

*The Office on Violence Against Women in partnership with Praxis International*

## Audio Conference Training Binder

### ***The National Custody Crisis for Battered Women: What Advocates Should Know***

with Rose Thelen, Praxis Technical Assistance Partner  
and Stephanie Avalon, Battered Women's Justice Project

**Thursday, March 20, 2008**

**Call at 2:00 p.m. Central Time**

**Dial 512-623-5114, then enter guest code 52533#**

**AUDIOCONFERENCE  
TRAINING**

**ALL CALLS ARE  
FROM 2:00 - 3:30 P.M.  
Central Time**

#### Things to Know:

Time zone conversion:

Eastern: 3:00 to 4:30

Central: 2:00 to 3:30

Mountain: 1:00 to 2:30

Arizona: 12:00 to 1:30

Pacific: 12:00 to 1:30

Alaska 11:00 to 12:30

Hawaii: 9:00 to 10:30

**Cost:** Long distance telephone call. All expenses can be covered by your OVW training funds.

**Participation:** Remember to say your name and state every time you start speaking – we can't see you!

**Muting:** Unless the operator has muted all of the lines, please keep your telephone on mute EXCEPT when you are speaking on the call. Press \*6 on your keypad to mute your line. To un-mute, press \*6 again.

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## **Trainer Biography:**

### ***Stephanie Avalon***

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Stephanie Avalon is a resource specialist for the Battered Women's Justice Project, responding to a wide range of questions regarding the criminal legal response to domestic violence. She assists in the conferences presented to VAWA grantees, visits grantee programs to evaluate their progress, and provides specific advocacy training. Stephanie has served on the Advisory Group of the American Prosecutor's Research Institute and helped develop their curriculum for domestic violence prosecution institutes. In addition, she has written two articles exploring the role of advocates working in the criminal justice system.

Prior to joining BWJP in 1997, Stephanie worked for battered women providing both individual and system advocacy. After working in a Minneapolis project, in 1992 she established the Southern Valley Intervention Project to serve a rural county in Minnesota. As coordinator, she worked with criminal justice personnel, advocating for battered women and training volunteers. Along with the County Attorney she developed and provided law enforcement training for all police officers in the county.

### ***Rose Thelen***

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Rose is co-founder of the Gender Violence Institute in Clearwater, MN where she recently completed an OVW - funded project to develop a coordinated community response (CCR) to domestic violence on two Minnesota Reservations. Rose is also a Rural Technical Assistance Partner (TAP) for Praxis International and also served as a consultant to the Safe Haven Visitation Center's national demonstration project.

In the past, Rose has been a shelter advocate, batterers' and battered women's group facilitator, lobbyist for the MCBW, and coordinator of a multi-county coordinated community response project, utilizing the Duluth model of criminal justice reform.

Rose is the author of several publications, including *Advocacy in a Coordinated Community Response*, a paper published and distributed by the Battered Women's Justice Project, St. Paul, MN, as well as a manual, *Best Practices for Responding to the Co-occurrence of Battering and Child Maltreatment*, distributed by the Minnesota Coalition for Battered Women. Rose has a BA from St. Cloud State University in Social Work and Psychology.



The National Custody Crisis  
for Battered Mothers:  
What Advocates Should Know

Stephanie Avalon  
BWJP Resource Specialist  
Savalon@bwjp.org

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Battered mothers are losing  
custody of their children  
to abusers.

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Empirical Evidence on the Custody  
Crisis facing Battered Mothers

*Violence Against Women, Volume 11,  
Number 8, August 2005*

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## Human Rights Violations by U.S.

- On May 11, 2007 ten mothers, one victimized child, now an adult, and leading national and state organizations filed a complaint against the United States with the Inter American Commission on Human Rights.
- Their petition claims that U.S. courts, by frequently awarding child custody to abusers and child molesters, has failed to protect the life, liberties, security and other human rights of abused mothers and their children.

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## How Does this Happen?

- Problematic legal structure assuming equality and favoring joint custody
- Gender Inequality, bias, and double standard
- Overburdened court system
  - Pressure to move case through the system
  - Less money and fewer personnel
  - Push for alternative dispute resolution (ADR)
  - Third party neutrals

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- Cultural mythology
  - PAS and PA
  - Belief in High Number of False Reports
  - Conflict vs Abuse
- Fatherhood Supremacy Movement
  - Attractive to abusive men
  - Good at packaging message as “rights”

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## Judicial Neutrality

“In custody cases, courts’ “neutral” stance is linked to their unquestionable obligation to treat both parties as starting with equal rights to custody, and not to presume, for example, that children need their mothers more than their fathers.”

“...courts treat the equality principle as not just a starting point, but as the requisite outcome, a goal that overrides contradictory information.”

Meier, Joan S., *Domestic Violence, Child Custody, and Child protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 *Am U.J. Gender Soc. Pol’y & L.* 657 page 9

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## “Friendly Parent” Statutes

- “The disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child”
- At least 32 states have statutes with friendly parent provisions
- Often can override a presumption that custody should be awarded to the non-abusive parent

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## “Friendly Parent” Statutes

- “Unfriendly behaviors” generally include only those of the custodial parents (for example, not wishing to reveal a new address, raising concerns about child sexual abuse or domestic abuse) and not behaviors of noncustodial parent, like nonpayment of child support.

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Questions?

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**This Assumption Underlying Family Court Practice**

- Physical harm must constitute serious bodily injury and threats must involve imminent physicality.

**Conflicts with this Domestic Violence Best Practice Assumption**

- ANY physical threat or harm should be taken seriously, including emotional and financial abuse.

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**This Assumption Underlying Family Court Practice**

- Parental influences and access are of primary importance.

**Conflicts with this Domestic Violence Best Practice Assumption**

- Safety is more critical than access.

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**This Assumption Underlying Family Court Practice**

- Parties share equal responsibility to work together to arrive at mutual agreement; parties should be friendly and cooperative toward one another.

**Conflicts with this Domestic Violence Best Practice Assumption**

- Structured agreements and schedules are best to avoid contact and negotiation for the abused party; mediation should be avoided.

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**This Assumption Underlying Family Court Practice**

- Denying on-going contact or access to children for a parent is an inappropriate attempt to punish that person.

**Conflicts with this Domestic Violence Best Practice Assumption**

- Creativity and persistence are important to outcomes that will not further opportunities for control, harassment or abuse.

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**This Assumption Underlying Family Court Practice**

- Non-family law proceedings are unrelated matters and use of them are viewed with skepticism regarding party intent: litigants want to get “a leg up.”

**Conflicts with this Domestic Violence Best Practice Assumption**

- Many forms of relief should be woven together to prevent the abuser from using financial, property, or decision-making power to harm the abused party.

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**This Assumption Underlying Family Court Practice**

- The parties are mutually and primarily responsible for making the order and post-separation relationship work.

**Conflicts with this Domestic Violence Best Practice Assumption**

- The abuser must be held accountable: orders must be enforced and violations quickly and consistently responded to.

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**Other Important Differences**

- Criminal Courts use the highest standard of proof—Beyond a Reasonable Doubt
- Family Courts use the lowest standard of proof—Preponderance of the Evidence

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**Other Important Differences**

- In Criminal Courts the state takes on the abuser and employs a prosecutor to advocate on behalf of the state.
- In Family Courts the parties are assumed to be equal and the victim herself faces her abuser or must find a private attorney to do so.

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## Other Important Differences

- The trend in Criminal Court over the last couple of decades has been toward improving the response to domestic violence
- The trend in Family Court has favored unmarried fathers and the assumption that fathers' "rights" to custody and child access should be equal to mothers', regardless of who has provided primary care-giving

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## Questions?

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## "Good Enough"

- Mothers without any identified problems can lose custody

—Phyllis Chesler's *Mothers on Trial: The Battle for Children and Custody*, 1985

This book explores examples of women who lost custody for reasons that had nothing to do with their fitness to mother.

[Custodyprepformoms.org](http://Custodyprepformoms.org)

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If June Cleaver can lose custody,  
what about real mothers?

The following red flags signal particularly  
strong risks for battered mothers in  
custody disputes

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The Mother Alleges

- Abuse of the child by the father, whether physical or sexual
- Domestic abuse of the mother

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The Mother's Past (or Present)

- History of Substance Abuse
- History of violence, i.e. arrests for assault
- History of Mental Health Problems
- History of relationships with abusive men
- Been threatened by the abuser that he would get the kids

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The Child Has Problems:

- Alienation of the *mother* by the child
- The child has significant developmental issues or health problems

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The Mother is Viewed as Uncooperative or Not Compliant

- She has a history of court filings to modify parental access times/custody/visitation
- She files a petition for a protection order at about the same time custody is being disputed
- She is viewed as “difficult” regardless of whether she has a significant parenting deficit

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So What’s A Mother To Do?

- The Battered Mother’s Dilemma
- The Advocate’s Dilemma

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## Questions?

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## What's An Advocate To Do?

- Think strategically when working with women.
  - Hennepin County advocates sometimes assist women who qualify for OFP in getting a HRO instead, which often does not involve having a hearing and can establish "no contact". This avoids having the judge actually make a custody decision.
  - In OFP hearings custody can be decided on the basis of safety for the mother and children
  - Convictions in criminal court may be the only way to establish a history of domestic violence the Family Court will recognize.
  - If custody is already being litigated a criminal no contact order is preferable to seeking an OFP, though it could still backfire.

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## What's An Advocate To Do?

- Expand services to include accompanying women to custody/divorce hearings even when women have attorneys.
  - Many do not. 60% of litigants in Hennepin County are pro se.
- Track and document what happens.
- Be available to validate women's fears and listen to their stories.

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## What's an Advocate To Do?

- Help locate and train competent, caring attorneys who can represent battered mothers.

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## What's an Advocate To Do?

- Monitor judges. Know the legal landscape of your jurisdiction.

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## What's an Advocate To Do?

- Help women counter charges of PA or PAS. The following are suggestions for protective parents from Arlaine Rockey, <http://members.aol.com/afoggyday/page10.html>
  - Have the child make gifts and/or cards for the abuser (birthday and all holidays)
  - Make sure the child calls the abuser at least every other evening, preferably from a cell phone
  - Inform abusers in writing (email okay) in advance of regular doctor and dental appts and teacher's conferences, invite him to attend (unless there's a restraining order) send him an email letting him know what happened and what's recommended
  - Make copies of all school report cards, progress reports, notes from teachers, and example of the child's work and send with cover letter saying please find X enclosed. Keep copies of your letters and keep the originals or copies of the things sent.
  - Send the abuser school pictures, even a few extra for his family, again with a cover letter, and keep a copy for yourself.
  - Be polite and professional in all your communications with the abuser. Remember, everything you say can and will be used against you.

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### What's An Advocate to Do?

- Prepare women for custody evaluations.  
Liz Richards, an attorney for MCBW has women make four lists:
  1. What makes you a good mother?
  2. What makes him a bad father?
  3. What will he say makes you a bad mom?
  4. What makes him a good dad?

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### What's An Advocate To Do?

- Consider legislative changes carefully.  
Work with your state coalitions.
  - Financial issues re: divorce and child support
  - Protective Parent Reform Act
  - Repealing "Friendly Parent" provisions
  - Beware of unintended consequences

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### What's An Advocate To Do?

- Familiarize yourself with "Custody-Visitation Scandal Cases"
  - Defines problem so it can be studied, exposed and recorded
  - Described by attorney Barry Goldstein as a tool to identify a serious problem in judicial system—judges who create more than one or two such cases should be retrained or removed.
  - When abusers seek extreme remedies "we can tell the court the father is seeking to create a Custody-Visitation Scandal Case".

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## What's an Advocate To Do?

- Attend The Battered Mother's Custody Conference in Albany, NY
- Fight for social justice issues that help women and children
- Plan local support rallies to raise awareness this coming Mother's Day, the first anniversary of the petition to the IACHR.

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## What's an Advocate To Do?

- Avoid using the language that reinforces the fatherhood supremacist frame.

For example, *parenting* and *co-parenting* are terms that obscure the gendered nature of the activity.

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Questions?  
Or better yet, other ideas?

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# Creating Justice Through Balance: Integrating Domestic Violence Law into Family Court Practice

BY ANDREA C. FARNEY AND ROBERTA L. VALENTE

## A B S T R A C T

Freedom from domestic violence is a central right that should be enjoyed by all.<sup>1</sup> The proper operation of the law is integral to that freedom—as is the cultural transformation that must occur in order for women to live free from harm. Courts and attorneys have a privileged role to play in seeking improvement in the substance of the law, the administration of justice, and the quality of service rendered by the profession. Without this professional commitment, however, judges and lawyers run the risk of turning the law into an inaccessible institution that oppresses battered women seeking safety, autonomy, economic independence, and justice for themselves and their children.

The core values underpinning family law—particularly as it addresses child custody and visitation—too often are at odds with the safety needs of victims of domestic violence. Family law, which has developed as a mechanism for defining, recognizing, establishing, re-ordering, or supporting the familial and intimate relationships that people have with one another, is fre-

quently inadequate to address domestic violence. In contrast, the specialized domestic violence law provisions operating within family law function under rationales and theories distinct from those underlying family law. The inherent substantive tensions that arise when the two bodies of law are simultaneously implemented can result in conflicting court orders, unsafe interventions, and inappropriate remedies for survivors of domestic violence.

“Friendly parent” provisions, for example, which can be useful in opening lines of communication in non-abusive family situations, can end up silencing a battered woman who fears reporting abuse lest it make her appear “unfriendly.” Stay away provisions in protection orders may offer structure that leads to safety, but may conflict with later visitation provisions in custody court. The challenge facing judges and lawyers is how to integrate the normative assumptions of family law with the safety assumptions that undergird domestic violence law.

Freedom from domestic violence is a central right that will be realized through a transformation of culture. Law, embedded within the evolving cultural transformation, plays a necessary, though not sufficient, role in social change. This article reviews the development of family and domestic violence law. It compares and contrasts the core precepts of family and domestic violence jurisprudence with resulting practice and policy ramifications arising from the inherent substantive tensions. Finally, critical civil legal system actors, courts, and attorneys are challenged to apply and practice domestic violence law in the struggle to afford justice for all.

**Andrea C. Farney, J.D.,** is a policy analyst with the National Resource Center on Domestic Violence of the Pennsylvania Coalition Against Domestic Violence. She concentrates her work on advocacy strategies to further economic opportunity and justice for battered women. Ms. Farney is the former Managing Attorney of the Legal Department of the PCADV.

**Roberta L. Valente, J.D.,** is the Senior Advisor for the Domestic Violence Resource Network, a consortium of national resource centers funded by the U.S. Department of Health and Human Services. Ms. Valente also serves as a consultant to the national projects of the Pennsylvania Coalition Against Domestic Violence and the National Network to End Domestic Violence as well as providing consulting services on family law issues and domestic violence for the Family Violence Department of the National Council of Juvenile and Family Court Judges.

## Family Law Development and Core Values

Family law provides the framework for legally establishing and dissolving interpersonal relationships and personal status. The rules and principles are meant to answer the questions of who can become a spouse or parent and what rights and responsibilities arise from familial status.<sup>2</sup> At its heart, this jurisprudence outlines the contours of defining a “family” for purposes of regulating legal status inside, and to ensure rights of property and inheritance outside, the family.<sup>3</sup>

The Constitution recognizes and “protects” the “sanctity” of the family because “the institution is deeply rooted in this Nation’s history and tradition” and “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”<sup>4</sup> The public law involving the family examines and pronounces the parameters of the rights of parents, the needs and rights of children, and the authority and obligation of the state. State regulation of the family is measured, as a matter of constitutional law, against fundamental liberty interests such as the freedom to marry, the interest of natural parents in the care, custody, and management of their children, and the sphere of private life free from state intrusion.<sup>5</sup>

Family law is, perhaps more than any other area of the law, a reflection of some of society’s most intimate and volatile beliefs. The history of marriage and divorce in the United States, for example, reads more as a history of moral and religious evolution than as an outline of legal development, despite the fact that the original principles defining marriage and divorce in this country were grounded in secular contract law.<sup>6</sup> The many state anti-miscegenation laws that once limited marriage between races, for example, illustrate the impact of society’s sense of morality on marriage law.<sup>7</sup>

Divorce law reflects a similar dichotomy, balancing the practical need to legally recognize certain evolving relationships against our culture’s emotional response to change within the family structure. Divorce law has been useful for legally structuring property rights as relationships change, but it also has been, at many periods of U.S. history, alternatively described as an immoral force that destabilizes society<sup>8</sup> and a “therapeutic” intervention that normalizes disruptions in family relationships.<sup>9</sup>

Similarly, the principles in family law that define

property division, support, and alimony are mixtures of moral assumptions and practical necessity. Early societal expectations about the role of women in marriage were reflected in the “merger rule” that established that “the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband....”<sup>10</sup> Spousal roles in marriage dictated that the husband be responsible for support and the wife for domestic services.<sup>11</sup> Yet moral pressure by mid-19th century American feminists and the practical need to clarify creditors’ debt collection rights, led state legislatures to enact “Married Women’s Property Acts” that initialized a gradual trend toward allowing married women legal capacity over their property.<sup>12</sup> The development of the law of alimony followed a similar trajectory, having its origins in providing a practical mechanism for enforcing a husband’s support obligation during an era where parties were forced to live separately while still married because of barriers placed upon absolute divorce.<sup>13</sup> At the same time, alimony law became infused with evolving moral principles regarding misconduct, maintenance of living standards, and need-based themes.<sup>14</sup>

The nature of family law, therefore, owes as much to societal assumptions as it does to the expression of substantive legal rights and protections. While these assumptions generally work well in resolving non-violent family law situations, they can undermine the safety protections that domestic violence laws were meant to provide.

## Family Law Values in Child Custody Cases

Two practical questions underscore child custody law: 1) What qualifies a parent or person to have custody; and 2) How should a decision-maker determine the arrangement of care for a child?

Yet the history of custody determination also begins with gender-based inherent property rights of men and caretaking propensities of women. That early history was also premised on the principle that children were the exclusive property of their father.<sup>16</sup> By the 1920s, this paternal hereditary right evolved into a judicial preference for the “tender years doctrine,” which theorized that mothers should care for younger

children.<sup>17</sup> A call for gender-neutrality grounded in equal-rights philosophy, fathers' rights activism, and research on children of divorce all contributed to the 1970s' "best interests of the child" standard for custody decisions. The key aspect to "best interests" became the underlying assumption that the court be gender-blind in its choice between two "fit" parents so as to provide the "least detrimental alternative."<sup>18</sup> "Children's best interests" were determined by considering a list of factors provided without hierarchical guidance. The very different issue of domestic violence was merely included within a list of other factors that had no relevance to addressing abuse of family members.

Custody law has now moved to an ostensibly gender-neutral place on the moral spectrum by focusing on offering solutions that engage both parents, such as joint custody and friendly parent provisions. These principles find their roots in influential popular research that suggests that divorce's detrimental aspects on children can be mitigated when courts offer liberal access to both parents and encourage children's contact with their non-custodial parent.<sup>19</sup> The most recent manifestation of this assumption is states' adoption of "friendly parent" provisions in their custody laws that favor granting custody to the parent who seems better at facilitating a cooperative and frequent relationship with the other.<sup>20</sup> The 1990s saw an extension of the cooperative parenting theme and focus on parental access to children with detailed, on-going contact sanctioned through "parenting plans" often reached through private process.<sup>21</sup> Even in states where courts are not required by law to insist that parties engage in cooperative parenting, many lawyers and domestic violence victim advocates observe anecdotally that judges in their jurisdictions believe that shared access is best for children and that the parent with the propensity to share is a better candidate for sole custody.<sup>22</sup> Cooperative parenting has now become the moral imperative of the law, so that the parent who complains of abuse or violence appears to put the children at risk of psychological damage.

Another significant societal assumption that drives outcomes in child custody cases is the idea that parental rights are nearly absolute and should rarely be subjected to regulation.<sup>23</sup> This idea stems from concepts of family privacy and that it is the individual parents, rather than

the state, who know best how to raise their children. This value is also underscored with constitutional force. Under Supreme Court jurisprudence, natural parents have a "fundamental liberty interest...in the care, custody, and management of their child."<sup>24</sup>

A third important family law assumption is the emphasis upon private process over court decision-making. The virtue of cooperation discussed *supra* militates toward a process that does not further conflict. This suggests that adversary proceedings and litigation are not the best outcome for the parents or the children. Additionally, society assumes that parents have better "standing" than judges or the state to decide what is best for their children. In part, this is because family law cases are viewed as extremely fact-sensitive and not "legal."<sup>25</sup> Therefore, processes that combine the elements of building cooperation and reducing state interference in decision-making are deemed in everyone's best interests. Ironically, while judicial discretion is the hallmark of custody law, courts, under the sway of this assumption, tend to abdicate their role to others, e.g., custody evaluators and guardians *ad litem*. Private process, such as mediation, becomes the preferred method. Courts become reluctant to decide "wrong-doing" or "fault" as a factor in parenting.

### **Domestic Violence Law Development and Core Values**

As cooperative parenting models in child custody cases evolved in the 1980s and 1990s, the parallel development of specialized statutes addressing domestic violence occurred. Domestic violence law, defined here as the civil body of law addressing intimate partner abuse in protection order, divorce, child custody and visitation, and child support cases, arose as part of, and in parallel to, more recent general family law development. Domestic violence law, like all other areas of family law, reflects changing societal assumptions about abuse in family settings.

The history of domestic violence law began with the assumption that men had the right to use violence against their wives on the grounds that they were, at best, dependents of their husbands, or were, at worst, mere property. Blackstone and the common law authorized the male right to beat women:

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children...<sup>26</sup>

American law reiterated the English common law rule in the 1824 case of *Bradley v. Mississippi*, a case infamous for prescribing that husbands could beat their wives with a rod or stick as long as the instrument was less than the diameter of the base of the husband's thumb.<sup>27</sup> In 1836, a New Hampshire court would not allow a wife to obtain a divorce since she had not submitted to the legitimate authority of her husband and had acted in a manner "unbecoming a lady." The court opined that the disobedient woman deserved abuse inflicted by her husband where she provoked his anger and did not remain silent during its exhibition.<sup>28</sup> The assumption that women should submit to (and might even improve as a result of exposure to) domestic violence began to evolve in the latter half of the 19th century. However, husbands could no longer beat their wives with impunity, but were statutorily required to observe specific limitations placed on the extent of injury caused (cautioning against excessive or permanent injury). Subsequently, the law began to question the need for discipline "to teach the wife her duty and subjection to the husband."<sup>29</sup>

By the late 19th century, courts operated under a mainstream "hands-off" approach by courts reluctant to intervene. Marital relationships became viewed in a framework that Elizabeth Schneider refers to as "affective privacy," unsuited to legal regulation, hence judicial involvement.<sup>30</sup> Considering abuse susceptible to mutual correction by the parties, and viewing preservation of the family as a core value, the family court system encouraged and coerced reconciliation by battered women who sought the protection of the legal system.<sup>31</sup>

The feminist movement of the 1960s and the battered women's movement of the 1970s brought wife beating back to public discourse and toward legal reform.<sup>32</sup> Critical to the response to domestic violence is an understanding of the core features of violence

against women in intimate relationships:

Although the details of the assaults are shocking, their meaning lies beyond the deadening statistics documenting the severity and frequency of violence. *Violence signifies crossing a boundary in which violation and degradation, previously unacceptable in a loving relationship, are now used as tools of power and coercion. Battering is far more than a single event, even for the woman who is hit once, because it teaches a profound lesson about who controls a relationship and how that control will be exercised...Self-consciously exercised, violence temporarily brings a man what he wants—his wife acquiesces, placates him, or stops her demands.* As a form of terrifying intimidation, violence signifies that the man's way will prevail even when the woman struggles against this imposition. Leaving her in a constantly vigilant state, violence forces a woman to worry about the time, place, or reason for the next attack. As trust is destroyed, life is never quite the same again.<sup>33</sup> [emphasis added]

Domestic violence involves instrumental, strategic violence designed to enforce the privilege and rules of the batterer. Tactics are more than physical violence and include a penumbra of threats and actions to induce fear, humiliation, social isolation, and resource deprivation. Batterers "cast aspersions on the moral character, parenting and mental health of battered women to discredit them with those who might intervene." They shift responsibility for their behavior and violence to women, and they "develop a convincing repertoire of reasons to justify violent and coercive controls."<sup>34</sup>

The complexity created by the combination of violence and coercive controls within the family context required the development of an entirely new set of assumptions: 1) that individual family members had the right to be free from abuse, and 2) that society, through the function of the legal system, had a responsibility to control and punish abusers' behavior. The question remained whether the most appropriate mechanism of law to achieve these goals would be criminal law or family law.

This is the core tension between domestic violence law and family law. Abusive behavior, which on its face appears to constitute criminal activity, occurs in a family context. The criminal law facet of domestic violence law recognizes that one intimate partner is a perpetrator and one is a victim in domestic violence cases and seeks to hold the perpetrator accountable. Family law, on the other hand, sees two intimate partners who need to modify, dissolve, or otherwise regulate their relationship with each other through cooperative acts that will resolve their conflicts.

Today, every state integrates the separate criminal and family law facets of domestic violence into the civil form of relief known generically as a “civil protection order” or CPO.<sup>35</sup> This “grandmother of domestic violence law”<sup>36</sup> is a revolutionary historical phenomena initially adopted in Pennsylvania in 1976.<sup>37</sup> The essential features of protection order codes now include the identification of a perpetrator and a victim through a fact-finding process and the provision of remedies available to the identified victims. These remedies include exclusive possession of the home, no-contact and cessation of abuse provisions, custody relief, spousal and child support, and restitution.

