A Surprising Ally: Harnessing the Power of Procedure in Domestic Violence Tort Cases

Andrew Bradt & Mallika Kaur†

ABSTRACT

Tort remedies for domestic violence, while not new, are not widely used. Many states do not explicitly provide for them, and those that do may find their goals stymied by procedural obstacles that legislatures did not consider. This paper highlights a recent case that the California legislature, leading the country with its specific Domestic Violence tort, likely intended its statutes to cover, thereby providing compensation to the plaintiff. But the case nearly foundered on an objection to personal jurisdiction and required an appellate opinion to reverse the trial court and get the case out of the starting gate. This delay—and the risk to the plaintiff's recovery— was unnecessary and easily avoidable. Legislators and judges following California's lead in actualizing domestic violence tort remedies should clarify their statutes' jurisdictional reach and the choice-of-law effects in the text of their bills. States have always had a great amount of leeway and vary greatly in their treatment of Domestic Violence torts. In 2024, as some states seek to provide specifically for this remedy for domestic violence survivors, they can preempt procedural challenges—that are especially foreseeable given everything known about tactics employed in Domestic Violence litigation—to truly make DV torts less illusory.

DOI: https://doi.org/10.15779/Z38TH8BP4H

†. Professor of Law, University of California, Berkeley School of Law. Bradt is a teacher and scholar of civil procedure, conflict of laws, and civil remedies. At Berkeley, he serves as the faculty director of the Civil Justice Research Initiative, a non-partisan think tank devoted to producing research on access to justice. Bradt currently serves as the Associate Reporter to the U.S. Judicial Conference Advisory Committee on Civil Rules, but the views expressed here are his alone. Bradt thanks his former students and research assistants, Natasha Geiling and Jessica Cuddihy, Berkeley Law '21, who provided critical input on the amicus brief discussed in this article.

Kaur has worked with victim-survivors of gendered violence for two decades, including as an emergency room crisis counselor, expert witness on domestic violence and sexual violence, researcher, and attorney. She is the co-founder and Executive Director of Sikh Family Center, the only organization focused on gender-based violence in Sikh community in the U.S. She teaches social justice classes and directs the Domestic Violence Field Placement program at UC Berkeley School of Law. Kaur thanks her former student Mia Stange, Berkeley Law '24,for her keen insights and valuable contributions to this article.

INTRODUCTION

> "…[Defendant]'s actions easily satisfy the minimum contacts requirement. If a negligent car accident or dog bite suffices, surely an assault [by an abusive husband] does, too."[1]
>
> –CA Appellate Judgment, October 20, 2021.

Few practicing lawyers will remember their mandatory torts courses including domestic violence (DV) torts cases: civil suits for damages by those escaping and surviving domestic violence.[2] All legal remedies for domestic violence survivors[3] have become more attainable in recent decades, but of the various criminal and civil options, tort remedies remain underutilized. Recognizing the inadequacy of common law tort claims in providing sufficient remedy due to the unique dynamics of domestic violence, some states have now developed specific torts and statutes to support victims filing for damages against their abusers. Other states rely on case law that has sought to free the application of common law tort claims (such as assault and battery) from vestiges of discriminatory legal principles and cultural attitudes that disadvantage the

1. Doe v. Damron, 70 Cal. App. 5th 684, 692 (2021).
2. Understood by experts as any tactic/s used to exert power and control over an intimate partner or other family member, including but not limited to, physical, sexual, emotional, financial, technological abuse. Definitions in criminal and civil codes vary, and are often much more limited as well as historically centered on physical violence (one possible tactic of abuse). Data from Centers for Disease Control's National Intimate Partner and Sexual Violence Survey (NISVS) show that DV affects millions of people in the U.S. each year. Fast Facts: Preventing Intimate Partner Violence, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 11, 2022), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html [https://perma.cc/5RLW-8UMG].
3. Various terms are used for those who are subjected to the power and control dynamics of domestic violence. This paper largely uses the term "survivor," employed and preferred by many who do not see their identity as a "victim." We acknowledge the reality that many victims of DV do not survive and that others who do survive wish to reclaim and remove shame from the word "victim." There should perhaps be no one default term; to return agency to someone who has been victimized, the individual should determine how they prefer to be to identified.

plaintiff-survivor. Survivors of domestic violence usually do not consider bringing DV tort actions for various reasons (such as lack of awareness about DV tort remedies, overwhelming fear of retaliation by the abusive party/defendant, preoccupation with attaining a safe distance from the abusive partner/defendant, and internalized biases about victims of gendered violence seeking monetary restitution). Even if the survivor has an attorney (typically in the area of family law), they too usually do not consider a tort remedy or inform the client of this option.[4] The illegality of suing for interspousal torts for much of U.S. legal history further contributes to the lack of legal clarity and activity; DV torts are usually not litigated in U.S. courtrooms.

Meanwhile, the legal system as a whole regularly interacts with the ubiquitous[5] societal problem of domestic violence. Domestic Violence remains the single largest category of police calls in many states.[6] The interaction of victim-survivors with the criminal legal system—where they are a "witness" for the prosecution of a crime rather than the driving agents in the case about their most intimate experiences—remains considerable, even if fraught.[7] In the civil system, the restraining order framework (that includes possibility of no-contact and stay-away orders) is regularly employed by many survivors. This most sought-after legal remedy for DV survivors[8] was the result of activists seeking non-criminal alternatives for survivors. Even before that, the criminalization of domestic violence was itself the result of sustained activism by anti-violence feminist activists. Now, through racial justice protests across the United States, as connections and tensions between decarceration, defunding the police, and domestic violence have been brought into sharper focus,[9] additional remedies

4. Some commentators assert that this failure may amount to malpractice. *See* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7, 7 (2005).

5. *See, e.g.,* NAT'L CTR. FOR INJ. PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2015 DATA BRIEF – UPDATED RELEASE (2018), (Nov. 2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf ("about 1 in 4 women and 1 in 10 men experienced contact sexual violence, physical violence, and/or stalking by an intimate partner and reported an IPV-related impact during their lifetime.") [https://perma.cc/T9JY-AN8K].

6. U.S. DEP'T OF JUST., NAT'L INST. OF JUST., PRAC. IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENF'T, PROSECUTORS, AND JUDGES (2009), https://www.ojp.gov/pdffiles1/nij/225722.pdf. [https://perma.cc/56LV-LH4P].

7. *See, e.g.,* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases,* 37 FLA. ST. U. L. REV. 1 (2009), https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1077&context=lr.

8. As of 2014, protection orders have reportedly been the most widely used legal remedy against domestic violence above both the tort system and criminal justice system. *See* Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015 at 1019 (2014).

9. *See* Jessica Pishko, *The Defund Movement Aims to Change the Policing and Prosecution of Domestic Violence*, THE APPEAL (Jul. 28, 2020), https://www.typeinvestigations.org/investigation/2020/07/28/the-defund-movement-aims-to-change-the-policing-and-prosecution-of-domestic-violence [https://perma.cc/PV2T-XJQR] ("She pointed to studies that show survivors of domestic violence are less likely to report abuse

independent of the criminal system are of renewed interest.

Might victim-survivors of domestic violence employ the civil legal system and sue for damages to recoup losses and avoid (or even correct) the various complications and disempowerment they feel in the criminal system?

