner. . .

Upon a finding of abuse, courts may impose a great range of relief with relatively little due process. *Ex parte* orders usually include basic injunctions on contact and continued abuse, but final orders can provide child support, evict the abuser from their common residence, provide transportation to the victim and remove all the defendant’s firearms.21

21 See, e.g., IND. CODE § 34-26-5-9 (in pertinent part):

(b) A court may grant the following relief without notice and hearing in an ex parte order for protection or in an ex parte order for protection modification:

1. Enjoin a respondent from threatening to commit or committing acts of domestic or family violence against a petitioner and each designated family or household member.
2. Prohibit a respondent from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with a petitioner.
3. Remove and exclude a respondent from the residence of a petitioner, regardless of ownership of the residence.
4. Order a respondent to stay away from the residence, school, or place of employment of a petitioner or a specified place frequented by a petitioner and each designated family or household member.
5. Order possession and use of the residence, an automobile, and other essential personal effects, regardless of the ownership of the residence, automobile, and essential personal effects. If possession is ordered under this subdivision, the court may direct a law enforcement officer to accompany a petitioner to the residence of the parties to:
   A. ensure that a petitioner is safely restored to possession of the residence, automobile, and other essential personal effects; or
   B. supervise a petitioner’s or respondent’s removal of personal belongings.
6. Order other relief necessary to provide for the safety and welfare of a petitioner and each designated family or household member.

(c) A court may grant the following relief after notice and a hearing, whether or not a respondent appears, in an order for protection or in a modification of an order for protection:

1. Grant the relief under subsection (b).
2. Specify arrangements for parenting time of a minor child by a respondent and:
   A. require supervision by a third party; or
   B. deny parenting time;
   if necessary to protect the safety of a petitioner or child.
3. Order a respondent to:
   A. pay attorney’s fees;
   B. pay rent or make payment on a mortgage on a petitioner’s residence;
   C. if the respondent is found to have a duty of support, pay for the support of a petitioner and each minor child;

21
In order to grant a petition and provide relief, a court must find that the petitioner has demonstrated the requisite elements of domestic abuse. Thus, defining abuse is central to every civil protection statute. Every definition of abuse in these statutes includes incidents of physical violence or threats of physical violence, and most civil protection statutes define abuse with references to criminal codes that include physical violence.  

(D) reimburse a petitioner or other person for expenses related to the domestic or family violence, including:
   (i) medical expenses;
   (ii) counseling;
   (iii) shelter; and
   (iv) repair or replacement of damaged property; or
(E) pay the costs and fees incurred by a petitioner in bringing the action.

(4) Prohibit a respondent from using or possessing a firearm, ammunition, or a deadly weapon specified by the court, and direct the respondent to surrender to a specified law enforcement agency the firearm, ammunition, or deadly weapon for the duration of the order for protection unless another date is ordered by the court.

22 See, e.g., ALA. CODE ANN. § 30-5-2(a)(1):

1. ABUSE. The occurrence of one or more of the following acts, attempts, or threats between family or household members, as defined by this chapter:
   a. Assault. Assault as defined under Sections 13A-6-20 to 13A-6-22, inclusive.
   b. Attempt. With the intent to commit any crime under this section or any other criminal act under the laws of this state, performing any overt act towards the commission of the offense.
   c. Child abuse. Abusing minor children as defined under Chapter 15 (commencing with Section 26-15-1) of Title 26, known as "The Alabama Child Abuse Act."
   d. Criminal coercion. Criminal coercion as defined under Section 13A-6-25.
   e. Harassment. Harassment as defined under Section 13A-11-8.
   f. Kidnapping. Kidnapping as defined under Sections 13A-6-43 and 13A-6-44.
   g. Menacing. Menacing as defined under Section 13A-6-23.
   h. Other conduct. Any other conduct directed toward a member of the protected class covered by this chapter that could be punished as a criminal act under the laws of this state.
   i. Reckless endangerment. Reckless endangerment as defined under Section 13A-6-24.
   j. Sexual abuse. Any sex offenses included in Article 4 (commencing with Section 13A-6-60) of Chapter 6 of Title 13A.
   k. Stalking. Stalking as defined under Sections 13A-6-90 to 13A-6-94, inclusive.
   l. Theft. Knowingly obtaining or exerting unauthorized control or obtaining control by deception over property owned by or jointly owned by the plaintiff and another.
   m. Trespass. Entering or remaining in the dwelling or on the premises of another after having been warned not to do so either orally or in writing by the owner of the premises or other authorized person.
   n. Unlawful imprisonment. Unlawful imprisonment as defined under Sections 13A-6-41 and 13A-6-42.

23 Federal laws addressing domestic abuse are almost wholly devoted to physical violence and reacting to physical violence within families. See, e.g., 42 U.S.C. 10421(1) (VAWA’s definition: “The term “family violence” means any act or threatened act of violence, including any forceful detention of an individual, which— (A) results or threatens to result in physical injury; and (B) is committed by a person against another individual (including an elderly person) to whom such person is or was related by blood or marriage or otherwise legally related or with whom such person is or was lawfully residing.”)
D. Fixation on Physical Violence

The legislative findings, policy statements and the scope of defined domestic abuse in the protection statutes demonstrate an intentional fixation on physical violence. Physical violence consumes the judicial inquiry for civil protection orders. In order to obtain a civil protection order, an abuse victim must demonstrate an incident of physical violence, a threat of physical violence or the elements of a crime requiring physical violence. Once a court finds this antecedent violence, its protection orders are meant to prevent future violence by the perpetrator against his victim and to provide resources and time for the victim to establish herself independently of the abuser.  

The evident policy undergirding most civil protection regimes suggests that physical violence is the beginning and end of domestic abuse, or at least the only aspect of domestic abuse that the law can confront. Those civil protection statutes which discuss legislative purpose and policy do not speculate on the roots of domestic abuse. Instead, these statutes respond to domestic abuse as a sort of quasi-crime to be prosecuted by the victim as civil plaintiff.

Although civil protection orders can be useful to prevent continued or future physical violence, these statutes do not address more fundamental causes of domestic abuse. The focus on physical violence misses the greater dynamic present in abusive, intimate relationships. Physical violence is a symptom, not the disease, of domestic abuse. The disease is a dangerous, coercive imbalance of power and control within the intimate relationship. This endemic,  

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24 In its recent Standards for Practice in Civil Protection Order Cases, the American Bar Association’s Commission on Domestic Violence observes this limited vision with its definition for civil protection orders: “A civil court order, enforceable by law enforcement, intended to protect a victim and to stop the violence, dangerous and/or harassing behavior of a respondent.” STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES, § II (J) (2007).