The advantages of embedding the CPO process within the family law context are numerous. The civil legal process gives battered women the capacity to initiate legal action against the abuser, rather than waiting for the state to act on her behalf. A victim-directed and expedited process, the civil law CPO gives courts the broad judicial discretion that characterizes family law, allowing for individually tailored and comprehensive awards of civil, economic, and anti-violence relief to support a battered woman’s independence. The CPO process in the family law context allows for flexible duration of orders, often covering intimate relationships that go beyond the marital relationship, and gives judges the discretion to craft additional relief and coverage based on the specific facts of each individual case. This freestanding and unprecedented legal remedy is a remarkable achievement of advocacy and community change that affords survivors of domestic violence a legal means to obtain enforceable and critical relief.

The theoretical triumph of the CPO cause of action, however, is too often undercut by the assumptions that dominate the family law context. Not surprisingly, the

identification of a parent as a “victim” in the CPO process will lead to the assumption in the custody proceeding that the parent so labeled suffers from weakness, ignorance or denial, indifference, or impaired caretaking ability. One reason for this is that lawyers and judges, like so many individuals in our society, are reluctant to acknowledge the possibility that domestic violence can ravage anyone’s life—thus, a person suffering from domestic violence must have some kind of vulnerability that makes her particularly susceptible to being victimized. Another reason is the misguided view that leaving the relationship should be the only goal for domestic violence survivors and that failure to do so “proves” that a woman’s parental fitness is compromised by “violence-induced mental trauma.”<sup>38</sup>

Lawyers and judges subscribing to the “Why doesn’t she just leave?” theory too often ignore the battered woman’s experience-based determination that leaving may be more dangerous to her and the child than staying. As a result, battered women seeking justice in a family law context may well face two unnerving consequences: more abuse from the batterer and state coercive authority to remove her children against her will on the grounds that a “traumatized” parent is less fit to care for her children than the parent who is responsible for the abuse. This critical family law assumption clouds the legal system’s capacity to see that the victimized parent’s decision may have a secure foundation—that the victimized parent is indeed capable of complex thinking and acting, including performing subtle acts of compliance, resistance, and direct action to further her own and her children’s safety and autonomy in the world in which she lives.<sup>39</sup>

### **Domestic Violence Law Core Values**

In contrast with the family relationship, extreme parental autonomy, and cooperative conflict-solving assumptions that underpin family law jurisprudence, domestic violence law is based upon the four cornerstones of the vision to end violence against women: safety, agency, restoration, and justice. This is the legislative pedigree of statutes addressing domestic violence. The intent of the state legislatures that enacted these codes was not to encourage communication and face-to-face problem solving, as was their intent in developing modern divorce and custody laws. Rather, the legislative

intent of domestic violence laws is to afford freedom from abuse and provide a safe context in which survivors can make independent decisions about their own and their children's futures.

Safety is the transcendent goal of domestic violence law and is every woman's right.<sup>40</sup> It involves freedom from physical violence and the attendant vestiges of threat and fear, circumscribed movement, anxiety for one's well-being as well as one's children, diminution of choice, imposed role, eclipsed resources, and collusive community aligned with the batterer. A person's safety is idiosyncratic and dependent upon the person's circumstance in the world.<sup>41</sup>

Agency is the ability to organize one's life, and for subordinated persons, such autonomy is "always partial, contingent and emerging."<sup>42</sup> The domestic violence law theory of agency is the ability to organize one's life in defiance of the abuser's attempts at subordination. It involves the ability to make and implement informed decisions; to employ legal options; to avail one's self of community resources; and to access economic remedies, housing opportunities, and educational programs. Material resources are critical to this reclamation agenda. When battered women have inadequate material resources, their choices necessarily become "more coerced than would otherwise be the case."<sup>43</sup> As Susan Schechter noted in 1982, "[E]mpowerment means gaining control over the decisions affecting one's life and finding access to the resources needed to live decently. . . . [W]ithout material resources—housing, jobs and sufficient income—empowerment as a universal goal is unreachable."<sup>44</sup>

Domestic violence law is also premised on the value of restoration, which calls for restitution and conditions and awards that allow survivors to return to the position they enjoyed but for the abuse. Monetary compensation assists in this renewal of prior life material conditions, but restoration also encompasses the invaluable aspects of maintaining or re-establishing social, familial, and sacred relationships. One must be restored to health, spiritual support, and a life without fear. The restorative venue is the community of one's choice.<sup>45</sup>

The fourth core value in the domestic violence law framework is justice. Justice can only prevail in a society free of domination and violence against women. This concept includes holding the abuser accountable,

affording all parties due process, ensuring that the survivor's claims are heard, treating people fairly and respectfully, and guaranteeing equal access to legal remedies and redress afforded under the promise of the law. The law must be more than a "paper construct" and must be made available and meaningful through the actions and practices of lawyers and judges. The real test of justice is what is afforded under the practice of the law for those who may be subordinated the most.<sup>46</sup>

### Comparing Domestic Violence and Family Law Assumptions

There are inherent tensions in the family law assumptions and domestic violence law assumptions. If we understand these differences and the resultant difficulty of applying them simultaneously, we can begin to shape appropriate practice solutions that will further the ultimate goal of ending domestic violence. To illustrate the conflicts and tensions that simultaneous—rather than alternating—applications of family law assumptions and domestic violence assumptions create, we offer the following examples of domestic violence/family law tensions in custody proceedings:

**EXAMPLE #1: An abuser repeatedly calls his ex-wife at work and engages in strategic threats and demands about the children's health and education. The custody court judge does not believe that these actions are part of domestic violence and that anything should be done.**

**Domestic Violence Law Assumption:** Take any physical threat or harm seriously, including emotional and financial abuse.

**Family Law Assumption:** The abuser's actions must constitute serious bodily harm or an imminent threat of such in order to make domestic violence a primary factor in any court decision.

The first domestic violence assumption is derived from the power and control essence of domestic violence and the core value of safety. As noted *supra*, the fundamental nature of domestic violence is the *instrumental schemata utilized by the batterer to maintain domination over an intimate partner*. Abuse is more than physical harm—it is the constellation of tactics

meant to induce fear and compliance.<sup>47</sup> Threats of homicide and suicide are real tactics utilized by batterers. With or without prior threat, batterers do kill.<sup>48</sup> Separation is no guarantor of safety, and if anything, may increase a woman's vulnerability in many respects.<sup>49</sup>

The family law assumption, on the other hand, arises from the assumptions about constitutional rights to autonomous parenting and reluctance for the state, here the court, to choose "who is the better parent." The family law assumption is quantitatively focused on the status of the relationships, their creation or dissolution, and their rights, not the quality of the relationships per se. The preference for co-parenting ("two parents are better than one") and generous visitation equates into a perspective that requires a large dose of one-sided physical violence before abuse is taken into account.<sup>50</sup>

**EXAMPLE #2: A custody court judge is reluctant to abridge or condition an abusive parent's right to access his children, even though a judge in an earlier, related protection order hearing found credible threats of physical violence directed at the other parent by the abusive parent.**

**Domestic Violence Law Assumption:** Safety is more critical than access in custody and visitation arrangements. Granting custody or visitation to the abuser can place both the domestic violence survivor and child in danger.

**Family Law Assumption:** Parental influences and access are most important, so it is better to allow contact rather than deny visitation. Evidence of emotional abuse or violence toward intimate partners may be irrelevant to the issue of someone's fitness as a parent.

Prioritizing safety over access is the key feature of this domestic violence assumption.<sup>51</sup> Safety, as noted *supra*, is defined broadly and includes freedom of movement and liberty from an artificially fettered life of oppression. Restricting the batterer's access to the survivor and her children, in the domestic violence law context, is more important than ongoing exposure of the children to the abuser.<sup>52</sup> Opportunities by the batterer to utilize the child(ren) as pawns and to engage in separation assault must be contained.<sup>53</sup> The

commonly held belief that mere physical separation from a batterer increases a battered woman's safety is challenged by the significant research showing that separation is potentially the most dangerous time for battered women and their children.<sup>54</sup> Finally, safety, not access, is the primary focus because domestic violence law recognizes that harm to a parent can also constitute harm to children.<sup>55</sup>

The family law assumption, on the other hand, prioritizes both parents' access to the children over safety concerns. Facilitating contact with the non-custodial parent, generous visitation, and co-parenting characterize this approach.<sup>56</sup> The belief or paradigm is that children are better off with two parents, that parental influences are critical to the child, and that safety can be discounted as the abuse is either not severe enough, or can be assuaged. This standpoint is buttressed by the jurisprudential underpinnings of family law previously discussed—that the law is meant to protect fundamental parental interests and regulation of relationships.

**EXAMPLE #3: A battered woman petitions the court for custody of her children, and when the court orders her to undergo mediation with her abusive husband, she resists. The court then questions her ability as the children's caretaker on the grounds that she models conflictive, rather than cooperative, behavior.**

**Domestic Violence Law Assumption:** Obtain structured agreements and schedules through the court process to avoid contact or negotiation for the abused party; do not mediate.

**Family Law Assumption:** Both parties have equal responsibility for working together to come up with a mutual agreement regarding everything; any party who won't work with another party is "unfriendly"—and less deserving of support.

This domestic violence law assumption is based upon experiential knowledge of the history of the abuser's tactics of threats, coercion, and resource deprivation designed to assure primacy and dominion in the relationship.<sup>57</sup> Obtaining detailed agreements and schedules for property, support, and child caretaking is a method of setting limits on the batterer and respond-

ing to his strategies.<sup>58</sup> Court orders and process are critical because they are public and enforceable. On the other hand, private processes such as mediation, while useful in non-domestic violence cases, can create enormous dangers and inequities for battered women because they are forced to make choices and agreements under threat of violence and coercion.<sup>59</sup>

While the domestic violence assumption seeks to buffer the survivor of domestic violence from the ongoing coercive controls and harm of the abuser, the family law assumption governing this scenario facilitates contact. General divorce literature on the impact of divorce on children views “conflict” as a negative influence on children and co-parenting as a positive influence.<sup>60</sup> This research, combined with the family law value of parental autonomy and judicial reluctance to make qualitative choices about parenting, puts the pressure onto the parties to resolve their differences without excessive court involvement or process. Alternative dispute resolution, primarily mediation, is believed to be most conducive to building cooperative parenting arrangements. This private resolution also removes the court from primary decision-making.

This family law assumption promotes on-going contact between parents and parent/child as a primary goal, with any parent critical of such arrangements painted as “unfriendly” and not child-centered. This precept places survivors of domestic violence in the “unfriendly parent” catch-22. If a survivor seeks custody and visitation arrangements that limit contact, then they are not “fostering relationships with the other parent” and are less deserving of custody. Yet, if they do not take action to protect their child, they are held responsible for failure to protect. Moreover, certain actions taken by the survivor to enhance safety and self-determination, such as relocation or restrictions on access, may be viewed in the false light of “animus” or “unfriendliness” toward the other parent, or as instability on the part of the protecting parent.<sup>61</sup>

**EXAMPLE #4: In the course of a protection order hearing, a mother asks the court not to award either custody or visitation to the abusive father. The court denies the request and orders supervised visitation. Later, in a custody proceeding, the father asks for unsuper-**

**vised visitation and the mother asks that the abusive father have only telephonic or video cam communications with the child, because she wants to relocate to an undisclosed location for the safety of herself and her child.**

**Domestic Violence Law Assumption:** Creativity and persistence are important to outcomes that will not further opportunities for control, harassment, or abuse.

**Family Law Assumption:** Denying an abusive parent custody/contact is an inappropriate attempt to punish him.

In this scenario, the domestic violence assumptions supporting the parent’s requests point to the domestic violence survivor’s pursuit of safety and location in a supportive environment (restoration). The remedies sought by the protecting parent may be creative—indeed, even unique—but they may well be grounded in good safety planning that assesses indicators that an abuser’s violence is life-threatening. Seeking structured court relief, in combination with inventive remedies that will forestall the batterer’s attempts to maintain dominance, are the hallmark of good domestic violence representation practice. To a domestic violence victim seeking safety and a supportive environment to raise the children, the relocation and access requests are reasonable, prudent, and necessary—not extraordinary.

To the traditional family law practitioner or judge, the mother’s request may look like a deliberate attempt to trigger a conflict, a maladaptive strategy pursued solely to punish the other parent. This construct sows the seeds for retaining and utilizing the scientifically defunct and legally unjustifiable theory of parental alienation syndrome (PAS) in custody cases.<sup>62</sup> A flawed and discredited theorem, PAS has a “dandelion” resilience for a number of courts and custody evaluators precisely because it draws upon family law values of access and cooperation/friendliness. Moreover, the PAS phenomenon tends to shift attention away from the dangerous behavior of the batterer to the protecting parent’s behavior.<sup>63</sup>

**EXAMPLE #5: An immigrant woman seeks a protection order on the grounds that her U.S.**

**citizen husband beat her two years ago and has since threatened her and controlled her by draining the family bank accounts, forcing her to hand over her paycheck, and providing her and her children with so little money that at times they go hungry or without appropriate clothing or medication. The woman not only asks the protection order court to make her husband vacate the family home, and stay away from her and the children, but also asks that the court order him to assist her in petitioning for legal permanent residency status, and to temporarily pay for the mortgage, child support, health and life insurance, and the costs of private tuition and medication for their learning disabled son.**

**Domestic Violence Law Assumption:** Weave many forms of relief together to prevent an abuser from using financial, property, or decision-making power to harm the survivor and the children.

**Family Law Assumption:** Evidence of other, non-family law proceedings regarding abuse are unrelated matters; at worst, utilizing more than one remedy is viewed as strategic litigiousness.

The constellation of batterer tactics involving resource deprivation is addressed by this domestic violence law assumption. In this scenario, the facts suggest that the physical harm is “old” and unserious. Domestic violence law, however, views the abuser’s tactics in this case as strategically designed to fall “below the radar” of the family court system, but no less damaging to the victim or her children. Domestic violence law considers that the economic or material resource deprivations contained here should be addressed in the protection order cause of action, even though the physical violence is remote in time. Access to material resources, housing, living wage jobs, health care, child care, educational opportunities, and support have a critical impact on the effect of domestic violence on a survivor.<sup>64</sup> Domestic violence may be the cause of homelessness for 50% of homeless women.<sup>65</sup> Economic barriers and viability are the greatest challenges for battered women who separate from their batterers.<sup>66</sup> Relocation is not without cost.<sup>67</sup> Obtaining court orders and seeking custody relief takes the resources of time and economic subsidy.

It also may involve compromising support awards for custody of the children.<sup>68</sup>

This restorative domestic violence assumption involving comprehensive relief leads to a court strategy seeking all possible remedies, often in multiple forums. The maximum use of system remedies is sometimes necessary and proper to respond to domestic violence.

From a family law viewpoint, however, this strategy is considered extreme gamesmanship meant to get “a leg up” in a later divorce or custody case or to circumvent existing rulings from other proceedings. Yet, when it comes to domestic abuse, it is more likely that battered women are failing to assert their needs, rather than exaggerating incidents to manipulate courts.<sup>69</sup> Moreover, a common tactic batterers use in litigation, ironically, is exactly the full court press of multiple hearings, motions, and modification requests.<sup>70</sup>

**EXAMPLE #6: A mother obtains a protection order against the father of her child that gives him visitation with the child only on alternate Saturdays. The child’s birthday falls on a day not scheduled for visitation, and the father makes multiple phone calls to the mother demanding time to see the child on the child’s birthday. Even though the mother refuses, citing the visitation schedule in the protection order, the father shows up at her home on the child’s birthday and “crashes” the child’s celebration with the mother and other relatives. The father cries openly when the child’s grandfather tells him to leave, and he says he is only there because he didn’t want the child to think he’d forget a special day like a birthday.**

**Domestic Violence Law Assumption:** Hold abuser accountable; enforce orders and respond to violations quickly and consistently.

**Family Law Assumption:** The victimized party has the responsibility for making the order and the relationship work.

Domestic violence law assumes that the court will take an aggressive approach to an abuser’s propensity to eke out deviations from rules or orders restoring balance in a relationship. This vigilance is necessary to prevent the abuser’s subtle attempts to resume power and

Domestic Violence Law Assumptions	Family Law Assumptions
Take ANY physical threat or harm seriously, including emotional and financial abuse.	Physical harm must constitute serious bodily injury and threats must involve imminent physicality.
Safety is more critical than access.	Parental influences and access are of primary importance.
Obtain structured agreements and schedules through the adversary system to avoid contact and negotiation for the abused party; avoid mediation.	Parties share equal responsibility to work together to arrive at mutual agreement; parties should be friendly and cooperative toward one another.
Creativity and persistence are important to outcomes that will not further opportunities for control, harassment, or abuse.	Denying on-going contact or access to children for a parent is an inappropriate attempt to punish that person.
Weave many forms of relief together to prevent the abuser from using financial, property, or decision-making power to harm the abused party.	Non-family law proceedings are unrelated matters and use of other proceedings are viewed with skepticism regarding party intent; litigants want to get “a leg up.”
Hold abuser accountable; enforce orders and respond to violations quickly and consistently.	The parties are mutually and primarily responsible for making the order and post-separation relationship work.

control.<sup>71</sup> Moreover, domestic violence law assumes that courts will issue orders that are detailed, readily enforceable, and comprehensive—anticipating the problems likely to arise based upon the perpetrator’s patterns and threats.<sup>72</sup>

Violations also require ramifications if they are to be meaningful to recalcitrant parties. When the public, here the courts, becomes involved in enforcing orders, then the public takes a stand that gradually removes it from complicity with an abuser’s acts of domestic violence. Sanctions for violations send a message that the underlying legal proceeding is a serious undertaking, and that the court will neither countenance disrespect toward its

authority nor overlook actions that suggest that the abuser will continue to try to threaten or control.

The family law assumption, of course, differs. A judge adhering to the norms of family law might assume that certain violations of a protection order or custody provisions are better left unaddressed because they are “minor” infractions or “simple misunderstandings” that do not impair the basic goals of communication and cooperative decision making. When lawyers argue or courts apply these values to facts like those outlined above, they are assuming it is better for the parties to resolve their differences privately, because conflict is an inherent part of a post-separation family system and

children need problem-solving parents who are mutually inclined in their best interest. Additionally, lawyers and judges may see this as a simple resource and case management issue: that the court cannot be the ubiquitous super-enforcer for the family, but rather, is there to partition and assist with the stabilization of the new relationship, made necessary by divorce or disunion. There is a zone of leeway placed upon party behavior that belies the *de jure* orders of the court—not because the court intends to encourage defiance, but because it hopes to build party-based mutual reliance.

This family law assumption becomes extremely problematic in domestic violence cases and has the unintended consequence of undermining judicial process as parties realize that orders of the court do not matter. Worse, it removes the legal remedies that should be available as of right, and it perpetuates the notion of a law on the books versus the law in action.

### **The Domestic Violence Distinction Makes a Difference**

At the heart of these juxtaposed domestic violence and family law assumptions are four dichotomous principles that guide the practice parameters for courts and representation.

#### **1. Domestic Violence vs. Conflict**

The foundational dichotomy of domestic violence law and family law is domestic violence vs. conflict. As discussed *supra*, the core features of domestic violence are the strategic, instrumental tactics and behaviors asserted by the batterer directed at or upon his intimate partner, designed to induce fear and maintain power and control in the relationship. This is gender-based violence.<sup>73</sup> It is more than physical assault. It is the induction of fear and threats to harm one's intimate partner. The batterer views his authority in the relationship as a right and privilege to be acknowledged and maintained.

Interventions flow from this acknowledgment of domestic violence, as courts and representatives ask themselves: What do battered women need to be safe? What types of orders and process will allow survivors to regain measures of control over their lives? What sort of relief or restitution will assist with safety and replacing

loss? The range of answers to these questions becomes focused upon those things that will address the unremitting instrumental and strategic use of violence. For example:

- Resources to allow survivors to relocate or live in their homes without the batterer;
- Custody and visitation provisions that increase the ability of the protecting caretaker to maintain healthy parent/child relationships;
- Support provisions that are immediate and automatically withheld from income;
- Confidentiality of records and location information;
- Access to courts and remedies via representation; and
- Acknowledgment of the value of the advocacy community that brings survivors' voices into the courtroom and that assists her with the services that further a battered woman's ability to employ options.

Vital, comprehensive resources and enforcement become key.

The alternative approach is conflict-based. Conflict connotes mutual responsibility for disagreements, problems, or antagonism. Conflict can be frequent and/or "severe" and may be referred to by levels—"high" or "low." The tendency is to consider conflict a result of stress, health problems, or alcohol and drug use. It may be situational—such as a response to divorce or separation, job loss, or adultery.

Interventions developed through a conflict paradigm focus on solving the problem through individual conflict-resolution education, e.g., classes that teach the negative aspects of unhealthy conflict; development of skills to problem-solve disagreements positively; and drug and alcohol treatment. The psychological underpinnings of conflict may be diagnosed through treatment and addressed through counseling. Thus, court interventions based upon this conflict approach tend toward: 1) divorce education and parenting classes; 2) marital and individual counseling; 3) mediation; 4) mutual restraining orders; and 5) sanctions for those parties that "flame" the conflict, e.g., are not friendly or that "alienate" the other parent.

### 2. Safety vs. Access

Intervention also differs depending upon how one values safety and access, which is directly related to whether a domestic violence approach or family law approach is predominant. If one acknowledges the lethality, harm, and fundamentally compromised parenting by batterers, then the comprehensive remedies outlined *supra* will seem necessary and proper. On the other hand, if the analysis of the court is that the parties are enjoined in a mutually antagonistic relationship characterized as “low level,” “not enough violence,” “past or remote violence,” or a lack of “ongoing violence,” then the rubric of “sharing” the parenting, liberal visitation, and ongoing contact between the parties becomes the prevailing practice, and domestic violence survivors are asked to “get along” in the best interests of their children.

### 3. Public vs. Private Legal Process

The domestic violence assumptions and family law assumptions also break down by whether or not the practice interventions arising from each tend toward the use of public court process or private alternative dispute mechanisms.

Public court process, judicial decision-making, and meaningful review are the interventions encouraged by the domestic violence law assumptions. Civil procedures and court rules level the playing field for all litigants, but especially for a battered woman subject to her batterer’s coerced rule matrix.<sup>74</sup> Hearings, motions, and trials provide both parties the opportunity to present their issues and get their day in court; for battered women this allows their voices to be heard. Evidentiary rules set the parameters for engagement and standards for what can be considered. For battered women this translates into protective provisions for confidentiality and standards for expert testimony (see PAS discussion *supra*). Stipulations and agreements through the court process are, in fact, the norm. Judicial review and enforcement of structured agreements is a positive by-product of the public system that provides the backdrop for attorney-negotiated settlements.

Affordable and informed representation for battered women in civil proceedings is critical. The system

is adversary-based, with courts making factual decisions based upon competing presentations by the parties who test, through cross-examination, each other’s case. A well-trained lawyer’s use of case precedent, civil procedure, rules, motions, trials, and appeals becomes the means to broker the rights and remedies afforded by domestic violence law. A survivor attempting to navigate the legal system on her own is not likely to know either her rights or court procedure. If she goes forward *pro se*, she may not receive the remedies and protections the individual situations demand. If she goes forward *pro se*, the court’s neutrality is threatened, as the judge is forced to help the survivor elicit the testimony and evidence she needs to make her case. An unrepresented battered woman is more likely to face great physical danger at the hands of an abusive partner while waiting alone at the courthouse; she is also more likely to be subjected to threats or actual harm if she must engage in negotiation with an abuser. *Pro se* litigants in domestic violence cases are not the system’s mainstream “free standing adversaries.”<sup>75</sup> It is a fundamental necessity for all battered women to have opportunities to consult with, and be represented by, an attorney when facing their batterer.

Alternatively, family law assumptions direct the use of nonadversarial-based private dispute resolution. The emphasis on mediation and therapeutic justice is logically sound if: these tools are used with non-domestic violence families who will do better without litigation; based on the facts of the case, parental influences are so important that they trump safety risks; the family’s only need is to have the judge approve agreements they arrive at; the only issue before the court is which parent is the best decision-maker regarding the parenting of their children; and the court offers processes that facilitate and educate parties to develop problem-solving skills so that ongoing future decisions can be made without court interference.

Unfortunately, from a batterer’s perspective, this private process approach is exactly the ticket—as the abuser prefers to keep things hidden or silent or away from the court’s eye. Methods or processes that do not intercede in the established relationship are undoubtedly advantageous to the one who has greater power.

#### 4. Ending Violence vs. Stabilizing Family Relationships

Family law assumptions and values are, at their core, about the establishment, preservation, and stabilization of individual families. Family law and attendant assumptions are about the creation and disunion of these relationships, intra-family responsibilities, and appropriate regulation and management of the family by the state. Parental autonomy and privacy are core values.

Domestic violence law assumptions and values go beyond family relationships, as the goal is to end violence against women. Perhaps most critical to reaching this goal is the comprehension and application of a seemingly simple truth—that not all battered women are similarly situated.<sup>76</sup> Differences have an impact on the resources available to a particular battered woman and the barriers that she may face in responding to the violence used against her.<sup>77</sup>

Poor women, for example, are more vulnerable to becoming homeless due to domestic violence and the lack of affordable housing.<sup>78</sup> Intermittent or nonexistent child support payments, including bureaucratic delays, have a negatively disparate effect upon women living in poverty.<sup>79</sup> Reliable transportation, decent child care, and time off from work—all necessities for court access—may not be available to poor women. Representation in civil courts is not a constitutional right for the indigent.<sup>80</sup> Separation violence may also be more frequent or severe for poor women.<sup>81</sup>

Race and ethnicity also have an impact on each battered woman's experience. For example, batterers often sabotage current and prospective employment of battered women through harassment at the workplace. Survivors also may have extraordinary job absenteeism due to caring for injuries, court, and social service appointments, and transportation made unreliable by the batterer. While all these things assuredly affect all battered women across race and class, it is also the case that African-American and Hispanic women face compounding educational and employment discrimination unlike white women.<sup>82</sup>

Another difference is that for some women, state control over one's life and the harm generated by the state is a more complicated matter than for other women. This context cannot be ignored if one seeks interventions that assist, rather than do additional or

substitute harm. Calling the police, for example, or using the criminal justice system present unique challenges for many women of color. For example, the disproportionate rates of incarceration for African-American men, including the risk of police brutality and lethal encounters, can make police response a less viable option for black women than for white women.<sup>83</sup> African-American women are quite likely disproportionately affected by inappropriate dual-arrest in domestic violence cases, just as African-American children are disproportionately represented in the CPS system. Immigration status concerns and language barriers create different burdens for battered Latinas and other immigrants.