State laws vary greatly in their approach to domestic violence civil suits. Despite the variance in state laws around DV torts, in 2023, the reality of interstate connectedness cannot be overlooked: people travel for work, for pleasure, for transit, and are coerced or trafficked across state lines. Given the pervasiveness of domestic violence, some are in abusive relationships and may be abused by their partner while both are in another state. If this non-home state seeks to provide a civil remedy for DV survivors, it should also account for and preempt procedural challenges (especially foreseeable given everything known about tactics employed in DV cases)[10] that may further dissuade survivors from employing this relatively novel remedy. A recent California case highlighted in this paper illustrates the danger of lack of jurisdictional specificity vis-à-vis civil remedies for DV survivors who may be non-state residents. As the employment of tort remedies for domestic violence gradually increases, we suggest states further clarify their jurisdictional reach and intentionally make DV tort remedies less illusory.

First, this paper briefly describes the evolutionary arc of civil remedies for DV survivors in the U.S. and lays out the context for DV tort remedies. Next, it describes a recent appellate case where a survivor sought to apply California's specific DV tort statute but had to first endure the arduous process of an appeal on procedural grounds. Third, it describes the grounds for the appellate win by the survivor, in which black letter civil procedure provided the winning argument. The fundamental procedural hook on which this case won illustrates how seemingly obvious procedural law still may not prevail over a trial judge overseeing a DV tort case, given the dynamics and prevailing myths of domestic violence and the relative novelty of DV tort suits.

The final section of the paper zooms out from this specific case to the more general lesson we can draw from it: to achieve their intended purpose, legislatures seeking to provide specific tort remedies for DV victims should be explicit about procedure and choice of law. Defendants will naturally seek to avoid liability on procedural grounds—indeed, that is their right. And the present reality is that when it comes to tort cases, those with multistate connections face even greater procedural hurdles than they did just a decade ago. Moreover, in multistate cases

---

when they think that will lead to an arrest and research showing that police are often unsympathetic to victims. Other studies have found that police themselves are often the perpetrators of domestic and sexual violence, rendering them undesirable as a source of help, particularly for women of color who experience much greater rates of violence, including sexual violence, from police. Interactions with the police can also exacerbate existing conditions, like economic instability or trauma.").

10. *See, e.g.,* David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. SOC. JUST. 429, 430 (2015) ("Domestic violence survivors and their advocates have long known that abusers often use the legal system to continue to exert power and control over survivors years after a relationship has ended, particularly through litigation in family court").

—which are inevitable and perhaps increasingly common—matters of jurisdiction and choice of law are challenging. Legislatures, however, have significant constitutional leeway in these areas. By making clear the intended jurisdictional and territorial scope of the statutes, legislators can better ensure effectiveness and make litigation more efficient by heading off expensive and delay-producing procedural objections.

To conclude, the paper thus illustrates that validation by the law of procedure need not be exceptional. Instead, states may further guarantee a meaningful DV tort remedy by explicitly stating their jurisdictional intent.

It is unlikely and unusual for a practicing lawyer to remember domestic violence law discussed in their civil procedure class. Indeed, this paper calls on advocates for statutory reform and proceduralists to be in dialogue at the statutory drafting phase and to facilitate these statutes' effectiveness. That is, if procedural hurdles are considered from the start, they need not be obstacles at all. To the contrary, procedure can, and should, be an ally to justice. Recognizing the power of procedure in DV tort cases will be another corrective step to bring these cases up to par with other civil cases, to signal a viable expansion of legal options for survivors, and to send a wider societal message that domestic violence is no longer overlooked by any law, in letter or spirit.

I. FROM COVERTURE AND "RULE OF THUMB" TO RIGHT TO SUE AN ABUSIVE PARTNER

A long cultural history dissuades women from suing their intimate partners; for too long they were legally prohibited from doing so in the U.S. Inherited English common law rendered married women property (chattel) of their husbands. Husbands were the sole legal identity of the married unit before any court of law (doctrine of coverture) and could admonish and punish their wives (doctrine of chastisement). The late eighteenth-century "rule of thumb" only limited the girth of the rod a husband could use to beat his wife.[11] In this subordinate status, wives suing husbands was rendered culturally unthinkable; for those who still dared, the law upheld the State's interest in 'protecting the sanctity of marriage' (doctrine of non-interference) and gravely disadvantaged women.[12]

As the decades turned slowly, slowest of all for those trapped in marriages marred by abuse, and women's rights were gradually recognized, the vestiges of common law retained their hold. Marital rape was not illegalized by all U.S. states until 1993.[13] It is then unsurprising that suing a spouse for damages remained

11. *See* State v. Rhodes, 61 N.C. 453, 454 (1868) ("A man may whip his wife with a switch as large as his finger, but not larger than his thumb, without being guilty of an assault."); Bradley v. State, 1 Miss. 156, 157 (1824) (discussing and recognizing a doctrine in which it is proper for a husband "to use a whip or rattan, no bigger than [their] thumb, in order to inforce[sic] the salutary restraints of domestic discipline.").
12. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122-41 (1996).
13. Jennifer A. Bennice and Patricia A. Resick, *Marital Rape: History, Research, and Practice*, 4 TRAUMA, VIOLENCE, & ABUSE 3, 228, 231 (2003).

discouraged, in letter and practice. Interspousal tort immunity, which prohibits one spouse from suing the other during the marriage,[14] is facially neutral but creates irrefutably disparate impacts given the gendered nature of domestic abuse. By blocking abused partners from suing those abusing them, it effectively prohibits wives from suing husbands. Today, some states still have not entirely abolished interspousal tort immunity and allow for partial immunity.[15] Women seeking civil remedies against intimate partners remain disadvantaged in bringing and sustaining litigation, an already fraught course of action for those seeking to escape abuse.

In the twentieth century, advocates challenged societal and cultural attitudes and insisted on the right to be free from abuse in intimate relationships and sought reforms from the legal system. Advocates urged police and the criminal legal system to recognize domestic violence as a crime rather than a 'private problem.' Thus 1994's Violence Against Women Act (VAWA) was a significant shift and has long been seen as a major achievement: it provided considerable funding for criminal arrests and prosecutions of domestic violence as a crime against the public and not an impenetrable private action.[16] The original VAWA, part of the Violent Crime Control and Law Enforcement Act of 1994,[17] led to an earlier unexpected collaboration between feminists and law enforcement,[18] which would only deepen over the years. Overreliance on the criminal system responses to domestic violence has come under increased criticism, heightened during the recent Black Lives Matter protests and dialogues.[19] But the original VAWA also contained an important non-criminal federal remedy.

---

14. *See generally* Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational, and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251 (2002).
15. Relevantly, Georgia is one of these states. Barnett v. Farmer, 308 Ga.App. 358, 362 (Ct. App. 2011) (note 15). *See generally* WILLIAM L. PROSSER, LAW OF TORTS, § 122 at 863 (4th ed. 1971); Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445, 454-457 (2013); Douglas D. Scherer, *Tort Remedies For Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 562 (1992).
16. The proportion of Violence Against Women Act funds allocated to non-criminal options or social services for survivors shrunk over next two decades. *See, e.g.*, Jill Messing, Allison Ward-Lasher, Jonel Thaller, & Meredith E. Bagwell-Gray, *The State of Intimate Partner Violence Intervention: Progress and Continuing Challenges*. J. SOC. WORK (2015), https://doi.org/10.1093/sw/swv027 ("[I]n 1994, VAWA appropriated approximately 62 percent of funds for criminal justice and 38 percent for social services. Whereas VAWA authorizations have nearly doubled to $3.1 billion in 2013, the proportion of funding for social services has decreased to approximately 15 percent of the total, resulting in a smaller dollar amount appropriated for social services in 2013 than in 1994.").
17. Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, 108 Stat. 2014, 2015 (1994).
18. *See e.g.,* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (Univ. of Cal. Press2020); *see also* Mimi E. Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization*, 1973-1986, 24 ISSI GRADUATE FELLOWS WORKING PAPER SERIES No. 2013-2014.70 (2015).
19. *See e.g.,* Am. Bar Ass'n, Section of C.R. and Soc. Just., "Restorative Justice and Gender Based Violence," YOUTUBE, https://www.youtube.com/watch?v=JVy-5u17M08.