25 A few states make some accommodation for non-violent emotional or psychological abuse, either in the predicate elements of abuse or the remedies available to victims. Section IV(D), infra, examines these statutes for insight into potential reforms that might capture coercive abuse in civil protection orders: Michigan, Illinois, Hawai‘i, Maine and Oregon.

26 The ABA’s Commission tentatively acknowledged this reality in its definition for domestic violence: “Physical abuse, alone or in combination with sexual, economic or emotional abuse, stalking or other forms of coercive control, by an intimate partner or household member, often for the purposes of establishing and maintaining power and control over the victim.” Id. § II(A).

27 See Leigh Goodmark, Law is the Answer? Do We Know for Sure?, 23 ST. LOUIS U. PUB. L. REV. 7, 28-30 (2004): But the legal system’s definition of domestic violence and the totality of battered women’s experiences of domestic violence bear little resemblance to one another. . . . By focusing so intently on physical violence, the legal system refuses to recognize how the other types of violence experienced by battered women affect their ability to function as parents and as people. . . . Moreover, by elevating physical violence over the other facets of a battered woman’s experience, the legal system sets the standard by which the stories of battered women are judged. If there is no assault, she is not a victim, regardless of how debilitating her experience has been, how complete her isolation, or how horrific the emotional abuse she has suffered. And by creating this kind of myopia about the nature of domestic violence, the legal system does battered women a grave injustice.
cultural dynamic creates an escalating cycle of abuse and violence, typically increasing in frequency and severity over time to maintain and enforce control.  

III. The Reality of Coercion in Domestic Abuse

Professor Evan Stark recognizes and criticizes this fixation on physical violence that permeates policies addressing domestic abuse:

The violence definition of abuse has much to recommend it. It is easy to apply, lends itself readily to measurement and comparison, appeals to audiences beyond the women’s movement, can be used across cultural and national boundaries, and bridges multiple disciplines. The focus on injury is also a useful rationing tool. It is simple to adjust the bar of injury required for real abuse so that intervention can match available resources. Given these benefits, it is a pity that it has been so hard to apply the definition in real life. . . .

In fact, because of its singular emphasis on physical violence, the prevailing model minimizes both the extent of women’s entrapment by male partners in personal life and its consequences. . . . Viewing woman abuse through the prism of the incident-specific and injury-based definition of violence has concealed its major components, dynamics and effects, including the fact that its neither “domestic” nor primarily about “violence.” Failure to appreciate the multidimensionality of oppression in personal life has been disastrous for abuse victims.

Limiting legal remedies to the prevention and deterrence of physical violence may interrupt the course of domestic abuse, but violence in intimate relationships flows from something more fundamental and seminal, an integrated, imbalanced conquest over the victims’ autonomy, independence and personhood. The various theories of domestic abuse and empirical studies distill to this reality, that physical violence merely is a symptom of oppressive, abusive coercion, not the root of domestic abuse.

A. Theories of Domestic Violence

As the battered women’s movement advanced, theorists have observed shifting power and control dynamics within abusive, intimate relationships. Competing theories diagnose domestic abuse across a spectrum from socio-cultural plight to psychological pathology, but they all recognize the imposition of control by force, coercion, intimidation and other emotional, economic and political tactics. Virtually all domestic abuse distills to a question of power, in

29 Stark, supra note 3, at 64.
30 Id. at 10.
culture or psychology, and violence is but one means of coercing responses from a victim. Stark identifies three prime theories for domestic abuse: sociological, feminist and psychological.  

1. **Sociology**

Sociological models suggest that domestic abuse springs from community and family structures, passed from generation to generation, which value violent conflict resolution and which are steeped in religious or social norms fostering gender inequality.

During childhood and adolescence, observations of how parents and significant others behave in intimate relationships provide an initial learning of behavioral alternatives which are “appropriate” for these relationships. If the family of origin handled stresses and frustrations with anger and aggression, the child who has grown up in such an environment is at greater risk for exhibiting those same behaviors, witnessed or experienced as an adult.  

2. **Feminism**

Feminist theories propose that patriarchy and male dominance are the fundamental causes of domestic abuse, that men use violence as a means of propagating the subjugation of women *qua* women.

Using historical and case-study data, they have concluded that male dominance – especially the *ideology* of male dominance – is the key factor underlying wife abuse. . . . Specifically, they hold that the primary source of wife abuse is the wife’s failure to live up to the husband’s ideals and expectations of what is means to be a good wife. Husbands experience stress in such situations. They abuse women in order to maintain dominance and control. 

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32 Stark, *supra* note 3, at 117 – 121. Some scholars classify their research into more discrete categories, such as psychoanalytic theory, social learning, social psychology, family systems, feminist theory and sociological theories. See e.g., Marsali Hansen and Michele Harway, eds., *Battering and Family Therapy: A Feminist Perspective*, 29-35 (1993). In their influential 1992 study, Molly Chadhuri and Kathleen Daly identify “two major social science perspectives on wife abuse – ‘family violence’ and ‘feminist’ – each having its own vocabulary, methods and interpretation. The latter perspective explicitly focuses on male domination and gender inequality as a major root of the problem. . . .” *Infra*, note 60, for full citation and expanded discussion.


34 See, e.g., Rhonda L. Lenton, *Power Versus Feminist Theories of Wife Abuse*, 44 *Canadian Journal of Criminology* 305, 310-312 (1995), reprinted *The International Library of Criminology, Criminal Justice & Penology, Domestic Violence* (Mangai Natarajan, ed., 2007). See also Armatta, *supra* note 4, at 779-781, 842 (citing David Levinson, *Family Violence in Cross-Cultural Perspective* 88 (1989). Armatta identifies legal structures, particularly within traditional societies and developing nations, that contribute to or exacerbate domestic violence: legal sanctions for wife abuse, marriage laws and customs, legal disabilities during marriage, marital dissolution laws, child custody, economics and property laws and access to legal system and other benefits of full citizenship and suffrage. She identifies four common factors that predict domestic violence in cross-cultural studies of traditional, small-scale societies: “(1) men control the greater share of economic resources; (2) men hold decision making-making power in the family, (3) availability of divorce is restricted for women; and (4) violence conflict resolution is valued.” The root of these factors lies constantly in an imbalance of power favoring men and lack of
3. Psychology

Psychological theories propose that abusers act violently against their intimate partners because of pathology, cognition or attitude. Psychological studies of domestic violence perpetrators suggest that abusers may experience personality disorders such as border-line personalities and paranoia, attachment disorders, trauma, identity disturbance, shame, and neurobiological or neural-structural anomalies. Psychology also has made great effort to explain why victims remain in abusive relationships and the reactions of victims and abusers to each other in intimate relationships.

