

What Do You Get When You Abuse Your Spouse? Spousal Support.

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*“[G]ranted spousal support to a convicted abuser is unconscionable and constitutes unjust enrichment . . . [S]pousal support orders in such domestic violence cases potentially force victims of abuse to remain dangerously entangled in the abuser’s web of violence and intimidation.”*¹

I. INTRODUCTION

After 23 years of marriage, David leaned into Amanda and whispered, “We are going to die tonight.”² When Amanda got home from work that day, everything she knew had changed.³ David crushed her cell phone, house phone, and laptop.⁴ If she yelled out or contacted anyone for help, he threatened to kill them with his ready and loaded shotgun.⁵ David forced Amanda into his car and drove erratically down a desolate county road.⁶ He made up his mind.⁷ He unbuckled Amanda’s seatbelt and turned to her and whispered: “We are going to die tonight.”⁸ Moments later, David pulled over in an unknown location, got out of the car, and walked over to the passenger side door.⁹ He picked up a hammer and swung it at Amanda’s head.¹⁰ Miraculously, the hammer missed.¹¹ Amanda believed she had survived her nightmare when the courts convicted David of domestic assault, battery, and abduction, and she filed for divorce.¹² Notably, divorce is usually the only means of escaping an abusive environment.¹³ Shortly thereafter, however, a family court awarded David spousal support, and Amanda began making payments to her abuser.¹⁴

Behind closed doors, or hidden beneath a blanket of silence, “nearly 20 people

1. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1221, at 3 (Aug. 23, 2001).
2. Noura Bayoumi, *Battered Wife Must Pay Abuser Alimony—That’s Still the Law*, WTVR (Feb. 16, 2015, 5:23 PM), <http://wtvr.com/2015/02/16/battered-wife-must-pay-abuser-alimony-thats-still-the-law/> (on file with *The University of the Pacific Law Review*). The names have been changed to preserve the privacy of the parties involved.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1221, at 3 (Aug. 23, 2001).
14. Bayoumi, *supra* note 1.

per minute” physically abuse “an intimate partner in the United States.”¹⁵ Domestic violence is a serious social problem and health concern that ravages the lives of an estimated 10 million people per year.¹⁶ It tears through one’s thoughts, feelings, behaviors, and personality.¹⁷ But domestic violence does not solely impact the victim; it perpetuates through the lives of children, relatives, friends, and employers surrounding the abuse.¹⁸ In the United States alone, domestic violence hotlines receive approximately 15 calls per minute, adding up to roughly 21,000 calls a day.¹⁹

For California law to provide meaningful protection to domestic violence victims, the California Family Code (Family Code) must take into account the realities of domestic violence.²⁰ Thus, California must enact legislation that recognizes the prevalence of unreported domestic violence and acknowledges that the criminal justice system may not convict all abusers of their crimes.²¹ Such legislation must also consider that the family law system hinges on judicial discretion.²² To do so, it is necessary that legislation minimize judicial discretion in the presence of domestic violence convictions but maximize discretion in cases of unreported abuse.²³

To protect domestic violence victims, California legislation should address documented, convicted, and unreported acts of domestic violence perpetrated by one spouse against the other in a judgment for spousal support.²⁴ Therefore, the following are clear: (1) legislation must not require a conviction to trigger protection; (2) documented evidence of prior domestic violence must create a presumption that abusive spouses cannot collect spousal support judgments; (3) legislation must completely terminate a convicted spouse’s ability to collect spousal support judgments; and (4) legislation must create a presumption that abusive spouses cannot collect spousal support judgments if a judge could find by

15. *Statistics*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <http://ncadv.org/learn-more/statistics> (last visited Feb. 15, 2017) (on file with *The University of the Pacific Law Review*).

16. *Id.*

17. *Effects of Domestic Violence*, JOYFUL HEART FOUND., <http://www.joyfulheartfoundation.org/learn/domestic-violence/effects-domestic-violence> (last visited Feb. 15, 2017) (on file with *The University of the Pacific Law Review*).

18. *Id.*

19. *Domestic Violence in California*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <http://ncadv.org/images/California%20Fact%20Sheet.pdf> (last visited Feb. 15, 2017) (on file with *The University of the Pacific Law Review*).

20. Michele Nealon-Woods, *The Realities of Domestic Violence and Its Impact on Our Society*, HUFFINGTON POST (Oct. 19, 2015, 1:44 PM), http://www.huffingtonpost.com/michele-nealonwoods/domestic-violence_b_8316888.html (on file with *The University of the Pacific Law Review*).

21. *Id.*

22. See CAL. FAM. CODE § 4320(a)–(n) (West 2016) (allowing a judge to consider any factors he or she deems just and reasonable in the circumstances).

23. *Id.*

24. *Infra* Parts IV.A–C (suggesting proposed legislation).

a preponderance of the evidence domestic violence existed in the relationship.²⁵ California legislation, therefore, should weigh heavily in favor of the domestic violence victim.²⁶

Part II of this Comment provides background information on spousal support apportionment for domestic violence victims in California.²⁷ Part III describes how other states have approached this problem.²⁸ Part IV proposes legislation that would fix the Family Code to further public policy and sufficiently protect victims of domestic violence.²⁹ Part V raises potential opposition arguments the proposed legislation may present.³⁰ Finally, Part VI concludes that the proposed changes would produce fairer spousal support determinations and rightfully address the issue of domestic violence victims funding their abusers.³¹

II. SPOUSAL SUPPORT AWARDS TO DOMESTIC VIOLENCE ABUSERS IN CALIFORNIA TODAY

California is a “no-fault” divorce state.³² This means California law does not require a spouse to prove the existence of socially reprehensible grounds for divorce prior to the dissolution of marriage.³³ To obtain a divorce in California, a married person must file a petition asserting irreconcilable differences or incurable insanity.³⁴

In any proceeding for the dissolution of marriage, spousal support determinations hinge on delineated factors set out in Section 4320 of the Family Code.³⁵ Thus, judges have the power to determine the amount and duration of a spousal support judgment.³⁶ It is also a judge’s responsibility to identify the

25. *Infra* Parts IV.A–C (suggesting proposed legislation).

26. *Infra* Parts IV.A–C (suggesting proposed legislation).

27. *Infra* Parts II.A–B (explaining how judges determine spousal support judgments in California).

28. *Infra* Parts III.A–B (describing ways other states have attempted to solve this problem).

29. *Infra* Parts IV.A–C (addressing benefits of the proposed legislation).

30. *Infra* Parts V.A–B (questing potential issues with proposed legislation).

31. *Infra* Part VI (concluding proposed legislation is necessary to protect all domestic violence victims).

32. CAL. FAM. CODE § 2310(a)–(b) (West 2015).

33. *Id.* (excluding socially reprehensible grounds for dissolution of marriage).

34. *Id.* (defining irreconcilable differences broad enough to include any reason a spouse has for ending the marriage).

35. *Id.* § 4320(a)–(n) (West 2016) (including potential earning capacity and marketable skills of the supported party, education and career contributions of the supported party to the supporting party, ability of the supporting party to pay spousal support, needs of each party based on the status of marital living, prior obligations and asserts of each party, duration of the marriage, ability of supported party to take on profitable employment without interfering with the best interests of dependent children, age and health of both parties, documented evidence of domestic violence, imminent tax consequences to both parties, hardships to both parties, reasonable period of time, criminal conviction of an abusive spouse, and any others factor the court determines are necessary to consider to abide by justice).