The VAWA of 1994 created a federal civil cause of action for gender-motivated violence, including domestic violence.[20] This "civil right for women," as described by VAWA, was struck down by the Supreme Court in 2000, in *United States v. Morrison*, holding that Congress had overstepped its authority (and that neither the Commerce Clause nor the Fourteenth Amendment allowed Congress to enact such private causes of action).[21]

The extinguishment of VAWA's DV-specific civil remedy at the federal level was a setback that some states took it upon themselves to immediately correct. A minority of states[22] have developed their own specific torts, modeled after the now defunct federal tort. The remedy is not always statutory. In some cases (notably New Jersey and Washington), case law has clearly interpreted and recognized the DV tort.[23]

In more states, monetary recovery is allowed in varying amounts through the much more prevalent civil legal system governing domestic violence: the civil restraining order (e.g., in New Mexico).[24] Long before the recent cycle of debates around the criminalization of domestic violence, anti-violence advocates also sought non-criminal responses to domestic violence. At its best, the DV movement has championed the central principle of returning choice and autonomy to those victimized by domestic violence. The option of filing a civil restraining order was an important advancement of the 1970s to 1990s feminist movement in the United States. Within restraining orders, survivors can obtain some financial recuperation.[25] While more limited than a possible tort recovery, it is some states' concerted attempt at filling the void of lack of a specific DV tort statute.

California recognized the unique tort of domestic violence in Civil Code section 1708.6, which took effect in 2003.[26] "Because California already had statutory torts providing the sort of civil remedies referred to in *Morrison* [the U.S. Supreme Court case invalidating the federal civil remedy] in the areas of sexual battery (which includes rape) and stalking, Civil Code section 1708.6 focused

---

20. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 13981 (108 Stat. 2014, 2015) (1994).
21. United States v. Morrison, 529 U.S. 598 (2000).
22. Five states and one municipality have recognized a domestic violence tort: California (Cal. Civ. Code § 1708.6); Illinois (740 Ill. Comp. Stat. Ann. 82/1-20); Florida (Fla. Stat. Ann. § 768.35), NJ (N.J. Rev. Stat. § 2C:25-29(13)(b)(4) (2017)); Washington (recognizes tort of Battered Woman Syndrome under Jewett v. Jewett, No. 93-2-01846-5 (Wash. Super. Ct. 1993)); and New York City (§ 7:16. Victims of Gender-Motivated Violence Protection Act (NYC Administrative Code §§ 8-901 through 8-907); *see also* Camille Carey*, Domestic Violence Torts: Righting A Civil Wrong* at 709.
23. Washington: Jewett v. Jewett, No. 93-2-01846-5 (Wash. Super. Ct. 1993); New Jersey: Cusseaux v. Pickett, 652 A.2d 789 (N.J. Super. Ct. Law Div. 1995).
24. *See* New Mexico Family Violence Protection Act, ch. 286, § 1; 1999, ch. 142, § 1, §40-13-5(A)(5), (providing that "[a]s a part of any order of protection, the court may . . . order the restrained party to reimburse the protected party or any other household member for expenses reasonably related to the occurrence of domestic abuse, including medical expenses, counseling expenses, the expense of seeking temporary shelter, expenses for the replacement or repair of damaged property or the expense of lost wages.")
25. *See, e.g., id*.
26. Cal. Civ. Code §1708.6 (West 2003).

solely on domestic violence."[27] The legislature clearly stated its intent to create this specific tort "modeled after provisions in the federal Violence Against Women Act that created a cause of action for gender motivated violence, which were struck down by the Supreme Court as lying beyond the powers of Congress. AB 1933 [the bill introducing this tort] has been amended to address specifically the issue of domestic violence, thus offering a more readily useable tool to the victims of domestic violence, who may not, in some cases, be able to show that the violence was gender motivated."[28] California thus explicitly sought to fulfill the promise of more complete remedies[29] for those victimized by an intimate partner, recognizing the special dynamics involved that require a special tort remedy.

A. Promise and Perils of DV Tort Remedies

Tort remedies may be relevant to DV survivors for various reasons; the primary financial recovery is a non-trivial part of the tort remedy promise. Domestic violence causes economic losses, including medical expenses, legal expenses, and property damage expenses, among others.[30] The economic harm is not only the result of the abuse: it may in fact also be the means of abuse; economic abuse against intimate partners has been documented to include: loss of savings, loss of credit, or bad credit.[31] Survivors often lose work days, or may even lose their jobs altogether. Recouping monetary losses is only partially satisfied through other legal remedies (including civil restraining order systems, mentioned below) available to survivors. Further, monetary recovery for pain and suffering is not available through criminal law or family law remedies.

Tort remedies carry important non-financial promise for survivors as well. They may create an avenue for survivors to take charge of their own legal case—unlike a criminal case, where the prosecutor is in charge—and obtain a sense of closure. They may provide a day in court and possible vindication. Even filing a civil lawsuit and placing the abuse on record may be important for some survivors who have no other avenue for publicly holding their abuser accountable—

27. Pugliese v. Superior Ct., 146 Cal. App. 4th 1444, 1455 (2007).
28. Cal. Legislature, Cal. Assembly Comm. on Judiciary, Cal. Bill Analysis A.B. 1933, (Apr. 09, 2002), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml. [https://perma.cc/36FH-CUGZ]. There are two California statutes, one requiring proof of gender motivation and one not requiring this. *See* Cal. Civ. Code § 52.4 (providing a civil cause of action for damages for someone subjected to gender violence).
29. Cal. Legislature, Concurrence in Senate Amendments, Cal. Bill Analysis A.B. 1933, (Jun. 28, 2002), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB1933 [https://perma.cc/KG5J-HDXS]. ("This bill strengthens and clarifies the relief available to victims of domestic violence in two ways. First, this bill offers a clear statement of the state's policy that victims of domestic violence be able to bring suit against their abusers and recover damages. By creating a specific tort of domestic violence, this bill gives victims and the courts a clear statement of the rights and remedies of victims in these cases. Second, this bill allows an award of attorney's fees in a case based on domestic violence, a remedy not available under existing law.").
30. For example, also moving expenses, security system expenses and therapy expenses.
31. Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 991 (2012).

including in cases where the abuse did not result in a criminal charge, or where the survivor chose not to involve the criminal system. Survivors may believe a monetary loss will have a more lasting deterrent effect on an abusive partner, or even on other abusive people in society at large. Tort cases bring increased public attention to domestic violence; this may be important to a survivor's sense of contributing to the safety of other potential victims, from their individual abuser or from other abusive people employing similar tactics.