4. Coercive Control

The theory of “coercive control” is a synthesis of these theories and has gained common approval among domestic abuse scholars and activists. The theory of coercive control is a framework of understanding domestic violence from the victims’ standpoint:

. . . . as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation and control. Assault is an essential part of this strategy and is often injurious and sometimes fatal. But the primary harm abusive men inflict is political, not physical, and reflects the deprivation of rights and resources that are critical to personhood and citizenship. Although coercive control can be devastating psychologically, its key dynamic involves an objective state of subordination and the resistance women mount to free themselves from domination. . . . Men deploy coercive control to secure privileges that involve the use of time, control over material resources, access to sex and personal service. Like assaults, coercive control undermines a victim’s physical and psychological integrity. But the main means used to establish control is the microregulation of everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually.

The theory of coercive control observes that domestic abuse is not a series of discrete incidents of violence or temper. From the victim’s vantage, domestic abuse is a continuous pattern of coercive and controlling behavior inflicting a range of harms in addition to physical injury. A batterer’s coercion does not force a victim’s compliance by physical assault but does

recourse for women. Domestic abuse and violence springs from values, relationships, social and institutional structures that promote male dominance and female subordination, or at least, the historic residue of these structures.


37 Stark, supra note 3, at 5; see also Stark, supra note 31.

38 Stark, supra note 3, at 99-100; see also Stark, supra note 31, at 976: The coercive control framework shifts the basis of women’s justice claims from stigmatizing psychological assessments of traumatization to the links between structural inequality, the
deprive a victim of liberty and volition by distorting her choices or perceived choices and the price to pay for disobedience. 39

Identifying abusive, coercive control demands close attention to individual contexts and singular relationships. Common bargaining and compromises among most couples may be healthy, but the same transactions may be coercive, abusive and oppressive in other contexts. Mary Ann Dutton and Lisa Goodman identify eight domains of control in which a batterer makes demands, imposes coercion and strips the victim’s autonomy:

- Personal activities/appearance (e.g. demand to wear a certain clothing or hairstyle), support/social life/family (e.g. refusal to allow target to seek help of counselor or talk with family members), household (e.g., demanding only specific foods be purchased), work/economic/resources (e.g. not allowing non-English speaking partner to learn English), health (e.g., not allowing target to obtain needed medication), intimate relationship (e.g., demanding target will not use birth control), legal (e.g., demanding the target engage in illegal activities), immigration (e.g. threats to report target to immigration officials) and children (e.g., threats to report target to child protective services). 40

Dutton and Goodman describe violence within the framework of coercive control: “Violence is simply a tool . . . that the perpetrator uses to gain greater power in the relationship to deter or trigger specific behaviors, win arguments or demonstrate dominance.” 41 Dutton and Goodman then set out to promote a “tighter conceptualization” of coercive control.

They begin with an examination and application of the “social bases” of power first described by French and Raven in the 1950s. 42 Upon these bases of power an “agent” influences a “target” to act. French and Raven identified six bases of power: coercive, reward, legitimate, referent, expert and informational. 43 Dutton and Goodman then explain the constant dynamic of coercive power in domestic abuse:

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39 See, e.g., Kuennen, supra note 31, 5, 15: “A victim may be dependent on her partner for money, health care, child care, transportation, or housing. A threat involving the loss of any of these may be just as effective as a threat of physical violence.”


41 Id. at 743.


43 See id. Coercive control is the agent’s ability to impose on the target things or actions the target does not desire or to remove or decrease desired actions or things. Reward power is the agent’s ability to give or take away things the target desires. Legitimate power is the agent’s ability to impose feelings, obligations or responsibilities on the target. Referent power is the agent’s ability to provide feelings of acceptance or approval on the target. Expert
Coercive power is the most central to theorizing about coercive control in violent relationships, although the remaining bases of power may also apply. Both can be distinguished from force in that force involves a complete lack of volition on the part of the target. That is, if sufficient force is imposed, the target has no discretion in responding (e.g., being forcefully held down while being raped). However, the target’s response to coercion does involve choice, although not “free choice.” Coercive control is based on the target’s belief that the target can and will experience negative consequences for noncompliance (e.g., getting beaten for not having dinner on the table, partner will have sex with someone else). The target can “choose” to comply (and hope to avoid threatened negative consequences) or risk punishment for noncompliance. Thus, the opportunity for resistance exists, but at a cost. Reward power also has a connection to coercive control in violent relationships since it is based on the target’s belief that the agent can and will provide a reward in return for compliance. Thus, the agent’s access to reward power (e.g., providing financial support, transportation, emotional intimacy) can be used to increase the target’s probability of complying with the agent’s coercion.\footnote{An abuser coerces his victim by issuing a demand and deploying a credible threat of consequences for failure to comply. Individual context and relationship culture shape coercive demands that may be explicit and obvious but also may be “integrated seamlessly into the day-to-day interactions of the partners’ lives.” To coerce, the abuser must deliver a credible threat with the demand. Likewise, the threat may be express, implied or understood. The threat becomes credible when the abuser has “set the stage” by inflicting the consequences in the past, creating an expectation of negative consequences, exploiting the victim’s vulnerabilities, wearing down her resistance and cultivating dependency on the abuser. Dutton and Goodman provide plausible examples of contextual vulnerabilities which a perpetrator may exploit to coerce responses or secure control over their intimate victims:}

An abuser coerces his victim by issuing a demand and deploying a credible threat of consequences for failure to comply.\footnote{Id.} Individual context and relationship culture shape coercive demands that may be explicit and obvious but also may be “integrated seamlessly into the day-to-day interactions of the partners’ lives.”\footnote{See id.} To coerce, the abuser must deliver a credible threat with the demand. Likewise, the threat may be express, implied or understood.\footnote{Id. Dutton and Goodman illustrate this dynamic for many women in abusive relationships who state, “‘I just knew that I had to _____ or else he would ____.’ Expectations become coercive demands when the expectation is held by the coercive partner and understood as such by the target and the price of noncompliance with those expectations is a contingent punishment or opportunity cost.”} The threat becomes credible when the abuser has “set the stage” by inflicting the consequences in the past, creating an expectation of negative consequences, exploiting the victim’s vulnerabilities, wearing down her resistance and cultivating dependency on the abuser.\footnote{See id.} Dutton and Goodman provide plausible examples of contextual vulnerabilities which a perpetrator may exploit to coerce responses or secure control over their intimate victims:

Illegal immigration status or legal problems increase vulnerabilities to threats involving exposure to police or other authorities. Language barriers increase vulnerability to threats that involve increased social isolation. History of childhood abuse or other dysfunctional family history can increase vulnerability to threats involving relationship termination or psychological manipulation. . . . In one case, a woman with breast cancer was exploited when her abusive partner

\footnote{power is the agent’s ability to provide skill or expertise or the target’s belief about the agent’s expertise. Informational power is the agent’s ability to provide knowledge or information to the target. Id. See id. Id. Dutton and Goodman illustrate this dynamic for many women in abusive relationships who state, “‘I just knew that I had to _____ or else he would ____.’ Expectations become coercive demands when the expectation is held by the coercive partner and understood as such by the target and the price of noncompliance with those expectations is a contingent punishment or opportunity cost.” See id. See id.}
insisted that she remain in the relationship, stating that no one would want a woman with those defects.\textsuperscript{49}

B. Social Science Evidence

Empirical social science studies consistently bear out these theories and demonstrate that abuse of power in intimate relationships begets violence. In studies examining the efficacy of civil protection orders, the dynamics of power, control and coercion determine outcomes more than any simple cause-and-effect calculus between legal remedy and compliance.

1. Grau and Faban

In 1984, Janice Grau, Jeffrey Faban and Sandra Wexler conducted one of the first empirical studies of civil protection orders.\textsuperscript{50} They interviewed 270 clients of federally funded Family Violence Demonstration programs in four states and examined three issues: who is more likely to seek a civil protection order, whether the civil protection order is effective to prevent future violence and what other conditions influence their effectiveness.\textsuperscript{51}

Although the researchers ultimately concluded that civil protection orders did not reduce overall violence significantly, the women who received orders believed they were effective. Civil protection orders actually were effective in reducing verbal abuse, harassment and physical violence, but only when prior physical injuries were not severe. Civil protection orders did not have a significant effect on future violence by spouses with longer and more severe histories of violence against their wives and third-parties.\textsuperscript{52} They also found several common attributes among the women who sought a civil protection order:

. . . . They are younger, employed women in shorter, less violent marriages, who have a history of prior separations. The presence of children in the home is also associated with receipt of a restraining order. . . . [T]he profile above suggests that restraining orders are more useful to victims who can become fiscally independent through employment, and are less often sought by older women in more violent marriages with longer abuse histories. In other words, restraining orders are more commonly received in cases where the victim has fewer emotional and financial ties to the batterer, or where the prior violence is less severe. Recipients also tend to have previously attempted to escape violence through separation. Victims who have longer histories of violence, and are financially tied to the assailant, may be less inclined to seek help through a restraining order.\textsuperscript{53}

In those early years when civil protection regimes were primitive and not widespread, Grau and Faban ultimately found that civil protection orders were not significantly effective at preventing future violence. They made suggestions that largely have been adopted, and civil

\textsuperscript{49} Id.


\textsuperscript{51} See id. at 20-21.

\textsuperscript{52} See id. at 19-20.

\textsuperscript{53} Id. at 21-22 (The authors used “restraining order” to identify civil protection orders.).
protection orders now are available in every jurisdiction. They proposed procedural reforms to ease access, speed relief, strengthen enforcement, and most of their suggestions appear in contemporary statutes, as described above in the Common Features section.\(^\text{54}\)

They called for another, substantive reform that has not gained sufficient ground, and which this article addresses: “The definition of abuse must be clear. It should include all conduct that is deemed criminal, including crimes against persons, property and the public. It should include psychological abuse, not only because restraining orders appear effective in preventing psychological abuse but also because of the interrelationship between psychological and physical abuse.”\(^\text{55}\)

2. Chaudhuri and Daly

In 1992, building on Grau and Faban, Molly Chaudhuri and Kathleen Daly published their study of thirty women who sought civil protection orders in 1986.\(^\text{56}\) They inquired whether batterers heeded the civil protection orders and whether police responses improved for women holding civil protection orders, and they studied women’s evaluations of the legal process and actors.\(^\text{57}\)

Chaudhuri and Daly made an observation similar to Grau and Faban’s comparing the victims who obtained civil protection orders to the broader population of battered women:

[They are younger, have completed more years of education, have paid jobs and earn more, and are in relationships of shorter duration with a history of separations. With a measure of financial and emotional independence from abusive partners, women who obtain TROs may be one step ahead of other abused women.\(^\text{58}\)]

They concluded that civil protection orders generally did increase police responsiveness and the likelihood of arrest for the abusers.\(^\text{59}\) Civil protection orders reduced the chance of physical violence unless the abuser had a prior criminal history, was unemployed or employed only part-time or abused drugs or alcohol.\(^\text{60}\)

Most important, Chaudhuri and Daly found that obtaining civil protection orders generally did empower women to end an abusive relationship, depending on the degree to which the women depended emotionally or economically on their abusers.\(^\text{61}\) “For some women, taking the steps to obtain a TRO already reflects their commitment to leave an abusive relationship, whereas other women are hopeful that the TRO might change the man’s behavior.”\(^\text{62}\) They

\(^{\text{54}}\) See id. at 24-26.

\(^{\text{55}}\) Id. at 25-26 (emphasis added).


\(^{\text{57}}\) See id. at 228-229.

\(^{\text{58}}\) Id. at 233.

\(^{\text{59}}\) See id. at 245.

\(^{\text{60}}\) See id.

\(^{\text{61}}\) See id.

\(^{\text{62}}\) Id.
conclude by noting that the very process of obtaining a civil protection order may be a greater benefit to abuse victims than directly deterring their abusers:

[T]he process is (or can be) empowerment. This occurs when attorneys listen to battered women, giving them time and attention, and when judges understand their situation, giving them support and courage. As important, though unfortunately less frequent, women’s empowerment can occur when men admit to what they have done in a public forum. Such conversations and admissions can transform the violence from a private familial matter, for which many women blame themselves, to a public setting where some men are made accountable for their acts. . . .

If the process of obtaining a [civil protection order] is partially its own reward, law students, attorneys and judges must be sensitive to the particular dynamics involved in battering relations and render legal advice and decisions accordingly. Attorneys cannot be expected to be friends or emotional buffers for all their physically abused clients, but many women wanted such support from their advocates. What a judge and counsel say in court and in chambers has important consequences for how a woman can redefine herself and change her situation and for how a violent man can be brought to change his behavior.  