The intersection of poverty and race is also important. Deportation of a batterer for a poor, undocumented Latina may force economic deprivation.<sup>84</sup> Poor African-American women in urban areas are more likely to live in neighborhoods that have a higher rate of poverty than poor urban white women resulting in less access to social services.<sup>85</sup> Services, moreover, may fail to meet the needs of women of color.<sup>86</sup> Non-English speakers are seriously disadvantaged in courts, legal services, advocacy programs, and social services.

Domestic violence assumptions and values require that we recognize battered women as individuals with unique capabilities, strengths, burdens, and barriers who, despite compromised options, are able to evaluate the strategies needed to respond to the violence that are in their own best interest. While safety is the overarching goal, it cannot be implemented without regard to a battered woman's agency and the context in which she lives her life, e.g., poverty. Domestic violence survivors are more than "battered." Understanding and *then responding* to that fact is no small feat. Interventions often are "universal" due to ease of administration, bureaucratic inertia, funding restraints, and professional burnout. At the same time, universal interventions may also be widely applauded by the advocacy community, fundable, and actually successful for many battered women. Mandatory arrest is a classic example of the latter.<sup>87</sup> "One size fits all" family service plans in child protection cases are a prime example of the former. Yet, there is no one universal battered woman. Legal system practices that are based upon generic assumptions about battered women without regard to the diverse

circumstances in which they live their lives are destined to be irrelevant, potentially detrimental, and unsafe.

### Transforming Judicial and Legal Practice to End Violence Against Women

**“[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”**

— Justice Kennedy in *Lawrence v. Texas* (2003).<sup>88</sup>

**“[T]he obligation of the court is to implement the purpose of the law, which is to do justice, and not to mechanically apply established principles of law, even when they compel an absurd result.”**

— Judge Imbriani in *D’Arc v. D’Arc* (1978).<sup>89</sup>

Addressing a domestic violence case under a family law construct is problematic at best, dangerous at worst. Batterers must be held responsible for their terror, harm, and lethal violence; concomitantly, court and representational practices and intervention should not be unwitting allies or silent partners of subjugation, bias, and burden. Practical, transformative practices are needed and should:

#### 1. Improve Competency

Domestic violence is a complex substantive field. The harm that can come to parties by inappropriate or “wrong” judicial judgments and orders is daunting and, appropriately, concerns many courts. Some judges, however, respond to the burden of decision-making by abdicating their authority to rule. Others may resort to rote decisions because that is how they have always done things. Neither response is adequate.<sup>90</sup> Ongoing training and education is critical. It is not, however, the cure-all. Knowledge gained through training must be actualized into practice changes for it to mean anything.<sup>91</sup> Justice-making courts are those that continually strive to improve their domestic violence competency through critical reflection and action.

#### Concrete Suggestions to Improve Competency:

- Regularly attend local and state domestic violence training
- Attend national domestic violence trainings
- Develop indices reviewing domestic violence law and cases
- Utilize technical assistance resources available in your state or nationally through the Domestic Violence Resource Network<sup>92</sup>
- Share resource information with local attorneys and other judges
- Encourage attorneys to fully brief the court on factual and legal issues
- Develop a domestic violence library<sup>93</sup>
- Recruit colleagues to join in the work to improve competency
- Take action to reduce bias (see below)

#### 2. Reduce Bias

The goal is to end the violence directed at women as a group and across race, ethnicity, immigrant status, class, and other differences. Failure to critically examine and respond to bias and how it renders unequal justice leaves the root causes of domestic violence unaddressed. For example, an assumption that “a history of domestic violence” for custody purposes requires police reporting of incidents seems logical on its face. However, it simultaneously ignores battered women who are not safer when they call police, or who will not call the police because it leads to elevated harm to themselves or their partner. Sometimes courts assume that custody relief should not be ordered in a protection order proceeding, but should await a divorce or separate custody action. Waiting, in and of itself, is a class privilege, as those with greater resources can afford necessary representation, additional days off of work, requisite child care, reliable transportation, and alternative safe places to stay.

Justice-making courts are those that work to overcome their own privilege and bias. The crux of justice-making for courts is the critical analysis of one’s own biases and the effects that these have on decision-making, and then working to eradicate them through both individual case disposition as well as through the overall administration of the court.

**Concrete Suggestions to Reduce Bias:**

- Take action steps to improve competency (see above)
- Support Continuing Legal Education Programs on Elimination of Bias<sup>94</sup>
- Make quality court interpretation a priority
- Implement recommendations of State Gender Bias Task Forces<sup>95</sup>
- Ensure accessibility of the courthouse
- Include diversity material in your domestic violence library
- Learn about “living wage” and the cost of basic necessities in your local community such as housing, food, child care, and health care<sup>96</sup>
- Invite and encourage “Courtwatch” activities, including citizen review panels

**3. Afford Equal Access to Justice and Ensure Due Process**

For a battered woman, representation is a fundamental necessity required to employ legal options. A fair hearing, an opportunity to have one’s cause of action heard or defended, is basic to providing justice and assuring excellence in judicial practice. Court process and judicial demeanor, in this regard, greatly impact survivors of domestic violence.<sup>97</sup> Courts must be willing to scrutinize their own performance and to modify decisions when appropriate.<sup>98</sup> Justice-making courts are those that actualize the law for the most vulnerable so that everyone can utilize its protections and remedies.

**Concrete Suggestions to Afford Equal Access to Justice and Ensure Due Process:**

- Take action steps to improve competency and reduce bias (see above)
- Seek feedback from litigants, local domestic violence advocates, attorneys, and others regarding your courtroom demeanor
- Make timely decisions based upon facts and law
- Ensure that proceedings occur “on the record” only
- Work with your local bar association, Legal Services program, and Domestic Violence program to increase funding for representation for indigent litigants

- Consider attorney fee awards to allow parties to hire counsel or pay for existing counsel
- Utilize *in forma pauperis* statutes to afford litigation expenses for parties
- Schedule sufficient court time for cases, including eliminating delays between hearings
- Develop protocols and procedures to improve outcomes for *pro se* litigants

**4. Be Resource-Enhancing in Court Relief and Process**

Interventions that amplify resources for battered women are the most promising because they assist with removing barriers to separation from the batterer and they help women and children to live decently. In a recent national study, women reported that domestic violence and sexual assault, equal pay, health care, and child care are their top priority issues.<sup>99</sup> We know that legal strategies collapse amidst economic need.<sup>100</sup> There is a cost to safety. While material resources are crucial, social and informational resources are also important.<sup>101</sup> Justice-making courts approach resource-based relief and process as necessities, not luxuries, to ending violence.

**Concrete Suggestions to Be Resource-Enhancing in Relief and Process:**

- Take action steps to improve competency, reduce bias, and afford equal access to justice and ensure due process (see above)
- Provide non-mandatory referrals to local domestic violence programs and other community agencies
- Provide quality child care for litigants
- Establish and enforce adequate and immediate support awards and insurance coverage in protection order cases<sup>102</sup>
- Award and enforce relief that will enable survivors to establish or continue their employment, e.g., return of vehicles, no-contact provisions at the workplace
- Provide reimbursement for wage loss or loss of job training due to court proceedings
- Provide relief that will enable battered women to live in safe housing

## Conclusion

The promise of the legal system is that it can offer redress and resources to survivors of domestic violence. Law, however, is an imperfect tool.<sup>103</sup> It is not self-enforcing.<sup>104</sup> The considerations, exemptions, and presumptions of domestic violence, embedded within the family law jurisprudence and values, are promising tools—but they are not accessible to all battered

women. Freedom from domestic violence is a human right that should be enjoyed by all. Professionals have a moral responsibility to offer this central human right guaranteed by the principles of the law to all battered women. Through the work of the courts and lawyers who rise to the challenge of actualizing justice, a collective transformation is underway.

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## END NOTES

- 1 See, e.g., Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1086 (1995) (“[F]reedom from domestic violence is a central human right that should be enjoyed by poor people as well as by others.”).
- 2 See Sylvia Law, *Access to Justice: The Social Responsibility of Lawyers: Families and Federalism*, 4 WASH. U. J.L. & POL’Y 175, 177-78 (2000).
- 3 See *Troxel v. Granville*, 120 S. Ct. 2054 (2000); Herma Hill Kay, *Symposium on the Law in the Twentieth Century: From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2047 (2000).
- 4 *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977).
- 5 See *Loving v. Virginia*, 388 U.S. 1 (1967); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lawrence v. Texas*, 539 U.S., 123 S. Ct. 2472 (2003).
- 6 See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 202-08 (2d ed. 1985). Both the civil ceremony and common law marriage were sanctioned forms of creating a husband and wife union in Colonial America. Friedman argues that common law marriage materialized due to social context—the philosophical distaste for ecclesiastical prerogatives, necessity based upon the shortage of available clergy, and a sparse farm-based population that had an economic need for clarity. Common law marriage is best characterized as a “verbal contract” or agreement between a man and a woman to consider themselves husband and wife. *Id.* As of 1999, 11 states and the District of Columbia continued to recognize common law marriage. See Kay, *supra* note 3, at 2037-38.
- 7 The Court, having identified the freedom to marry as “one of the vital personal rights essential to the orderly pursuit of happiness by free men,” struck down state laws covering filing fees for divorce that prevented poor people from marrying, child support requirements interfering with marriage license acquisition, and prohibitions against marriage of state prisoners. *Loving v. Virginia*, 388 U.S. at 12. See also; *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987). Herma Hill Kay notes how the rise of state miscegenation laws coincided with the post-Emancipation period and was clearly a public policy statement meant to assure white supremacy. In the 1920s, 29 states had enacted such laws and federal constitutional law allowed for such racist schemata under *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Kay, *supra* note 3, at 2036. Contemporary debate continues as to who can marry whom with federal enactment of the Defense of Marriage Act in 1996 meant to counter action in Hawaii involving same-sex marriage.
- 8 See, e.g., Kay, *supra* note 3, at 2047 (“On the one hand, there was a genuine demand for divorce—a demand for ways to regularize legal status inside the family, and thus ensure rights of property, inheritance and the smooth operation of the land market... [t]here were also competing demands for strict divorce laws, to protect family structure, to strengthen the home, and to prevent immortality and sin.”).
- 9 In 1951, the American Bar Association sponsored a national Interprofessional Commission on Marriage and Divorce to address and recommend marriage and divorce law reform. The Commission selected three assumptions to study: “basing divorce on guilt and punishment has proven harmful to family stability,” “the use of adversary procedures on divorce cases should be displaced” and “the approach to the subject of divorce should be therapeutic with the interest of the family as the motivating factor.” See Kay, *supra* note 3, at 2043-44.
- 10 See Susan Frelich Appleton, *From the Lemma Barkeloo and Phoebe Couzins Era to the New Millennium: 130 Years of Family Law*, 6 WASH. U. J.L. & POL’Y 189, 191 (2001) (citing I WILLIAM BLACKSTONE, \*442). Acknowledgment of women as separate human beings from the men they marry is a relatively recent phenomenon. For thousands of years the law viewed women’s property rights as either nonexistent or dependent on the rights of their husbands, fathers, or other male kin. Only in the 19th century did economic independence for married women begin to creep into substantive law. As late as the 1950s, 1960s, and 1970s, states viewed women as economically dependent on their husbands. Wives in California, for example, only obtained the legal right to control their earnings in 1951, and most states continued until the late 1980s to view married women as dependents of their husbands, absent presenting contrary evidence. See Valente et al., *The Violence Against Women Act of 1994: The Federal Commitment to Ending Domestic Violence, Sexual Assault, Stalking, and Gender-Based Crimes of Violence*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN (Jeffrey L. Edleson, Claire E. Renzetti, & Raquel Kennedy Bergen eds. 2001)[hereinafter Valente]. The husband was the owner of the “one flesh” that resulted from the merger of women’s identities with that of their husbands. See FRIEDMAN, *supra* note 6, at 208.
- 11 See FRIEDMAN, *supra* note 6, at 208.
- 12 Mississippi passed the first version of such property reform acts in 1839. Ownership and disposal of slaves by married women consumed four of five sections of the law. See FRIEDMAN, *supra* note 6, at 210. Friedman notes

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that these reforms involved primarily the *external* relations with creditors and not *internal* litigation between spouses. See FRIEDMAN, *supra* note 6, at 211. See also Kay, *supra* note 3, at 2021-22 (describing the development of Married Women's Property Acts and the unsuccessful demand for joint property rights in household labor). Additionally, "earnings statutes" allowed married women ownership of their labor outside the home. See Kay, *supra* note 3, at 2021-22. The modern era of property division law is best characterized by a progression from title to equitable division in the majority of jurisdictions, with a community property minority. See James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. REV. 923, 946 (2001). Today, most states outline a list of factors for court consideration that includes spousal non-monetary contributions and economic misconduct. See Linda D. Elrod & Robert Spector, *A Review of the Year in Family Law: State Courts React to Troxel*, 35 FAM. L.Q. 577 (2002) 5 at Chart 5.

13 See DiFonzo, *supra* note 12, at 946.

14 *Id.*

15 With regard to the first question, the traditional rule recognized natural birth or adoption as the sole means to establish a parent/child relationship. Modern interpretations, while deferring to the biological or adoptive parent, also consider unavailability and/or unfitness of the legal parents and may allow for "third parties" to seek custody of a child. See DiFonzo, *supra* note 12, at 928-29. Further, there is a growing trend toward granting legal recognition to "functional" parents. *Id.* at 936. Note that the ALI Principles of the Law of Family Dissolution Analysis and Recommendations (2002) set out three categories of "parents" for custodial purposes: legal parents, parents by estoppel, and *de facto* parents.

16 See Valente, *supra* note 10, at 281.

17 Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations*, in National Electronic Network on Violence Against Women Applied Research Forum (1998) at <http://www.vawnet.org>.

18 See Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 VIOLENCE AGAINST WOMEN 597 (2002); Stephen Doyne *et al.*, *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority* 50 JUV. FAM. CT. J. 1, 1-12 (1999); Saunders, *supra* note 17, at 1.

19 See Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System* 37 FAM. & CONCILIATION CTS. REV. 273, 277 (1999). The notion that children need both parents

became reflected in permissive joint custody provisions in nearly every state, with approximately 13 states having presumptions, some mandatory, favoring joint custody. See Katherine T. Bartlett, *Improving the Law Relating to Postdivorce Arrangements for Children*, in THE POSTDIVORCE FAMILY: CHILDREN, PARENTING, AND SOCIETY (ROSS A. THOMPSON & PAUL R. AMATO, eds. 1999).

20 In 1995, 10 states codified such public policy statements in their custody statutes. See Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 2, 197-227 (1995). Today, approximately 22 states have "cooperative parent" custody criteria. See ABA Family Law Section—Law in the 50 States (2003) at <http://www.abanet.org/family/familylaw/tables.html>.

21 See Hardesty, *supra* note 18, at 603-04. Nine states utilize parenting plans, usually as a condition of joint custody. *Id.*

22 See Dalton, *supra* note 19.

23 See Bartlett, *supra* note 19, at 79.

24 *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The principle of a natural parent's fundamental liberty interest in the caretaking of their child is central to both earlier and later Court decisions involving parental prerogative over public education, evidentiary standards in termination of parental rights proceedings, and state court awards of non-parent visitation without consideration of parental wishes. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982); and *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

25 See Sandra Day O'Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573, 574 (2001) ("[F]amily law matters more often than not raise fact-specific problems regarding the equities of the particular case and the best interests of the parties involved.").

26 Appleton, *supra* note 10, at 191 (citing I WILLIAM BLACKSTONE at 444).

27 NEIL WEBSDALE, *RURAL WOMAN BATTERING AND THE JUSTICE SYSTEM: AN ETHNOGRAPHY* at 84-85 (1998).

28 ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000).

29 *Id.* Excessive and permanent injury is discussed in the 1864 case of *State v. Black*, 60 N.C. 262, 263, 86 Am. Dec. 436 (1864). Necessity to enforce subjugation is outlined in the 1871 Massachusetts case, *Commonwealth v. McAfee*, 108 Mass. 458, 11 Am. Rep 383 (1871). Although the Blackstone and English common law regarding the male right to beat became the dominant theme in the

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- development of American common law, there were some exceptions to this precept, notably the Puritans. This early colonial history, however, is an example of the law on the books in contrast with the law in practice, as courts were not anxious to insert themselves into the private sphere of the marital relationship and enforce the law. See E. SCHNEIDER, *supra* note 28.
- 30 See SCHNEIDER, *supra* note 28, at 16-20.
- 31 *Id.* at 18.
- 32 *Id.* at 20.
- 33 SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 17 (1982)(emphasis added).
- 34 Barbara Hart, *Rule Making and Enforcement/Rule Compliance and Resistance* 253-263 in I AM NOT YOUR VICTIM: ANATOMY OF DOMESTIC VIOLENCE (B. Sipe and E. Hall, eds. 1996).
- 35 See I. SCOTT, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE (2002).
- 36 Barbara Hart, The Legal Road to Freedom (1991)(unpublished manuscript, on file with the Legal Department of the Pennsylvania Coalition Against Domestic Violence).
- 37 See Ellen Pence, *Advocacy on Behalf of Battered Women*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 10, at 333.
- 38 See, e.g., Chris M. Sullivan *et al.*, *Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women are Nurturing Parents*, 2 J. EMOTIONAL ABUSE 51 (2000)(noting that mother's experience of physical and emotional abuse had no direct impact on their parenting stress or discipline).
- 39 See Hart, *supra* note 34; see also JILL M. DAVIES, ELEANOR LYON, & DIANE MONTI-CATANIA, SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES (1998)(analyzing risks posed to battered women by their particular batterer as well as by "life," e.g., poverty).
- 40 See Pence, *supra* note 37, at 329.
- 41 See Barbara Hart, Safety and Accountability: The Underpinnings of a Just Justice System (1998)(unpublished manuscript on file with the Legal Department of the Pennsylvania Coalition Against Domestic Violence); Pence, *supra* note 37; Perilla, *Domestic Violence as a Human Rights Issue: The Case of Immigrant Latinos*, 21 HISPANIC J. BEHAVIORAL SCIENCES 107 (1999); DAVIES, LYON, & MONTI-CATANIA *supra* note 39.
- 42 Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).
- 43 See Donna Coker, *Piercing Webs of Power: Identity, Resistance, and Hope in Latcrit Theory and Praxis: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000).
- 44 See SCHECHTER, *supra* note 33, at 253.
- 45 See Pence, *supra* note 37.
- 46 See Coker, *supra* note 43.
- 47 See Doyne, *supra* note 18; Hart, *supra* note 34.
- 48 At least 157 people were killed in Pennsylvania in 2002 due to domestic violence. This number is derived from newspaper reports and is likely underreported. See Pennsylvania Coalition Against Domestic Violence, Domestic Violence Homicide Report (2002) at <http://www.pcadv.org>.
- 49 See Hardesty, *supra* note 18.
- 50 *Id.* See also Dalton, *supra* note 19.
- 51 See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE §402 (National Council of Juvenile and Family Court Judges 1994).
- 52 For a thorough review of the parenting by batterers, including the broader perspective regarding batterers' poor role modeling and influence regarding stability and emotional health see LUNDY BANCROFT & JAY SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).
- 53 See PETER JAFFE, NANCY LEMON, & SAMANTHA POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY (2002); See also Hardesty, *supra* note 18; Doyne, *supra* note 18.
- 54 See Coker, *supra* notes 42 and 43; Hart, *supra* note 36; Hardesty, *supra* note 18.
- 55 See Doyne, *supra* note 18; Hart, *supra* note 36.
- 56 See Dalton, *supra* note 19; Hardesty, *supra* note 18.
- 57 See Hardesty, *supra* note 18.
- 58 See Caitlin Glass, Tamara Kuennen, & Sharon López, *Custody and Visitation: Considerations for Every Attorney Retained by a Survivor of Domestic Violence*, 36 CLEARINGHOUSE REV. 529-543 (2003)[hereinafter Glass].

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- 59 See Hardesty, *supra* note 18. See also Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990). Perpetrators of domestic violence, because they can more readily utilize subtle coercion and threats in the less formal process, are situated to eagerly agree to mediation.
- 60 See Doyne, *supra* note 18.
- 61 See Dalton, *supra* note 19; See also *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996)(indicating that the behavior of a protective parent may be misinterpreted as a sign of instability).
- 62 See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 530-34 (2001)(discussing the flaws in PAS theory).
- 63 See *id.* at 537-541 (noting the prevalence of PAS as an issue in custody cases through an appellate search and that, while many courts have reviewed the admissibility issues regarding PAS, many, disturbingly, have not inquired into the scientific validity). See also Doyne, *supra* note 18, at 7 (discussing a 1996 survey of custody evaluation practices and noting that more than 75% of evaluators recommended denial of sole or joint custody to parents who alienated children from the other parent).
- 64 See Margulies, *supra* note 1, at 1076.
- 65 *Id.* at 1076 (citing numerous references at footnote 27).
- 66 See Hart, *supra* note 36, at 4 (“The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him.”).
- 67 *Id.* at 4 (reporting a minimum of \$5,000 per relocation); See also Coker, *supra* note 42, at 836 (discussing separation costs such as first and last month’s rent plus deposit, new child care arrangements, school enrollment, a new job, and transportation).
- 68 See Hardesty, *supra* note 18, at 606 (“Research indicates that a climate of fear during custody proceedings leads a substantial number of women to compromise their rights....[A] significant inverse relationship exists between fear during child support negotiations and awards of child support.”).
- 69 See Doyne, *supra* note 18, at 5 (noting that battered women may not be believed when they report violence as it is viewed as exaggerating incidents to manipulate courts).
- 70 See Jaffe, *supra* note 53, at 61(discussing how batterers fight for custody and visitation for purposes of continuing the abuse, control, and compliance over their partner). See also Hardesty, *supra* note 18, at 610 (reviewing a study showing that women forgo support for fear of violence and that visitation requests by fathers center around control issues rather than relationships with the children).
- 71 See Loretta M. Frederick, *Effective Advocacy on Behalf of Battered Women* (1997) (at <http://www.bwjp.org>).
- 72 See Hart, *supra* note 41. Representatives should keep in mind that safety planning and strategies for enforcement of court orders go hand in hand. See Glass, *supra* note 58, at 542.
- 73 See SCHECHTER, *supra* note 33, at 210 (framing the domestic violence inquiry as to why individual men batterer is misplaced; the question is why men as a group direct their violence against women).
- 74 See Hart, *supra* note 34.
- 75 See WEBSDALE, *supra* note 27, at 127.
- 76 Battered women differ in age, race, class, and ethnicity. Battered women also differ by health conditions and abilities. The community where a battered woman lives may be rural, suburban, or urban. It may be a college or university town. A battered woman may be a tribal member. A battered woman may or may not have children with the batterer, may or may not speak English, and may or may not be a citizen of the United States. Every woman is unique.
- 77 See DAVIES, LYON, & MONTI-CATANIA, *supra* note 39. This is to say that not every woman (and man) is impacted the same way as another. Poor battered women may face many similar barriers, but not all poor women will be impacted exactly the same.
- 78 See Margulies, *supra* note 1, at 1076; see also WEBSDALE, *supra* note 27; Coker, *supra* note 43, at 1020-21 (noting that “inadequate material resources render women more vulnerable to battering” and that battering behaviors contribute to job loss, homelessness, health and disability impairments, and estrangement from family and friends).
- 79 See Hardesty, *supra* note 18, at 607.
- 80 See Coker, *supra* note 42, at 804-805 (noting that without legal representation, “women are unable to benefit from much of domestic violence law reform” and that “there are too few free lawyers for the number of domestic violence cases.”); See also Brennan Center for Justice: *Struggling to Meet the Need: Communities Confront Gaps in Federal Legal Aid* (2003) at <http://www.brennan>

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- center.org/resources/atj/index.html (noting that 45 million low-income Americans meet the financial qualifications for LSC-funded representation, and that LSC-funded programs provide services to about 1.4 million). The right to counsel in criminal cases was established in the United States in 1963 in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Gideon* overturned the 1942 ruling of *Betts v. Brady*, 316 U.S. 455 (1942). In 1981 in *Lassiter v. Dep't of Social Serv.* 452 U.S. 18 (1981), the Court ruled 5-4 against an absolute federal right to counsel in termination of parental rights proceedings for the indigent.
- 81 See Hardesty, *supra* note 18, at 607.
- 82 *Id.* at 606.
- 83 Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM L. Q. 461, 467 (1999).
- 84 See Coker, *supra* note 43, at 1029-1032.
- 85 See Coker, *supra* note 43, at 1026-27.
- 86 *Id.*
- 87 See Coker, *supra* note 43 (discussing how mandatory arrest policies negatively affect undocumented battered Latinas).
- 88 *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).
- 89 *D'Arc v. D'Arc*, 164 N.J. Super. 226 (1978).
- 90 For repudiation of doing things the same way just because that is how one has always done them, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have not better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").
- 91 See, e.g. Dalton, *supra* note 19, at 275 ("Without real change in the attitudes and practice of professionals, formal change can be a largely empty promise.").
- 92 The Domestic Violence Resource Network (DVRN) is a national network of domestic violence resource centers that provide information on a wide array of domestic violence topics, from criminal and civil legal system response, health, child protection and custody, and economic justice. Each center has a toll free number. Contact information for the various centers can be obtained by contacting the National Resource Center on Domestic Violence (NRC DV) at 1-800-537-2238. Information on the various centers can be found on the NRC DV Web site at <http://www.nrcdv.org>.
- 93 An excellent book to begin or add to a domestic violence library is JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* (1999).
- 94 Minnesota, for example, has a mandatory elimination of bias component as part of its continuing legal education requirements.
- 95 As of 2000, 21 states had investigated and reported on gender bias in their court systems. See *United States v. Morrison* 529, U.S. 598 (2000) (Souter, J., dissenting).
- 96 In Pennsylvania, for example, the Women's Association for Women's Alternatives, Inc. has put together county by county cost information on housing rents, food, child care, transportation, and other costs to establish family economic self-sufficiency. The Pennsylvania 2001 self-sufficiency report can be found at <http://www.womensassoc.org/programs/tools.html>.
- 97 See PTACEK, *supra* note 93.
- 98 See Dalton, *supra* note 19.
- 99 See Center for the Advancement of Women, Press Release (June 24, 2003) at <http://www.advancewomen.org>.
- 100 See Hart, *supra* note 36 ("Legal strategies collapse if the consciousness of the community is not aligned against violence, if emergency services and housing are not available to battered women and children, if human service institutions are not cognizant of domestic violence and are not employing strategies to safeguard victims and hold batterers accountable, and if the family and friends of the battered woman and the batterer do not reject violence as an option in intimate relationships and offer support for safety and change.").
- 101 See Coker, *supra* note 43, at 1051 (noting battered women's positive reaction to police behavior that provides information regarding services and legal rights).
- 102 Domestic violence law reform may be necessary to implement this suggestion in certain jurisdictions.
- 103 See Hart, *supra* note 36.
- 104 *Id.*





## Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns (Revised 2007)

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It may be hard to believe that an abusive partner can ever make good on his threat to gain custody of the children from his victim. After all, he has a history of violent behavior and she almost never does. Unfortunately, a surprising number of battered women lose custody of their children (e.g., Saccuzzo & Johnson, 2004). This document describes how this can happen through uninformed and biased courts, court staff, evaluators, and attorneys and how the very act of protecting ones' children can lead to their loss. It also describes the major legal and social trends surrounding custody and visitation decisions and the social science evidence supporting the need to consider domestic violence in these decisions. It ends with some recommendations for custody and visitation in domestic violence cases.