36. *Id.* § 4330(a) (West 2000).

supporting and supported party.³⁷ A judge's determination is made on a case-by-case basis and centers around what he or she believes is "just and reasonable" based on the standard of living established by the two parties throughout their marriage.³⁸

Existing law restricts a judge's discretion in two situations: a conviction for attempted murder or a violent sexual felony.³⁹ The Family Code prohibits a spouse convicted of either crime from receiving a spousal support award.⁴⁰ A judge, however, does not similarly relinquish the power to grant spousal support judgments in all situations of documented, convicted, or unreported acts of domestic violence.⁴¹

No Family Code provision protects victims of unreported domestic violence within a home.⁴² A judge will only consider documented or conviction evidence of domestic violence in a spousal support judgment.⁴³ Section A explains how courts determine spousal support judgments when there is evidence of documented domestic violence.⁴⁴ Section B discusses how courts determine spousal support judgments if one spouse has a domestic violence conviction.⁴⁵

A. Documented Evidence: Factor I

Family Code Section 4320(i), known as "Factor I," allows courts to consider documented evidence of domestic violence in a judgment for spousal support.⁴⁶ Documented evidence is any: (1) tangible writing or (2) form of communication or representation that establishes a record.⁴⁷ This refers to "any record thereby created, regardless of the manner in which the record has been stored."⁴⁸ Documented evidence, therefore, may include the victim's emotional distress resulting from the abuse or the abuser's history of violence.⁴⁹ Factor I states:

37. *Id.*

38. *Id.*

39. *Id.* §§ 4324, 4324.5(a)(1); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 4 (July 3, 2012).

40. CAL. FAM. CODE §§ 4324, 4324.5(a)(1).

41. *Id.* §§ 4320(i), 4325(a), 4330(a).

42. *See id.* §§ 4320(i), 4325(a) (omitting unreported acts of domestic violence).

43. *Id.* §§ 4320(i), 4325(a).

44. *Infra* Part II.A (describing protections Factor I provides to domestic violence victims).

45. *Infra* Part II.B (establishing current protections to domestic violence victims from convicted spouses).

46. CAL. FAM. CODE §§ 4320(i), 6211(a)–(f) (Domestic violence is abuse perpetrated against a: (a) spouse or former spouse, (b) cohabitant or former cohabitant, (c) partner of a dating or engagement relationship, (d) person with whom you have a child, (e) child of either party, or (f) any other blood relative within the second degree).

47. CAL. EVID. CODE § 250 (West 2003) (Tangible writing includes any evidence that is handwritten, typewritten, printed, photographed, photocopied, or transmitted by electronic mail. Form of communication or representation refers to "letters, words, pictures, sounds, or symbols, or combinations thereof," that creates a record).

48. *Id.*

49. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1221, at 2 (Aug. 23, 2001).

Documented evidence, including a plea of nolo contendere, of any history of domestic violence . . . between the parties or perpetrated by either party against either party's child, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.⁵⁰

Thus, courts may consider documented evidence of domestic violence in three circumstances: 1) one partner against the other, 2) one partner against either partner's child, or 3) emotional distress resulting from the violence.⁵¹

Factor I is unique to other domestic violence provisions in the Family Code because it does not specifically use the term "spouses."⁵² A judge, therefore, may consider documented acts of domestic violence that occurred between the parties prior to marriage.⁵³

No single factor of Section 4320 is dispositive in a spousal support judgment, however.⁵⁴ The "weight" a judge attaches to a factor represents the evidence's degree of importance balanced against other evidence.⁵⁵ A judge's discretion, therefore, determines the effectiveness of the protective measures afforded under Factor I.⁵⁶

The final factor defined in Section 4320, known as "Factor N," is a catch-all that allows a judge to consider "[a]ny other factors the court determines are just and equitable."⁵⁷ This provision guarantees that courts maintain complete power over spousal support judgments.⁵⁸ Thus, unreported evidence of domestic violence could theoretically come in under Factor N.⁵⁹ Similar to Factor I, however, the weight a judge attaches to the evidence is discretionary, and he or she may not consider unreported evidence at all.⁶⁰

B. Protections from Convicted Abusers

When either spouse has a domestic violence conviction, courts analyze spousal support judgments under Family Code Section 4320(m).⁶¹ Section 4320(m),

50. CAL. FAM. CODE § 4320(i).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* § 4320(a)–(n).

55. *Weight of Evidence*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/weight+of+evidence> (last visited Mar. 20, 2017) (on file with *The University of the Pacific Law Review*).

56. CAL. FAM. CODE § 4320(a)–(n).

57. *Id.* § 4320(n).

58. *Id.*

59. *Id.*

60. *Weight of Evidence*, *supra* note 55.

61. CAL. FAM. CODE § 4320(m).

known as “Factor M,” states:

The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4324.5 or 4325.⁶²

Subsection 1 describes Family Code Section 4325 and the effect domestic violence convictions have on spousal support judgments.⁶³ Subsections 2 and 3 outline the two provisions in the Family Code that explicitly prevent an abuser from collecting a spousal support award.⁶⁴ Subsection 2 addresses Section 4324.5, which protects victims of violent sexual felonies.⁶⁵ Subsection 3 explains the impact an attempted murder conviction has on a spousal support award.⁶⁶

1. Criminal Convictions for Domestic Violence

When determining spousal support judgments, Section 4325, read with Section 4320(m), allows courts to consider evidence of a “criminal conviction for an act of domestic violence perpetrated by one spouse against the other spouse” within five years of the dissolution of marriage.⁶⁷ When triggered, Section 4325 creates a rebuttable presumption that a convicted abuser cannot receive spousal support.⁶⁸

To raise a Section 4325 presumption, the victim must put forth factual evidence of his or her spouse’s domestic violence conviction.⁶⁹ Section 4325 then shifts the burden of proof to the convicted spouse to produce contrary evidence.⁷⁰ Thus, a spousal support judgment against a convicted spouse is not automatic because a convicted spouse may overcome a Section 4325 presumption against him or her by submitting contrasting evidence.⁷¹ This presumption becomes conclusive only if it is not successfully rebutted.⁷²

Successfully rebutting a Section 4325 presumption, however, does not automatically award a spousal support judgment to a convicted abuser either.⁷³

62. *Id.*

63. *Infra* Part II.B.1 (explaining the effect of criminal convictions for domestic violence in determining spousal support judgments).

64. *Infra* Parts II.B.2–3 (outlining the two provisions in the Family Code explicitly preventing an abuser from collecting a spousal support award).

65. *Infra* Part II.B.2 (describing the effect criminal convictions for violent sexual felonies have on spousal support determinations).

66. *Infra* Part II.B.3 (addressing the effect attempted murder of one’s spouse has on spousal support determinations).

67. CAL. FAM. CODE § 4325(a).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

Courts still use their discretion to determine spousal support judgments; notably, rebutting a Section 4325 presumption only permits a judge to consider a convicted spouse in his or her determination.⁷⁴ Courts typically (but not always) invoke this presumption in a mutually abusive relationship.⁷⁵

A convicted abuser has the burden of rebutting a Section 4325 presumption by a preponderance of the evidence.⁷⁶ In doing so, courts may consider documented instances of mutual acts of domestic violence as well as any other factors necessary to avoid unjust outcomes.⁷⁷ This includes documented instances where a convicted spouse is the victim and his or her spouse raising the presumption is the abuser.⁷⁸

By allowing a convicted abuser to overcome a Section 4325 presumption with documented acts of abuse, this provision creates a loophole that equates conviction evidence with documented evidence.⁷⁹ Rebutting conviction evidence with documented evidence, rather than requiring mutual conviction evidence, conflates the severity and reliability between both categories of evidence.⁸⁰

2. Protection for Violent Sexual Felonies

The Family Code terminates a judge's discretion to award spousal support in cases of violent sexual felonies.⁸¹ In 2010, a California court ordered Crystal Harris to pay spousal support to her abusive spouse, despite his six-year conviction for forcible oral copulation during their marriage.⁸² When news of this story struck, California legislators responded by adding Section 4324.5 to the Family Code.⁸³ Section 4324.5 automatically prohibits a spouse convicted of a violent sexual felony from collecting a spousal support award from his or her victim spouse if the conviction is within five years of filing a dissolution of marriage.⁸⁴ Thus, convicted

74. *Id.*

75. B. Robert Farzad, *California Spousal Support and Domestic Violence*, FARZAD FAM. L. (Jan. 10, 2013), <http://farzadlaw.com/california-spousal-support/domestic-violence-rebuttable-presumption/> (on file with *The University of the Pacific Law Review*).