In 2000, a group of researchers agreed with Chaudhuri and Daly and demonstrated that the civil protection process may be as important as the order itself. In a notable study of 150 Black, Hispanic and White women in Houston, Texas, the researchers strove to create a deeper, more thorough study than the relatively small studies that preceded it in early days of civil protection orders. The researchers evaluated whether the women experienced less violence by their intimate partners at specific intervals after petitioning for the orders.

All of the women in the sample had applied for civil protection orders, and the researchers divided them into those who received orders and those who did not, either because the woman dropped the petition, the court could not locate and serve the defendant or the court dismissed the petition. Of the 81 women who received a civil protection order, 36 reported a violation during the 18 months of the study, and most violations involved a breach of order to

63 Id. at 246.
65 See id. at 613-614. From 2,932 women who applied for civil protection order in the year preceding the study, 68% met qualifying criteria, and 49% received protection orders. One-hundred and fifty women agreed to participate in the study and agreed to several follow-up interviews for 18 months after their orders were granted. One woman committed suicide shortly after the study commenced, so the response rate was 99% with 149 women completing the study.
66 See id. at 615. Eighty-one petitioners received civil protection orders. Forty women dropped their petitions. Eighteen could not serve notice of process on their defendants, and courts dismissed 11 petitions.
remain a distance from a workplace, stalking, threats of violence or a combination of these factors.\(^{67}\)

McFarlane, et al., ultimately concluded that the petitioning process, not the actual receipt of an order, is the significant determinant affecting future abuse:

The 149 women who took part in this study reported significantly lower levels of intimate partner violence, including worksite harassment, up to 18 months after applying for a protection order. Whether women were granted or not granted the protection order made no significant difference in terms of the amount of violence they reported at the time of application for the order or during the subsequent 3, 6, 12 or 18 months.

. . . . Our results agree with those of others reporting significantly lower levels of violence experienced by women seeking assistance from the justice system, irrespective of the justice system outcome.\(^{68}\)

They cite another qualitative study observing why women choose to seek civil protection orders which “revealed a desire among women to regain some measure of control in their lives by making the abuse public.”\(^{69}\)

They viewed the legal system as a force larger than themselves and as having power over the abusers that they themselves had lost as a result of the abuse. Moreover, they felt a need to have the legal system both approve and reinforce their decision to leave the abuser. The protection order becomes an announcement that the abused woman refused to “take it” anymore and is acting on her own behalf. Our results appear to quantify these qualitative findings. *Once a woman applied and qualified for a protection order, a rapid and significant decline in violence scores occurred and was sustained for 18 months.*\(^{70}\)

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\(^{67}\) See id. at 616.

\(^{68}\) Id.

\(^{69}\) Id. at 617, citing K. Fisher and M. Rose, *When ‘Enough is Enough’: Battered Women’s Decision Making Around Court Orders of Protection*, 41 CRIMINAL DELINQUENCY 414-429 (1995). Professor Jane C. Murphy makes the following observations about victims’ goals for civil protection orders, goals which may confound attorneys interested in ultimate legal outcomes:

> [F]or many women, not following through with the proceeding to the final order was, to some extent, a choice. Getting the *ex parte* order alone helped them achieve some of their goals – getting the abuser to stay away, stopping the violence, or making a reconciliation possible. This data underscores an important message for advocates and state funders. When women file for a [civil protection order], they are pursuing this legal remedy as one strategy among many others – both legal and non-legal, public and private, formal and informal – to achieve their goals. They do not frame their goals in terms of the legal remedies available – for instance “to get a protective order.” Rather, their goals depend upon the particular context and stage in their relationship: “to stop the violence, to get him counseling, to keep him away from the kids.” If the legal remedy whether it is an *ex parte* or a civil protection order, gets them closer to that goal, it is viewed as helpful.


\(^{70}\) Id. (emphasis added).
Thus, the significant, defining factor predicting future violence was not the presence of an enforceable civil protection order, but it was the victim’s decision to petition for it in the first place. The court and legal remedy have less effect on the relationship than the victim demanding back power and autonomy.

4. Other Studies

Empirical studies on the efficacy of civil protection orders have not rendered wholly consistent results, although later, bigger, more sophisticated studies do demonstrate some statistically significant effect on recurring violence between the intimate partners. According to one review, by 2000, nine studies analyzed civil protection orders, including Grau and Faban and Chaudhuri and Daly. These rendered mixed results, although, as discussed above, civil protection orders were unrefined and not universally available when the studies commenced.

In addition to McFarlane, et al., at least three other studies since have found that civil protection orders have a significant, positive effect on recurring physical violence. In 1999, to examine risk factors for re-abuse, researchers examined court records and police filings in Texas for 210 couples who had received civil protection orders. These researchers found that prior to filing their petitions, 68% of the women reported physical violence, but only 23% reported violence after filing, determining that the number of women reporting physical violence declined by 66% after filing. The study also revealed that women of very low socio-economic status and women with children in the home are more likely to report re-abuse after obtaining a civil protection order. The authors proposed possible explanations for the significance of these risk factors:

Previous research from the social control/deterrence perspective has found that when men are arrested for abuse, the power structure of the home changes such that women report gaining power, and men report losing power. This increase in a woman’s relative power is, in part, the result of her ability to make the private event public by involving law officers and thereby increasing her partner’s fear of negative consequences. . . .

In 2003, a University of Washington study tracked 448 adult victims of domestic abuse for a year in Seattle. The researchers reported that women who obtained and maintained a civil

71 Thomas F. Capshew and C. Aaron McNeese, Empirical Studies of Civil Protection Orders in Intimate Violence: A Review of the Literature, 6 CRISIS INTERVENTION 151-167 (2000). These studies concerned access to civil protection orders, the process to obtain them, the risk of re-abuse after civil protection orders and victims’ experiences and perceptions in the process.
73 Id. at 214-215.
74 Id. at 220.
protection order were significantly less likely than victims without an order to be contacted, threatened or abused by the perpetrator.\textsuperscript{77}