### Legal Trends

Over the past 200 years, the bases for child custody decisions have changed considerably. The patriarchal doctrine of fathers' ownership of children gave way in the 1920s and '30s to little formal preference for one parent or the other to obtain custody. When given such broad discretion, judges tended to award custody to mothers, especially of young children. The mother-child bond during the early, "tender years" was considered essential for children's development. In the 1970s, "the best interests of the children" became the predominant guideline, although it remains somewhat ambiguous (Fine & Fine, 1994).

It was presumably neutral regarding parental rights. Little was known then about the negative impact of domestic violence on women and children, and domestic violence was not originally included in the list of factors used to determine the child's best interest.

States more recently came to recognize that domestic violence needs to be considered in custody decisions (Dunford-Jackson, 2004; Cahn, 1991; Hart, 1992; for legislative updates from 1995 through 2005, see NCJFCJ, <http://www.ncjfcj.org/content/blogcategory/256/302/>). Every state now lists domestic violence as a factor to be considered, but does not necessarily give it special weight. However, since the mid-1990s, states have increasingly adopted the custody/visitation section of the Model Code on Domestic and Family Violence developed by the National Council of Juvenile and Family Court Judges (NCJFCJ, 1994), increasing from 10 states using the code in 1995 to 24 in 2006 (NCJFCJ, 1995a; 2007). These statutes use the model's wording, or similar wording, that there is a "rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence" (p. 33).<sup>1</sup> Although statutes have become increasingly precise regarding definitions of domestic violence, they may leave children vulnerable to psychological abuse when it is not included in the definition (Dunford-Jackson, 2004).

Statutes also address other issues about custody and visitation, such as standards for supervised

visitation and similar safeguards (Girdner & Hoff, 1996; Hart, 1990; Jaffe, Lemon, & Poisson, 2003), exempting battered women from mandated mediation (Dunford-Jackson, 2004; Girdner, 1996),<sup>2</sup> protecting battered women from charges of “child abandonment” if they flee for safety without their children (Cahn, 1991), and enabling a parent to learn if a person involved in a custody proceeding has been charged with certain crimes (see Pennsylvania’s Jen & Dave Program on the Web at <http://www.jendaveprogram.us/>). Some recent statutes make it easier for victims to relocate if needed for safety reasons (Jaffe, et al., 2003; NCJFCJ, 1995a; 1999; see Zorza, 2000).

Other legal protections are also available. For example, in one state (Tennessee), if a parent alleges that a child is exposed to domestic violence, such allegations cannot be used against the parent bringing the allegation (NCJFCJ, 2004). In another state (Texas), a mediated agreement can be declined by the court if domestic violence affected the victim’s ability to make the agreement (NCJFCJ, 2005). Some states (Massachusetts, Ohio) now make the presumption that custody or visitation should not be granted to anyone who is found guilty of murdering the other parent (for a more complete review of the above trends, including legal reforms in Australia, Canada, and New Zealand, see Jaffe, et al. 2003).

Unfortunately, courts and the mental health professionals advising them (Johnson, Saccuzzo, & Koen, 2005; Fields, in press) and lawyers (Fields, 2006) may pressure women to stay tied to their abusers. In addition, “friendly parent” provisions in statutes or policies create another factor for courts to assess in custody decisions, favoring the parent who will encourage frequent and continuing contact with the other parent or foster a better relationship between the child and the other parent (Zorza, 1992). Despite a reasonable reluctance to co-parent out of fear of harm to themselves or their children, battered women may end up being labeled “unfriendly,” thereby increasing the risk of losing their children (APA, 1996).

Along with legal changes, training and resource

manuals for judges and court managers are available, including guidelines for selecting custody evaluators and guardian ad litem (Dalton, Drozd, & Wong, 2006; Maxwell & Oehme, 2001; Goelman, Lehrman, & Valente, 1996; Lemon, Jaffe, & Ganley, 1995; NCJFCJ, 1995b; NCJFCJ, 2006; National Center for State Courts, 1997). One benchbook covers cultural considerations for diverse populations (Ramos & Runner, 1999). A recent trend is the use of “parenting coordinators” or “special masters,” a mental health or legal professional with mediation training who focuses on the children’s needs and helps the parents resolve disputes. With the approval of the parties and/or the court, they can make decisions within the bounds of the court order. The Association of Family and Conciliation Courts provide guidelines for parenting coordinators and a discussion of implementation issues (AFCC, 2006; Coates, et al., 2004). The guidelines require that parenting coordinators have training on domestic violence and caution that “the parenting coordinator’s role may be inappropriate and potentially exploited by perpetrators of domestic violence who have exhibited patterns of violence, threat, intimidation, and coercive control over their co-parent” (AFCC, 2006, p. 165). When one parent seeks to maintain dominance over another, the parenting coordinator may need to act primarily as an enforcer of the court order.

Another legal trend is the ordering of “virtual visitation” (Flango, 2003; Shefts, 2002). Web cams and videoconferencing can supplement face-to-face visits or replace face-to-face visits in more dangerous cases. Parents can read and play games with their children and help them with homework. The practice may loosen restrictions on parents moving to different communities. In one court case, the judge ordered each parent to purchase and install computer equipment that would allow videoconferencing (Flango, 2003). In 2004, Utah passed a law stating that virtual visitation should be permitted and encouraged if available. In some states, prisons provide virtual visitation services (Pennsylvania Department of Corrections, <http://www.cor.state.pa.us/dallas/site/default.asp>). Virtual

visits are untested in domestic violence cases and are likely to require the same type of monitoring that occurs with telephone and in-person visits.

Despite the above trends for improved protections, some parents and children believe the legal system has failed them. They may form grassroots support and advocacy groups, such as networks in Arizona (<http://www.azppn.com/>) and California (<http://www.protectiveparents.com/>), that conduct court watches and help parents share common court experiences, especially when they lose custody when trying to protect children and themselves from abuse. The Courageous Kids Network in California makes suggestions to other children who are forced to live with an abuser or molester when professionals do not believe them. They describe themselves as “a growing group of young people whose childhood was shattered by biased and inhumane court rulings, which forced us to live with our abusive parents while restricting or sometimes completely eliminating contact with our loving and protective parent. We know how horrible it is to be forced into the arms of an abuser” (<http://www.courageouskids.net/>). A national organization, Kourts for Kids, works to better protect abused children in the family courts by increasing awareness and education for judges, attorneys, guardians ad litem, social workers, officers of the law, legislators, and advocates ([http://www.kourtsforkids.org/index.php?option=com\\_frontpage&Itemid=1](http://www.kourtsforkids.org/index.php?option=com_frontpage&Itemid=1)). In 2007, 10 mothers and a victimized child (now an adult) and national and state organizations filed suit against the United States with the Inter-American Commission on Human Rights. They claimed that the human rights of abused mothers and children were not protected because custody was awarded to abusers and child molesters (Klein, 2007; Stop Family Violence: <http://www.stopfamilyviolence.org/ocean/host.php?folder=3>).

In summary, courts in all states must now consider domestic violence in custody and visitation decisions, but only about half of them make it the primary consideration. Legal innovations include protections for survivors who need to relocate due to safety concerns and exemptions from mandated

mediation. Many states still have “friendly parent” statutes that do not recognize battered women’s realistic reluctance to co-parent. Domestic violence training materials and guidelines are increasingly available for judges, court managers, custody evaluators and parenting coordinators. Recent trends include the use of “virtual visitation” and the development of grass roots protective parent and advocacy organizations.

### **Parent Most at Risk for Physically and Emotionally Abusing the Children**

Social science evidence can help establish which parent is most at risk to harm their children. The most convincing evidence that men who batter their partners are also likely to batter their children comes from a nationally representative survey (Straus, 1983). Half the men who battered their wives also abused their children. Abuse was defined as violence more severe than a slap or a spanking. Battered women were half as likely as men to abuse their children. Several non-representative surveys show similar results (reviewed in Saunders, 1994, and Edleson, 2001). When battered women are not in a violent relationship, there is some evidence that they are much less likely to direct anger toward their children (Walker, 1984). As expected, time away from the abuser seems to benefit battered mothers and their children (Rossman, 2001).

Emotional abuse of children by men who batter is even more likely than physical abuse because nearly all of these men’s children are exposed to domestic violence (Wolfe, Crooks, McIntyre-Smith, & Jaffe, 2004). This exposure to domestic abuse by their fathers often constitutes a severe form of child abuse. The serious problems associated with witnessing abuse are now clearly documented (e.g., Edleson, 1999; Graham-Bermann & Edleson, 2002; Kitzmann, Gaylord, Holt, & Kenny, 2003; Wolfe, Crooks, McIntyre-Smith, & Jaffe, 2004). These include short- and long-term negative emotional and behavioral consequences for both boys and girls. However, one must be cautious about generalizing these findings to most or all

children since many children find resources that buffer the ill effects of the violence (Edleson, 2006). Parents may not realize that their children can be affected, even if they do not see the violence. For example, children may be hiding in their bedrooms listening to repeated threats, blows, and breaking objects. They may be afraid their mother will be injured or killed and in many cases they intervene physically (Edleson, Mbilinyi, Beeman, & Hagemester, 2003). However, they may have other reactions, such as divided loyalties toward their parents, guilt about not being able to intervene effectively, and anger at their mothers for not leaving (Margolin, 1998; Saunders, 1994). If mothers cannot find safety, their fears and depression may reduce their ability to nurture and support their children as they normally would (Jaffe & Crooks, 2005).

As a result of children's exposure to domestic violence, mothers may be unjustly blamed for harming their children in cases where evaluators and practitioners do not understand the dynamics of abuse (Edleson, 1999). Cases are sometimes labeled as a "failure to protect" since mothers are supposedly capable of protecting their children from the physical and emotional abuse of their partners (Enos, 1996). Battered women may even face criminal charges (Kaufman Kantor & Little, 2003; Sierra, 1997) or removal of their children into foster care (Edleson, Gassman-Pines, & Hill, 2006). However, battered women's actions usually come from their desire to care for and protect their children. They may not leave because of financial needs, family pressures, believing the children need a father, or the fear that he will make good on threats to harm the children or gain custody (Hardesty & Chung, 2006; Hardesty & Ganong, 2006). They often leave the relationship when they recognize the impact of violence on their children, only to return when threatened with even greater violence or out of economic necessity (Anderson & Saunders, 2003, 2007). Innovative programs have been developed to address these concerns by helping to coordinate the actions of child protection, domestic violence, and family court systems. The "Greenbook Initiative"

sponsored by the federal government is a notable example (Dunford-Jackson, 2004; for information see: <http://www.thegreenbook.info/>). On a policy level, a few states allow evidence to show that the non-abusive spouse feared retaliation from her partner and thus could not reasonably prevent abuse to the child. However, most of these states impose restrictions on how quickly the protective parent must provide this evidence and how it must be done (Jaffe, et al., 2003).

### **Factors Related to Risk to the Children**

In a given custody case, a number of factors may correctly or incorrectly be attributed to the risk of child abuse and exposure to domestic violence. Several of these factors — parental separation, childhood victimization of the parents, the parents' psychological characteristics, and abuser interventions — are discussed next.

#### ***Parental Separation***

Parental separation or divorce does not prevent abuse to children or their mothers. On the contrary, physical abuse, harassment, and stalking of women continue at fairly high rates after separation and divorce and sometimes only begin or greatly escalate after separation (Hardesty & Chung, 2006). Homicidal threats, stalking, and harassment affect as many as 25%-35% of survivors (e.g., Bachman & Saltzman, 1995; Leighton, 1989; Thoennes & Tjaden, 2000). In addition, up to a fourth of battered women report that their ex-partner threatened to hurt the children or kidnap them (e.g., Liss & Stahly, 1993), and children may witness violence more often after separation than before (Hardesty & Chung, 2006). Separation is a time of increased risk of homicide for battered women (Saunders & Browne, 2000), and these homicides sometimes occur in relation to custody hearings and visitation exchanges.

Many abusers appear to use the legal system to maintain contact and harass their ex-partners (Bancroft & Silverman, 2002; Hardesty & Ganong, 2006), at times using extensive and lengthy litigation

(Jaffe, et al., 2003). Children may also be harmed if the abuser undermines their mothers' authority, disparages her character in front of the children, and attempts to use the children to control the mother (Bancroft & Silverman, 2004); this appears to occur more often after separation by the most severe abusers (Beeble, Bybee, & Sullivan, 2007). Children are also likely to be exposed to renewed violence if their fathers become involved with another woman. Over half of men who batter go on to abuse another woman (Wofford, Elliot, & Menard, 1994). As a result, judges should not necessarily consider the remarriage of the father as a sign of stability and maturity.

### *Parents' Characteristics*

Evaluators may look to childhood risk factors of each parent to assess their child abuse potential. The link between being abused in childhood and becoming a child abuser is not as strong as was once thought, with about 30% of child abuse victims becoming child abusers (Kaufman & Zigler, 1987). Some evidence suggests that this link with child abuse is stronger in men than in women (Miller & Challas, 1981). Neither parent is likely to have severe and chronic mental disorders (e.g., schizophrenia, or bipolar disorder) (Gleason, 1997; Golding, 1999). Personality disorders, as distinct from mental disorders, are much more likely to appear on the psychological tests of the parents. However, the parents' personality traits and psychological disorders are generally poor predictors of child abuse (Wolfe, 1985). In addition, great care must be taken when interpreting parents' behaviors and psychological tests. Men who batter often have the types of personality disorders—such as anti-social, dependent, and narcissistic (Holtzworth-Munroe, Meehan, Herron, Rehman, & Stuart, 2000)—that may keep childhood traumas and other problems hidden from evaluators and judges.

To the extent that psychological disorders continue to be used to describe battered women, they can be placed at a serious disadvantage. Compared with the chronic problems of her partner,

a battered woman's psychological problems, primarily depression and posttraumatic stress disorder, appear to be reactions to the violence. These problems seem to decrease as victims become safer (Erickson, 2006). Many battered women may seem very unstable, nervous, and angry (APA, 1996; Erickson, 2006; Crites & Coker, 1988). Others may speak with a flat affect and appear indifferent to the violence they describe (Meier, 1993). These women probably suffer from the numbing symptoms of traumatic stress. The psychological test scores of some battered women may appear to indicate severe personality disorders and mental illness. However, their behaviors and test scores must be interpreted in the context of the traumas they faced or continue to face (Dalton, Drozd, & Wong, 2006; Dutton, 1992; Rosewater, 1987). For example, psychological test findings of borderline and paranoid traits can be misleading when the impact of domestic violence is not considered (Erickson, 2006). The psychological tactics used by abusers parallel those used against prisoners of war (Golding, 1999) and include threats of violence, forced isolation, degradation, attempts to distort reality, and methods to increase psychological dependence (Stark, 2007). Severe depression and traumatic stress symptoms are the likely results (Golding, 1999). When women fear losing custody of children to an abusive partner, the stress can be overwhelming (Erickson, 2006; Bancroft & Silverman, 2004).

### *Interventions for the Abuser*

Although there are numerous treatment programs around the country for abusive partners and parents, successful completion of a batterer intervention program does not mean that the risks of child and woman abuse are eliminated. The evaluation of programs for men who batter is in its infancy, including programs for men of color (Gondolf, in press; Saunders & Hammill, 2003). A substantial proportion of women (35% on average across a number of studies) report that physical abuse by their partners recurs within 6-12 months after treatment and psychological abuse often

remains at high levels. In controlled studies, the recidivism rates average only 5% lower for the “treated” groups than the control groups (Babcock, Green, & Robie, 2004). These results are less optimistic than those implied in the section of the Model State Statute on Domestic and Family Violence (NCJFCJ, 1994) that recommends the successful completion of abuser treatment as a condition for visitation.

Only two studies of programs for men who batter investigated the reduction of actual or potential violence toward the children (Myers, 1984; Stacey & Shupe, 1984). Both of these studies showed promising results but did not specifically focus on parenting issues. Special parenting programs for men who batter have developed in recent years, either as modules within existing intervention programs or as stand-alone programs (Edleson, Mbilinyi, & Shetty, 2003; Edleson & Williams, 2007).

In summary, contrary to what one would expect, separation is a time of increased risk of violence, abusers’ chronic problems may not be apparent, and the trauma from violence and continuing, intense fears may make battered women appear “crazy.” Furthermore, successful completion of an abuser intervention program does substantially reduce the risk of re-abuse on average.

### **Factors that Compromise Safety of Children and Survivors**

Negative outcomes for domestic violence victims and their children include (1) dangerous offenders in contact with ex-partners and children due to unsupervised or poorly supervised visitation; (2) sole or joint custody of children awarded to a violent parent, rather than a non-violent one; and (3) urging or mandating mediation that compromises victims’ rights or places them in more danger. Such negative outcomes are likely to be compounded for women of color, lesbian mothers, survivors whose English is not proficient, and/or immigrant women with little or no knowledge of the U.S. legal system (Barnsley, Goldsmith, Taylor, 1996; Ramos & Runner, 1999).

Joint custody can be quite beneficial for children of non-violent, low-conflict couples.<sup>3</sup> However, joint custody—in particular, joint physical custody or “shared parenting”—can obviously increase the opportunities for abusers to maintain control and to continue or to escalate abuse toward both women and children. Enthusiasm for joint custody<sup>4</sup> in the early 1980s was fueled by studies of couples who were highly motivated to “make it work” (Johnston, 1995). This enthusiasm has waned in recent years, in part because of social science findings. Solid evidence about the impact of divorce and custody arrangements is difficult to find because most data are gathered at one point in time, and thus statements about cause and effect are not possible (e.g., Bender, 1994). There is increasing evidence, however, that children of divorce have more problems because of the conflict between the parents *before* the divorce and not because of the divorce itself (e.g., Kelly, 1993). Johnston (1995) concluded from her review of research that “highly conflictual parents” (not necessarily violent) had a poor prognosis for becoming cooperative parents. In a study by Kelly (1993), more frequent transitions between high-conflict parents were related to more emotional and behavioral problems of the children. If exposure to “high conflict” parents is damaging to children, then they are even more likely to be damaged by exposure to domestic violence. We now have evidence that a high percentage of couples labeled “high conflict” are experiencing domestic violence, and thus attempts to detect domestic violence within “high conflict” families are crucial (for further review, see Jaffe & Crooks, 2007).

In general, domestic violence is often not detected or not documented in custody/visitation proceedings (Johnson, Saccuzzo & Koen, 2005; Kernic, Monary-Ernsdorff, Koepsell, & Holt, 2005). In one study that interviewed survivors with documented abuse, there were frequent failures to consider documentation of domestic abuse and/or child abuse in the custody decision; unsupervised visitation or custody was often recommended or granted to men who used violence against their partners and/or children (Silverman, Mesh,

Cuthbert, Slote, & Bancroft, 2004). One study found that battered and non-battered women were equally likely to be awarded custody; in addition, offenders were just as likely as non-offenders to be ordered to supervised visits (Kernic, et al., 2005). Similarly, in a random sample of court cases, only minor differences existed between the custody evaluation process and custody recommendations for domestic violence versus non-domestic violence cases (Logan, Walker, Jordan, & Horvath, 2002). Most fathers with protection orders against them were not awarded custody (Rosen & O'Sullivan, 2005); however, this was not the case when mothers withdrew their petitions, which may have been from pressure from their abusers. Mediators in one study were about equally likely to recommend joint legal and physical custody for both domestic violence and non-domestic violence cases; rates of supervised and unsupervised visitation also did not differ between violent and non-violent cases (Johnson et al., 2005). Similarly, O'Sullivan and her colleagues report two studies showing that a history of domestic violence has little impact on courts' decisions regarding visitation (O'Sullivan, 2000; O'Sullivan, King, Levin-Russell, & Horowitz, 2006). (For further review, see Jaffe & Crooks, 2007.)

A number of reports from state and local commissions on gender bias in the courts have documented negative outcomes. For example, negative stereotypes about women, especially about their credibility, seem to encourage judges to disbelieve women's allegations about child abuse (Danforth & Welling, 1996; Meier, 2003; Zorza, 1996). A lack of understanding about domestic violence leads to accusations of lying, blaming the victim for the violence, and trivializing the violence (e.g., Abrams & Greaney, 1989). When the abuse is properly taken into account, court decisions that awarded abusive fathers custody are often reversed on appeal (Meier, 2003). Research evidence is now growing that allegations of domestic violence are generally not more common in disputed custody cases; and one study shows that mothers are more likely to have their abuse allegations substantiated

than fathers (Johnston, Lee, Oleson, & Walters, 2005).

The influence of fathers' rights groups on evaluators and judges is unknown, but some groups tend to lobby for the presumption of joint custody and co-parenting and doubt the validity of domestic violence allegations (Williams, Boggess, & Carter, 2004). For example, the National Fathers' Resource Center and Fathers for Equal Rights "demands that society acknowledge that false claims of Domestic Violence" are used to "gain unfair advantage in custody and divorce cases" (NFRC, 2007). They state, "Fathers' organizations now estimate that up to 80% of domestic violence allegations against men are false allegations." Consistent with what might be expected from the gender bias reports, female judges in one study showed more knowledge of domestic violence and greater support for victim protections (Morrill, Dai, Dunn, Sung, & Smith, 2005). Women of color and immigrant women can expect to be placed in "double jeopardy," as many states report racial and ethnic bias in the courts, in addition to gender bias (Ramos & Runner, 1999).

Research is also illuminating the negative impact of "friendly parent" provisions. Zorza (1996; in press) notes that "friendly parent" statutes and policies work against battered women because any concerns they voice about father-child contact or safety for themselves are usually interpreted as a lack of cooperation and thus the father is more likely to gain custody. A woman might refuse to give her address or consent to unsupervised visitation (APA, 1996). Parents who raise concerns about child sexual abuse can be severely sanctioned for doing so. The sanctions include loss of custody to the alleged offender, restricted visitation, and being told not to report further abuse or take the child to a therapist (Faller & DeVoe, 1995; Neustein & Goetting, 1999; Neustein & Leshner, 2005). Even in jurisdictions with a presumption that custody should be awarded to the non-abusive parent, a "friendly parent" provision tends to override this presumption (Morrill, et al., 2005). At least 32 states have statutes with "friendly parent" provisions (Zorza, in

press). “Unfriendly behaviors” generally include only those of the custodial parents and not behaviors of noncustodial parents, like nonpayment of child support (Zorza, in press).

The beliefs and training of custody evaluators and judges in relation to outcomes have received very little attention. Evaluators and judges may need more information on the continued safety risks to children from abusive fathers, the likelihood of post-separation violence, risks of mediation, the inadmissibility of Parent Alienation Syndrome (Dalton, Drozd, & Wong, 2006), false allegations, and the limits of criminal justice and treatment interventions (Jaffe, Lemon, & Poisson, 2003; Saunders, 1994). Ackerman and Ackerman (1996) found that psychologists who conducted child custody evaluations did not consider domestic violence to be a major factor in making a recommendation. However, three-fourths of them recommended against sole or joint custody to a parent who “alienates the child from the other parent by negatively interpreting the other parent’s behavior.” In a more recent study of evaluators, Bow and Boxer (2003) found that many sources of information were used in evaluations, but evaluators did not tend to use domestic violence screening instruments — only 30% administered specialized questionnaires, instruments, or tests pertaining to domestic violence. When domestic violence was detected, it weighed heavily in their recommendations. In one study of judges, those with domestic violence education and more knowledge of domestic violence were more likely to grant sole custody to abused mothers (Morrill, et al., 2005). Some states require initial and/or continuing domestic violence education for judges,<sup>5</sup> custody evaluators, and mediators, which is essential to close the gap between professional standards and their implementation (Jaffe & Crooks, 2005).