76. CAL FAM. CODE § 4325(c); *Preponderance of the Evidence*, FREE DICTIONARY, <http://legaldictionary.thefreedictionary.com/Preponderance+of+Evidence> (last visited Jan. 8, 2017) (on file with *The University of the Pacific Law Review*) (Preponderance of the evidence is “just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true.”).

77. CAL FAM. CODE § 4325(b).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* § 4324.5(a)(1).

82. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 5 (July 3, 2012).

83. *Spousal Rape Law*, CRYSTAL HARRIS, <https://www.crystaljharris.com/spousal-rape-law.html> (last visited Mar. 24, 2018) (on file with *The University of the Pacific Law Review*).

84. CAL FAM. CODE § 4324.5(a)(1); CAL. PENAL CODE § 667.5(c) (West 2014) (defining violent sexual felony to include rape; sodomy; oral copulation; sexual penetration; and rape, spousal rape, or sexual penetration, in concert).

spouses cannot submit evidence to disprove the evidence against them.⁸⁵

Section 4324.5's enumerated violent sexual felonies fall under the umbrella of domestic violence because domestic violence includes physical, sexual, psychological, and emotional abuse.⁸⁶ Section 4324.5, however, applies solely to violent sexual felonies and does not extend to domestic violence completely.⁸⁷ As a result, many acts of domestic violence fall outside this provision.⁸⁸

3. *Attempted Murder*

The Family Code also restricts a judge's discretion to award spousal support in cases of attempted murder.⁸⁹ Specifically, Section 4324 prohibits an individual convicted of attempted murder of his or her spouse from collecting a spousal support judgment.⁹⁰ This includes acts of attempted murder or solicitation of murder, regardless of whether actual physical injury occurred.⁹¹ This provision does not protect all domestic violence victims, however, because not all acts of domestic violence qualify as attempted murder.⁹² Due to prosecutorial charging decisions, it is possible an untouched victim of attempted murder will qualify for protection under this provision, whereas a severely beaten individual will not.⁹³

III. OTHER STATES' ATTEMPTS TO AVOID THIS PROBLEM

State legislators outside of California have attempted to avoid the problem that arises when abusers collect spousal support awards from their victims.⁹⁴ Louisiana is the only successful state to pass legislation to overcome this problem, however.⁹⁵ Section A describes legislation proposed by other states to avoid spousal support awards to abusive parties.⁹⁶ Section B explains enacted protections to assist domestic violence victims in Louisiana.⁹⁷

85. FAM. § 4324.5(a)(1).

86. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 5 (July 3, 2012).

87. CAL FAM. CODE § 4324.5(a)(1).

88. *Id.* (including acts such as beating, restraining, and choking).

89. *Id.* § 4324.

90. *Id.* (California legislators have extended this ban to include medical, life, and general insurance benefits).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Infra* Parts III.A–B (analyzing legislation from New Jersey, Virginia, and Louisiana).

95. LA. STAT. ANN. § 1:112(B) (2014) (enacting law prohibiting a domestic violence abuser from collecting spousal support).

96. *Infra* Part III.A.1–2 (explaining proposed bills from New Jersey and Virginia).

97. *Infra* Part III.B (describing protections offered under Louisiana law).

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A. Proposed Legislation Among Other States

Subsection 1 addresses New Jersey Senate Bill 2353 and Assembly Bill 584.⁹⁸ Subsection 2 explores Virginia House Bill 2105.⁹⁹

1. New Jersey Senate Bill 2353 and Assembly Bill 584

In 2014, New Jersey legislators introduced Senate Bill 2353 and Assembly Bill 584 to their respective houses.¹⁰⁰ If enacted, these identical bills would have protected domestic violence victims in two ways.¹⁰¹ First, the twin bills would have prohibited a convicted domestic violence abuser from collecting a spousal support award from his or her victim spouse and would not have considered any other factors.¹⁰²

Second, the bills would have terminated existing spousal support judgments for supported spouses later convicted of domestic violence against the supporting party.¹⁰³ This is because the state may still convict ex-spouses of domestic violence after marriage because “domestic violence” includes abuse perpetrated by an individual against a spouse or former spouse.¹⁰⁴ In such cases, changed circumstances between the parties justify terminating the spousal support award.¹⁰⁵

New Jersey Senate Bill 2353 and Assembly Bill 584 would not have gone far enough to protect all victims of domestic violence, however, because the twin bills do not mention documented or unreported acts of domestic violence.¹⁰⁶ Because California considers documented acts of abuse in determining spousal support, California offers victims protection against more types of domestic violence than New Jersey.¹⁰⁷

Similar to California, these bills would have created a separate provision for

98. *Infra* Part II.A.1 (discussing proposed bills from New Jersey).

99. *Infra* Part II.A.2 (addressing the proposed bill from Virginia).

100. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

101. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

102. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

103. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

104. CAL. FAM. CODE § 6211(a)–(f) (West 2016).

105. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

106. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

107. FAM. § 4320(i); SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

ascertaining spousal support when a domestic violence conviction is present.¹⁰⁸ In comparison, the New Jersey bills would have provided greater protection than those currently offered by California's counterpart.¹⁰⁹ This is because the automatic prohibition of spousal support issued by the New Jersey bills provides stronger and more reliable protection than the rebuttable presumption offered under Section 4325 of the Family Code.¹¹⁰

Because a rebuttable presumption is not conclusive, California victims ordered to pay spousal support to their convicted spouses would benefit most from legislation similar to the New Jersey bills.¹¹¹ Substantively, the New Jersey bills achieve the purpose of assisting victims more effectively than current California law because they ensure victims do not: 1) endure litigation arguing why they should not pay their violent spouse, or 2) fund their abuser.¹¹²

To modify a spousal support order in California, "the moving party must show a material change of circumstances."¹¹³ Because victims are the moving party in domestic violence cases, victims must show changed circumstances when a supported party perpetrates later acts of domestic violence.¹¹⁴ Thus, California misplaces the burden of proof on victims, rather than convicted abusers.¹¹⁵ In this sense, we should give preference to the New Jersey bills over California law because California law requires its victims to do the heavy lifting and prove changed circumstances.¹¹⁶ By placing the burden of proof on victims, California fatally gives an abuser the assumption of being "correct."¹¹⁷ A court's discretion, therefore, determines the effectiveness of the protective measures because courts may differ as to whether domestic violence is a changed circumstance.¹¹⁸ This is different from New Jersey where a domestic violence conviction would have

108. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

109. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted); FAM. § 4325(a).

110. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted); FAM. § 4325(a).

111. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

112. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

113. *In re Marriage of Gavron*, 250 Cal. Rptr. 148, 151 (Cal. Ct. App. 1988) (defining a material change to be more than a mere raise in salary or slight reduction in expenses, such as a material or significant change that places the parties in a different position); *See* CAL FAM. CODE § 3603 (allowing an order modifying or terminating spousal support at any time).

114. *In re Marriage of Gavron*, 250 Cal. Rptr. at 151.

115. *Id.* at 152.