Also in 2003, a researcher at Michigan State University, published a study to determine whether the type or severity of violence affected the success of civil protection orders.\textsuperscript{78} Burgess-Proctor drew a distinction between “patriarchal terrorism” and “common couple violence.” According to the author, “patriarchal terrorism” involves more severe mental and physical abuse used primarily to control and was identified in the study if one of three factors were present in the relationship: whether the abuser ever had beaten or choked his partner, whether the abuser ever had forced his partner into sexual activity or whether the abuser ever had used or threatened to use weapons against the victim.\textsuperscript{79} “Common couple violence” refers to milder abuse, perpetrated by both partners in a relationship.\textsuperscript{80} Burgess-Proctor hypothesized that civil protection orders would be less effective in cases of “patriarchal terrorism” than for “common couple violence.”\textsuperscript{81} The study, however, suggested that the severity or type of violence had no statistically significant effect on civil protection orders to prevent future violence.\textsuperscript{82} Even if the type or severity of violence is not significant, the power and control dynamic is ubiquitous; the study found that race, employment status and living arrangements did affect future violence significantly.\textsuperscript{83}

For example, this analysis indicates that employed women are less likely than their unemployed counterparts to experience a violation of their protection orders. Indeed, lower levels of reported violations among employed women seems logical given that this group likely has greater resources at their disposal (e.g. available cash, transportation, etc.) that allow them to remain apart from their partners without suffering undue financial hardship.\textsuperscript{84}

5. **Consistent Conclusions**

These studies tend to show that civil protection orders are generally effective in preventing or reducing future physical violence. This positive effect, however, probably is not the result of a defendant complying with a legal injunction. Instead, civil protection regimes generate relief to violence victims by affording them a lever to demand or regain power or to be liberated from coercive oppression, by communicating defiance, by seizing a power greater than the abuser’s in the law and by exposing her oppression publically.

\textsuperscript{77} See id. at 18. The authors suggest that civil protection orders may be more effective than Grau and Faban had found 20 years earlier because “sanctions for [civil protection order] violations have generally shifted from civil to criminal, and police response has improved following the institution of mandatory arrest laws; thus the possibility for violence prevention related to [civil protection orders] may have increased.” The authors also note methodological differences between the studies, including Grau and Faban’s failure to accommodate for various confounding factors.


\textsuperscript{79} See id. at 40-41.

\textsuperscript{80} See id. and the Abstract at 33.

\textsuperscript{81} See id. at 40.

\textsuperscript{82} See id. at 45.

\textsuperscript{83} See id. at 48.

\textsuperscript{84} Id. at 49.
Fundamentally, the successful civil protection order is merely a manifestation of the victim’s resolve to seize autonomy and rebalance power in the relationship. She gains relief from abuse because she decides to seek a protection order, not because she receives one.

Evidence suggests that many, if not most, women who petition for civil protection orders do not consider the legal remedy a primary goal. In 1995, a qualitative survey of women who filed for protection orders further illustrates the actual use of civil protection orders to abuse victims. A common theme among several women who participated in the interviews was that the CPO process was a means for creating a public record of the abuse they had experienced. It was a way for them to break their silence and send a message to the batterer that his behavior would not be tolerated. Several women also indicated that filing a protection order allowed them to take some initial steps toward regaining control of their lives.

In 2002, Mary Ann Dutton conducted interviews of women who received ex parte orders but did not return for final orders. These women did not frame their goals as success or failure in court, but their goals varied with their relationship dynamics. These women reported that they did not return for a final order because they felt supported by their advocates and the law, achieved a “wake-up call” for their partner, sent a “message,” motivated him to change or raised the stakes of continued abuse.

IV. Proposal: Civil Protection Orders Should Provide Relief from Coercive Control.

A. Calls for Reform

After describing these petitioners’ diverse and compelling goals, Murphy called for increased access to civil protection to accommodate their relationships: “The civil protection order has an important place in the broad range of strategies women use in response to abuse from their intimate partners. Therefore, we need to remove the barriers that prevent women who desire the full protection of this remedy from getting these orders.”

As Kuennen explored the effect of coercion on domestic abuse victims, she called for “the development of more discriminating legal approaches, to be applied in broader contexts that would reject the reflexive practices of many judges who do not take into account the complexities of analyzing coercion.” “Without attention to the batterer’s use of coercion – pressure, influence, or threat of force to the degree that these tactics interfere with a victim’s volition – courts hear only parts of the victims’ stories.”

Dutton and Goodman extend this call within their “tighter conceptualization” of coercion:

Finally, and perhaps most urgently, the role of coercive control in [intimate partner violence] needs to be more thoroughly understood in the legal context. In

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85 Waul, supra note 15, at 56, citing Fisher and Rose at 414-429.
86 Id.
87 Murphy, supra note 8, citing MARY ANN DUTTON, ET AL., ECOLOGICAL MODEL OF BATTERED WOMEN’S EXPERIENCES OVER TIME (2002).
88 See Murphy, supra, at 513.
89 Id. at 514.
91 Id. at 2.
that context, domestic violence is usually understood as a one-size-fits-all category, based on acts of assault alone without regard to the coercive context in which they occur. . . . Much work needs to be done to bring the notion of coercion in IPV into the legal arena. Without attention to this critical element of IPV, legal actors hear only parts of the stories the victims bring them every day in court. A more discriminating understanding of the nature of specific IPV crimes, including the element of coercion, would help secure more appropriate sentencing, as well as treatment for perpetrators, and more effective safety planning for victims.92

B. Enjoining Coercion

Civil protection orders could prevent domestic abuse more effectively by providing relief from coercion, not only physical violence. By including coercion or coercive control within the scope of defined “abuse,” civil protection regimes could afford relief that better matches the reality of domestic abuse. By providing a cause of action for abuse victims who have not yet, or not recently, been victims of physical violence, these victims might break the cycle of escalating violence and seek liberation before a coercive, abusive relationship becomes inevitably violent.

Every state requires evidence of physical violence or potential violence. This focus on violence is understandable because oppressive coercion or other non-violent abuse is difficult to quantify and prove. Violence is tangible and is already criminalized, with evidence and elements familiar to courts, lawyers and police. In order to intercept and prevent abusive, coercion, however, these regimes must shed the fixation of physical violence. When civil protection statutes define abuse, in addition to customary definitions of violence or references to criminal codes, the statute should include definitions to encompass non-violent, abusive coercion.

To codify coercive control, drafters must grapple with highly contextualized, subjective, discrete relationships. While seeking to extend civil protection relief to victims who suffer coercive abuse but not violence, drafters must guard against expanding the definition so far as to interfere with ordinary conflicts in non-abusive relationships. Quantified elements of coercive control might be so broad as to be indistinguishable from common arguments between aggrieved spouses, and they might dilute the promise of civil protection orders for those in legitimate need of relief.