### **Recommendations for Custody and Visitation**

Some recommendations can be made based on practice experience and the growing body of research reviewed above. The past and potential

behavior of men who batter means that joint custody or sole custody to him is rarely the best option for the safety and well-being of the children. In addition to their propensity for continued violence toward children and adult partners, these men are likely to abuse alcohol (Bennett & Williams, 2003), be poor role models (Jaffe, Lemon, & Poisson, 2003), and communicate in a hostile, manipulative manner (Holtzworth-Munroe, et al., 2000). As noted earlier, the Model Code State Statute of the National Council of Juvenile and Family Court Judges states that there should be a presumption that it is detrimental to the child to be placed in sole or joint custody with a perpetrator of family violence (NCJFCJ, 1994). The model statute emphasizes that the safety and well-being of the child and the parent-survivor must be primary. In addition, states should repeal friendly parent provisions or, at a minimum, say that they have no weight in cases where domestic or family violence has occurred.

The perpetrator’s history of causing fear and physical harm, as well as the potential for future harm to the mother or child, should be considered. A parent’s relocation in an attempt to escape violence should not be used as a factor to determine custody. Courts sometimes label battered women as “impulsive” or “uncooperative” if they leave suddenly to find safety in another city or state. The model statute specifies that it is in the best interest of the child to reside with the non-violent parent and that this parent should be able to choose the location of the residence, even if it is in another state. The non-custodial parent may also be denied access to the child’s medical and educational records if such information could be used to locate the custodial parent.

The model statute (NCJFCJ, 1994) states that visitation should be granted to the perpetrator only if adequate safety provisions for the child and adult victim can be made. Orders of visitation can specify, among other things, the exchange of the child in a protected setting, supervised visitation by a specific person or agency, completion by the perpetrator of a program of intervention for perpetrators, and no overnight visitation (NCJFCJ, 1994). If the court

allows a family member to supervise the visitation, the court must set the conditions to be followed during visitation (O'Sullivan, et al., 2006). For example, an order might specify that the father not use alcohol prior to or during a visit and that the child be allowed to call the mother at any time (see Bancroft & Silverman, 2002, for a description of different levels of supervision).

Unsupervised visitation should be allowed only after the abuser completes a specialized program for men who batter (APA, 1996) and does not threaten or become violent for a substantial period of time. Practitioners need to be aware of the strong likelihood that men who batter will become violent in a new relationship and that they often use non-violent tactics that can harm the children. Visitation should be suspended if there are repeated violations of the terms of visitation, the child is severely distressed in response to visitation, or there are clear indications that the violent parent has threatened to harm or flee with the child. Even with unsupervised visitation, it is best to have telephone contact between parents only at scheduled times, to maintain restraining orders to keep the offender away from the victim, and to transfer the child in a neutral, safe place with the help of a third party (Johnston, 1992). Hart (1990) describes a number of safety planning strategies that can be taught to children in these situations.

In response to the need for safe visitation, supervised visitation and exchange programs are expanding rapidly across North America. Many programs follow the standards of the Supervised Visitation Network, an international organization. The standards include a special section on domestic violence that requires policies and procedures designed to increase safety for domestic abuse survivors and their children (<http://www.svnetwork.net/Standards.html>). In addition, a number of authors and programs have described the special features needed at these programs to increase the safety of domestic abuse survivors, including heightened security, staff knowledge of domestic violence, and special court reviews (Maxwell & Oehme, 2001; Sheeran & Hampton,

1999). Close coordination with family courts, lethality assessment prior to referral, and recognition of common abuser behaviors are some of the ingredients needed for effective operation of these programs (Maxwell & Oehme, 2001). Programs also need to be aware of the risks of keeping detailed intake, observation, and other records because currently they cannot be kept confidential in family court proceedings (Stern & Oehme, 2002, 2007). The evaluation of visitation programs has occurred only on a small scale thus far (e.g., Tutty, Weaver-Dunlop, Barlow, & Jesso, 2006). Finding promising practices is complicated by the growing recognition that not all men who batter are alike and that interventions need to be tailored to different types of abusers, with variations occurring by levels of dangerousness and the motivation to control. A "think tank" of advocates and legal and mental health professionals met in 2007 to explore the implications of such differences for custody and visitation decisions (Dunford-Jackson & Salem, 2007).

In 2003 the Office on Violence Against Women of the U.S. Department of Justice began the Safe Havens program in order to increase awareness of visitation/exchange programs and their community collaborators of the special needs of domestic violence cases. "Safety audit" reports from four demonstration sites are available, covering the role of visitation/exchange centers in domestic violence cases, how to increase culturally sensitive practices, centers' relationships with courts, and many other topics related to the infusion of domestic violence knowledge and awareness into programming (<http://www.usdoj.gov/ovw/safehavens.htm>).

Finally, termination of access needs to be considered more seriously than in the past. Those with a history of severe abuse and who have engaged in high levels of antisocial behavior may never be able to provide the safety and nurturing that their children need (Jaffe & Crooks, 2005; Stover, Van Horn, Turner, Cooper, & Lieberman, 2003).

In conclusion, although there is a need for much more practice experience and research, our current

knowledge of risk factors for continued abuse of women and children means that decision-makers must exercise great caution in awarding custody or visitation to perpetrators of domestic violence. If visitation is granted, coordination with the courts, careful safety planning, and specific conditions attached to the court order are crucial for lowering the risk of harm to children and their mothers.

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### Endnotes

<sup>1</sup> A few states set specific standards for meeting the definition of “domestic violence”; for example, “conviction of domestic abuse” and “convicted of a felony of the third degree or higher involving domestic violence.”

<sup>2</sup> The term “mediation” can cover many different practices and is not easily defined. Although many regard it as always unsafe for battered women, this view is not universally held, especially if risk assessment is done properly (e.g., Ellis & Stuckless, 2006).

<sup>3</sup> Recently, however, concerns have been raised about how well joint custody works in general (e.g., Wallerstein, 2000).

<sup>4</sup> Generally, joint physical custody is being referred to here rather than joint legal custody. There is a trend toward the term “shared parental rights” instead of “joint custody.”

<sup>5</sup> As of October 2006, 18 states required education on domestic violence for judges (from a document obtained from the National Council of Juvenile and Family Court Judges: “State Legislation: Mandatory Domestic Violence Training for Judges”).

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## Resources for Battered Mothers

***Helping Children Thrive: Information for Mothers who Have Left Abusive Relationships, 2004***

by Linda Baker & Alison Cunningham  
Centre for Children & Families in the Justice System  
London Family Court Clinic  
254 Pall Mall St., Suite 200  
London, Ontario N6A 5P6 Canada  
<http://www.lfcc.on.ca/index.htm>

***When Dad Hurts Mom: Helping Your Children Heal the Wounds of Witnessing Abuse, 2004***

by Lundy Bancroft  
New York, NY: G.P. Putnam's Sons

***Little Eyes, Little Ears: How Violence Against a Mother Shapes Children as They Grow, 2007***

by Alison Cunningham & Linda Baker  
Centre for Children & Families in the Justice System  
London Family Court Clinic  
254 Pall Mall St., Suite 200  
London, Ontario N6A 5P6 Canada  
<http://www.lfcc.on.ca/index.htm>

***Supervised Visitation: Information for Mothers, 2007***

Family Violence Prevention Fund  
383 Rhode Island St. Suite #304  
San Francisco, CA 94103-5133  
<http://fvpfstore.stores.yahoo.net/supervised-visitation-information-for-mothers.html>

***Managing Your Divorce: A Guide for Battered Women, 1998***

National Council of Juvenile and Family Court Judges  
P.O. Box 8970  
Reno, NV 89507  
[http://www.ncjfcj.org/images/stories/dept/fvd/pdf/managing\\_divorce.pdf](http://www.ncjfcj.org/images/stories/dept/fvd/pdf/managing_divorce.pdf)



***In Brief:***  
**Child Custody and Visitation Decisions in Domestic Violence Cases:  
Legal Trends, Risk Factors, and Safety Concerns**

- Approximately half of all state laws make a presumption that it is harmful to the child and *not* in the best interest of the child to be placed in sole custody or joint physical or legal custody with the perpetrator of domestic violence. In the remaining states, domestic violence is merely one factor in a list of factors that must be considered in custody and visitation decisions.
- States have increasingly provided protections for battered women in the divorce process, for example exempting them from mandated mediation, protecting them from charges of “child abandonment” if they flee for safety without their children, and making it easier for them to relocate if they are in danger.
- Despite a reasonable reluctance to co-parent out of fear of harm to themselves or their children, battered women may end up being labeled “unfriendly,” thereby increasing the risk of losing their children because there may be a “friendly parent” statute that favors the “cooperative” parent.
- A recent trend is the use of “parenting coordinators” or “special masters,” a mental health or legal professional with mediation training who focuses on the children’s needs and helps the parents resolve disputes. They can make decisions within the bounds of the court order but it is important that they have training on domestic violence and realize when they need to act primarily as an enforcer of the court order.
- Another recent trend is the use of “virtual visitation.” Web cams and videoconferencing can supplement face-to-face visits or replace face-to-face visits in more dangerous cases.
- When parents believe the legal system has failed them, they sometimes form grassroots support and advocacy groups. They may conduct court watches and help parents share common court experiences, especially when they lose custody when trying to protect children and themselves from abuse.
- Half the men who batter their wives also abuse their children, a rate twice as high as that of battered women.
- Emotional abuse of children by men who batter almost always occurs because nearly all of these men exposed their children to domestic violence, and such exposure often has traumatic and lasting effects.
- Mothers may be unjustly blamed for harming their children through “failure to protect,” since mothers are supposedly capable of protecting their children from the physical and emotional abuse of their partners.
- Parental separation does not prevent abuse to children or their mothers. Indeed, physical abuse, harassment, and stalking of women continue at fairly high rates after separation and divorce and the risk of homicide increases. Attempts to undermine the mothers’ authority and to disparage her in front of the children also increase.
- Men who batter often have chronic but well hidden psychological disorders and problems stemming from childhood traumas that are often not apparent to evaluators and judges; on the other hand, battered woman’s psychological problems, primarily depression and posttraumatic stress disorder, appear to be reactions to the violence.



- Successful completion of an abuser intervention program does not substantially reduce the risk of re-abuse. Special parenting programs for men who batter are growing in number but remain untested.
- A high percentage of couples labeled “high conflict” are experiencing domestic violence, and thus attempts to detect domestic violence within “high conflict” families are crucial. Unfortunately, domestic violence is often not detected or not documented in custody/visitation proceedings.
- Contrary to common belief, allegations of domestic violence are *not* generally more common in disputed custody cases. When allegations are made, one study found that mothers are more likely to have their abuse allegations substantiated than fathers.
- Evaluators and judges may need more information on the continued safety risks to children from abusive fathers, the likelihood of post-separation violence, risks of mediation, the inadmissibility of Parent Alienation Syndrome, and the limitations of criminal justice and treatment interventions.
- The past and potential behavior of men who batter means that awarding joint custody or sole custody to them is rarely the best option for the safety and well-being of the children.
- Visitation should be granted to the perpetrator only if adequate safety provisions for the child and adult victim can be made. Orders of visitation can specify, among other things, the exchange of the child in a protected setting, supervised visitation by a specific person or agency, and completion of an intervention program for perpetrators.
- Visitation should be suspended if there are repeated violations of the terms of visitation, the child is severely distressed in response to visitation, or there are clear indications that the violent parent has threatened to harm or flee with the child.
- Some professional standards developed for supervised visitation/exchange programs contain a section on domestic violence that requires policies and procedures designed to increase safety for domestic abuse survivors and their children. In addition, the U.S. government is providing technical assistance to increase the awareness of visitation/exchange programs and their community collaborators of the special needs of battered women and their children.

# *Future Trends and Developments*

## *Violence Against Women in Europe and East Asia*

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*In writing this article*, I was asked to think about future trends and developments in two very different and geographically distant parts of the world, Europe and East Asia. Context associated with specific countries and regions, related cultural and historical features, as well as local events are crucial to understanding how work on violence against women has already developed, and if we are to make any predictions for the future. Also of importance are transnational links and global or international concerns that may influence or affect work on violence against women in specific countries. However, to examine these issues in any depth or with coverage of the many and varied East Asian and European contexts would, of course, be a huge task not possible in an article. Thus, I will indeed consider some general trends and issues but also limit my discussion and use of examples to a smaller number of countries. My own research has tended to focus on the United Kingdom, Denmark, and China, examining domestic violence, links between abuse of women and abuse of children, and prostitution. These areas and issues inform some of the key areas that I have chosen for discussion, which are

- definitions in context,
- transnational and global influences, and
- links between violence to women and maltreatment of children.

### DEFINITIONS IN CONTEXT

At regional levels, Europe and East Asia have some of their own shared traditions and ideas pertaining to violence against

women, although also with distinct nation-based perspectives and policy orientations (see *Violence Against Women* special issues on East and South East Asia, 2003; and on Europe, 2001). For instance, within the East Asian region, Confucian ideas have played an important part in defining perceptions of gender and gender violence (Hester, 2003). In China and Vietnam, Confucian notions of men as dominant and superior, with emphasis on women as virtuous and inferior, are considered part of traditional, prerevolutionary society (i.e., pre-mid-1940s) and are in that way considered backward. Violence against women is perceived as a consequence of China's and Vietnam's recent rapid socioeconomic transition, especially since the introduction of market forces and associated external or foreign so-called evils from the late 1970s, combined with backward Confucian traditions (Hester, 2000; Rydstrom, 2003; Tang, Wong, & Cheung, 2002). Violence against and controlling of women are thus justified and explained through recourse to Confucian ideas. Feminists and others working in the field of violence against women have increasingly questioned these traditional views. However, in the next 10 years we can still expect to see discussion and tension between these differing perceptions of women's positioning, gender, and violence.

In Europe, supranational and national governance have been and will continue to be of significance to the development of policies and practices concerning violence against women. There have been campaigns, debates, and policy directives concerning violence against women at a European level, as well as developments in policy and practice within individual countries. Development of work on violence against women began more than 30 years ago in the United Kingdom, with other countries—especially in Northern Europe—following suit from the 1980s. However, it has been in the past 10 years that developments have been particularly rapid, especially in relation to work on domestic violence. The European Union (EU) is expanding to incorporate western and eastern European countries. As I write, the EU has just become an amalgam of 25 countries, and more countries will be incorporated during the next 10 years. The EU no longer consists of mainly rich, Christian, liberal democratic nations but has increasingly included nations recently developed from being centralized Communist states, and including larger populations of

Muslims, Russian Orthodox, and members of other religions. These aspects, and especially the various religious discourses and perspectives on violence against women and in relation to gender more generally, are likely to become more important in defining and responding to violence against women. Potential clashes regarding who and how gender violence is defined are already becoming apparent. In relation to issues such as forced (as distinct to love or arranged) marriage and honor killings, the U.K. government, for example, has expressly defined marriage in which one partner is expected to marry another without consent as a form of domestic violence, and honor killings as just another form of homicide. In Sweden, however, a more lenient approach to honor killings has been allowed, by recourse to cultural difference.

A word about the term *violence against women*. The 1993 U.N. World Conference on Human Rights defined violence against women as “any act of gender-based violence” resulting or likely to result in harm to women, and occurring in the family, within the general community, and perpetrated or condoned by the State. This includes, for instance, domestic violence, rape, and trafficking.<sup>1</sup> The linking of different violences against women in this way is important to understanding how such violence continues to reflect, and also serves to maintain, structural gender inequalities. However, in different countries and at different times there may be focus on only certain forms of violence as violence against women. For example, in the United Kingdom the term *violence against women* has in the past decade come to represent mainly domestic violence. Ironically, this narrow emphasis has resulted largely from the success of women’s groups and others in placing domestic violence on the policy agenda and in forcing change in practice by the police and other governmental and nonstatutory bodies and agencies. To create that change it was imperative that domestic violence was focused on and campaigned around as a single issue, even if domestic violence is not separate from, and indeed overlaps with, other violences against women (Hester & Westmarland, 2004; Kelly & Regan, 2000). The unintended consequence has been, however, that it has been more difficult to argue that resources should also be aimed at the other forms of violence against women. Moreover, as Keeler (2001) pointed out in relation to similar debates at a wider European level,

If we limit our focus . . . we will not only be unable to develop an overall accurate understanding of violence against women, but will contribute to the invisibility of one or more aspects of it and continue to create and revamp institutions so that they cannot effectively respond to violence against women in its myriad of forms. The danger in taking too narrow a view of violence against women is that of contributing to the victimization of women. (pp. 7-8)

Arguing for and achieving the “joined-up-ness” of the different manifestations of violence against women is set to be an important feature of European debate and practice in the next decade.

In China, there has not been a similar separation between different forms of violence against women, and this is perhaps less likely to happen there. There are indications that some organizations and academics will emphasize single-issue forms of violence against women at particular times, such as the focus on domestic violence by the recently established multiagency and multiregion project on Domestic Violence—Research, Intervention and Prevention (Guo, 2003; Milwertz, 2003). Yet the situation also appears more fluid, with the same organizations also taking up other violence-against-women issues. For instance, the domestic violence project in China is now taking up the issue of sexual harassment at work alongside the work on domestic violence because these two issues are seen as linked. Women seeking to escape violent relationships need access to financial independence; however, sexual harassment may undermine women’s involvement in paid work and is thus seen as a further barrier to their economic independence. In the next decade, with the Chinese market economy expanding ever more rapidly and with previous rights and protections for workers continuing to be undermined, activism around sexual harassment at work is likely to become even more significant.

The terms used for aspects of violence against women in different countries may also reflect the differential developments that have and are taking place in different locations, and thus give us some indication of what may be in store for the future. If we look at China, the United Kingdom, and Denmark, we also see that it is not necessarily the European countries that are more developed. In China, conceptual and linguistic frameworks within which to express ideas about violence against women have changed

dramatically during the past 10 years (Guo, 2003). For instance, domestic violence in China has until recently been termed *da laopo* (wife-beating), a violent act of a man against his wife and *nuedai* (maltreatment). These terms were linked to biologicistic and individualistic rather than gender-based (and thus socially constructed) notions of violence against women. New research and activism that developed in the 1990s used the directly translated concept of domestic violence (*jiating baoli*) and also specifically domestic violence against women (*zhen dui funü de jiating baoli*) as a means of including gender awareness (Milwertz, 2003; Wesoky, 2002).<sup>2</sup> In China, domestic violence has also tended to include violence and abuse of other family members, specifically children and the elderly (Hester, 2000). In the United Kingdom, the term *domestic violence* is generally used but has also been questioned because the words themselves do not adequately reflect the gendered nature or intimate relations involved, and (as in China) it has also been used more widely by academics, the courts, and others, to include violence between any family members (Hester, Pearson, & Harwin, 2000). Increasingly, in the United Kingdom, practitioners are adopting the term *domestic abuse* to show the wider range of abusive behaviors—other than merely physical violence—involved in domestic violence. On the other hand, in Denmark, a part of Europe usually considered very advanced, continued use of the term *house disturbance* (*husspektakler*) by the police indicates that they still perceive the problem as not so serious. The terms *violence against women* (*vold mod kvinder*) or *wife abuse* (*hustruvold*) are the terms more generally used by Danish academics and activists (Mogensen & Nielsen, 2000).<sup>3</sup>

### TRANSNATIONAL AND GLOBAL INFLUENCES

It is difficult to talk about violence against women in different locations across the globe without also considering the impact of globalization. Globalization is usually applied to the economic sphere, where the organization of corporations and development of trade have become increasingly global or international, rather than bound by nation-states, with implications for restructuring of the economic, political and social spheres (see e.g., Walby, 2003). Economic globalization has also had, and will continue to

have, direct implications for violence against women. It has to be recognized that the massive changes resulting from globalization may create possibilities for positive and negative change where women are concerned. On the one hand, there may be increases in or development of certain forms of violence against women within a context of patriarchal reconstruction and recreation of previous patterns of male dominance (Hester, 2002b). On the other hand, there may also be the creation of important links and alliances as well as spaces for activism (Naples & Desai, 2002). Both of these tendencies are apparent in the East Asian and European contexts.

In East Asia and in Europe, as previously socialist or communist and so-called developing economies have become more market oriented, some forms of violence against women appear to have increased and old forms reemerged. For instance, in China, the period of reform and development of a socialist market economy since the end of the Cultural Revolution in the late 1970s has seen increasingly rapid change in many aspects of Chinese society. Many Chinese writers and feminists suggest that the recent reforms appear to be increasing the degree of violence against women, including domestic violence. As Chang (1996) argued, "The worrisome trend is that with the social economy developing, the number of cases involving domestic violence has risen year by year" (p. 152). It was previously thought in China that domestic violence was primarily a phenomenon of the rural backward areas with low levels of education (Hester, 2000). However, the All China Women's Federation has found that domestic violence now appears to be rising sharply among professional families with higher levels of education. The reasons for this are deemed to be linked to gender inequality and increasing unemployment of women, and the new pressures on families to achieve, although the more public debate and heightened awareness about such violence are also likely to have played a part (Hester, 2000; Wang, 1999).

Economic activities involving primarily the sexual exploitation and violation of women have also reappeared in China, such as prostitution and the abduction, kidnapping, and sale of women for wives. Access to pornography has seen a massive expansion via new television networks and the Internet. Very similar trends have emerged in the European context, with increases in the

trafficking of women from the poorer Eastern European countries to those in the North and West, whether for sexual exploitation as prostitutes or for use as domestic slaves (entrapping and coercing women to undertake domestic work for which they receive little or no pay—see Reid, 2003). In China, new legislation was enacted in the early 1990s in an attempt to deal with some of these infringements of women's rights and interests (Law for Protecting Women's Rights and Interests 1992; see Li & Cui, 1996). In the European context, the Council of Europe adopted a plan of action against trafficking in women and forced prostitution in 1996, and the issues were also adopted in human rights legislation by the Council's Committee of Ministers in 2002 (Reid, 2003).<sup>4</sup> These areas of exploitation and violence against women arising from the globalization of trade and commodification of people and sex will undoubtedly increase in the coming decade alongside other, and widening, aspects of this extremely lucrative global sexual economy. Moreover, with the Chinese economy expected to take a much bigger role within the global economy in the next 10 years, we can expect to see the trends already identified becoming particularly pronounced within this context, with women becoming even more vulnerable, and the need for women's activism and resistance particularly urgent.

Within the space of the past 30 years, violence against women has shifted from being a private issue, to being recognized as a public issue and against that people have mobilized at a global level. Transnational influences and global alliances have become increasingly important in changing policies and practices regarding violence against women at national and international levels (see Naples & Desai, 2002; Wesoky, 2002). For instance, at the level of the United Nations, the issue began to be acknowledged following pressure from feminists in the 1980s; in 1993, the U.N. Assembly adopted the Declaration on the Elimination of Violence Against Women; and the 1995 U.N. Women's Conference agreed on a Platform for Action that included violence against women. The trend to look beyond national boundaries will inevitably continue and also has important implications for those working to counter violence against women as everyone increasingly looks to global—or at least transnational—connections and support. This is an aspect that we can expect to become even more important in the future as local campaigns to develop policies and laws

to increase women's and children's safety draw on experiences from other nations and regions, and as practitioners from different areas link up to share and further develop their expertise.

For the United Kingdom, past colonial connections—with concomitant issues of a common language and legal system—have historically been important in determining transnational connections and global alliances. Despite being located in Europe and a member of the European Union, the lack of linguistic prowess in the United Kingdom and reliance on the ability of others to speak English, has often focused the United Kingdom away from Europe. There has instead been a tendency to look to other English speaking nations (and past colonies) for ideas on tackling violence against women, especially the United States, but also Australia, Canada, and New Zealand. Thus, in the United Kingdom, the initial discussions of violence against women and development of shelters or refuges in the 1970s were profoundly influenced by the slightly earlier developments that had taken place in the United States. There has also been the widespread use in the United Kingdom of the ideas and initiatives of the Duluth project in Minnesota, United States, with Pence's (Pence & McDonnell, 2000) notion of power and control apparent in U.K. work on domestic violence, including the more mainstream policies and practice. Emphases in the United Kingdom on proarrest policies combined with multiagency work also owe much to the Duluth model (Pence & McDonnell, 2000; Taylor-Brown, 2001). Work in Canada and New Zealand has been drawn on in relation to debates about children and domestic violence as well as legal models on child contact or visitation, and there have been similar debates around rape in Australia and the United Kingdom.

However, membership in the EU has in recent years placed more emphasis on transnational debates and potential influence from across Europe, and this will become much more prominent in the next 10 years. There are a number of aspects that will be especially important, including policy development and resources. As indicated earlier, there have already been campaigns, debates, and policy directives concerning violence against women at a European level, with implication for developments in policy and practice within individual countries (see e.g., Keeler, 2001). Recommendations regarding violence against women were drawn up in 2000 following conferences in 1998 and

1999 hosted by European Presidencies (Keeler, 2001). This has also affected individual countries. In Denmark, for instance, requirements from the EU have recently led to the establishment of a Violence Laboratory (*Voldslaboratorium*) and formulation of a plan of action.