116. *Id.*

117. *Id.*

118. *Id.* at 151.

spoken for itself and not required anything more of victims.¹¹⁹

2. Virginia House Bill 2105

In 2015, Virginia Delegate Christopher K. Pace introduced Virginia House Bill 2105.¹²⁰ House Bill 2105, if enacted, would have barred a convicted spouse from collecting a spousal support judgment if the conviction occurred within five years of filing for dissolution of marriage.¹²¹ House Bill 2105 would not have provided as much protection as the New Jersey bills, however, because it would have allowed a convicted spouse to prove by a preponderance of the evidence that withholding a spousal support award is unconscionable.¹²² If a convicted spouse met this burden of proof, the victim spouse would owe his or her abuser spousal support.¹²³ The bill, therefore, would have created a loophole detrimental to its intended purpose of protecting domestic violence victims because it would have allowed victims to fund abusers.¹²⁴

House Bill 2105 is more similar to Family Code Section 4325 than the New Jersey twin bills, despite its appearance of terminating spousal support for a convicted abuser.¹²⁵ Allowing an abuser to prove withholding support is unconscionable resembles California's rebuttable presumption, such that both laws leave open the possibility that a convicted spouse may collect a spousal support award from this or her victim spouse.¹²⁶ This possibility is harmful because it forces victims to remain dangerously entangled in an abuser's pattern of harassment and punishment.¹²⁷

Similar to the identical bills proposed in New Jersey, Virginia House Bill 2105 would have terminated existing spousal support awards if a court subsequently convicted a supported party of domestic violence against a supporting party.¹²⁸ The bill would have also given convicted abusers the opportunity to prove, by a preponderance of the evidence, that terminating the existing spousal support judgment is unconscionable.¹²⁹ Because terminating spousal support would not have been absolute, this bill would have been less effective than New Jersey because it would not have entirely shielded victims from paying spousal support

119. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

120. HB 2105, 2015 Leg., 2015–2016 Sess. (Va. 2015) (as introduced on Feb. 10, 2015, but not enacted).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*; CAL. FAM. CODE § 4325(a) (West 2012).

126. HB 2105, 2015 Leg., 2015–2016 Sess. (Va. 2015) (as introduced on Feb. 10, 2015, but not enacted); CAL. FAM. CODE § 4325(a).

127. *In re Marriage of Freitas*, 147 Cal. Rptr. 3d 453, 460 (Cal. Ct. App. 2012).

128. HB 2105, 2015 Leg., 2015–2016 Sess. (Va. 2015) (as introduced on Feb. 10, 2015, but not enacted).

129. *Id.*

to their convicted spouse.¹³⁰

Virginia House Bill 2105, however, would have offered more protection than the Family Code because it would have placed the burden of proof on an abuser to prove termination would be unconscionable, rather than the California method requiring victims to prove changed circumstances.¹³¹ Thus, in Virginia, domestic violence victims would have had the presumption of being “correct.”¹³² This aligns more consistently with public policy against domestic violence than California law because it avoids the unjust enrichment of an abuser.¹³³

B. Enacted Legislation—Louisiana Law

Under Louisiana law, if a court determines domestic violence existed within a marriage, an abusive spouse owes his or her victim spouse a final periodic support or lump sum award.¹³⁴ This section is only applicable if the victim spouse is not at fault prior to filing a dissolution of marriage, however.¹³⁵ Unlike Louisiana, California is a no-fault state for divorce.¹³⁶

Louisiana judges consider the prevalence and impact of domestic violence when making spousal support judgments.¹³⁷ Similar to Family Code Section 4320, Louisiana law does not require prosecutorial evidence as a prerequisite for a judge to consider instances of domestic violence in his or her determination.¹³⁸ Unlike Section 4320, which factors documented evidence of domestic violence into a judge’s spousal support determination, Louisiana law considers all evidence showing the existence, effect, or duration of domestic violence.¹³⁹ Thus, Louisiana law offers a lower evidentiary threshold to trigger protection than California.¹⁴⁰ California would benefit from this approach because it is highly victim-focused and incorporates acts of unreported abuse.¹⁴¹

When the victim alleges domestic violence in the absence of a criminal conviction, Louisiana judges may order an evaluation of both spouses to determine

130. *Id.*

131. *Id.*

132. *Id.*

133. *In re Marriage of Freitas*, 147 Cal. Rptr. 3d 453, 460 (Cal. Ct. App. 2012).

134. LA. STAT. ANN. § 1:112(B) (2014) (periodic support is the incremental amount a court determines that one party owes the other; a lump sum award is one payment made at a particular time for an amount the court chooses).

135. *Id.*

136. CAL. FAM. CODE § 2310(a)–(b) (West 2015) (explaining the California does not require a spouse to prove the marital misconduct of their spouse prior to filing for divorce).

137. LA. STAT. ANN. § 1:112(C)(1)–(9) (2014).

138. *See id.* § 1:112(C)(9) (considering the existence, effect, and duration of domestic violence).

139. *Id.*

140. *Id.*

141. *Id.*

the existence and nature of the claim.¹⁴² This includes claims of entirely unreported abuse.¹⁴³ Courts choose mental health professionals in the field of domestic abuse to conduct court-ordered evaluations.¹⁴⁴ In California, there is no similar court-ordered evaluation investigating the credibility of unreported claims of domestic violence.¹⁴⁵ California does not consider allegations of unreported abuse, and victims may pay spousal support to their abuser.¹⁴⁶

IV. FIXING THE FAMILY CODE TO ENSURE DOMESTIC VIOLENCE ABUSERS ARE NOT AWARDED SPOUSAL SUPPORT

“Domestic violence is an epidemic,” and silence is its greatest ally.¹⁴⁷ California fails victims by not implementing stricter criteria to prevent abusers from collecting spousal support judgments from their victims.¹⁴⁸ Instead of supporting domestic violence survivors, California law maintains the possibility that victims will pay spousal support to their abusers.¹⁴⁹ To prevent the injustice of abusers profiting from their wrongdoings, California should: (1) enact an explicit provision to the Family Code preventing a convicted abuser from collecting spousal support from his or her victim and (2) create a rebuttable presumption preventing an abuser from collecting spousal support when there is documented evidence of domestic violence in a relationship or upon a judge’s finding, by a preponderance of the evidence, that unreported domestic violence exists in a relationship.¹⁵⁰

The following sections propose three amendments to the Family Code to ensure the judicial system does not award spousal support to domestic violence abusers: (A) documented acts, (B) convicted acts, and (C) unreported acts of domestic violence.¹⁵¹

142. *Id.*

143. *Id.*

144. *Id.*

145. *See* CAL. FAM. CODE §§ 4320(i), 4325(a) (West 2016) (omitting unreported acts of domestic violence).

146. *Id.*

147. Jennifer O’Neill, *Domestic Violence Statistics: The Horrific Reality*, GOOD HOUSEKEEPING (Feb. 23, 2016), <http://www.goodhousekeeping.com/life/relationships/a37005/statistics-about-domestic-violence/> (on file with *The University of the Pacific Law Review*).

148. *See* FAM. §§ 4320(i), 4325(a) (failing to prioritize documented acts above other factors, not expressly preventing a convicted abuser from collecting spousal support, and omitting unreported acts of domestic violence).

149. *See id.* (lacking an express provision terminating spousal support when domestic violence is present).

150. *Infra* Part IV.A–C (describing proposed legislation California should adopt).

151. *Infra* Part IV.A–C (proposing legislation to prevent domestic violence abusers from collecting spousal support in cases of documented, conviction, or unreported evidence).