Despite possible options for recovery (financial and non-financial), tort remedies are not attractive to many survivors. As an initial matter, their relevance is diminished for survivors who suffered abuse at the hands of someone who has no assets. Further, survivor healing does not have a statute of limitations but tort claims do: by the time a survivor fulfills their primary safety priorities and is ready to emotionally engage with the abuser in a court, it may be too late to file the civil action. Also, most who complete the difficult and dangerous task of leaving want to limit engagement with their abuser, not extend it through lengthy court dates that allow for the other party to further their abusive tactics, including public denial, gaslighting, avoidance, and casting the survivor as at-fault, or unreasonable or worse as conniving and lying about the abuse to pursue other ends (for example, in the case highlighted below, for a nonimmigrant visa, a topic entirely unrelated to the lawsuit). Many survivors may be weary of returning to court given prior experiences.[32] Finally, insurance carriers do not cover torts against family members—perpetuating their own form of interspousal immunity—and this may further diminish survivors' chances of possible recovery should they successfully face the other obstacles.[33] The calculus for survivors of the trauma of domestic violence is considerable: they are acutely aware of the myths perpetuated about domestic violence and are not usually seeking an open forum where they may be subjected to prodding, disbelief, and victim-blaming.

Societal and related legal exceptionalism still attaches to claims of damages that result from gendered violence. Legal historian Professor Reva B. Siegel notes that "for a century after courts repudiated the right of chastisement, the American legal system continued to treat wife beating differently from other cases of assault and battery."[34] The civil remedy created by the 1994 VAWA sought to alleviate this by creating a specific tort remedy for survivors of gendered violence, including domestic violence.[35] The repudiation of this remedy leaves survivors in most states with only the option to pursue monetary damages against an intimate

32. *See, e.g., supra* note 12. *See also In re Marriage of Kuhlmeyer*, No. 82828-2-I (Wash. Ct. App. Nov. 7, 2022) (unpublished) [https://perma.cc/V3R9-G5D8] (affirming a trial court decision dismissing appellant's lawsuit against his ex-wife as abusive litigation under Washington's Abusive Litigation Act (ALA) Ch. 26.51 RCW).

33. Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251, 252 (2002).

34. Siegel, *supra* note 12, at 2118.

35. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40302(c), 108 Stat. 1796, 1941 (codified as 34 U.S.C. § 12361(c),(d). This remedy was struck down six years later by the Supreme Court, *supra* note 21.

partner through general assault and battery claims, provided interspousal tort immunities can be overcome. Restrictive statutes of limitations for these general common law torts are one barrier. Their subjective elements are another barrier: given the sustained societal myths about domestic violence dynamics, elements such as whether the survivor acted "reasonably" foreseeably pose higher hurdles in cases involving intimate partner violence. For example, would a jury that still largely subscribes to the societal bias 'if it were so bad she/survivor could have just left,' believe the account of a survivor who stayed in the same household with their abuser despite no evidence of physical barriers to leaving the house?[36]

Even in the few states with specific DV tort remedies, there has not been a resultant avalanche of cases precisely because of the difficult dynamics of domestic violence and related emotional and safety considerations. Specific DV tort cases also do not overcome the financial reality that such remedies are irrelevant to individual survivors who were abused by partners without money, and from whom there is nothing to recover. They are by default less available to survivors without access to money: finding a lawyer, paying for costs and fees (even when a lawyer takes the case on a contingency), and having time to pursue these cases over possible years-long timelines is not an option for the majority of the country's DV survivors. Despite individual barriers, the existence of specific DV tort remedies forwards an essential function of signaling a clear and long overdue advancement in the law surrounding intimate partners.

II. CASE: NO VACATION FROM VIOLENCE

A recent case in California considered a Plaintiff's right to bring a DV tort suit as a non-resident subjected to domestic violence by a non-resident Defendant while they were on vacation in California.

The Plaintiff (henceforth "Ms. Doe"), according to her petition,[37] was a survivor of complex traumas outside[38] and within California when she filed the tort action against her ex-husband, Mr. Damron.

In December 2016, Mr. Damron traveled with Ms. Doe, his then-wife, from their home state of Georgia to Riverside, California. While on this vacation, Mr. Damron committed various acts of domestic violence against Ms. Doe, including

36. *See* Camille Carey, *Domestic Violence Torts: Righting A Civil Wrong*, 62 U. KAN. L. REV. 695, 725 (2014) (citing, among other cases, Chen v. Fischer, 843 N.E.2d 723, 725 n.2 (N.Y. 2005) (holding that New York does not recognize intentional infliction of emotional distress claims by one spouse against another); Artache v. Goldin, 519 N.Y.S.2d 702, 706 (N.Y. App. Div. 1987) "(dismissing an intentional infliction of emotional distress claim when parties lived together for fourteen years and had four children together)"; Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991) (holding that spouse's perpetration of domestic violence throughout a marriage was not sufficiently outrageous to sustain a tort claim for intentional infliction of emotional distress).

37. Doe v. Damron, 70 Cal. App. 5th 684, 688 (2021), *as modified* (Nov. 9, 2021).

38. "During marital dissolution proceedings in Georgia, Doe alleged that Damron abused her, and she filed claims against him for battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages. Doe later dismissed these claims without prejudice. The Georgia court granted the couple a divorce, finding that the marriage was irretrievably broken." *Id.* at 688.

groping her violently and attempting to force her to perform oral sex on the street and later repeatedly raping and strangling her in their hotel room.[39] The next day, Mr. Damron was arrested in California, including for felony domestic violence[40] and Ms. Doe was interviewed and photographed by the police and transported to a hospital where she also underwent a sexual assault exam.[41]

In February 2017, Mr. Damron, who had been charged with a felony violation of Penal Code Section 273.5 for infliction of corporal injury resulting in a traumatic condition on a spouse or former spouse, took a plea deal and pled guilty to a misdemeanor violation of Penal Code Section 273.5. (A year later, his petition to have his California criminal conviction expunged was accepted. Mr. Damron allegedly perjured himself in furthering his expungement request.)[42]

Traumatized by the California assault, Ms. Doe had filed and obtained a no-contact restraining order against Mr. Damron in Georgia. Mr. Damron actively sought to reconcile with her, and under pressure, she eventually relented. They entered a period of reconciliation that is characteristic of abusive relationships.[43] The abuse continued into their next trip to California, just a few months later.[44]

In June 2017, Mr. Damron again traveled to California with Ms. Doe. Over the course of this trip, through various California counties, Ms. Doe alleged her husband verbally abused her calling her racial and sexist epithets, physically assaulted her, prevented her from calling the police, threatened to kill her, and strangled her.[45]

On returning to Georgia, Ms. Doe separated from Mr. Damron and they were

---

39. Recent research recognizes strangulation as an indicator of high lethality danger and is now even recognized specifically in Cal. S.B. 40 (2007), codified as Cal. Penal Code §273.5 (2007). *See, e.g.,* JT Messing JT, JC Campbell, C. Snider, *Validation and adaptation of the danger assessment-5: A brief intimate partner violence risk assessment*, J. ADV. NURS. (2017). *See, generally,* https://www.strangulationtraininginstitute.com.

40. Opening Brief for Appellant at 12, Doe v. Damron, 70 Cal. App. 5th 684 (Cal. App. 1 Dist. 2021) (No. A161078). ("Scott was arrested for violation of felony Penal code section 288a(C)(2), "oral copulation by use of force or injury," Penal Code Section 262(A)(1), "rape spouse by force/fear/etc."; felony Penal Code Section 262(A)(3), "rape: spouse unconscious of nature of act"; and felony Penal Code Section 27[3].5(A) "inflicting corporal injury on a spouse," all based upon his violence against Jane. (CT 558:28 to 559:1-4.) An Emergency Protective Order issued protecting Jane from Scott. (CT 560:10-12; CT 580.)")