Considering those risks, civil protections statutes could and should extend relief from coercive abuse. Such a definition might incorporate these elements:

(1) ABUSE. The occurrence of one or more of the following acts, attempts, or threats between family or household members, as defined by this chapter:

(a) Coercion:

(i) willful or knowing acts, courses of action, or demands and credible threats to compel an intimate, domestic partner, relative or household member to engage in conduct from which the person has a right to abstain or to abstain from conduct in which the person has a right to engage;

92 Dutton and Goodman, supra note 40.
(ii) with intent to coerce or maintain coercive power and control over the life, decisions, relationships or activities of an intimate, domestic partner, relative or household member;

(iii) which reasonably would cause a person in the petitioner’s position to engage in conduct from which that person otherwise would abstain or to abstain from conduct in which that person otherwise would engage.

Courts would examine proof of these elements against the preponderance of evidence standard. Petitioning victims would present proof that their abuser acted to deprive the victim of autonomy and independence against her will using coercive tactics to establish and maintain power and control.

For example, coercion codified with these elements in a civil protection statute would provide relief for victims in those relationships illustrated by Dutton and Goodman:

The birth of a child can be exploited if, for example, an abusive partner threatens to remove the child’s coverage on his medical insurance if his partner does not comply with his desire for sex immediately following the birth of the child. . . . Numerous clinical examples have shown that creating financial indebtedness by insisting that all expenses be charged on a credit card in the partner’s name is not uncommon. Forcing one’s partner to quit a job, become involved in illegal activities (e.g. fraud, elicit drugs) or engage in shameful experiences (e.g., sex with strangers, children or animals) also can create vulnerabilities such as physical or mental health effects of traumatic violence exposure, fear of future revictimization, or economic loss.93

Within each of these scenarios, the abuser exerts coercive control over his victims, not by threatening or perpetrating violence, but by threatening untenable, albeit often lawful, consequences on the victim for failure to acquiesce. Under existing regimes, she would not have a cause of action for protection, but adding elements of coercion to abuse definitions would afford relief, before she suffered the threatened consequence or violence for refusing to be subjugated.

“Given the insidious use of pressure by a batter to control a victim, and the goal of drafters of [civil protection orders] to prevent abuse in all its forms, defining which pressures are extraordinary is a daunting task.”94 No relationship is completely free of persuasion or influence, and civil protection orders should not substitute for marriage therapy. The great challenge is to define what actions and threats violate voluntary, ordinary compromises and bargaining in relationships to create oppressive, abusive, coercion.95

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93 Dutton and Goodman, supra note 40.
94 Kuennen, supra note 31, at 16. Kuennen provides a thorough examination of the contextual subjective and bias problems of drafting statutes that could encompass abusive coercion without violence. She calls for more “discriminating legal approaches” but does not proposing elements and language for such a statute.
95 See id.; see also Dutton and Goodman, supra note 40.
The elements above may capture the notions of coercion, but the greatest challenges are in proof and remedy. Courts must inquire into the relationship to identify the vulnerabilities, control structures and threatened consequences to find coercive control. If a court finds that an abuser has deployed a demand that the petitioner reasonably would resist if not for his credible threat to exploit her personal vulnerabilities, then the court would shape a remedy to fit the petitioner’s position.

Kuennen observes the importance of context and subjectivity in identifying abusive coercion: “Individuals enter abusive relationships with different levels and types of vulnerabilities. The vulnerability may not necessarily be a weakness, but merely something the batterer may exploit or take away.”96 Thus, remedies for coercion would be as individualized and situational as the relationships they address. Probably remedies will address primarily the credible threat expressed by the perpetrator, not the demand. For instance, in the case above where “an abusive partner threatens to remove the child’s coverage on his medical insurance if his partner does not comply with his desire for sex immediately following the birth of the child,” the judicial remedy would enjoin the abusive partner from canceling the child’s medical coverage without showing some legitimate economic reason as good cause.

C. Promising State Provisions

Although no civil protection statutes encompass coercion or coercive control as articulated by the social scientists and as proposed here, a few states have made efforts to relieve abuse that is not strictly physically violent. These states’ civil protection regimes accommodate limited incidents of emotional and psychological coercion.

Michigan’s civil protection regime includes a promising catch-all provision within its list of acts to be enjoined, its effective definition of abuse: “Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.”97 Although this provision might include coercive demands and threats, probably the “interference with personal liberty” refers to immediate restraint of physical movement or communication, not life decisions. It is broad, however, and follows other non-violent elements, such as “interfering” with the petitioner at her work or school and “engaging in conduct that impairs petitioner’s employment or educational relationship environment.”98 This statute does not specifically conform to the observed dynamics of coercive control, but a creative advocate and an insightful judge might find that it covers the elements proposed above to capture coercive control.99

96 Id. at 18.
99 No Michigan state appellate court has construed the statute specifically to include non-physical coercive control. A judge conceivably could reach this conclusion within her very broad discretion to craft custom relief, as described in Perrett v. Rhode, No. 267649, 2007 WL 913341, at *1 (Mich. App. Mar. 27, 2007)(citations omitted): “The granting of injunctive relief, and specifically the issuance of a PPO, lies within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.’ The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations; instead, there may be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, it has not abused its discretion and so the reviewing court should defer to the trial court’s judgment.”

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Likewise, Illinois’s statute could extend far enough to provide relief for oppressive coercion. Although its Domestic Violence Act defines abuse with requisite elements of physical violence and harm, it also provides for “intimidation of a dependent” and “interference with personal liberty.” 100 Its remedies provisions contemplate relief for non-violent exploitation, and its Purpose may accommodate the theory of coercive control:

[To] support the efforts of victims of domestic violence to avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse and, when necessary, reduce the abuser’s access to the victim and address any related issues of child custody and economic support, so that victims are not trapped in abusive situations by fear of retaliation, loss of child, financial dependence, or loss of accessible housing or services. 101

Hawaii contemplates relief for “extreme psychological abuse,” defined as “intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such a course of conduct would cause a reasonable person to suffer extreme emotional distress.” 102 This form of emotional abuse might provide relief for abusive coercion, but the infliction of “extreme emotional distress” is a measure of injury, not an articulation of the power and control at the root of domestic abuse.

Maine’s statute includes this clause in its definition of abuse: “Compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage. . . .” 103 Force is a principle in the definition of abuse, but compelling by intimidation may reach certain coercive tactics. The Maine statute does not define “intimidation.” Probably, in keeping with its expressed purpose, this statute contemplates more immediate harassment and acute threats, not contextual coercion driven by discrete vulnerabilities. The purpose section of the Maine statute includes the same language as the Illinois statute set out above. 104

While Oregon’s definitions of abuse all require findings of physical violence, its remedies options reflect the situational, contextual nuance demanded by coercive relationships. 105 In its list of available civil protection remedies, Oregon’s statute sets forth these flexible definitions:

(4) "Interfere" means to interpose in a manner that would reasonably be expected to hinder or impede a person in the petitioner's situation.