A. Proposed Legislation—Documented Abuse

Factor I allows a judge to consider documented evidence of domestic violence in a spousal support judgment.¹⁵² Documented evidence, however, should instead raise a presumption against an abusive spouse and shift the burden of proof to the abusive party.¹⁵³ Adding a presumption against a documented abuser is necessary to align the Family Code with public policy of not awarding an abusive spouse for his or her bad behavior.¹⁵⁴ This would incorporate a “double-check” system on documented abusers requesting spousal support: first, he or she must successfully rebut the presumption by a preponderance of the evidence (or it becomes conclusive), and second, a judge must find a spousal support award is just and reasonable considering the standard of living established within the marriage.¹⁵⁵ This proposed legislation is more victim-focused than Factor I because it shifts the burden of proof to an abusive spouse, which makes it more difficult for an abusive spouse to collect a spousal support award.¹⁵⁶

In a judge’s determination for spousal support when there is documented evidence of domestic abuse by one party against the other, legislation should mimic California Family Code Section 4325 and take the following form:

In any proceeding for dissolution of marriage where there is documented evidence of an act of domestic violence perpetrated by one party against the other party entered by the court within five years prior to the filing of the dissolution proceeding, or anytime thereafter, there shall be a rebuttable presumption affecting the burden of proof that any award of temporary or permanent spousal support to the abusive party otherwise awardable pursuant to the standards of this part should not be made.¹⁵⁷

The law should not require a conviction to trigger a rebuttable presumption for documented evidence of abuse.¹⁵⁸ This is because documented evidence of domestic violence proves an abuser harmed the victim in some way.¹⁵⁹ Thus, legislation should warrant a strong assumption made by the court.¹⁶⁰

152. FAM. § 4325(a).

153. *See id.* (suggesting legislative changes to the section).

154. *In re Marriage of Freitas*, 147 Cal. Rptr. 3d 453, 460 (Cal. Ct. App. 2012).

155. *See* CAL FAM. CODE § 4325(a) (suggesting legislative changes to the section).

156. *See id.* § 4320(i) (allowing a judge to determine the weight he or she gives to evidence of domestic violence).

157. *See id.* § 4325(a) (basing the proposed legislation on Section 4325(a)).

158. *See id.* (implementing a rebuttable presumption only when there is a criminal conviction of domestic violence).

159. *See Presumption*, CORNELL U. L. SCH., <https://www.law.cornell.edu/wex/presumption> (last visited Feb. 14, 2017) (on file with *The University of the Pacific Law Review*) (defining presumption as a legal inference based upon certain facts).

160. *Id.*

Further, legislation should adopt the current language of Section 4320 that references “parties” rather than “spouses” to encompass all acts of domestic violence between individuals.¹⁶¹ Domestic violence does not only exist between married couples—it includes abuse perpetrated by one cohabitating partner against another.¹⁶² Thus, to fully support domestic violence victims, it is necessary legislation does not discredit evidence merely because two individuals are not married at the time of the abuse.¹⁶³ Instead, spousal support judgments should give equal weight to all violent acts, regardless of marital status.¹⁶⁴ Ultimately, the severity of the abuse does not diminish because it is between two unwed individuals.¹⁶⁵

B. Proposed Legislation—Convicted Spouses

Family Code Section 4325 establishes a rebuttable presumption that convicted domestic violence abusers should not receive a spousal support award.¹⁶⁶ Convictions, however, are reliable evidence that abuse is present in a relationship.¹⁶⁷ As a result, courts should yield to the criminal justice system and relinquish their discretion in situations of convicted domestic abuse.¹⁶⁸ This is because despite a conviction, a judge may give greater weight to other Section 4320 factors if an abuser rebuts the presumption.¹⁶⁹ Because this process is discretionary, current spousal support judgments may vary despite clear evidence of abuse.¹⁷⁰ Personal experiences mold one’s perception of reality; thus, it is impossible for judges to be wholly neutral in situations of conflict.¹⁷¹ Legislation, therefore, should acknowledge the reliability of conviction evidence and explicitly make certain that victims do not provide financial support to their abusers.¹⁷²

In a judge’s determination for spousal support when the State has convicted one spouse of domestic violence against the other spouse, legislation should mimic

161. CAL FAM. CODE § 4320(i).

162. *Id.* § 6211(a)–(f).

163. *See id.* (acknowledging that domestic violence is abuse inflicted by one party against the other in cohabitating or former cohabitating, dating, and co-parenting relationships).

164. *See id.* (failing to distinguish any difference between the abuse of a married or nonmarried individual).

165. *See id.* (giving equal weight to marital and nonmarital acts of domestic violence).

166. *Id.* § 4325(a).

167. *Conviction*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/conviction> (last visited Jan. 8, 2017) (on file with *The University of the Pacific Law Review*).

168. *Id.*

169. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 4 (Mar. 30, 2012).

170. Robert Farzad, *How Do Judges Decide Divorce Cases? By Applying Facts, Law, and Using Judicial Discretion*, FARZAD FAM. L. (Aug. 28, 2015), <http://farzadlaw.com/california-divorce/how-do-judges-decide-divorce-cases/> (on file with *The University of the Pacific Law Review*).

171. *Judicial Bias—A Variable That Is Often Overlooked in Family Law Litigation*, MARK B. BAER, INC. (Jan. 14, 2012), <http://www.markbaeresq.com/Pasadena-Family-Law-Blog/2012/January/Judicial-Bias-A-Variable-That-Is-Often-Overlooked.aspx> (on file with *The University of the Pacific Law Review*).

172. *Id.*

Family Code Section 4324.5 (the spousal support provision barring spouses convicted of violent sexual felonies from collecting spousal support) and take the following form:

In any proceeding for dissolution of marriage where there is a criminal conviction for domestic violence perpetrated by one party against the other party and the petition for dissolution is filed before five years following the conviction and any time served in custody, on probation, or on parole, an award for spousal support to the convicted party from the injured party is prohibited.¹⁷³

This legislation protects victims of domestic violence because it eliminates judicial discretion and guarantees victims are not funding abusers through spousal support payments.¹⁷⁴ Legislation should align with Sections 4324 and 4324.5, which terminate spousal support judgments for spouses convicted of attempted murder and violent sexual felonies, and close the gap in the Family Code that gives prime concern to these particular acts of domestic violence, rather than all acts of domestic violence equally.¹⁷⁵ Attempted murder and violent sexual felonies fall within the umbrella of domestic violence.¹⁷⁶ Yet, the law fatally places greater importance on these two acts.¹⁷⁷

California law does not go far enough to reach more, and equally deserving, victims of all forms of convicted abuse.¹⁷⁸ Thus, Legislation must remove all discretion from the courts to acknowledge the seriousness of domestic violence and close the unintended division between convicted acts of attempted murder, violent sexual felonies, and all other forms of domestic violence.¹⁷⁹

In situations where one party has a domestic violence conviction, legislation should adopt language comparable to the identical bills introduced in New Jersey.¹⁸⁰ Such bills would have prohibited a convicted spouse from collecting a spousal support award and function similarly to Family Code Sections 4324 and

173. See CAL. FAM. CODE § 4324.5(a)(1) (West 2013) (basing the proposed legislation on Section 4324.5(a)(1)).

174. *Id.* §§ 4324, 4324.5(a)(1).

175. *Id.*

176. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 5 (July 3, 2012).

177. CAL FAM. CODE §§ 4324, 4324.5(a)(1) (providing explicit provisions in the Family Code preventing a convicted abuser from collecting spousal support only for attempted and violent sexual felonies).

178. See *id.* § 4325(a) (failing to prohibit spousal support awards to spouses convicted of domestic violence).

179. See *id.* §§ 4324, 4324.5(a)(1), 4325(a) (providing greater protection to victims of attempted murder and violent sexual felonies than the rebuttable presumption offered to all other acts of domestic violence).

180. Compare *id.* § 4325(a), with SB 2353 § j, 2014 Leg., 2014–2015 Sess. (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted), and AB 584 § j, 2014 Leg., 2014–2015 Sess. (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted) (differing in the amount of protection offered to victims when a domestic violence conviction is present).