Access to resources will be a crucial aspect of trans-European influences. With resources for research and projects to counter violence against women increasingly being made available at a European level, research and practical projects involving groups of European countries have developed alongside.<sup>5</sup> This possible refocusing of the United Kingdom, away from the United States in particular and toward other European countries, is also likely to further the different research traditions in the United Kingdom and the United States where violence against women is concerned. In the United States, more resources have been committed to violence against women research, and there has been greater emphasis on development of treatment-oriented measures. This has led to a proliferation of large-scale quantitative studies in the United States using comparative scales and inventories, such as the Conflict Tactics Scale, plus attempts to correlate different forms of abuse, including domestic violence and harm to children (Edleson, 1999; Straus & Gelles, 1990; Straus, Gelles, & Steinmetz, 1981).<sup>6</sup>

In the United Kingdom, and the wider European context, there has been a stronger tradition of phenomenological and critical social research, also reflected in the research on violence against women. This has led to emphasis on examination and analysis of the dynamics and processes involved in abusive contexts via personal experience. Large-scale studies on domestic violence have tended to develop from this more detailed knowledge (e.g., Kelly, Regan, & Burton, 1991; Lundgren, Heimer, Westerstrand, & Kalliokoski, 2001; Piispa, 2002; Walby & Allen, 2004). In the next decade, the emphasis is likely to be on larger, pan-European studies using multimethods and hopefully more nuanced comparative approaches. Furthermore, sophisticated evaluations and new measures of violence against women are also likely to be trends.

Transnational and international concerns have also been important to the development of work on violence against women in East Asia. Within the East Asian region the nation-states are also very different, leading to an expectation that their

respective trajectories of work on violence against women in the next decade might also be different. Similar to the countries of the EU, Japan and South Korea are liberal democracies, with North Korea and China having one-party communist governments. Affecting policy development thus entails different strategies in these different contexts. Similar to many European feminists, activists in Japan and South Korea have engaged with the state to ensure that (at least some) resources have been channeled toward support work with women whether in relation to rape, domestic violence, or prostitution (Park, 2000; Yoshihama, 2000). There have also been developments of services in the nongovernmental and private sectors. In Japan, the earliest shelter was established in the 1970s, at the same time as shelters were set up by feminists in the United Kingdom and the United States, although in Japan further work on domestic violence did not become prominent until the 1990s (Yoshihama, 2000). In Japan and South Korea, feminists began organizing against sex tourism involving Japanese men going to South Korea. This issue has only become prominent in Europe in the 1990s, with sex tourism by European men to Asia and the trafficking of women from Eastern Europe in particular to serve as prostitutes to Western European men (Kelly & Regan, 2000).

In China, the development of work on violence against women has also benefited by being able to draw on international support and influences. Use of international resources, such as grants from the Ford Foundation and the European Union, and the ability to draw on U.N. mandates and discussions have proved important to the ability of Chinese women to organize against violence against women (Guo, 2003; Milwertz, 2003). Some writers have cautioned against the dimensions of power and inequality inherent in such funding by richer European or Western countries and organizations of activities in the poorer so-called developing countries (Naples, 2002). In China, however, it has been organizations working on the margins—in a context where only state-sanctioned organizations can otherwise exist—who have received transnational funding (Hester, 2000; Milwertz, 2003).<sup>7</sup>

In creating change and influencing policies, Western and some East Asian feminists have challenged the state, related organizations, and agencies from outside. Increasingly, feminists have

become part of the new developments, and feminist ideas and developments mainstreamed, with resulting neutralization and incorporation (Dobash & Dobash, 1992; Mogensen & Nielsen, 2000). In China, the situation has been somewhat different because of the central grip of the Communist state and the imposition from above of gender equality that took place in the 1950s under Mao. Nonetheless, the impetus for change that we are now seeing in the Chinese context relies on women organizing and pushing for new policies and practices. We tend to think of the Chinese state as difficult to influence, and that criticism of state policies leads to containment and imprisonment of those concerned. However, feminist activists in China have developed ways of challenging and exerting pressure on the state by participation in and use of official bodies such as the China Law Society and the All China Women's Federation, and by using the leverage that global activities and transnational links provide (see e.g., Milwertz, 2003).

#### **LINKS BETWEEN VIOLENCE AGAINST WOMEN AND MALTREATMENT OF CHILDREN**

The position of women where marriage and divorce are concerned will also continue to be an important arena regarding future issues and trends in violence against women. In East Asia, the possibility of divorce and women's property rights on divorce remain key issues relating to the ability of women to escape from violent men. In many East Asian countries, divorce remains difficult, with women likely to lose access to resources and custody of children to their male ex-partners. (Recognition of gay and lesbian relationships, let alone violence or postseparation issues, have barely reached the public agenda.) In China, the recent changes to the Marriage Law (2001) included domestic violence as a ground for divorce for the first time. Chinese legal academics and feminists see property rights as an important feature of debates and activism concerning violence against women in the next decade. Issues concerning abuse of children within the context of the family and postseparation, and related issues of custody, have hardly been examined or debated within the Chinese context but will no doubt also become part of the agenda in the next 10 years.

By contrast, in Europe, custody and visitation or contact have emerged as major arenas of gender conflict and are set to remain an important aspect of work on violence against women. Divorce has become relatively routine, and women's property rights are acknowledged in many European countries. Instead, the issue that has focused the minds and actions of feminists has been that of parenting postdivorce or separation. Father's rights groups have responded to the shift to maternal preference by arguing for equal rights in parenting. Since the 1980s, in Europe (and North America, Australia, and New Zealand), this has become reflected in a presumption that the best interests of the child are always best served by contact with both parents.<sup>8</sup> This presumption has prevailed in legal discourses and among professionals dealing with child visitation or contact. In England, this is exemplified by the recent consultation and report *Making Contact Work*, which recommends stronger, and legally sanctioned, measures for the enforcement of contact (Children Act Sub-Committee, 2002). In Denmark, a renewed emphasis on the contact presumption led, from 1996, to new legislation strengthening the enforcement of contact (Hester, 2002a).

At the same time, research has increasingly indicated that where there is a history of domestic violence children may also suffer harm, and women and children may face ongoing violence and abuse from the abuser postseparation (Hester et al., 2000; Hester & Radford, 1996). In England, this has been recognized in case law,<sup>9</sup> and guidelines for good practice (Children Act Sub-Committee of the Lord Chancellor's Advisory Board, 2002; Crown Prosecution Service, 2001) have also been issued to the courts concerning contact with violent parents. Yet the contact presumption remains a strong underpinning to judicial discourses and practice.

The challenge for the next decade is to ensure that women's and children's safety is ensured when women leave violent men (or perhaps female partners). This can only be achieved by recognizing the current contradictions that exist within many European countries (let alone elsewhere) between laws and professional practices relating to domestic violence, child protection, and visitation or contact. These contradictions will need to be overcome if women's and children's safety is to be ensured. I

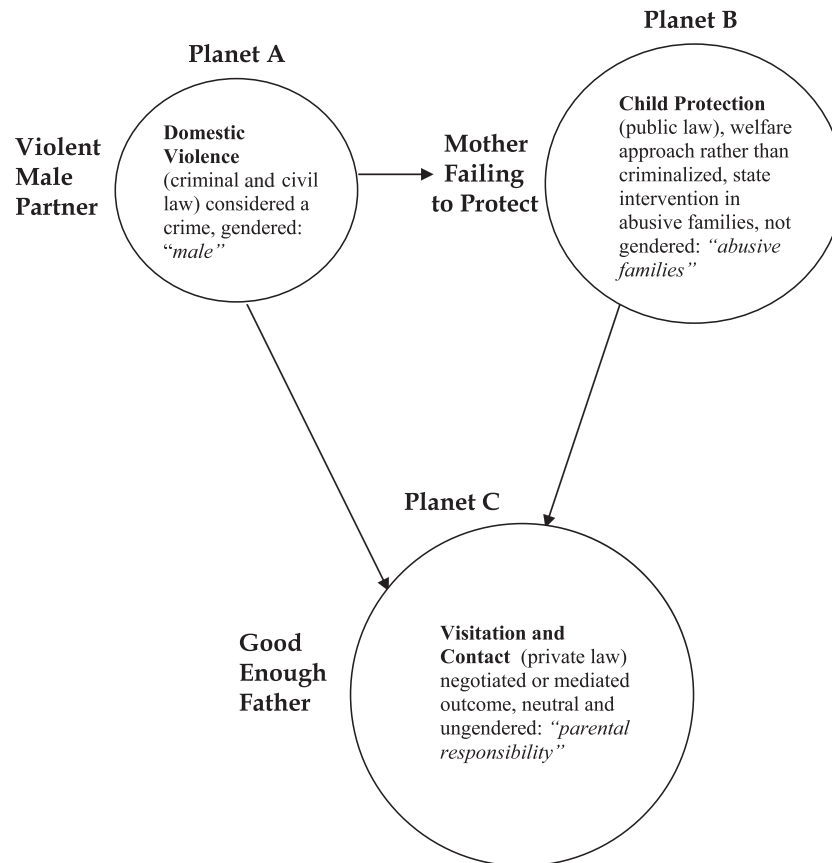


Figure 1: The Three Planets

attempt to explain this by using the story of “life on three planets” (see Figure 1).

The three planets each have their own history, culture, and laws. On Planet A—the domestic violence planet—the father’s behavior may be recognized by the police and other agencies as abusive in relation to the mother; his behavior is seen as a crime, and he may even be prosecuted for a criminal or public order offense. He might also have a restraining or protective order taken out against him. He is thus perceived as a violent partner and the woman in need of protection.

If instead, he arrives on Planet B—the child protection planet—he may also be perceived as abusive to the mother while the parents are still together or during the process of them separating. However, the focus of Planet B is on protecting children, not adults. His abuse of the mother may lead to involvement in the family by social services or other child protection agencies and result in the children being placed on the child protection register for emotional abuse. It is highly unlikely, however, that he will be prosecuted on Planet B because a predominantly welfare, rather than criminalizing, approach prevails. To protect the children, social workers are likely to insist instead that the mother remove herself and her children from his presence and leave the relationship if she has not already done so. If she does not, then it is she who is seen as failing to protect, and the children might be removed into the care of the local authority. On Planet B, therefore, despite the violence to the mother being from the male partner, it is the mother who is seen as responsible for dealing with the consequences. In effect, the violent man disappears from the picture.

From Planet B or Planet A, the father moves to Planet C—the visitation or contact planet—to apply for contact (or possibly custody or parental responsibility) with his children. As there has been no prosecution of him on Planet B in relation to the emotional abuse of the children that resulted from his violence to the mother (despite them being on the child protection register for this), there is no apparent concrete evidence in relation to child care to question his postseparation parenting abilities. Even if he has a criminal conviction or protection order against him from his violence against the mother on Planet A, this may still be seen as being between the adults and not directly related to the children. On Planet C, the emphasis is less on protection than on children having two parents. Within this context, an abusive father may still be deemed a so-called good enough father, who should at least have contact with his child postseparation, if not custody or residence. The mother ends up in a particularly difficult dilemma on Planet C. She has attempted to curb his violent behavior by calling the police and supporting his prosecution on Planet A. She has left her violent partner following instruction from social services on Planet B that she leave to protect her children. However, Planet C, in effect, has the opposite approach, that families should

continue to be families even if there is divorce and separation. On Planet C, therefore, she is ordered to allow contact between her violent expartner and the children, leaving her not only bewildered and confused but also yet again scared for the safety of her children. Realistic assessment of risk and lethality for children is extremely difficult within such a context. The three-planet model also shows that there is a conceptual gap between violent men on one hand and fathers on the other (Eriksson & Hester, 2001). There are violent men but good enough fathers, and the two are difficult to merge whether in policy or in practice.

To reiterate, a key challenge (if not trend) for the next decade is to bring these three planets into line, so that the safety of women and children prevails throughout. As part of this, it is vital that the legal and practice implications of the gap between violent men and fathers is closed so that violent men can be dealt with as violent fathers and as domestic violence perpetrators.

## CONCLUSION

In this article I covered some of the areas that I see as important future trends and challenges regarding violence against women. I could have chosen many others. Obvious omissions I would also have liked to discuss are future trends in tackling male perpetrators of violence against women, the effects of mainstreaming work on violence against women, and the revisiting of old and the development of new theory in relation to gender-based violence.

## NOTES

1. Whereas domestic violence and rape are relatively noncontentious in being defined as "violence against women," there has been much debate as to whether trafficking should be similarly defined. I will not go into these debates here, but I think it is important to include trafficking as a phenomenon infused with gender-based violence.

2. There has been much criticism of the potential colonization or imperialism engendered by feminists in Southern countries being directly influenced by those in Northern or Western countries and regions (Naples, 2002). What is especially interesting here is that although *domestic violence* is a term also used by Northern and Western feminists, Chinese activists adopted gender awareness as an approach to violence against women following interaction with other Southern feminists, specifically in India (see Milwertz, 2003).

3. I want to thank Cecilia Milwertz for discussions we have had about comparative terms in the three countries.

4. It should be noted that the Council of Europe was founded in 1949 (following the Second World War) and is made up of 45 member-states across the European continent. Its remit is to develop common democratic and legal principles based on the European Convention of Human Rights. The Council of Europe is separate from the Parliament of the European Union, an elected body currently involving 25 countries across Europe.

5. There have been development of Europe-wide networks on violence against women, such as the European Network on Gender, Violence and Conflict, and Women against Violence Europe (WAVE), and a wide range of projects involving three or more European countries within the DAPHNE initiative. DAPHNE is the European Union program to combat violence against children, young people, and women.

6. The Conflict Tactics Scale, despite its many weaknesses (Dobash & Dobash, 1992; Nazroo, 1995), continues to dominate research on violence against women in the United States, and this is likely to be the case in the foreseeable future.

7. It has to be recognized, of course, that the richer liberal democracies also have vested interests in funding organizations that may in some way challenge the Chinese communist state.

8. This also reflects Article 9 of the U.N. Convention on the Rights of the Child, concerning children's right to know their two parents.

9. Via the Appeal Court decision in *Re L (Contact: Domestic Violence)*; *Re V (Contact: Domestic Violence)*; *Re M (Contact: Domestic Violence)*; *Re H (Contact: Domestic Violence)* [2000] 2 FLR 334.

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## **RATES AT WHICH ACCUSED AND ADJUDICATED BATTERERS RECEIVE SOLE OR JOINT CUSTODY**

Compiled by Joan S. Meier, Esq.

One statement in *Breaking the Silence: Children's Voices* that has provoked controversy was my statement that "the studies are showing" that up to 2/3 of accused or adjudicated batterers receive joint or sole custody in court. While no empirical study can definitively determine a universal statistical rate, the key point is that the research consistently shows that accused and adjudicated batterers receive joint or sole custody disturbingly often. This confirms the anecdotal experience of domestic violence attorneys and victims around the country. The following research supports this perspective.

### **I. A History of Domestic Violence is Common among Contested Custody Cases.**

The remarkably consistent research on this issue is compiled in my previously-issued statement, *Research Indicating that the Majority of Cases that go to Court as 'high conflict' contested custody cases have a history of domestic violence* (Nov. 9, 2005).

One good example is a study cited by Janet Johnston, a leading researcher of parental alienation, which found that, among custody litigants referred to mediation, "[p]hysical aggression had occurred between 75% and 70% of the parents . . . even though the couples had been separated. . . [for an average of 30-42 months]". Furthermore, [i]n 35% of the first sample and 48% of the second, [the violence] was denoted as *severe* and involved battering and threatening to use or using a weapon."

- Janet R. Johnston, "High-Conflict Divorce," *The Future of Children*, Vol. 4, No. 1, Spring 1994, 165-182) citing Depner et al., "Building a uniform statistical reporting system: A snapshot of California Family Court Services," *Family and Conciliation Courts Review* (1992) 30: 185-206

### **II. Domestic Violence Perpetrators are More Likely to Contest Custody than Non-Abusers.**

The American Psychological Association's Presidential Task Force on Violence in the Family, the leading review of the research as of 1996, found that men who abuse their partners contest custody at least twice as often as non-abusing fathers. They are even more likely to contest custody if the children are boys.

- American Psychological Association Presidential Task Force on Violence in the Family (1996) at p. 40.

### **III. Accused and Adjudicated Batterers Receive Joint or Sole Custody Surprisingly Often.**

The research on this has only emerged in recent years, and most studies have been small and local. Nonetheless, they document disturbing trends, which surprised even me when I first discovered them.

#### **A. Multiple studies have documented gender bias against women in custody litigation.**

Contrary to the conventional wisdom that women are favored in custody litigation, both the experiences of battered women and the empirical research are showing that women who allege abuse are deeply *disfavored* in custody courts.

The Massachusetts Supreme Judicial Court Gender Bias Task Force was one of the first states to document the gender bias against women in family courts. This court-initiated study expressly

found that “our research contradicted [the] perception” that “there is a bias in favor of women in these decisions.” Moreover, it found that “in determining custody and visitation, many judges and family service officers do not consider violence toward women relevant.” The Court’s study further found that “the courts are demanding more of mothers than fathers in custody disputes” and that “many courts put the needs of noncustodial fathers above those of custodial mothers and children.”

- *Gender Bias Study of the Court System in Massachusetts*, 24 New Eng.L.Rev. 745, 747, 825, 846 (1990)

More recently, and since the evolution and widespread adoption of “parental alienation syndrome,” a multi-year, four-phase study using qualitative and quantitative social science research methodologies by the Wellesley Centers for Women found “a consistent pattern of human rights abuses” by family courts, including failure to protect battered women and children from abuse, discriminating against and inflicting degrading treatment on battered women, and denying battered women due process. Histories of abuse of mother and children were routinely ignored or discounted.

- Wellesley Centers for Women Battered Mothers’ Testimony Project, *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* (Nov. 2002)(hereafter “BMTP”), *Executive Summary* at 2.

A comparable study by the Arizona Coalition Against Domestic Violence found that most of the women surveyed felt the history of abuse was not taken seriously and that they were ignored, disrespected and discriminated against by court personnel.

- Arizona Coalition Against Domestic Violence, *Battered Mothers’ Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence* (June 2003), pp. 47, 49, 6.

A study of the Domestic Relations Division of Philadelphia Family Court conducted by the Philadelphia Women’s Law Project in cooperation with the court, found that litigants are often denied due process, and that applicable legal standards are “not always observed, particularly in the consideration of abuse in custody proceedings, leaving families at risk.”

- Tracy, Fromson & Miller, *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community*, DOMESTIC VIOLENCE REPORT, Vol. 8, No. 6 (Aug/Sept. 2003), p. 94.

## **B. Studies show Accused and Adjudicated Batterers Receiving Sole or Joint Custody Surprisingly Often.**

My own survey of the case law in 2001 identified 38 appellate state court decisions concerning custody and domestic violence. The survey found that 36 of the 38 trial courts had awarded joint or sole custody to alleged *and adjudicated* batterers. Two-thirds of these decisions were reversed on appeal. - Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, A.U. J. Gender, Soc. Pol. & the Law, 11:2 (2003), 657-731, p. 662, n. 19, and Appendix.

These cases included a case in which the perpetrator had been repeatedly convicted of domestic assault;<sup>1</sup> in which a father was given sole custody of a 16-month old despite his undisputed choking of the mother resulting in her hospitalization and his arrest;<sup>2</sup> in which the father had broken the mother’s collarbone;<sup>3</sup> had committed “occasional incidents of violence”;<sup>4</sup> and had committed two admitted assaults.<sup>5</sup> More such instances can be found in *Meier, supra*.

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<sup>1</sup> *In re Custody of Zia*, 736 N.E. 2d 449 (Mass. App. Ct. 2000)

<sup>2</sup> *Kent v. Green*, 701 So. 2d 4 (Ala. Civ. App. 1996)

<sup>3</sup> *Couch v. Couch*, 978 S.W.2d 505 (Mo. App. 1998)

<sup>4</sup> *Simmons v. Simmons*, 649 So. 2d 799, 802 (La. App. Ct. 1995)

<sup>5</sup> *Hamilton v. Hamilton*, 886 S.W.2d 711, 715 (Mo. App. 1994)

A multi-state study found that, even in states with a presumption against custody to a batterer, 40% of *adjudicated* batterers received joint (legal or physical) custody. In states with competing (e.g. friendly parent or joint custody) presumptions, only 4% % of courts gave sole physical custody to a mother. Morrill et al, "Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother," VIOLENCE AGAINST WOMEN, Vol. 11, No. 8, Aug. 2005, 1076-1107.

The American Judges Association has found that approximately 70% of batterers succeed in convincing authorities that the victim is unfit for or undeserving of sole custody. Another way of saying this is that 70% of batterers obtain sole or joint custody.

- American Judges Association, "Domestic Violence and the Courtroom: Understanding the Problem . . . Knowing the Victim" <http://aja.ncsc.dni.us/domviol/page5.html> (at "Forms of Emotional Battering. . . Threats to Harm or Take Away Children")

A survey of battered women by the Arizona Coalition Against Domestic Violence found that courts awarded joint or sole custody to the alleged batterers 56-74% of the time (depending on the county). Many of these cases involved documented child abuse or adult abuse.

- Arizona Coalition Against Domestic Violence, *Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence* (June 2003), pp. 33-34, 47-49

A study of 300 cases over a 10-year period in which the mother sought to protect the child from sexual abuse, found that 70% resulted in unsupervised visitation or shared custody; in 20% of the cases the mothers completely lost custody, and many of these lost *all visitation rights*.

- Neustein & Goetting (1999), "Judicial Responses to the Protective Parent's Complaint of Child Sexual Abuse," *Journal of Child Sexual Abuse* 8 (4): 103-122.

The Wellesley Battered Mothers' Testimony Project found that 15 out of 40 cases resulted in sole or joint physical custody to the fathers, all of whom had abused *both* the mother and the children.

- BMTP, *supra* at Appendix A.

The Massachusetts Supreme Judicial Court Gender Bias Task Force found that **94%** of fathers who actively sought custody received sole or joint custody, regardless of whether there was a history of abuse. While fathers received primary physical custody 29% of the time, mothers received primary physical custody in only 7% of the contested cases. The Study also cited other research which similarly found that fathers who sought custody received primary physical custody 2/3 of the time, with mothers receiving it less than 1/4 of the time; and another study which found that fathers seeking custody received joint or sole custody 79% of the time, with mothers receiving sole custody in only 15% of those cases (compared to fathers' sole custody in 41% of the cases).

- Gender Bias Study at 831-832 and citing Middlesex Divorce Research Group relitigation study and Phear et al., 1983.

It is likely that a substantial proportion of the fathers in this study had committed domestic violence.

- Meier Statement, *Research Indicating that the Majority of Cases that go to Court as 'High Conflict' Contested Custody Cases have a History of Domestic Violence* (Nov. 9, 2005).

**See generally, VIOLENCE AGAINST WOMEN, Vol. 11, No. 8, Aug. 2005 (Symposium on NIJ-funded research studies on domestic violence and custody)**

# Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases\*

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CAROL S. BRUCH\*\*

## I. Introduction

As American courts and legislatures continue their enthusiastic ventures into family law reform, they make frequent use of theories and research from the social sciences. This essay focuses on developments in child custody law stemming from Parental Alienation Syndrome (PAS), a theory propounded in 1985 that became widely used despite its lack of scientific foundations. The discussion highlights theoretical and practical problems with PAS, provides a similar discussion of more recent proposals labeled Parental Alienation (PA), and concludes with recommendations for lawyers and judges who must evaluate these and similar developments.

## II. PAS and Its Critics

### A. *The PAS Doctrine*

Child psychiatrist Richard Gardner coined the term Parental Alienation Syndrome in 1985 to describe his clinical impressions of cases

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\* © 2001 by Carol S. Bruch. This article incorporates, with permission, materials first published in Carol S. Bruch, *Parental Alienation Syndrome: Junk Science in Child Custody Determinations*, 3 EUROPEAN J. L. REFORM 383 (2001).

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he believed involved false allegations of child sexual abuse.<sup>1</sup> The essence of PAS, in his view, is a child's campaign of denigration against a parent that results from "programming ('brainwashing') of the child by one parent to denigrate the other parent [and] self-created contributions by the child in support of the alienating parent's campaign. . . ."<sup>2</sup> Dr. Gardner first stated that PAS was present in approximately ninety percent of the children whose families were involved in custody litigation but provided no research findings to substantiate his assertions about the syndrome, its frequency, or its setting. In fact, his initial estimates appear to have been dramatically overstated, particularly as to the frequency of false sexual abuse allegations,<sup>3</sup> and his revised estimates have been far more circumspect.<sup>4</sup>

In recent years, use of the term PAS has been extended dramatically to include cases of all types in which a child refuses to visit the non-custodial parent, whether or not the child's objections entail abuse allegations. Although Dr. Gardner sometimes states that his analysis does not apply to cases of actual abuse,<sup>5</sup> the focus of his attention is directed

1. Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, ACADEMY F., vol. 29, no. 2, at 3 (American Academy of Psychoanalysis, 1985).

2. RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME* xix (2d ed. 1998) [hereafter GARDNER (2D ED.)], *quoted in* Introductory Comments on the PAS, formerly available at <http://www.rgardner.com/refs/> (hereafter: *Gardner's website*); the current iteration has been lightly reworded and is found on *Gardner's website* (last updated May 31, 2001 and last visited September 16, 2001) under the title "Basic Facts about the Parental Alienation Syndrome." Precise reading and careful comparisons between sources are required when Gardner articulates his theories; often revised wording entails no change in substance.

3. As to frequency of cases involving sexual abuse, see the careful, comprehensive reports of a major research effort, Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 160 (1990) ("Less than 2% of the approximately 9,000 families with *custody and visitation disputes* served by 8 domestic relations courts included in th[is] study involved an allegation of sexual abuse.") (emphasis added). See also DEBRA WHITCOMB, U.S. DEPARTMENT OF JUSTICE, *WHEN THE VICTIM IS A CHILD* 7 (2d ed. 1992) ("As an alternative way of framing the magnitude of this problem, sexual abuse allegations occurred in the range of approximately 2 to 1 per 1,000 *divorce filings* among the courts [in seven jurisdictions] that were studied") (emphasis added). See also an analysis of Gardner's work by a University of Michigan professor of social welfare, Kathleen Coulbourn Faller, *The Parental Alienation Syndrome—What Is It and What Data Support It?* 3 CHILD MALTREATMENT 110–15 (1998).