(5) "Intimidate" means to act in a manner that would reasonably be expected to threaten a person in the petitioner's situation, thereby compelling or deterring conduct on the part of the person.

100 See 750 ILL. COMP. STAT. 60/101, 103.
101 See 750 ILL. COMP. STAT. 60/102(4).
102 See HAW. REV. STAT. § 586-1.
103 See ME. REV. STAT. ANN. tit.19-A, § 4002(C).
104 See ME. REV. STAT. ANN. tit.19-A, § 4001 (3).
105 See OR. REV. STAT. § 107.700.
(6) "Menace" means to act in a manner that would reasonably be expected to threaten a person in the petitioner's situation.

(7) "Molest" means to act, with hostile intent or injurious effect, in a manner that would reasonably be expected to annoy, disturb or persecute a person in the petitioner's position.  

Oregon courts must inquire into “the petitioner’s position” and shape remedies which conform to her circumstances and relationships. This is a useful instruction to courts that they should consider individual vulnerabilities.

D. Other Consistent Reform Proposals

Other scholars have recognized the need to reform legal remedies to accommodate coercive tactics. The three writers examined here each seek to answer the theoretical calls for reform with specific policy proposals. Their proposals are consistent with the proposed reform expressed here. Although these writers do not address civil protection orders directly, they do observe the dynamics of power, control and autonomy endemic to abusive relationships. They are interesting and hopeful but likely would not create practical, accessible legal tools for victims subjected to oppressive coercion without predicate violence.

In 1995, Merle H. Weiner argued “for a per se standard of outrage whereby the defendant’s conduct would be outrageous as a matter of law if he violated an injunction issued for a woman’s protection. . . . Upon proving that the defendant had in fact willfully violated a civil protection order, the plaintiff would establish conclusively the most important element of the tort.”  

By expanding the tort of outrage, the author hopes “to provide a useful remedy to women who find the existing remedies (including the tort) inadequate. In general, the proposal may help the victims shut out of the criminal justice system, either because the abuser’s conduct is not criminal, or because the criminal process is ineffective for domestic violence victims.”

This proposal is promising because it would expand remedies available to an abuse victim, freeing her from dependence on police and criminal courts, one of the purposes at the very heart of civil protection regimes. Weiner’s proposal recognizes that abuse and violations of a civil protection order are not necessarily violent or criminal acts within themselves, although violation of an order almost always is a misdemeanor, regardless of the form of the violation. This proposal would strengthen a petitioner’s options and would raise the stakes on a perpetrator by invoking tort liability and punitive damages. This proposal to expand the scope of the tort might promote obedience to a civil protection order for those defendants who were not judgment-proof. To avail herself of this cause of action, however, the petitioner still must have obtained a civil protection order and thus have suffered criminal violence already.

In 1998, Christine O’Connor sought to derive a constitutional “right to autonomy” for domestic abuse victims from the penumbras that yield the constitutional right to privacy:

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106 Id.
108 Id. at 189-190.
At the core of individual autonomy is the fundamental right to make decisions important to one’s destiny. The Supreme Court has found decisions as whom to marry, whether to conceive a child, whether to terminate a pregnancy and whether to refuse life-sustaining medical treatment to be constitutionally protected liberty interests. Deliberative autonomy, as established by the Court’s substantive due process decisions, safeguards the privacy of individuals when deciding matters central to family structure. The victim of domestic violence must confront issues and make decisions pivotal to the survival of her family; these decisions fall within the scope of guarantees provided by the Court’s substantive due process decisions.\textsuperscript{109}

O’Connor applies this theory to no-contact protection orders issued in criminal prosecutions. Essentially she advocates for a victim’s right to a voice in sentencing and prosecution. She argues that prosecutors and judges must listen to a victim and consider the many, contextual and personal factors that shape her desired outcome:

The issuance of a criminal no-contact order, in essence, separates a family, forcing one member out of the home. The emotional and financial hardships inherent in such an action should not be ignored. In addition to these concerns, the history of violence, or lack thereof, within the relationship needs to be considered. In failing to allow for victim input in the process of defining the conditions of a pretrial release, courts ignore the victim’s right to determine the structure of her family.\textsuperscript{110}

In 2005, Joy M. Bingham called for inclusion of emotional abuse as grounds for a civil protection order.\textsuperscript{111} She argues that civil protection regimes should include “emotional abuse” within the scope of abuse that gives rise to a cause of action. She does not provide an actual definition of emotional abuse but thoroughly discusses the problems and subjectivity inherent in the phenomenon.\textsuperscript{112} Bingham does not equate emotional abuse to coercive control, but she quotes an expert in a Louisiana domestic case who defined “mental abuse” as “a form of domestic violence in that it is a method of controlling the actions and thoughts of one person for the purpose of controlling the relationship.”\textsuperscript{113} This is coercive control, and civil protection orders could and should extend relief to its victims.

V. Conclusion

Civil protection orders are useful, effective tools to prevent future domestic abuse and to extricate victims from dangerous relationships. A fixation on physical violence hampers current systems, requiring incidents of physical violence or imminent threats of violence before affording victims relief and protection. Victims of domestic abuse must await violence before availing themselves of the law.

\textsuperscript{110} \textit{Id.} at 967.
\textsuperscript{112} \textit{Id.} at 843.
\textsuperscript{113} \textit{Id.} at 842, citing \textit{Dean v. Dean}, 579 So.2d 1124, 1127 (La. Ct. App. 1991).
Domestic abuse does not arise from physical violence. Rather, physical violence is a manifestation of oppressive power and control dynamics within the abusive relationship. Very often, physical violence is simply another tool by which an abuser seeks to dominate and oppress his victim. Before an abusive relationship escalates into violence, the abuser typically has deployed coercive tactics to deny his victim autonomy, independence and capital in the relationship. An abuser may seek to control his partner through emotional, psychological, social, financial, cultural and personal means that are not physically violent and that are not illegal.

Civil protection statutes would afford more effective protection by creating causes of action and relief for abusive, oppressive coercion. By providing a tool for victims to resist coercion and to strengthen her power in an abusive relationship, civil protection statutes could prevent violence before it occurs and could support a person who would be free of her oppressor and who would insist on the liberty inherent to her humanity.