4324.5.¹⁸¹

Virginia House Bill 2105, on the other hand, would not have provided enough protection to victims because the bill would have offered convicted spouses the opportunity to prove withholding or terminating a spousal support award is unconscionable.¹⁸² This is because conviction evidence should bar spousal support privileges absolutely.¹⁸³ Legislation should follow the policy behind adding a presumption to acts of documented evidence and not reward an abusive spouse for his or her bad behavior.¹⁸⁴

In 2006, California held nonmodifiable spousal support provisions are unenforceable when the court later convicts a spouse of abuse.¹⁸⁵ Balancing contract law against public policy, the court found “the parties could not have reasonably expected that [one spouse] would finance his own abuse by [the other spouse].”¹⁸⁶ In essence, the court determined that a subsequent domestic violence conviction trumps an abuser’s ability to enforce a nonmodifiable spousal support contract.¹⁸⁷ In so holding, California acknowledges the importance of eliminating spousal support in the presence of a domestic violence conviction and should mimic this mentality and view all spousal support judgments similarly.¹⁸⁸ When the State convicts either spouse of domestic violence, the conviction should trump the marriage contract and any associated spousal support obligations.¹⁸⁹ This reasoning aligns with the panel on appeal which concluded that, disregarding the motive for entering into the spousal support contract, a court should not require the victim to “financially support those who have been convicted of harming them.”¹⁹⁰ The only way to ensure one does not financially support a convicted abuser is to terminate his or her eligibility for spousal support.¹⁹¹

Additionally, legislation should recognize that victims in abusive relationships do not always leave immediately or leave abusers at all.¹⁹² Because many victims choose to remain married to their abusers, legislation should prohibit convicted spouses from collecting a spousal support awards only if their victim spouse files for dissolution of marriage within five years of the conviction.¹⁹³ Enacting a black and white rule may create unfair results to convicted spouses in situations where a

181. SB 2353, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Sept. 15, 2014, but not enacted); AB 584, 2014 Leg., 2014–2015 Sess. § j (N.J. 2014) (as introduced on Jan. 16, 2014, but not enacted).

182. HB 2105, 2015 Leg., 2015–2016 Sess. (Va. 2015) (as introduced on Feb. 10, 2015, but not enacted).

183. *In re Marriage of Freitas*, 147 Cal. Rptr. 3d 453, 460 (Cal. Ct. App. 2012).

184. *Id.*

185. *In re Marriage of Cauley*, 41 Cal. Rptr. 3d 902, 906 (Cal. Ct. App. 2006).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 907 n. 5.

191. *Id.*

192. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 5 (July 3, 2012).

193. *Id.*

partner forgives his or her abuser and continues the marriage.¹⁹⁴ When victims forgo terminating a marriage after the court convicts their spouse of domestic violence, it is sometimes because the victim no longer feels he or she needs protection.¹⁹⁵

C. Proposed Legislation—Unreported Abuse

Domestic violence is a unique crime.¹⁹⁶ Many domestic violence victims live in fear and still never report abuse because they feel embarrassed, depressed, or ashamed of their situation.¹⁹⁷ To domestic violence victims, their abuser has violated a very personal relationship.¹⁹⁸ Thus, victims often fail to report, undermine, and gloss over abuse with hopes that circumstances will change.¹⁹⁹ Adopting legislation that protects victims of unreported domestic violence is necessary to reflect the realities of domestic violence and reach a more accurate number of victims.²⁰⁰

The Family Code should follow Louisiana's lead and enact legislation acknowledging the secrecy and prevalence of unreported acts of domestic violence.²⁰¹ Louisiana considers the "existence, effect, and duration" of the domestic violence in a spousal support judgment.²⁰² This is comparable to Factor I, which weights documented acts of domestic violence against other marital factors, but is more victim-focused because it requires a lower evidentiary threshold.²⁰³

When unreported acts of domestic abuse by one party against the other are present, legislation should create a presumption that abusive spouses cannot collect spousal support judgments if a judge finds, by a preponderance of the evidence, that domestic violence exists in the relationship.²⁰⁴ Such legislation should take the following form:

194. *Id.*

195. *Id.*

196. Michele Nealon-Woods, *supra* note 20 (acknowledging abused individuals are not the only victims of the crime).

197. Michael Lonich, *Domestic Violence and The Rebuttable Presumption*, LONICH & PATTON, LLP (June 17, 2015), <http://www.lonichandpatton.com/blog/2015/domestic-violence-and-the-rebuttable-presumption/> (on file with *The University of the Pacific Law Review*).

198. Michele Nealon-Woods, *supra* note 20.

199. Michael Lonich, *supra* note 197.

200. *Id.*

201. *See* LA. STAT. ANN. § 1:112(C)(9) (2014) (acknowledging acts of unreported abuse).

202. *Id.*

203. *Compare id.*, with CAL. FAM. CODE § 4320(i) (West 2016) (comparing California, which requires evidence of documented acts of domestic violence to trigger protection, with Louisiana, which protects victims of unreported acts).

²⁰⁴. *See* CAL FAM. CODE § 4325(a) (basing the proposed legislation on Section 4325(a)).

In any proceeding for dissolution of marriage where a judge could determine by a preponderance of the evidence that domestic violence existed in the relationship by one party against the other party entered by the court within five years prior to the filing of the dissolution proceeding, or anytime thereafter, there shall be a rebuttable presumption affecting the burden of proof that any award of temporary or permanent spousal support to the abusive party otherwise awardable pursuant to the standards of this part should not be made.²⁰⁵

California legislation should adopt a provision for unreported abuse to fulfill its purpose of providing protection to all victims of domestic violence.²⁰⁶ Weighing unreported acts of domestic violence against other factors in a determination for spousal support would not provide victims with enough protection.²⁰⁷ Legislation must give victims an advantage; placing victims and abusers in an equal position to pay spousal support downplays the cruelty of domestic violence and gravely disregards the violence the victim suffers.²⁰⁸

Like Louisiana, however, California legislation should allow a judge to order an evaluation of both parties to assist the court in determining the existence and nature of the alleged domestic abuse.²⁰⁹ In such cases, the court should appoint an independent mental health professional specializing in domestic abuse to conduct an evaluation of both parties.²¹⁰ Such findings would assist judges in determining whether there is enough evidence to raise the presumption that prohibits an abuser from collecting spousal support.²¹¹

Granting judicial discretion to determine whether domestic violence exists in a relationship is different from restricting judicial discretion in cases of convicted domestic abuse.²¹² Judicial discretion is necessary in the former because not all victims have tangible evidence to prove abuse.²¹³ Thus, a judge is necessary to assist victims and enable their attorneys to introduce domestic violence evidence in court.²¹⁴ This is not the case when conviction evidence is present because

205. *Id.*

206. *See id.* §§ 4320(i), 4325(a) (omitting unreported acts of domestic violence).

207. *See id.* § 4320(i) (weighting documented evidence of abuse against other spousal support factors rather than establishing a rebuttable presumption).

208. *See id.* (failing to establish a presumption against a documented abuser from collecting spousal support).

209. LA. STAT. ANN. § 1:112(C)(9) (2014).

210. *See id.* (enacting similar legislation).

211. *See id.* (allowing a judge to consider the existence, effect, and duration of domestic violence).

212. *See id.* (granting judicial discretion to consider domestic violence absent a conviction).

213. Michele Nealon-Woods, *supra* note 20; Paul Wallin, *He Said, She Said: The Difficulty of Evidence in Domestic Violence Cases*, WALLIN & KLARICH, <https://www.wklaw.com/he-said-she-said-the-difficulty-of-evidence-in-domestic-violence-cases/> (last visited Jan. 8, 2017) (on file with *The University of the Pacific Law Review*).