4. Compare RICHARD GARDNER, *THE PARENTAL ALIENATION SYNDROME* 59 (1992) (90% figure) [hereafter GARDNER (1992)] with GARDNER (2D ED.), *supra* note 2, at xxix–xxxi (stating that no estimates for PAS can be made, but mentioning reports of alignments [a different, much broader phenomenon] in up to 40% of high-conflict custody disputes).

5. Indeed, the PAS definition on his website no longer mentions sex abuse allegations (perhaps in response to critiques challenging Gardner's assertions about the frequency with which unsubstantiated allegations of sexual abuse occur). See *Gardner's website*; note 3 *supra*; notes 21 & 46–48 *infra*. Gardner also now acknowledges that "some abusive neglectful parents are using the PAS explanation . . . as a coverup and

at discerning whether the beloved parent and child are lying, not whether the target parent is untruthful or has behaved in a way that might explain the child's aversion.<sup>6</sup> His recommended treatment for serious cases is to transfer custody of the child from the beloved custodial parent to the rejected parent for deprogramming. This may entail institutional care for a transitional period, and all contact, even telephone calls, with the primary caregiver must be terminated for "at least a few weeks." Only after reverse-brainwashing may the child slowly be reintroduced to the earlier custodian through supervised visitation.<sup>7</sup>

### B. *The Setting in Which PAS Is Said to Occur*

High conflict families are disproportionately represented, of course, among the population of those contesting custody and visitation.<sup>8</sup> These cases commonly involve domestic violence, child abuse, and substance abuse.<sup>9</sup> Many parents are angry, and a broad range of visitation prob-

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diversionary maneuver." Publications and lectures that he promotes as assisting those who need to distinguish true from false allegations of abuse or neglect are, however, strongly reminiscent of his earlier, discredited Sex Abuse Legitimacy Scale (SALS) work, described below. See Richard A. Gardner, *Differentiating Between Parental Alienation Syndrome and Bona Fide Abuse-Neglect*, 27 AM. J. FAM. THERAPY 97 (1998); notes 21 & 46-48 *infra*.

6. Two examples are his efforts to distinguish true from false allegations and his blanket advice to judges that they should refrain from taking abuse allegations seriously, even when supported by a therapist who has seen the child. Compare, e.g., Richard A. Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families—When Psychiatry and the Law Join Forces*, 28(1) CT. REV. 14, 18 (Spring 1991) [hereafter Gardner, CT. REV.] ("The court's therapist should have a thick skin and be able to tolerate the children's shrieks and claims of maltreatment. . . . To take the allegations of maltreatment seriously . . . may result in . . . [lengthy or lifelong] alienation."), with the authorities discussed in notes 16, 21 & 46-48 *infra* and accompanying text (questioning his methodology and discussing the incidence of false allegations).

7. *Id.* at 16-17 (where his language, although not the substance of his recommendations, has been softened somewhat).

8. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD—SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 132-61 (1992). Approximately 25% of families experience substantial legal conflict; "in these families, the parents—the fathers in particular—harbor especially high levels of hostility toward the former spouse." *Id.* at 159.

9. ADMINISTRATIVE OFFICE OF THE COURTS, *FAMILY COURT SERVICES SNAPSHOT STUDY REPORT I—OVERVIEW OF CALIFORNIA FAMILY COURT SERVICES MEDIATION 1991: FAMILIES, CASES AND CLIENT FEEDBACK* 8-12 (1992), at <http://www.courtinfo.ca.gov/courtadmin/aoc/familycourtservices/usrs/report01/r01rpt.htm>. In California, mediation is mandatory for all contested custody cases. In this statewide study of most custody mediation sessions conducted by court personnel on a single day, serious issues of child abuse, family violence and substance abuse were raised by the parties in 42% of all mediating families, with an additional 24% raising one of these issues alone. In a review of five federally funded demonstration projects to resolve child access and visitation problems, researchers report, "Nearly half of the access denial cases at every site involve allegations of the child's imperiled safety. Most allegations are made by the residential parent, regardless of sex, against the nonresidential parent and the other

lems occur. Dr. Gardner's description of PAS may well remind parents, therapists, lawyers, mediators, and judges of these frequently encountered emotions, and this may help to explain why his audience has often accepted PAS without question. The overwhelming absence of careful analysis and attention to scientific rigor these professionals demonstrate, however, is deeply troubling. As the following discussion reveals, this carelessness has permitted what is popularly termed junk science (pseudo science) to influence custody cases in ways that are likely to harm children.

### C. *The Flaws in PAS Theory*

The deficiencies in PAS theory are multiple. Some have already been identified in social science literature and child custody judicial opinions; still others are now emerging. First, Gardner confounds a child's developmentally related reaction to divorce and high parental conflict (including violence)<sup>10</sup> with psychosis. In doing so, he fails to recognize parents' and children's angry, often inappropriate, and totally predictable behavior following separation. This error leads him to claim that PAS constitutes a frequent example of *folie à deux* or *folie à trois*, Shared Psychotic Disorders that the American Psychiatric Association and scholarly studies report occur only rarely.<sup>11</sup> His assertion that these

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people in his/her household. Violent behavior is the only allegation that is consistently leveled with greater frequency against men." Jessica Pearson & Jean Anhalt, *Enforcing Visitation Rights—Innovative Programs in Five State Courts May Provide Answers to This Difficult Problem*, 33 (2) JUDGES' J. at 3, 40–41 (Spring 1994) (citing four additional studies which also indicate "that safety concerns feature prominently in many visitation disputes").

10. See JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP—HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 77–80 (1980) (special vulnerability of 9- to 12-year-olds to alignments, for whom this coping behavior at divorce wards off loneliness, sadness, and more serious depression), 99, 145–46, 233–34 (only a weak correlation between children's anger and parents' quarreling), 237, 253; JUDITH S. WALLERSTEIN, JULIE M. LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE—A 25 YEAR LANDMARK STUDY* 115–17, 125 (2000) (*alliances* usually involve pre-adolescents or young adolescents in high-conflict cases or when "enmity overshadows good sense"); Janet R. Johnston, *Children of Divorce Who Refuse Visitation, in NONRESIDENTIAL PARENTING* 109–35, at 124 (Charlene E. Depner & James H. Bray eds., 1993) [hereafter Johnston, *Children Who Refuse Visits*].

11. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM IV* § 297.3: Shared Psychotic Disorder (Folie à Deux) (4th ed. 1994) ("This disorder [in which a second or further person in a close relationship with a primary person comes to share delusional beliefs of the primary person, who already had a Psychotic Disorder, most commonly Schizophrenia,] is rare in clinical settings, although it has been argued that some cases go unrecognized"); Jorg M. Fegert, *Parental Alienation oder Parental Accusation Syndrome?—Part 1*, KIND-PRAX 1/2001, at 3 (hereafter: Fegert, *Part 1*); *id.* *Part 2*, at KIND-PRAX 2/2001, at 39, 41–42 (hereafter: Fegert, *Part 2*) (citing a literature search by the Würzburger Klinik of the period from 1877 through 1995 that produced only 69 case reports of

disorders occur primarily in young children is also contrary to the literature,<sup>12</sup> probably also due to a misreading of typical developmental responses to divorce on the part of young children.<sup>13</sup>

Second, possibly as a consequence of these errors and his tail-of-the-elephant view,<sup>14</sup> Gardner vastly overstates the frequency of cases in which children and custodial parents manufacture false allegations or collude to destroy the parent-child relationship. Taken together, these assertions have the practical effect of impugning all abuse allegations, allegations which Gardner asserts are usually false in the divorce context.<sup>15</sup> Here, too, Gardner cites no evidence in support of his personal view, and the relevant literature reports the contrary—that such allegations are usually well founded.<sup>16</sup>

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children and youth that match the description of *folie à deux*); Jose M. Silveria & Mary V. Seeman, *Shared Psychotic Disorder: A Critical Review of the Literature*, 40 CANADIAN J. PSYCHIATRY 380, 390–91 (1995) (reporting a literature search covering 51 years, from 1942 through 1993, that produced 123 cases, of which only 75 met the tests for a shared psychotic disorder under DSM-IV; of these only 61 involved two people, of which 31.1% [19 cases] involved parents and children, with only 5 of these involving children 18 years old or younger). Silveria and Seeman note that whether published cases reports provide a representative sample or reflect frequency is unknown, but they, Fegert (*supra* note 11), and the DSM (*supra* this note) all describe the phenomenon as rare. See also WORLD HEALTH ORGANIZATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS [ICD-10], Disorder F24: Induced Delusional Disorder (Folie à deux), at 331 (10th ed. 1992).

12. Silveria and Seeman, *supra* note 11, at 390, 392, report, “Age ranges were similar for both the secondaries (10 to 81 years) and the primaries (9 to 81 years).” There were also no differences in the average ages for primaries and secondaries. Instead, “the age distribution is more in keeping with the expected distribution of age of onset for other nonorganic psychotic disorders in general, which is relatively rare in the very young and the very old.” *Id.*

13. “Resistance to visitation among young children, for example, is a developmentally expectable divorce-specific separation anxiety, which is made more intense by overt conflict between parents” and is unrelated to emotional disturbance of either parents or children. Johnston, *Children Who Refuse Visits*, *supra* note 10, at 118. For typical responses to chronically disputing parents at the developmental stages Johnston studied, see *id.* at 120: “temporary reactions (2- [to] 4-year-olds), shifting allegiances (4- [to] 7-year-olds), loyalty conflicts (7- [to] 10-year-olds), and alignments (9- [to] 12-year-olds).”

14. The reference is, of course, to the story of several blind men, each attempting to describe an elephant. One holds the tail, another the trunk, the third a tusk, and the fourth a leg. Because each describes only his own perceptions, no one provides an accurate description.

15. As Faller points out, Gardner does not attempt to explain why he believes that “perhaps 95% or more” of all allegations of child sexual abuse are true but “the vast majority of allegations in [divorce custody cases] are false.” Faller, *supra* note 3, at 103–04.

16. As to the frequency of unsubstantiated abuse allegations, see the literature collected and analyzed in JOHN E.B. MYERS, A MOTHER’S NIGHTMARE—INCEST: A PRACTICAL LEGAL GUIDE FOR PARENTS AND PROFESSIONALS 133–35, 198–210 (1997); see also *id.* at 144–45 (innocent misperceptions of innocent behavior); Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1373–74, 1391–94 (1994).

Third, in this fashion, PAS shifts attention away from the perhaps dangerous behavior of the parent seeking custody to that of the custodial parent. This person, who may be attempting to protect the child, is instead presumed to be lying and poisoning the child. Indeed, for Gardner, the concerned custodial parent's steps to obtain professional assistance in diagnosing, treating, and protecting the child constitute evidence of false allegations.<sup>17</sup> Worse yet, if therapists agree that danger exists, Gardner asserts that they are almost always man-hating women who have entered into a *folie à trois* with the complaining child and concerned parent.<sup>18</sup> Indeed, he warns judges not to take abuse allegations seriously in the divorce court setting in high conflict cases (severe PAS cases). Neither Gardner nor those who accept his views acknowledge the logical difficulties when Gardner asserts that abuse allegations which are believed by therapists constitute evidence of PA by the protective parent.

Fourth, Gardner believes that, particularly in serious cases, the relationship of an alienated child with the rejected parent will be irreparably damaged, probably ending for all time,<sup>19</sup> unless immediate, drastic measures (custody transfer, isolation from the loved parent, and deprogram-

17. Gardner once identified a public prosecutor in a criminal child sex-abuse prosecution, for example, as a mother's "hired gun." He accordingly rated the defendant less likely to be guilty than if the woman had not sought legal assistance. The prosecutor later pointed out the absurdity of Gardner's reasoning, saying, "If you believe your child has been sexually abused, shouldn't you be going to an attorney and seeking medical advice?" Rorie Sherman, *A Controversial Psychiatrist and Influential Witness Leads the Backlash against Child Sex Abuse "Hysteria,"* 15 NAT'L L.J., August 16, 1993, at p. 1. The custodial parent, of course, is left in an untenable position under Gardner's approach. If he or she fails to act in the face of possible abuse, the custodial parent may be guilty of a failure to protect the child, passivity that may lead to a child dependency action or, even, to criminal charges.

18. Compare GARDNER (1992), *supra* note 4, at 146-47 (such *folies à trois* with therapists are "a widespread phenomenon") and Gardner, CT. REV., *supra* note 6, at 18, with Faller, *supra* note 3, at 102-03 (collecting and critiquing relevant passages from Gardner's work) and Fegert, Part 2, *supra* note 11, at 41 (reports of a *folie à deux* or *trois* are extremely rare). Further, Gardner asserts that when sexual abuse is alleged, these custodial parents and therapists may take personal sexual pleasure in visualizing the alleged activity between the noncustodial parent and the child. See Faller, *supra* note 3, at 103, 104, 110-11 (collecting quotations and providing research literature to the contrary); see also Gardner, CT. REV., *supra* note 6, at 16 (attributing allegations to mothers' sexual fantasies). A trial court judge who sat as a family court judge for one year after several years on the criminal law bench is reported as noting PAS in "most of the family law cases he heard" and as cautioning family law judges "to be aware that in addition to the child, professionals upon whom the court relies may also be 'brainwashed' by the alienating parent." Judge Nakahara on PAS and the Role of the Court in Family Law, PAS-NEWSLETTER, January 1999, at unnumbered 2-3 (News for Subscribers), at <http://www.vew.ch/en/pas/bw199901.htm> (last visited April 8, 2001).

19. See Richard A. Gardner, March 2000 Addendum (to GARDNER (2D ED.), *supra* note 2), at <http://www.rgardner.com/refs/addendum2.html> (last visited September 30, 2001).

ming) are taken. Here, too, reliable sources reveal that his theory is exaggerated, with all but unusual cases (for example, those appearing in violent families) resolving themselves as the children mature.<sup>20</sup>

Fifth, as these sources suggest, Gardner's proposed remedy for extreme cases is unsupported and endangers children.<sup>21</sup> In his admitted decision to err on the side of under-identifying abusers, Gardner appears to have overlooked the policy differences between criminal law and child custody law and also to have misunderstood the distinction between the burdens of proof in criminal and civil cases in the United States. To the extent that PAS results in placing children with a parent who is, in fact, abusive, the youngsters will be bereft of contact with the parent who might help them. Parent groups and investigative reporting describe, for example, numerous cases in which trial courts have transferred children's custody to known or likely abusers and custodial parents have been denied contact with the children they have been trying to protect.<sup>22</sup> In less extreme cases, too, children are likely

20. In 1993 Professor Janet Johnston, a specialist in high-conflict custody disputes with advanced degrees in social work and sociology, gave initial findings from two studies of high-conflict disputes referred to her research projects by the courts. Refusals to visit appeared frequently, especially among a subset of older children who had been exposed to serious abuse or domestic violence. Almost one-third of the total sample of children were in alignments more than 2 to 3 years post-separation, with three-fourths of the 9- to 12-year olds involved in such behavior. Johnston concluded that "when conflicts are overt and involve the children, and when the disputes are intense and prolonged, the children are more likely to submit to this alignment mode of defending and coping" and predicted that "it is highly likely that children will move into alignments as they approach early adolescence, if the parental conflict is ongoing." She contrasted these findings to far more benign findings in a community study of 131 children of recently separated parents. Johnston, *Children Who Refuse Visits*, *supra* note 10, at 124. In that less-troubled population, 20% of the children were in alignments (most of them in the 9- to 12-year-old group), but every case resolved itself before the child reached 18, with most resolving within one or two years when the children regretted their earlier behavior. Telephone conversation with Dr. Judith Wallerstein (April 10, 2001). A further report by Johnston concerning children from all these groups (the two court-referred groups and the community study) will appear shortly. See Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, \_\_\_ (forthcoming).

21. Gardner acknowledges that his SALS was weighted to find some perpetrators innocent who were in fact guilty. Sherman, *supra* note 17. Although Gardner now disavows responsibility for these applications of his work, he continues to recommend attention to the same factors his early work endorsed. See generally Faller, *supra* note 3 *passim*.

22. See, e.g., Gina Keating, *Disputed Theory Used in Custody Cases: Children Often Victims in Parental Alienation Syndrome Strategy*, PASADENA STAR-NEWS, April 23, 2000, at [http://www.canow.org/NOWintheNews/familylaw\\_news\\_text.html](http://www.canow.org/NOWintheNews/familylaw_news_text.html) (last visited April 8, 2001); MOTHERS OF LOST CHILDREN, SAMPLE OF CALIFORNIA FAMILY LAW CASES: CHILDREN TAKEN AWAY FROM SAFE PARENTS, FORCED TO LIVE WITH ABUSIVE PARENTS(2000), available from Mothers of Lost Children, P.O. Box 1803, Davis, CA 95617; KAREN WINNER, PLACING CHILDREN AT RISK: QUESTIONABLE PSYCHOLOGISTS AND THERAPISTS IN THE SACRAMENTO FAMILY COURT AND SURROUNDING COUNTIES (2000) (study commissioned by California Protective Parents Associa-

to suffer from such a sudden dislocation in their home life and relationship with the parent they trust. Even therapists who accept PAS theory have advised against custody transfers to no avail in some reported cases in which it seems judges have implemented Gardner's views on their own initiative.<sup>23</sup>

In sum, children's reluctance or refusal to visit noncustodial parents can probably be better explained without resorting to Gardner's theory. Studies that followed families over several years, for example, report that visits may cease or be resisted when a variety of reasons cause custodial parents and children to be angry or uncomfortable with the other parent. Often the noncustodial parent's behavior and the child's developmental stage play decisive roles. Alignments or alliances that are somewhat reminiscent of Gardner's construct are much less frequent than he suggests, and even in extreme cases, these scholars agree that PAS theory calls for inappropriate and harmful responses that intensify the problem.<sup>24</sup>

### III. The Merchandising of PAS in Child Custody Cases

How, then, did such a seriously misconceived, overstated, and harmful view gain widespread acceptance? What would inspire judges to order custody transfers against the uniform advice of expert witnesses in a case?<sup>25</sup> First, Gardner is broadly (but mistakenly) believed to be a

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tion). See also Christine Lehmann, *Controversial Syndrome Arises in Child-Custody Battles*, PSYCHIATRIC NEWS, September 1, 2000, at unnumbered 2, at <http://www.psych.org/pnews/00-09-01/controversial.html>. Paul Fink, M.D., past president of the American Psychiatric Association agrees, stating, "I am very concerned about the influence Gardner and his pseudo-science is having on the courts . . . . Once the judge accepts PAS, it is easy to conclude that the abuse allegations are false, and the courts award custody to alleged or proven perpetrators. . . . Gardner . . . undermines the seriousness of sexual abuse allegations." *Id.* See generally MYERS, *supra* note 16, at 8, 135-38.

23. See Karen "PP" v. Clyde "QQ," 602 N.Y.S.2d 709 (App. Div. 1993) (the trial court's reference to a book on PAS that was neither entered into evidence nor referred to by any witness provided no ground for reversal of custody transfer to father and termination of mother's contact with daughter in case where trial court held mother's sex abuse allegation fabricated and child programmed; mother's challenge to termination of contact treated as moot because subsequent trial order permitted visitation; no mention by appellate court of expert testimony, if any). See also Karen B. v. Clyde M., 574 N.Y.S.2d 267 (Fam. Ct. 1991), the deeply troubling trial court opinion in the case.

24. See, e.g., Fegert, *Part 2, supra* note 11, at 40-42; Johnston, *Children Who Refuse Visits, supra* note 10, at 132-33.

25. See Krebsbach v. Gallagher, 181 A.D.2d 363 (N.Y. App. Div. 1992) (trial court's order transferring custody against recommendation of psychologist and Law Guardian reversed for lack of support in record).

full professor at a prestigious university.<sup>26</sup> Because this aura of expertise accompanies his work, few suspect that it is mostly self-published,<sup>27</sup> that it lacks scientific rigor,<sup>28</sup> and that his books on PAS are not even held by most university and research libraries.<sup>29</sup> Next, Gardner promotes his writing and services as an expert through his own website,<sup>30</sup> receives referrals from the websites of fathers' organizations,<sup>31</sup> and provides packaged continuing education courses for pro-

26. See, e.g., Justice R. James Williams, *Should Judges Close the Gate on PAS and PA?* 39 FAM. CT. REV. 267, 267 (2001) (referring to "Dr. Richard Gardner, a psychiatrist at Columbia University"); Rola J. Yamini, *Note: Repressed and Recovered Memories of Child Sexual Abuse*, 47 HASTINGS L.J. 551, 557 n.58 (1996) (referring to "Dr. Richard Gardner, professor of psychiatry at Columbia University"); Joseph Berger, *Recanting a Sex Abuse Charge; Family Needs to Heal, but Which Statement Is the Lie?* N.Y. TIMES, July 10, 1998, at B1 (referring to "Dr. Richard A. Gardner, professor of child psychiatry at Columbia University Medical School"); Jon Meacham, *Trials and Troubles in Happy Valley*, NEWSWEEK (US EDITION), May 8, 1995, at 58 (referring to "Richard A. Gardner, a professor of child psychiatry at Columbia University medical school"). Gardner identifies himself by the courtesy academic title he holds from Columbia University (Clinical Professor of Medicine), a title that U.S. medical schools provide to doctors who permit students to observe their practice. Unlike the title Professor of Clinical Medicine, however, the title Gardner enjoys indicates neither full faculty membership nor research accomplishment. See *People v. Fortin*, 706 N.Y.S.2d 611, 612 (Crim. Ct. 2000), reporting Gardner's testimony that his academic appointment is unpaid, and that "at present [Gardner's] therapeutic work actively takes approximately 1 to 2% of his time and the remainder of his time and income are accounted for by forensic analysis and testimony [that increasingly concerns PAS]."

(*Fortin* was a criminal sex abuse case in which Dr. Gardner offered to testify concerning PAS and the credibility of the complaining witness. The court refused to permit his testimony because of a failure to establish general acceptance of PAS within the professional community.)

27. Creative Therapeutics of Cresskill, N.J., is the publishing firm that Gardner established to publish his works. *People v. Fortin*, 706 N.Y.S.2d 611, 612 (Crim. Ct. 2000) (reporting that Gardner's company had published and marketed all but one of his books since 1978).

28. Seeking to refute criticism about the absence of scientifically rigorous reports on PAS, Gardner recently published a report of cases from his own practice and consulting work in which he concluded that PAS was present; the case summaries concern 99 children. Richard A. Gardner, *Should Courts Order PAS Children to Visit/Reside With the Alienated Parent? A Follow-up Study*, 19(3) AM. J. FORENSIC PSYCHOL. 61 (2001). The article is unsuccessful, however, because in it Gardner confounds criminal, family law, and personal injury cases; omits essential information (e.g., the children's ages and information on the nature of any abuse allegations); includes cases in which he had no direct contact with the child; and treats highly disparate factual and legal issues as equivalents. For example, Gardner tallies criminal and personal injury decisions (where courts were without power to adjust custody orders) as cases in which custody or visitation was not adjusted to account for PAS.

29. An April 2001 electronic search of the Research Libraries Information Network (RLIN), a database that includes the holdings of over 160 major reference libraries, revealed that only 9 of these libraries hold one or both editions of Gardner's book, THE PARENTAL ALIENATION SYNDROME.

30. See Gardner's website for a listing of his appearances. See generally Sherman, *supra* note 17.

31. See generally Williams, *supra* note 26, at 269 and n.21 (concerning the websites of fathers' groups).

professionals.<sup>32</sup> Finally, he often inaccurately represents or suggests that PAS is consistent with or endorsed by the accepted work of others.<sup>33</sup>

An eight-page article in the journal of the American Judges Association provides a typical example.<sup>34</sup> Gardner is identified by his courtesy title alone,<sup>35</sup> and the article provides only ten sources (nine of his own writings and one piece by Sigmund Freud) to support his dramatic, even hyperbolic, assertions.<sup>36</sup>

In any event, over the years since Gardner first announced his theory, the term PAS has entered into public usage. The media, parents, therapists, lawyers, mediators, and judges now often refer to PAS, many apparently assuming that it is a scientifically established and useful mental health diagnosis.<sup>37</sup> Accordingly, in practice, whenever child sexual abuse allegations or disrupted visitation patterns arise in the United States, one must now be prepared to confront a claim asserting that PAS is at work, not abuse or other difficulties.<sup>38</sup>

32. See Gardner's website, *supra* note 2, for a listing of such appearances.

33. See, e.g., the publications and cases listed on his website. The website identifies negative publications as supporting PAS, claims that discussions of entirely distinct phenomena (such as alignments) are about PAS, claims that cases in which any reference to PAS is made constitute decisions that the syndrome is scientifically and legally accepted, and claims that articles in peer-reviewed law or mediation journals (which do not provide substantive review of his scientific claims) establish the scientific merit of PAS.

34. See Gardner, CT. REV., *supra* note 6.

35. *Id.* ("Richard A. Gardner, M.D., is clinical professor of child psychiatry at Columbia University, College of Physicians and Surgeons.")

36. Specifically, Sigmund Freud, *Three Contributions to the Theory of Sex: II—Infantile Sexuality*, in THE BASIC WRITING OF SIGMUND FREUD 592–93 (A.A. Brill ed., 1938), is cited to support Gardner's statement concerning cases in which sexual abuse is alleged: "I agree with Freud that children are 'polymorphous perverse,' and thereby provide [their] mothers with ample supply of material to serve as nuclei for [the mothers' projection of their own inclinations to pedophilia] onto the father." Additional dangerous hyperbole is typified by Gardner's statement that a child's hatred for one parent is "superficial" and his warning to judges that "tak[ing] the allegations of maltreatment seriously may help entrench the parental alienation syndrome and may result in years of, if not lifelong, alienation." Gardner, CT. REV., *supra* note 6. Compare the views of reputable scholars set forth in notes 15–18 *supra*.