41. Opening Brief at 12. Ms. Doe would eventually receive $40,000 from the California Victims' Compensation Fund as reimbursement and/or coverage for bills and expenses resulting from Mr. Damron's violence against her. Opening Brief at 14.

42. Appellant's Opening Brief at 13, Doe v. Damron, 588 Cal. App. 5th 684 (Cal. App. 1 Dist. 2021) (No. A161078). ("In April 2018, Scott submitted a Petition for Dismissal (otherwise known as an "expungement" of his California criminal conviction, pursuant to Penal Code Section 1203.4. (CT 594-95.) In making his request, Scott falsely declared under penalty of perjury that he had "lived an honest and upright life since pronouncement of judgment and conformed to and obeyed the laws of the land." Scott omitted any mention of an August 29, 2017 Georgia court finding of willful contempt for violations of a protective order and violence toward Jane throughout 2017. (CT 559:6-18; CT 570; CT 594-595.)")

43. *See generally* National Domestic Violence Hotline, "50 Obstacles to Leaving," https://www.thehotline.org/resources/get-help-50-obstacles-to-leaving/#:~:text=Leaving%20is%20not%20easy.,regain%20control%20over%20their%20victim [https://perma.cc/H3J3-RHW7].

44. *See Damron*, 70 Cal. App. 5th at 688.

45. Appellant's Opening Brief at 12, Doe v. Damron (Cal. App. 1 Dist. 2021) (No. A161078).

eventually divorced in Georgia. "Prior to the final disposition of the dissolution, Jane withdrew her counterclaims concerning civil torts for battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. No final judgment on those issues was made. A final judgment issued on the parties' dissolution of their marriage only."[46]

In November 2019, just short of three years since the first vacation violence in California, Ms. Doe filed a Complaint for Damages in the Superior Court of Napa County for the torts of domestic violence (Civ. Code § 1708.6), Sexual Battery (Civ. Code, § 1708.5), and Gender Violence (Civ. Code, § 52.4). The complaint alleged the history of the violence in Georgia[47]—a state with no specific tort of DV—as well as the specific events that took place in various counties in California.

Mr. Damron, properly served by mail,[48] responded with a Motion to Quash Summons for Lack of Personal Jurisdiction and a Motion to Dismiss on Ground of Inconvenient Forum. Despite California twice being his chosen vacation destination where he assaulted his wife, was arrested and pled guilty for this violence on one occasion, and where he expunged his criminal record, Mr. Damron argued his alleged lack of connections to California made it unreasonable to subject him to California's jurisdiction.[49] In addition to claiming to have over two dozen witnesses, mostly in his home state of Georgia, Mr. Damron also focused on the fact that that the couple had been in legal proceedings in Georgia earlier and that the majority of the alleged violence occurred in Georgia, not California. Additionally, the defense raised/insinuated common questions employed against survivors: Why would she even travel with him if she was a victim of his violence? What ulterior motives did she have to pursue a civil case

46. Opening brief at 16; CT 562:14-17; Doe v. Damron, 70 Cal. App. 5th at 688.

47. In Georgia, the Plaintiff's only option for civil remedy would have been general assault, battery, and emotional distress claims. The limitations of pursuing these common law tort claims aside (explained in section II *infra*), the statutes of limitation for both had run as explained in detail in Ms. Doe's Opening Brief to the Appellate Court: "Plaintiff's potential causes of action stemming from Defendant's act of domestic violence against her in Georgia may include battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. There are no separate domestic violence or sexual battery torts in Georgia. The statute of limitations for all three torts in Georgia is two years. (Ga. Code Ann. §9-3-33; *see* Gowen v. Carpenter, 376 S.E.2d 384, 386 (1988) (applying the statute to battery); *see* Mears v. Gulfstream Aerospace Corp., 484 S.E.2d 659, 663 (1997) (applying the statute to intentional infliction of emotional distress).) All the acts that took place in California, including the most egregious acts of sexual battery (Riverside County) and strangulation (Napa County), took place over 2 years ago— in 2017. The strangulation took place in June 2017. The sexual battery took place in December 2017. The statute of limitations has now run on those claims for battery. While there is a Georgia statute that tolls the statute of limitations by 6 months after dismissal (*see* GA. CODE. ANN. §9-2-61), that additional 6-month period has also passed. As to any previous acts of battery that took place before December 3, 2017 — and there are many — the statute of limitations has also passed in Georgia. In short, Georgia is not an available forum for Plaintiff to litigate any of the physical violence in Georgia that occurred prior to February 28, 2018 (two years from the date of the motion at bar.) The intentional infliction of distress and emotional infliction of distress causes of action are similarly most likely barred by the [Georgia] statutes of limitations of 2 years." Opening brief at 15.

48. Pursuant to Cal. Code Civ. Proc. § 415.40.

49. *Damron*, 70 Cal. App. 5th at 688.

against him? Ms. Doe's status as an immigrant and non-U.S. citizen was also brought into focus.[50]

To further illustrate how California's exercise of personal jurisdiction would be reasonable in the totality of circumstances, Doe listed 10 witnesses located in California who could testify as to DV injuries immediately following the assault, the investigation of the Riverside sexual assault, Doe's state of mind immediately after the sexual assault, and California Victim's Compensation funds expended in the aftermath of the assault.[51]

After a hearing in the Napa, California trial court on July 15, 2020, the trial judge issued her order granting Mr. Damron's Motion. The judge found California's exercise of personal jurisdiction unreasonable in this case:

> "Both Doe and Damron are now, and were, at all times relevant to the allegations of the Complaint, residents of Georgia. Of the approximately 14 specific acts of violence alleged in the Complaint, only three are alleged to have happened in California. Doe alleges that each of these three occurred while the parties were travelling in the State.
>
> Doe does not allege any other connection between the State of California and either Damron or herself. Doe admits that no one (other than Doe and Damron) witnessed any of the assaults alleged to have occurred in California. Finally, both parties submit evidence that Doe has brought claims in the Superior Court of Cobb County, State of Georgia, against Damron based on the same facts alleged here.
>
> Damron presents evidence that appearing in California to defend this action would place considerable burdens on him. Among these, Damron specifically identifies 20 individuals, including Doe, who reside in Georgia and who Damron maintains are or may be witnesses to the events alleged in the Complaint.
>
> In light of the foregoing, the Court finds that asserting personal jurisdiction over Defendant in this matter would not comport with either fair play or substantial justice."[52]

Ms. Doe appealed. Though many of the financial barriers to civil recovery (discussed in section II) existed in her case, she was in the unique situation of being represented by a victim's rights and family law firm, ADZ Law, that continued representing her pro bono, and took charge of the appellate work in her case.