214. *See* CAL. FAM. CODE § 4320(i) (West 2016) (admitting evidence of at least documented acts of domestic violence).

convictions speak for themselves.²¹⁵ The justice system, therefore, does not need a judge when that State has convicted one spouse of domestic violence because the conviction itself is proof that domestic violence exists.²¹⁶

V. POSSIBLE OPPOSITION ARGUMENTS

Opponents of this legislation will likely raise three objections: (1) the judicial system needs judicial discretion to accurately assess each case when the State has convicted one spouse of domestic violence, (2) documented abuse is not strong enough evidence to trigger a presumption prohibiting spousal support, and (3) ascertaining whether unreported domestic violence is present within a marriage would increase procedural costs and litigation.²¹⁷ Section A argues why an explicit rule preventing convicted domestic violence abusers from collecting spousal support is necessary.²¹⁸ Section B analyzes why a rebuttable presumption is not too restrictive in cases of documented acts of domestic violence.²¹⁹ Section C contends that additional costs and court proceedings to determine the extent of alleged, unreported abuse would be minimal.²²⁰

A. *Removing Judicial Discretion for Convicted Abusers*

When California added Section 4324.5 to the Family Code prohibiting a spousal support award to individuals convicted of violent sexual felonies, legislators contemplated whether the ban should extend to all convictions of domestic violence.²²¹ The Senate Judiciary Committee, however, argued against this extension by reason of complex family dynamics and the need for case by case judicial review.²²² It argued that because facts are so unique in the family court system, judicial discretion is necessary to avoid injustice and undesirable results.²²³ Specifically, the Senate Judiciary Committee considered instances in which an alleged abuser claims self-defense.²²⁴ It believed enacting a per se rule would produce harsh results in instances where mutual abuse led to a conviction of only

215. *Conviction*, *supra* note 167.

216. *Id.*

217. *Infra* Part IV.A–C (discussing opposition arguments).

218. *Infra* Part IV.A (arguing why an explicit rule preventing convicted domestic violence abusers from collecting spousal support is necessary).

219. *Infra* Part IV.B (analyzing why a rebuttable presumption is not too restrictive in cases of documented acts of domestic violence).

220. *Infra* Part IV.C (contending additional costs and court proceedings to determine the extent of alleged, unreported abuse would be minimal).

221. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 4 (July 3, 2012).

222. *Id.*

223. *Id.*

224. *Id.*

one party.²²⁵

The Senate Judiciary Committee's arguments, however, are flawed because they are not victim-focused.²²⁶ The committee emphasized the need for judicial discretion because family dynamics sometimes "give rise to temper or emotions" and "provocation may occur."²²⁷ Legislation would only reduce a court's discretion in the presence of a domestic violence conviction, however.²²⁸ Judges should retain discretion in instances of documented and unreported acts of domestic violence; but the Family Code must treat convicted acts of domestic violence differently than other crimes because a spouse's conviction entangles the victim's life.²²⁹ Additionally, many victims remain in abusive situations despite his or her spouse's conviction.²³⁰ California needs to step up and be the voice that reassures victims they were right to walk away.²³¹ Forcing the victim to pay spousal support to his or her convicted abuser perpetuates the detrimental effects of domestic violence and could have a psychological toll that leaves victims doubting their decision to leave.²³² Instead, eliminating spousal support or enacting stricter provisions preventing an abuser from collecting spousal support awards leaves abusers with fewer financial resources to continue the harassment.²³³

Domestic abuse is the intentional or reckless act of causing or attempting to inflict bodily harm, sexual assault, or placing someone in reasonable fear of imminent serious bodily injury to themselves or others.²³⁴ Healthy family dynamics do not include abusive acts the law deems worthy of criminal punishment.²³⁵ By chalking domestic violence up to be nothing more than "family dynamics," the Senate Judiciary Committee justifies abusive behavior and inherently underplays the significance of domestic violence convictions.²³⁶

Convictions are static.²³⁷ They are finalized, and they are reliable.²³⁸ It is necessary that legislation offers credence to the criminal justice system and procedures that lead to convictions.²³⁹ Fear that prosecutors will not convict both

225. *Id.*

226. *See id.* (fearing additional safeguards might increase the number of false claims of abuse rather than providing meaningful protection to victims).

227. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 4 (July 3, 2012).

228. *See* CAL. FAM. CODE § 4325(a) (West 2012) (proposing legislation to terminate spousal support for a convicted abuser).

229. *In re Marriage of Freitas*, 147 Cal. Rptr. 3d 453, 460 (Cal. Ct. App. 2012).

230. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 5 (July 3, 2012).

231. Michele Nealon-Woods, *supra* note 20.

232. *In re Marriage of Freitas*, 147 Cal. Rptr. 3d at 460.

233. *In re Marriage of Cauley*, 41 Cal. Rptr. 3d 902, 906 (Cal. Ct. App. 2006).

234. CAL. FAM. CODE § 6203(a)(1)–(4) (West 2016).

235. *See id.* (listing acts of abuse worthy of criminal punishment).

236. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 5 (July 3, 2012).

237. *Conviction*, *supra* note 167.

238. *Id.*

239. *Id.* (explaining how a conviction is the outcome of a criminal proceeding during which a defendant is

spouses in the event of mutual violence is not enough a reason to withhold security to these victims.²⁴⁰ Victims of abuse live in secrecy due to pain, embarrassment, and isolation.²⁴¹ Enacting victim-focused legislation is essential to encourage victims to utilize the court system and take action to secure their safety.²⁴² California fails victims who fear filing for dissolution because it is “unclear how the court will award spousal support.”²⁴³

Legislation must tackle the idea that victims may stay in violent relationships due to financial hardship.²⁴⁴ Many victims feel trapped in abusive situations because they feel threatened by financial ultimatums, including the fear of paying their abuser and inability to support themselves.²⁴⁵ Current law does not assist in minimizing this reality because victims may still owe abusers spousal support.²⁴⁶

B. A Rebuttable Presumption is Not Too Restrictive for Documented and Unreported Abuse

Without a conviction, allegations of domestic violence could become a classic example of “he said, she said.”²⁴⁷ Because domestic violence frequently occurs within the privacy of a home, there are usually few—if any—witnesses to the abuse.²⁴⁸ In the presence of documented or unreported acts of domestic violence, judges are left with the alleged victim’s word pitted against that of an alleged abuser.²⁴⁹

Victims, therefore, need the law to trigger protection before domestic violence escalates to a conviction.²⁵⁰ Some may argue that creating a rebuttable presumption might be too risky absent a conviction because of the seriousness of the consequences.²⁵¹ This argument is flawed because: 1) documented acts of domestic violence demonstrate that abuse has occurred and 2) claims of unreported domestic violence would not be frivolous since the claim would hinge upon a judge’s

found guilty).

240. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 5 (July 3, 2012).

241. Michele Nealon-Woods, *supra* note 20.

242. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 5 (July 3, 2012).

243. *Id.*

244. Kerri Anne Renzulli, *Money Fears Keep Women in Abusive Relationships. Here’s How to Change That.*, TIME (Sept. 10, 2014), <http://time.com/money/3312968/whyistayed-prepare-financially-leave-abusive-relationship/> (on file with *The University of the Pacific Law Review*).

245. *Id.*

246. See CAL. FAM. CODE §§ 4320(i), 4325(a) (West 2016) (failing to explicitly prevent a domestic violence victim from funding his or her abuser).

247. Paul Wallin, *supra* note 213.

248. *Id.*

249. *Id.*

250. *Id.* (leaving room for a judge to give greater weight to an abuser’s side of the story than the victim’s).

251. Brian Beltz, *Why Are False Allegations of Domestic Violence Rarely Prosecuted?*, DOPPLR (Apr. 22, 2016), <http://www.dopplr.com/false-allegations-of-domestic-violence/> (on file with *The University of the Pacific Law Review*).

finding.²⁵² This is because a judge would only raise the presumption in cases of unreported evidence after they determine, by a preponderance of the evidence, that domestic violence exists in the relationship.²⁵³

A party may only raise a presumption when evidence supports the facts.²⁵⁴ Limiting this to documented evidence or a judge's determination that domestic violence exists in the relationship by a preponderance of the evidence minimizes the concern that a rebuttable presumption is too restrictive and may not withstand false claims of domestic violence.²⁵⁵ Raising the presumption does not solely prohibit alleged abusers from collecting spousal support awards.²⁵⁶ Individuals may still put forth contradicting evidence to rebut the court's assumption and set the record straight.²⁵⁷ Therefore, any worry that a rebuttable presumption would penalize individuals subject to frivolous claims lacks support because parties have the opportunity to prove the allegations false.²⁵⁸

The benefits of introducing a rebuttable presumption outweigh the inconvenience on falsely accused individuals because California court should rather protect victims of abuse and be wrong, than not protect victims of abuse and be right.²⁵⁹ The fear of prohibiting a spousal support awards to those falsely-accused of domestic violence is not strong enough to avoid introducing legislation because cases across all areas of law have the potential to yield unfavorable results.²⁶⁰ The risk that courts will punish the innocent and set the guilty free embeds our criminal justice system.²⁶¹ For this reason, the Family Code should not fear offering greater protection to victims of un-convicted abuse.²⁶²

Secondly, the law already recognizes a rebuttable presumption in cases of child custody by presuming the court cannot award an individual sole or joint physical or legal custody if they have perpetrated acts of domestic violence.²⁶³ Family Code Section 3044 establishes a presumption against a party who commits domestic violence acts within the last five years against: (1) the other party seeking custody, (2) the child, or (3) the child's siblings.²⁶⁴ A court's finding that acts of domestic violence have occurred within the family dynamic determines whether there is a

252. See generally *id.* (providing reasons why a presumption is not too strict).

253. See Michael Lonich, *supra* note 197 (providing reasons why a presumption is not too strict).

254. *Presumption*, *supra* note 159.

255. See *id.* (restricting the ways in which the victim may raise the presumption that an abuser cannot collect spousal support).

256. *Id.*

257. *Id.*

258. *Id.*

259. Kara N. Bitar, Comment, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275, 301 (2012).

260. *Id.*

261. *Id.*

262. *Id.*

263. CAL. FAM. CODE § 3044(a) (West 2004).

264. *Id.*

presumption against a party.²⁶⁵

Legislation for documented and unreported acts of domestic violence should run parallel to this section.²⁶⁶ By enacting Section 3044, the Family Code acknowledges that a judge's finding of domestic violence is strong enough to trigger a rebuttable presumption in custody matters.²⁶⁷ Implementing a rebuttable presumption for domestic violence upon a judge's finding, therefore, does not give judges too much power.²⁶⁸

Further, Section 3044 handles cases of child custody—a far more valuable and meaningful asset than money.²⁶⁹ If a court's finding of domestic violence is strong enough to establish a rebuttable presumption to withhold a parent's right to care for their child, a similar finding should be strong enough to withhold financial support.²⁷⁰

C. Additional Costs of Proposed Legislation Would Be Minimal

Some may argue that proposed legislation for unreported abuse would increase costs and court proceedings to ascertain whether domestic violence exists within a relationship.²⁷¹ Specifically, each spousal support judgment alleging domestic violence could become a “mini-trial” and exhaust legislative resources.²⁷²

Many divorce proceedings overlap with child custody, however.²⁷³ Because Family Code Section 3044 already requires a judge's finding of alleged domestic violence to determine child custody cases, many of these “mini-trials” already occur.²⁷⁴ Extending this protection to divorce proceedings alleging domestic violence would produce more consistent results to protect victims.²⁷⁵

Currently, California law makes it possible for a judge to find the existence of domestic violence in a custody proceeding but award spousal support to the abusive party.²⁷⁶ This is because the rebuttable presumption offered to victims in custody cases provides more protection to victims than the spousal support factor

265. *Id.*

266. *See id.* (creating a rebuttable presumption upon a judge's finding).

267. *Id.*

268. *See id.* (establishing a rebuttable presumption upon a judge's finding of domestic violence).

269. *Id.*

270. *Id.*

271. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1522, at 3 (July 3, 2012).

272. *Id.*

273. Edward Tsui, *Divorce and Child Custody: Everything You Need to Know*, EXPERTISE (May 13, 2015), <https://www.expertise.com/divorce/divorce-and-child-custody-everything-you-need-to-know> (on file with *The University of the Pacific Law Review*).

274. CAL FAM. CODE § 3044(a).

275. *See id.* (inquiring into domestic violence allegations during a divorce proceeding would protect a larger percentage of victims).

276. *See id.* (addressing child custody cases but not spousal support).

test under Section 4320.²⁷⁷ This is highly unlikely, however.²⁷⁸ Thus, it is the victims without children, who are not disputing custody, that miss out on the benefits offered by this “mini-trial.”²⁷⁹ These victims will suffer the most without more protective legislation because judges are not aware of the extent of their abusive situation.²⁸⁰ Because courts highly involve themselves investigating abuse in child custody cases, the cost of extending this protection to all cases of unreported violence would be minimal.²⁸¹

VI. CONCLUSION

The California Family Code aims to assist victims of domestic violence in spousal support determinations.²⁸² The code fails, however, to provide protection in all cases of documented, convicted, and unreported acts of domestic violence.²⁸³ California legislators must therefore: 1) create a rebuttable presumption preventing an abuser from collecting spousal support when documented evidence of domestic violence is present in a relationship or unreported acts upon a judge’s finding that domestic violence exists in a relationship by a preponderance of the evidence and 2) enact an explicit provision prohibiting a convicted abuser from collecting spousal support awards from their victims.²⁸⁴ Without these additional safeguards, victims may stay in abusive situations in fear of risking undesirable financial outcomes.²⁸⁵

The proposed changes to the Family Code aim to produce fairer spousal support determinations and rightfully address the prevalence of domestic violence.²⁸⁶ These changes have the potential to bring greater value to documented evidence, restore uniformity to all convicted acts of domestic violence, and provide a voice to victims suffering from unreported abuse.²⁸⁷

California fails victims of domestic violence each time the court awards an

277. Compare *id.*, with *id.* § 4320(i) (requiring a rebuttable presumption for allegations of domestic violence in child custody but a factor test for documented acts of domestic violence for spousal support).

278. See *id.* § 3044(a) (offering a rebuttable presumption in cases of child custody).

279. See *id.* (offering a rebuttable presumption in cases of child custody and not all unreported acts of domestic violence).

280. See *id.* (offering a rebuttable presumption in cases of child custody and not all unreported acts of domestic violence).

281. See *id.* (addressing child custody cases but not spousal support).

282. See *id.* §§ 4320(i), 4324, 4324.5(a)(1), 4325(a) (acknowledging domestic violence in a spousal support judgment).

283. *Id.*

284. *Id.*

285. Kerri Anne Renzulli, *supra* note 244.

286. See *Statistics*, *supra* note 15 (finding that domestic violence impacts the lives of 10 million people per year).

287. *Id.*

abuser a spousal support judgment against his or her victim.²⁸⁸ Without adopting stronger legislation to protect victims of documented, convicted, and unreported acts of domestic violence, victims will continue to fund their abusers.²⁸⁹ Until then, California will continue to fail thousands of other domestic violence victims, like Amanda, by disregarding domestic violence evidence to award “just” and “reasonable” awards.²⁹⁰ But there is nothing just or reasonable about domestic violence; it’s disgusting, repulsive, and unacceptable.²⁹¹

288. *In re Marriage of Freitas*, 147 Cal. Rptr. 3d 453, 460 (Cal. Ct. App. 2012).

289. CAL FAM. CODE §§ 4320(i), 4324, 4324.5(a)(1), 4325(a).

290. *See id.* § 4320(i) (considering documented evidence of domestic violence among other factors in determining spousal support).

291. *See SARAH NILES, TORN FROM THE INSIDE OUT IN AMERICA* 422 (2016) (stating that more individuals have died from domestic violence than the 58,000 soldiers in the Vietnam War).