Nowhere does the California legislature state, in the statute or its history, that the DV tort statute seeks to provide protection only to those with established

---

50. Respondent's Answer to Amicus Brief Filed by Family Violence Appellate Project, Doe v. Damron, 70 Cal. App. 5th 684 (Cal. App. 1 Dist. 2021) (No. A161078).
51. *See id*.
52. Opening Brief at 18-19. CT 692: 6-24. Citations to record have been omitted.

residency in California. The words "California" do not appear in the text nor its clearly stated intent:

> "The Legislature finds and declares the following:
> (a) Acts of violence occurring in a domestic context are increasingly widespread.
> (b) These acts merit special consideration as torts, because the elements of trust, physical proximity, and emotional intimacy necessary to domestic relationships in a healthy society makes participants in those relationships particularly vulnerable to physical attack by their partners.
> (c) It is the purpose of this act to enhance the civil remedies available to victims of domestic violence in order to underscore society's condemnation of these acts, to ensure complete recovery to victims, and to impose significant financial consequences upon perpetrators."[53]

Appellate case law interpreting the DV tort statute had similarly not contended with a situation where both plaintiff and defendant were non-residents. Ms. Doe's attorneys concluded from their research: "We are very likely in new territory."[54]

III. CALIFORNIA APPEALS COURT CLARIFIES AND CLOSES A LOOPHOLE

> "…Damron's actions easily satisfy the minimum contacts requirement. If a negligent car accident or dog bite suffices, surely an assault [by an abusive husband] does, too." [55]
>
> –Appellate Judgment, October 20, 2021.

Ms. Doe's family law attorneys, who were also DV experts, were now contending with briefing questions of specific jurisdiction for the Appellate Court, from which they sought relief from the trial court's order. California's jurisdiction seemed all too obvious to her legal team. Although the Supreme Court's specific-jurisdiction jurisprudence is maddeningly complex at the margins, the touchstone is that there is jurisdiction over cases against out-of-state defendants when the plaintiff's claim arises out of or relates to the defendant's purposeful contacts with the forum state.[56] After all, the Defendant had chosen to travel to California with his then-partner, had committed acts of violence including strangulation and rape against her in California, and, unlike most cases of intimate partner violence, had even pled guilty in California. But Mr. Damron was, at least in the trial court, able

53. Cal. Legis. Serv. Ch. 193, § 1(a)-(c) (A.B. 1933, eff. Jan. 1, 2003). https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200120020AB1933 [https://perma.cc/VJ25-QX78].
54. 2020 Memorandum and personal correspondence with Ms. Doe's attorneys regarding internal process and strategy (on file with author).
55. *Damron*, 70 Cal. App. 5th at 692.
56. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1025 (2021).

to emphasize a dearth of direct case law as well as the relative novelty of the DV tort statute. So, while to Ms. Doe's lawyers, personal jurisdiction seemed clear, they would need to explain their position to an appellate court that might feel reluctant to interpret California's general long-arm statute to cover these facts, as the trial court had been.

Co-author Kaur, as Of Counsel with ADZ Law and a nationally recognized expert on intimate-partner and sexual violence,[57] solicited an amicus brief from a civil procedure expert who could elucidate the personal jurisdiction jurisprudence and course-correct the trial court's hasty analysis. Kaur contacted co-author Bradt, a professor of civil procedure at UC Berkeley School of Law, where Kaur also teaches courses on domestic violence. While the two had never collaborated before, and neither had worked at the intersection of their respective fields, the immediate importance of working on this case was apparent to both. Recognized nationally as an expert on civil procedure, and the author of textbooks on the subject,[58] Bradt immediately recognized the opportunity to not only correct a serious error, but also to develop appellate precedent regarding personal jurisdiction in DV tort cases and more generally. He began to work on an amicus brief. It must be noted that such collaboration with a professional proceduralist is not the kind of resource a typical plaintiff would have. And, although this sort of joint effort is a credit to the culture of Berkeley Law, it is exceptional in most cases. Most plaintiffs do not have an eager proceduralist on call, and most proceduralists cannot draw on an expert in the substantive law. The importance of corrective appellate caselaw on the procedure of DV torts was thus all the more apparent to the co-authors in their support of the lawyers at ADZ Law championing Ms. Doe's case. Indeed, one goal of this paper is to encourage such collaborations in the future—but also to make them less necessary by encouraging legislators to anticipate procedural issues in advance.

In this case, Bradt's amicus brief expounded both on how the almost eight decades of jurisprudence around the *International Shoe* test undoubtedly established required contacts between the Defendant and California, and why the trial court's perfunctory analysis did not "pass muster under the U.S. Supreme Court's reasonableness jurisprudence."[59]

Another detailed amicus brief supporting a finding of jurisdiction in cases where the DV is committed in CA, even though both parties are non-residents, was filed by Family Violence Appellate Project, a California and Washington state non-profit legal organization focused on appellate representation of survivors. It

57. Professor Kaur has worked with victim-survivors of gendered violence for two decades, including as an emergency room crisis counselor, expert witness on domestic violence and sexual violence, researcher, and attorney. *See https://www.law.berkeley.edu/our-faculty/faculty-profiles/mallika-kaur/#tab_profile*.

58. Professor Bradt has taught Civil Procedure at Berkeley Law for over a decade and is a co-author on two leading casebooks in the field. *See https://www.law.berkeley.edu/our-faculty/faculty-profiles/andrew-bradt/#tab_profile.*

59. Brief for Andrew Bradt as Amicus Curiae Supporting Petitioner, Doe v. Damron, 70 Cal. App. 5th 684 (No. A161078).

was signed by twenty other state and national organizations and DV experts.[60] The case had an undeniable precedential value.

The California Court of Appeals for the First District made its decision in October 2021, nearly two years after the case had been filed.[61] It reversed the trial court's finding and held that "absent compelling circumstances that would make the suit unreasonable, a court may exercise jurisdiction over a non-resident who commits a tort while present in the state."[62]

The court summarized the "minimum contacts" doctrine and concerned itself with determining whether Mr. Damron's contacts with the state were sufficient to constitute "specific jurisdiction."[63] For his part, the court noted, Mr. Damron had vigorously argued: "He had never lived, owned property, paid taxes, registered to vote, opened a bank account, or held a driver's license in California. His only contacts arose from his two trips to California with Doe."[64] During one of these trips, Mr. Damron admitted to assaulting Doe and thus pleading guilty to "willfully inflicting corporal injury on her." This travel to the state and injury to the plaintiff while in the state were found sufficient to meet the two *Ford* factors to support specific jurisdiction: "(1) the defendant's own actions must connect him or her to the forum state, and (2) the litigation must arise from or relate to the defendant's actions." [internal citations omitted].[65]

The opinion noted how these factors establish specific jurisdiction even in cases where the tort action occurred during a sole and brief visit, giving the example of a car accident caused by an out-of-state visitor.[66] Further, it noted that California's Supreme Court has found jurisdiction over an out-of-state dog owner in a dog bite tort action, finding it fair for the Defendant, "whose voluntary acts have given rise to a cause of action in a state to litigate his responsibility for that conduct at the place where it occurred."[67]

The appellate decision rejected Mr. Damron's claims of unreasonableness and clearly refocused on California's state interest in regulating abusive behavior. First, the court stated the indisputable interest in regulating tortious conduct in California (weeding out the red herrings in Mr. Damron's reasonableness

60. Brief for Family Violence Appellate Project as Amicus Curiae Supporting Petitioner, Doe v. Damron, 70 Cal. App. 5th 684 (No. A161078). ("We are joined in this request by the following state and national non-profit organizations and individuals: Alliance for Hope International; Battered Women's Justice Project; California Protective Parents Association; California Women's Law Center; Center for a Non-Violent Community; Community Legal Aid SoCal; Domestic Abuse Center; Doves of Big Bear Valley, Inc.; FreeFrom; Law Foundation of Silicon Valley; Legal Voice; Los Angeles County Bar Association Counsel for Justice Domestic Violence Project; Project Sanctuary; Public Interest Law Project; Sanctuary for Families; San Diego Volunteer Lawyer Program, Inc.; Christine M. Scartz; Stopping Domestic Violence; Walnut Avenue Family &Women's Center; and D. Kelly Weisberg.")
61. *Damron*, 70 Cal. App. 5th at 684.
62. *Id.* at 687.
63. *Id.* at 689.
64. *Id.* at 688.
65. *Id.* at 692.
66. *Id*.
67. *Damron*, 70 Cal. App. 5th at 692.

argument, such as the duration of the domestic relationship in Georgia). Second, the court unambiguously stated how California's interest extends to non-resident victims.

> "California law protects people from domestic violence, holds abusers to account, and provides a remedy for victims of spousal abuse that occurs in the state— without regard for whether the abusers or victims reside here. (See, e.g., Civ. Code, § 1708.6 [providing for liability for the tort of domestic violence]; Pen. Code, § 273.5; Hogue v. Hogue (2017) 16 Cal.App.5th 833, 839.) If a defendant has minimum contacts with a forum state, there is no additional requirement that the plaintiff be a resident of that state. (Keeton, supra, 465 U.S. at p. 780; Epic Communications, Inc. v. Richwave Technology, Inc. (2009) 179 Cal.App.4th 314, 336.) Constitutional limits on jurisdiction do not grant a free pass to tourists and business travelers—millions of whom visit California each year—to abuse their spouses or assault other visitors without fear of civil liability in the state." [68]

Finally, the Court was unpersuaded by Damron's argument that he would be unduly inconvenienced; it noted lack of specificity in the evidence Damron claimed was in Georgia, noting also that the Plaintiff listed nine specific witnesses in California.

With this reversal, Ms. Doe and her pro bono attorneys were able to proceed once again in trial court, now in Riverside County (after a stipulated change of venue).

Almost four years after filing the Complaint in November 2019, jury selection began in October 2023 and the trial took place over the span of six weeks.

Doe's intersecting vulnerabilities, including her immigration status and single motherhood, were brought into issue by Damron again in an effort to have the jury question her motivations to file a tort suit. Ms. Doe's lead trial attorney Jessica Dayton from ADZ Law recounts:

> "On cross examination, defense counsel tried to imply that Ms. Doe, a native Spanish speaker, was using an interpreter for manipulative reasons. They made false connections regarding the timing of marrying Mr. Damron, as well as regarding the timing of the filing the civil lawsuit. Their strategy was to paint Ms. Doe as manipulative, motivated by money and immigration gain. They implied negative inferences about her ability to work or spend time with her children after suffering abuse at the hands of Mr. Damron, rather than recognizing Ms. Doe could be a survivor doing her best to move on with her life."[69]

Eventually the jury returned a verdict for Ms. Doe. The award was however

68. *Damron*, 70 Cal. App. 5th at 9.
69. Email correspondence with Jessica Dayton (Feb. 6, 2023) (on file with authors).

limited; 10 out of 12 jurors found Mr. Damron liable for domestic violence against Ms. Doe. They awarded her full request for past and future economic damages in the amount of $188,000. They did not, however, award any general damages, finding contradictorily that Ms. Doe had experienced no pain and suffering.

IV. LEGISLATURES SHOULD HEAD OFF PROCEDURAL HURDLES WITH CAREFUL DRAFTING

State legislatures wishing to ensure that their DV statutes are maximally effective must take what one might call 'lawyer's law' into account.[70] Without fully addressing issues like personal jurisdiction and choice of law in the statutory language, legislators risk leaving the interpretation of their statute to judges who may feel compelled to limit its scope, as the trial court in *Damron* did.[71] And while the trial court decision in *Damron* was ultimately reversed on appeal, that result was far from certain, even though the Plaintiff's legal team believed that the law was clear. The reality is that domestic-violence-specific statutes are so new that there is little precedent that is on all fours. Moreover, procedural law is always in flux, as the Supreme Court's decade of personal-jurisdiction cases demonstrate.[72] And even though the right result was eventually reached in *Damron*, it was not without delay and uncertainty. The failure to address procedural issues in the text of the statute very much could have spelled doom for this case had the court of appeals not felt compelled to reverse.

If personal jurisdiction over the defendant had proved to be an insuperable obstacle in *Damron*, the effectiveness of California's statute would have been in serious doubt in all cases other than those where both parties were domiciled in California and all the tortious acts occurred in California. Such is the power of procedure.[73] No longer may any sophisticated lawyer refer to the law of procedure (or analog fields like conflict of laws or remedies) as "adjective law," acting only as the "handmaid" to the substantive law.[74] Setting aside that there is no meaningful way to divide the world between substantive and procedural law, what should be clear is that the procedural law is equally important to the substantive law—and that when procedure is mismatched to legislative intent, that intent may be thwarted.[75]

But procedure need not be an enemy. When thought through *ex ante* by legislators, specificity in procedure can go a long way toward ensuring that a

70. *See generally* Robert H. Jackson, *Full Faith and Credit—The Lawyers' Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).
71. Doe v. Damron, Napa County Superior Court, Docket No. 19CV001762 (Sept. 4, 2020).
72. *See* Maggie Gardner, Pamela K. Bookman, Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 457 (2022).
73. *See* Stephen B. Burbank*, Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1706 (2004).
74. *Id.*; *cf.* Charles Alan Wright & Harry M. Reasoner, *Procedure—The Handmaid of Justice, Essays in Honor of Charles E. Clark* (1965).
75. *See* Karl N. Llewellyn, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930).

statute accomplishes its goals. Personal jurisdiction is a prime example. As noted above, California's DV tort statute contained no specific jurisdictional provision. This is not uncommon in California or other states that also have adopted a "pure long-arm statute," that is, a personal-jurisdiction statute that extends to the outer limit of what the Fourteenth Amendment allows.[76] In other words, states with pure long-arm statutes allow their courts to exercise as much jurisdiction as the Supreme Court permits. But what *Damron* illustrates is that even these maximal statutes can have holes. That is especially true during a period of constitutional flux like the one we are in now. The meaning of California's long-arm statute varies according to the Supreme Court's current jurisprudence, so what might have been acceptable in 1949, 1979, or 2009, might not be so today. In this case, the Court of Appeals corrected the confusion, but not without significant uncertainty and elbow grease.

One way that legislators can preempt these questions is by being specific in the statutory text about the intended jurisdictional scope of the statute. In the end, we were affirmed that our central argument—that California may assert jurisdiction over an out-of-state defendant who commits an intentional tort within California's borders—was uncontroversial. The legislature, however, could have made clear its intention to cover torts committed by visitors while in California by simply saying so in the statute. That is, statutory drafters should make clear in the statutory text the jurisdiction it intends to grant to state (and by extension federal) courts. For instance, drafters could canvas the current law of personal jurisdiction and make clear that some predictable scenarios are intended to be covered—for example, a tort committed by one Californian against another while outside the state, or torts committed by non-Californians while present within the state's borders. Of course, there are risks in specificity.[77] To the extent there is any uncertainty, legislators can include a savings clause such that any scenario not included may be adjudicated by the state's courts if allowed by the general long-arm statute. Conversely, legislators who want to limit their statute's scope more carefully can do so, as well.

It is of course true that any more specific statute will be subject to challenge by a defendant on constitutional grounds. For instance, even if the California statute specified that its courts would have jurisdiction over torts committed in the state by a non-resident, Mr. Damron could have asserted that the statute was unconstitutional. Still, the legislative intent would be clear. To the extent that a judge's espying "forum shopping" in a particular case—as the Supreme Court seemed concerned with in *Bristol-Myers* and *Ford*[78]—a specific jurisdictional

76. *See, e.g.,* CAL. CODE CIV. PROC. § 410.10 (West 1970) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). *See also* Zachary D. Clopton, *Long Arm "Statutes"*, 23 GREEN BAG 2d 89 (2020).

77. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 670 (1992).

78. *See Ford*, 141 S. Ct. at 1031 (distinguishing Bristol-Myers Squibb on the basis that there, the "plaintiffs were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State"); Gardner et al., *supra* note 72, at 468-69.

provision would make clear that California welcomes and encourages these cases and does not consider survivors filing in California to be kind of manipulation. Moreover, legislators could make life easier on lawyers and judges by providing accompanying notes and analysis explaining the reasons it concluded that jurisdiction over the denominated cases is appropriate. In this way, procedure can be a powerful ally. By making clear that the statute's jurisdictional scope has a strong constitutional foundation, specific procedural text can ensure the statute fulfills legislators' aims.

Personal jurisdiction, of course, is only one way that statutory drafters can be clearer about the intended scope of a statute. Much state procedural law resides in codes or rules, which typically track to at least some degree the Federal Rules of Civil Procedure.[79] To the extent these statutes demand specific provisions for pleading, joinder, discovery, and the right to a jury trial, legislators can again leave less to chance by being more specific in the text. Beyond code or rule-based procedure is, of course, procedural common law, within which, for purposes of this paper, we include choice of law, remedies, and preclusion.[80] Each of these areas are less likely to be defined by statute, and they each have constitutional dimension, whether as a matter of due process or federalism.[81] Like personal jurisdiction, being specific about statutory intent will better define the statute's ambit. To illustrate this, this paper focuses on choice of law.

Choice of law is a subject that terrifies many lawyers. Renowned former Berkeley Law Dean Prosser did the field no favors when he famously described it as a "dismal swamp,"[82] a label that has stuck over the intervening decades.[83] The reality of choice of law may, however, be easier than it seems if a legislator keeps it in mind. The natural presumption, if a statute is silent as to choice of law, is that legislators did not intend their statute to protect non-residents or apply to events occurring outside the state's territory.[84] But this is a presumption that attaches only to legislative silence. Legislators should be aware that the Constitution imposes only minimal limits on a state's power to apply its own law to a case.[85] So long as the forum state has "significant contacts" with the case at bar, the forum state may apply its own law.[86] Despite many opportunities, the Supreme Court has declined

79. John Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1369 (1986) (noting the "pervasive influence of the Federal Rules on at least some part of every state's civil procedure"); *see also* Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2019).

80. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 823 (2008).

81. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-08 (2001).

82. William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

83. *See, e.g.*, Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991).

84. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

85. Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 279 (1996); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 442 (1982).

86. *Compare* Allstate Ins. Co. v. Hague, 449 U.S. 302, 333 (1981) (holding that neither the due process clause nor the full faith and credit clause were violated by application of Minnesota

to make this standard stricter or to regularly police state choice of law.[87] States are therefore typically left to their own devices when it comes to their rules and methods for choosing law.

The result has been a cacophony—U.S. states follow at least six different "approaches" to choosing law, some of which are more complicated and nuanced than others.[88] Most prominently, some states adhere to more traditional territorially based rules, such as "apply the law of the state where the injury occurred," while others take more modern approaches that balance many factors, such as the parties' domiciles and governmental interest, to determine the most appropriate law.[89] Most statutory causes of action do not contain explicit choice-of-law provisions, so in cases with multistate elements, the choice of law is left (with maximal leeway) to the trial court judge. So, for instance, in a state that follows the old "lex loci delicti" rule that selects the law of the state where the alleged injury occurred, that state's DV statute would not likely apply to a tort committed outside the state, even if legislators intended it to.[90] The general choice-of-law rule would trump.

California, for its part, follows a "governmental interest" approach to choice of law.[91] Much has been written explaining California's methodology.[92] For our purposes, one can boil it down, with apologies for oversimplification. California will apply its own law if doing so will advance its statutory policy. It will defer to the law of another state only when California has no such interest, or another state's interest will be impaired significantly by applying California law.[93] Consider how this method might have thwarted the plaintiff's efforts in *Damron*: a California court might conclude that despite there being personal jurisdiction over the defendant, Georgia's tort law should apply because that was, at the relevant time, the parties' common domicile. If Georgia's tort law is less plaintiff-friendly than California's, the plaintiff might find herself worse off even in California's courts.[94] The legislature could, however, preempt this risk altogether by mandating in the statute that California law will apply in all cases where either one party is a California citizen, or the tort occurred within California. Such a choice-of-law rule, even if imposed by statute, is entirely consistent with the constitutional architecture. Defendants might challenge application of California law, but such a challenge would be futile since in all such cases California will

law), *with* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-23 (1985) (holding that application of Kansas law to members of a nationwide class with no connection to Kansas was unconstitutional).

87. Weinberg, *supra* note 85, at 442.

88. SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 63 (2006).

89. *Id*.

90. *See id.* at 66.

91. Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 578 (1980).

92. *See, e.g., id*.

93. McCann v. Foster Wheeler LLC, 225 P.3d 516 (2010).

94. *See id.*; *see also* Kearney v. Solomon Smith Barney, Inc., 137 P.3d 914, 936 (2006).

have the requisite "significant contact" with the litigation. Ultimately, then, legislatures can head off these problems with appropriate procedural foresight.

CONCLUSION

> "Constitutional limits on jurisdiction do not grant a free pass to tourists and business travelers—millions of whom visit California each year—to abuse their spouses or assault other visitors without fear of civil liability in the state." [95]
>
> –Appellate Judgement, October 20, 2021.

Even after survivors and their attorneys become well-versed in DV tort claims as a possible remedy, lack of textual clarity may render the DV tort remedy a non-starter for most plaintiffs. Among the inherent limitations of civil DV tort remedies, financial status is already a limiting factor (as discussed in section II). If a survivor must also appeal a case even before it begins, they are likely to not only incur more fees but are also more likely to lose their trial lawyer who is already working on a contingency basis and in an area of law that remains uncommon. In the California case described here, black letter civil procedure provided the winning argument and allowed the case to proceed.

This ameliorative appellate case, which may well have never proceeded in the absence of a very persistent and brave plaintiff and the availability of committed pro bono legal assistance (including the expert amicus brief), is a meaningful win for California's DV tort statutes as well as a cautionary tale for other state statutes seeking to effect civil remedies for gender-based violence. Statutes must be drafted with procedure as a prominent element, and not an afterthought. And the jurisdictional language of existing statutes must be amended to account for procedural issues instead of relying on appellate clarifications if and when a petitioner and their advocate are able to pursue an appeal. However, even short of action by legislatures, courts should recognize that they must consider state procedural law as an ally to facilitate the litigation. DV advocates may thus need to bring more cases to appeal to actualize DV tort remedies through spread of positive case law.

Finally, this case and the successful collaborations it engendered for creating positive appellate case law in California illustrates that the ubiquitous nature of domestic violence also requires remedial legal actions across silos—"family lawyer," "DV expert," "personal injury lawyer," "civil procedure expert"— and beyond the courtrooms where DV cases have traditionally been litigated.

95. *Damron*, 70 Cal. App. 5th at 9.