37. A recent friend-of-the-court brief provides an example. See Amici Curiae Brief of Leslie Ellen Shear, et al., *Montenegro v. Diaz*, Supreme Court of California No. S090699 (2001). Written on behalf of mediators, therapists and California attorneys who have passed a specialist's examination in family law, the brief's arguments in favor of easier custody modification standards (including transfers in custody) include reliance on PAS. *Id.* at 26–30. Judges have also endorsed PAS. See, e.g., the remarks of Judge Aviva Bobb, Presiding Judge of the Los Angeles Superior Court Family Court, *quoted in Keating, supra* note 22:

[Just because PAS is not supported by scientific evidence] does not mean that it does not exist. One parent is being successful in undermining the child's relationships with the other parent. That is so serious that the child will not be able to bond [sic] with the other parent. . . . And unless that parent stops that behavior, that parent should be monitored by a third party.

38. Even Gardner now concedes that this is a frequent pattern. Keating, *supra* note

An electronic search for all reported U.S. cases between 1985 and February 2001 employing the term “parental alienation syndrome” revealed numerous mental health professionals in addition to Gardner who have testified that PAS was present, although far fewer were willing to recommend that custody be transferred and contact with the primary custodian be terminated. The search produced forty-eight cases from twenty states, including the highest courts in six states. The degree to which PAS has been invoked by expert witnesses, attorneys, or judges in these cases and the almost total absence of inquiries into its scientific validity is profoundly disturbing.<sup>39</sup> In only a handful of cases did the trial or appellate court specifically consider whether the supposed syndrome was admissible under the accepted precedents that test either acceptance in the scientific community or acceptable scientific methodology,<sup>40</sup> and in several of these, the court determined that it did not need to reach the admissibility question, often because no alienation had been shown.<sup>41</sup> On more than one occasion, however, appellate

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22 (quoting Gardner: “Now that PAS is a widespread diagnosis, many abusers are claiming they are innocent victims of PAS”).

39. Most of the cases listed as admitting PAS on *Gardner’s* website fit into this category, and the list is therefore misleading. When PAS is mentioned by a party, an expert or a judge, but no challenge to admissibility or decision on point has occurred, no conclusion concerning admissibility can be drawn; the issue has simply been waived. *See, e.g., In re Violetta B.*, 568 N.E.2d 1345 (Ill. Ct. App. 1991) (PAS mentioned by one witness, but not discussed and irrelevant to decision); *Crews v. McKenna k/a Kuchta*, 1998 Minn. App. LEXIS 793 (July 7, 1998) (“kernel of authenticity” to 11-year-old’s fears, but “some” of child’s behavior evidenced PAS); *Truax v. Truax k/a Briley*, 874 P.2d 10 (Nev. 1994); *Loll v. Loll*, 561 N.W.2d 625 (N.D. 1997) (state supreme court upheld the trial court’s decision that alienation had not been shown; it noted but did not respond to the mother’s objection that the son’s therapist was “unaware that [the child] . . . was suffering from parental alienation syndrome”).

40. In the United States, reliable expert testimony on scientific, technical or other specialized knowledge is generally permitted if it will assist the trier of fact understand the evidence or determine a fact that is in issue. The general-acceptance-in-a-particular-field test first articulated for the federal courts in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) became the test in most state courts as well. PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, 1 SCIENTIFIC EVIDENCE § 1–5 (3d ed. 1999). The U.S. Supreme Court ruled that the Federal Rules of Evidence (adopted in 1975) displaced the *Frye* test in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Most states have also replaced *Frye* with *Daubert*, the new test that considers many factors to determine scientific reliability. *Id.* §§ 1–7 to 1–8 (comparing the standards). *See also id.* § 9–5 (on opinion evidence).

41. *See e.g., In the Interest of T.M.W.*, 553 So. 2d 260, 261 (Fla. Dist. Ct. App. 1989) (court’s power to order psychological examination at issue, not merits of father’s PAS argument or its relevance to adoption case); *Bowles v. Bowles*, No. 356104, 1997 Conn. Super. LEXIS 2721 (Conn. Super. Ct. Aug. 7, 1997) (court makes orders without regard to PAS theory); *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994) (same). *See also Pearson v. Pearson*, 5 P.3d 239, 243 (Alaska 2000), where the father’s PAS assertions were heard at trial and the mother apparently did not challenge admissibility on appeal. The state supreme court upheld the trial court’s finding that no alienation was present.

courts nevertheless took the occasion to alert trial courts to the fact that Gardner's work is seriously disputed.<sup>42</sup>

In the few reported cases in which Gardner's proffered testimony was challenged or the validity of PAS was otherwise questioned, courts usually exclude his testimony and reliance on PAS. These cases reveal two areas of concern. First, courts are consistent in refusing to permit Gardner to testify on the truth or falsity of witnesses, noting that this question is reserved to the trier of fact.<sup>43</sup> Second, most U.S. courts considering the question agree that PAS has not been generally accepted by professionals and does not meet the applicable test for scientific reliability.<sup>44</sup> These conclusions are echoed by a Canadian jurist in an article discussing admissibility issues under both U.S. and Canadian

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42. *See, e.g.*, In the Interest of T.M.W., 553 So. 2d 260, 261 n.3 (Fla. Dist. Ct. App. 1989); Hanson v. Spolnik, 685 N.E.2d 71, 84 n.10 (Ind. Ct. App. 1997). A powerful concurrence and dissent in *Hanson* by Judge Chezem details the deficiencies of PAS as a theory and as implemented in this case. The appellate court upheld the trial court's order of a custody transfer (with complete termination of the mother's contact with her 6-year-old daughter for two months) on the basis of testimony provided by a psychologist. The psychologist had not interviewed either parent or the child, but based his analysis instead on notes made by a therapist who, in turn, had never met the father. Judge Chezem's opinion points out that although the father was unable to work due to an emotional disability, neither psychologist had any way of knowing whether the mother's assertions about the father's behavior (she suspected sexual abuse) were true. By one year after the transfer order, the mother was being permitted a six-hour visit once every two weeks. *See also* Pearson v. Pearson, 5 P.3d 239, 243 (Alaska 2000), where the state supreme court volunteered that PAS (which both parties' experts accepted) is "not universally accepted."

43. *See, e.g.*, *Tungate v. Commonwealth*, 901 S.W.2d 41 (Ky. 1995) (refusing Gardner's proposed testimony on "indicators for pedophilia" in criminal case because it went to ultimate issue of guilt or innocence and "lacked sufficient scientific basis for the opinions offered").

44. *See, e.g.*, *People v. Fortin*, 706 N.Y.S.2d 611 (N.Y. Crim. Ct. 2000); *Husband Is Entitled to Divorce Based on Cruel and Inhuman Treatment: Oliver V. v. Kelly V.*, 224 N.Y. L. J., Nov. 27, 2000, at 25 (noting that no testimony was offered to validate PAS and therefore declining to make such a finding). The *Fortin* court refused to hear Gardner's PAS testimony for the defendant in a criminal case, holding that the defendant "has not established general acceptance of Parental Alienation Syndrome within the professional community which would provide a foundation for its admission at trial." In support of its holding, the court cited a concurring opinion of Chief Judge Kaye of the New York Court of Appeal and several articles, including Wood, *supra* note 16. It also quoted Gardner's view that "the concept of scientific proof . . . is not applicable in the field of psychology; especially with regard to issues being dealt with in such areas as child custody disputes, and sex abuse allegations," citing Gardner's own writings (on which he was cross-examined). *See also* *Wiederholt v. Fischer*, 485 N.W.2d 442 (Wis. Ct. App. 1992) (appellate court, although not discussing validity of PAS, upheld trial court's refusal to transfer custody of "alienated" children to father as his expert urged because only "limited research data" supported theory that removal would provide cure, expert conceded cure was controversial and carried uncertain risks, and testimony from parents and children supported trial court's finding that transfer would not succeed and was unreasonable). *But see* *Kilgore v. Boyd*, Case no. 94-7573 (13th Jud. Cir., Fla. Nov. 22, 2000) (transcript of hearing permitting Gardner's PAS testimony), at <http://www.rgardner.com/pages/kg.excerpt.html>.

law<sup>45</sup> and by other prominent professionals. Dr. Paul J. Fink, a past president of the American Psychiatric Association and president of the Leadership Council on Mental Health, Justice, and the Media, for example, has stated quite bluntly, “PAS as a scientific theory has been excoriated by legitimate researchers across the nation. Judged solely on his merits, Dr. Gardner should be a rather pathetic footnote or an example of poor scientific standards.”<sup>46</sup>

Following considerable scientific criticism, Gardner withdrew the test he had constructed to determine whether sexual abuse had taken place.<sup>47</sup> Yet, as Faller’s close examination reveals, this set of questions was simply replaced by other publications with new titles that largely replicate his earlier content and methodology.<sup>48</sup>

Despite the good work of most of the courts that have considered the scientific probity of PAS, there is little to celebrate. The vast ma-

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45. Williams, *supra* note 26, at 275–78.

46. Gina Keating, *Critics Say Family Court System Often Amounts to Justice for Sale*, PASADENA STAR-NEWS, April 24, 2000, at [http://www.canow.org/NOWintheNews/familylaw\\_news\\_text.html](http://www.canow.org/NOWintheNews/familylaw_news_text.html) (last visited 8 April 2001). A similarly outspoken assessment by a well-regarded scholar appears in the American Bar Association’s Journal; referring to Gardner’s withdrawn Sex Abuse Legitimacy Scale (SALS, the basis for Gardner’s PAS theory), Professor Jon R. Conte of the University of Washington Social Welfare Doctoral Faculty remarked, SALS is “[p]robably the most unscientific piece of garbage I’ve seen in the field in all my time. To base social policy on something as flimsy as this is exceedingly dangerous.” Debra Cassens Moss, *Abuse Scale*, 74 A.B.A. J., Dec. 1, 1998, at 26. Gardner’s views on pedophilia and what he calls a wave of hysteria concerning child abuse allegations have been received with equally harsh appraisals elsewhere. *See, e.g.*, Jerome H. Poliacoff & Cynthia L. Greene, *Parental Alienation Syndrome: Frye v. Gardner in the Family Courts*, at <http://www.gate.net/~liz/liz/poliacoff.htm> (a revised version of an article by the same name that originally appeared in the FAMILY LAW SECTION, FLORIDA BAR ASSOCIATION, COMMENTATOR, vol. 25, no.4, June 1999).

47. *See, e.g.*, Lucy Berliner & Jon R. Conte, *Sexual Abuse Evaluations: Conceptual and Empirical Obstacles*, 17 CHILD ABUSE & NEGLECT 111, 114 (1993):

[The Sexual Abuse Legitimacy Scale (SALS)] is based entirely on the author’s personal observations of an unknown number of cases seen in a specialized forensic practice. Although reference is made to studies [by Gardner] these are unpublished, not described, and are of unknown value. . . . Indeed, to our knowledge, the entire scale and parent[al] alienation syndrome upon which it is based have never been subjected to any kind of peer review or empirical test. In sum, there is no demonstrated ability of this scale to make valid predictions based on the identified criteria.

In addition, Faller notes that Gardner’s work makes reference to none of the works on false allegations of sexual abuse in divorce that predate his publications. Faller, *supra* note 3, at 106–08 (analyzing Gardner’s work in light of the relevant literature and finding it wanting).

48. As Faller puts it, Gardner has repudiated the numbers produced by his scale, but not the factors. Although the SALS is no longer listed as a separate publication by Gardner’s press, Creative Therapeutics, Faller examines Gardner’s more recent *Protocols* and concludes that “virtually all SALS factors are included in the Protocols, and the parental alienation syndrome figures prominently in the Protocols as a signal that the allegation of sexual abuse is false.” Faller, *supra* note 3, at 105–06.

majority of the cases mentioning PAS reveal that one or more of the experts evaluated the case in light of PAS, and there is nothing to suggest that anyone—expert, attorney or judge—thought to question whether the theory is well founded or leads to sound recommendations or orders.<sup>49</sup> A similar lack of rigor is now also seen in foreign sources.<sup>50</sup>

In practice, PAS has provided litigational advantages to noncustodial parents with sufficient resources to hire attorneys and experts.<sup>51</sup> It is possible that many attorneys and mental health professionals have simply seized on a new revenue source—a way to “do something for the father when he hires me,” as one practitioner puts it. For those who focus on children’s well-being, it hardly matters whether PAS is one

49. See, e.g., *Metza v. Metza*, 1998 Conn. Super. LEXIS 2727 (Conn. Super. Ct. 1998) (mother’s disparaging remarks “can lead to the Parental Alienation Syndrome”); *Blosser v. Blosser*, 707 So. 2d 778, 780 (Fla. Dist. Ct. App. 1998) (parties stipulated to admission of psychologist’s report that included conclusion that “child did not exhibit any parental alienation syndrome”); *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33, 39 n.9 (Ct. App. 1998) (mentioning but not discussing father’s “declaration and supporting materials [from a psychologist] regarding ‘Parental Alienation Syndrome’”; however, suggest skepticism); *In re John W.*, 48 Cal. Rptr. 2d 899, 902 (Ct. App. 1996) (father given custody without discussing expert’s reasoning that mother’s good faith belief that father had molested child was produced by subtle, unconscious PAS); *White v. White*, 655 N.E.2d 523 (Ind. Ct. App. 1995) (mother sought to introduce evidence to rebut father’s factual assertions but did not question PAS theory). *But see* *Wiederholt v. Fischer*, 485 N.W.2d 442 (Wis. Ct. App. 1992) (appellate court upheld trial court’s refusal to transfer custody of “alienated” children to father as his expert urged, in part because transfer carried uncertain risks, and testimony from the parents and children supported trial court’s finding that transfer was unreasonable); *Bowles v. Bowles*, 1997 Conn. Super. LEXIS 2721 (Conn. Super. Ct. 1997) (court refuses to order custody transfer to father because “it would be unrealistic and counter-productive”). Cases that *Gardner’s* website lists as examples of PAS’s admissibility, however, whether domestic or foreign, rarely address the scientific sufficiency question. See *infra* note 50 and accompanying text.

50. See, e.g., *Johnson v. Johnson*, No. AD6182, Appeal No. SA1 of 1997, Family Court of Australia (Full Court) (July 7, 1997), at [http://www.austlii.edu.au/au/cases/cth/family\\_ct/](http://www.austlii.edu.au/au/cases/cth/family_ct/) (trial court erred in not allowing father to recall expert witness in order to put questions on PAS; no discussion of PAS’s scientific sufficiency; mother’s counsel conceded relevance of PAS but argued unsuccessfully that questions had already been put under another label); *Elsholz v. Germany*, 8 EUR. CT. H.R. 2000, at para. 53 (deciding that the German courts’ refusal to order an independent psychological report on the child’s wishes and the absence of a hearing before the Regional Court constituted an insufficient involvement of the applicant in the decision-making process, thereby violating the applicant’s rights under Articles 8 and 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms). PAS appears only in the father’s arguments, not in the Court’s findings or reasoning. See *id.* paras. 33–35, 43–53, 62–66.

51. As a general matter, custodial households are at a financial disadvantage in the United States, and custodial parents are less likely than noncustodial parents to be represented in custody litigation. MYERS, *supra* note 16, at 8, vividly describes the costs to the custodial parent and the tactical advantages to the noncustodial parent of pretrial discovery to “keep . . . [the protective parent and counsel] off balance and distract them from the important work of getting ready for court.”

more example of a “street myth” that has been too willingly embraced by the media and those involved in child custody litigation, or whether attorneys and mental health professionals truly do not know how to evaluate new psychological theories.<sup>52</sup> This latter possibility may, however, explain why an annual essay prize from the American Bar Association’s Section on Alternate Dispute Resolution went to a remarkably non-evaluative, hence inadequate, piece on PAS,<sup>53</sup> and why articles on PAS that seriously misstate the research literature have appeared even in refereed journals.<sup>54</sup>

#### IV. Improved Science but More Bad Policy

Faced with such widespread misinformation and the harm that it may be causing in custody cases, leading scholars are now attempting to refine the area. In addition to their written works, some are now responding to Gardner on his own turf by presenting papers at professional meetings and continuing education courses for judges, attorneys and mental health professionals. In Northern California, which has been the site of much of the research now being erroneously cited by proponents of PAS, several professionals who have been lecturing broadly on the topic of alienation recently published a collection of related articles.<sup>55</sup>

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52. Similar analytical sloppiness has accompanied other recent fads in American custody law—theories favoring joint physical custody over the objections of a parent, opposing relocation of custodial households, enforcing frequent visitation in high-conflict (even physically abusive) cases, and permitting dispositional recommendations from mediators to courts. In each of these areas, a great many troubling trial court decisions had been entered before leading scholars and practitioners pointed out their flawed reasoning. For a critical assessment of one such more recent innovation see the textual discussion below of so-called special masters.

53. See Anita Vestal, *Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model*, 37 FAM. & CONCILIATION COURTS REV. 487 (1999).

54. See, e.g., Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome*, AM. J. FORENSIC PSYCHOL., vol. 15, 1997, no. 3, at 23 (Part I) and No. 4, at 39 (Part II), which is replete with inaccurate characterizations of the findings and views of many scholars, including those of Judith Wallerstein, Janet Johnston and Dorothy Huntington. Rand frequently cites works as dealing with PAS although they discuss distinct matters that Rand and others confound with PAS in ways similar to Gardner, as discussed in this article. *Accord*, telephone conversation with Dr. Judith Wallerstein, April 10, 2001.

55. In May 2001, for example, a national conference on Conflict Resolution, Children and the Courts included both a half-day institute titled “The ABC’s of High Conflict Families and Alienated Children” and a panel devoted to “Restoring Relationships Between Alienated Children and their Parents.” AFCC 38th Annual Conference, May 9–12, 2001. The July 2001 issue of Family Court Review contains a symposium on PA. As described by the editors, the purpose is “to review the psychological and legal difficulties with Parental Alienation Syndrome . . . and to develop a more complex and useful understanding of situations in which children strongly and unexpectedly reject a parent during or after divorce.” Janet R. Johnston & Joan B. Kelly,

These professionals distinguish themselves sharply from Gardner and PAS in several important respects.<sup>56</sup> First, they directly criticize his theory, its lack of scientific foundations, and its treatment recommendations. Next, they distinguish “alienation” from “estrangement” (although these terms have been synonymous in ordinary usage) and point out that there are many possible reasons for objections to or interference with visitation. They employ the term “estrangement” to refer to difficulties in a noncustodial parent’s relationship with a child that can be traced to that parent’s characteristics or behavior. “Alienation” in their usage refers to difficulties stemming from the child’s disproportionate, persistent, and unreasonable negative feelings and beliefs toward a parent.<sup>57</sup> By addressing the skewed rationales and conclusions promoted by Gardner’s work, they reopen a broad inquiry into causation and recognize that many factors may be at work collectively.

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*Guest Editorial Notes*, 39 FAM. CT. REV. 246, 246 (2001) [hereafter Johnston & Kelly, *Ed. Notes*]. In their joint article for the issue, Johnston and Kelly argue for a new formulation that would distinguish alienated children “from other children who also resist contact with a parent after separation but for a variety of normal developmentally expectable reasons (including realistic estrangement from violent, neglectful, or abusive parents).” *Id.*, summarizing Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249 (2001) [hereafter Kelly & Johnston, *The Alienated Child*].

56. The following summary is based largely on Kelly & Johnston, *The Alienated Child*, *supra* note 55. Disagreement with Gardner concerning custody changes, however, appears in a companion piece, Janet R. Johnston et al., *Therapeutic Work With Alienated Children and Their Families*, 39 FAM. CT. REV. 316, 316 (2001):

The therapeutic approach to alienated children and their families described in this article stands in marked contrast to others that are largely coercive and punitive in nature (e.g., Gardner [2d ed., *supra* note 2] prescribed primarily court sanctions in mild and moderate cases and change of custody in severe ones). It draws on two decades of specialized knowledge and skill derived from more humane methods of educating, mediating, and counseling . . . .

Johnston and her co-authors do, however, accept what they term “judicious and coordinate use of legal constraints and case management together with these therapeutic interventions,” and adopt certain coercive recommendations from a companion piece by Sullivan and Kelly. *Id.* at 316, 330–32, setting forth their own more moderate approach, but relying in part on Matthew J. Sullivan & Joan B. Kelly, *Legal and Psychological Management of Cases With an Alienated Child*, 39 FAM. CT. REV. 299 (2001).

57. The definition of *alienated child* used in the Family Court Review symposium is:

one who expressed freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or/fear) toward a parent that are significantly disproportionate to the child’s actual experience with that parent. From this viewpoint, the pernicious behaviors of a “programming” parent are no longer the starting point. Rather, the problem of the alienated child begins with a primary focus on the child, his or her observable behaviors, and parent-child relationships.

Andrew Schepard, *Editorial Notes*, 39 FAM. CT. REV. 243, 243 (2001), citing Kelly & Johnston, *The Alienated Child*, *supra* note 55, at 251. *See generally* Williams, *supra* note 26, at 271–73 (discussing others’ varying definitions of *parental alienation*).

Specifically disapproved is Gardner's recommendation that children, even those who are supposedly engaged in a *folie à deux* with their custodial parent, be removed immediately and cut off from all contact with that parent pending reverse brain-washing or deprogramming. In line with more general psychological theory, these children are to be protected from the trauma of an abrupt termination of their primary relationship. Therapy for the child and the custodial parent may be recommended instead to loosen unhealthy aspects of their bond, supplemented by professional assistance in reestablishing the child's relationship with the noncustodial parent at an appropriate time and in a manner that will not unduly frighten the child. These authors are careful in their references to research literature and usually qualify their claims appropriately. In addition, to varying degrees they provide helpful clinical insights for the use of therapists whose work includes families with child-parent antipathies. To this extent, their insights, although not yet scientifically proven, are an important step forward.

Unfortunately, however, these mental health specialists, like Gardner before them, go far beyond their data as they craft recommendations for extended, coercive, highly intrusive judicial interventions. They recommend a court-appointed "special master" (that is, a lawyer or mental health professional) to lead a team consisting potentially of therapists for each family member, a co-parent counselor, and attorneys for the parties and child. As articulated by Sullivan and Kelly, the special master assumes a quasi-judicial role "including child-specific decision making, case management, further assessments . . . structural interventions that are legally binding, and immediate conflict resolution . . . ." <sup>58</sup> Other important recommendations are that courts order parties to waive significant rights to confidentiality (privileges), <sup>59</sup> and that courts order parents to share the potentially onerous costs equally. <sup>60</sup>

58. Sullivan & Kelly, *supra* note 56, at 314, Appendix. *See also id.* at 300, 308 (role of special masters regarding counseling for child), 309, 310 (sample order compelling parties to sign waivers of confidentiality and agree to share costs, and sample order referring disputed custody issues to special master and prohibiting parents from obtaining attorney-drafted "letters or filed motions" until after special master has held meeting), 311 (referring to delegated authority to a team leader to "codify" decisions as court orders), 315 ("If authorized by the court, the special master can take on . . . interventions that are legally binding . . ."). Compare *id.* at 303, the authors' only reference to a stipulation, one authorizing "a time-limited special master while an evaluation is going on."

59. *See id.* at 310 (sample order compelling parties to sign waivers of confidentiality). The authors acknowledge in passing, without explanation, that their recommendation may come under legal or ethical scrutiny. *Id.*

60. References to expense appear, for example, in Johnston et al., *supra*, note 56, at 330-31 and Sullivan & Kelly, *supra* note 56, at 300, 311 (concerning cases in which a family's needs far exceed available resources), and 314 (listing a special master,

Some of these specific proposals are clearly contrary to current law. California constitutional, statutory, and case law, for example, make clear that the scheme Sullivan and Kelly propose (which apparently would authorize a special master over one or both parents' objections) constitutes an impermissible delegation of judicial authority.<sup>61</sup> Similarly, their recommended court-ordered waivers ("limited confidentiality" in their terminology) would require that courts act contrary to controlling legal mandates.<sup>62</sup> Finally, although their proposal that parties share costs equally is not contrary to law, it is (for no apparent reason) potentially punitive to the less affluent spouse.

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child's therapist, parents' therapists, co-parent counselor, parents' attorneys, and child's attorney or guardian ad litem as potential "collaborative team" members). Sullivan and Kelly recommend orders splitting all uninsured costs equally between the parties throughout their article.

61. Sullivan and Kelly may have confounded voluntary stipulations with court orders following litigation. Their use of language throughout, particularly in their sample orders, incorrectly suggests that courts may order a person to agree to matters that the law leaves to an individual's choice. *See Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 771-75 (Ct. App. 1997), which reversed the trial court's order (adopting the recommendation of Dr. Margaret Lee) that a special master be appointed over the objection of one parent and also reversed an order excusing the special master from requirements that the proceedings be reported. *Id.* at 772. The appellate court held,

[T]he authority of the trial court to [designate a separate forum to resolve family law disputes] is constrained by the basic [state] constitutional principle that judicial power may not be delegated.

The trial court has no authority to assign matters to a referee or special master for decision without explicit statutory authorization. An invalid reference constitutes jurisdictional error which cannot be waived.

...

When, as here, the parties do *not* consent to a reference, the authority of the trial court to direct a special reference is limited to particular issues. The trial court has no power to refer issues other than those explicitly specified by statute. . . .

*Id.* at 772-73 (citations omitted). As the court also pointed out, the case did not involve the appointment of a court commissioner. *Id.* at 772 n.9. Nor did it involve the court's power, *upon agreement by the parties*, to order a reference to try "any or all of the issues in an action or proceeding, whether or fact or of law." *Id.* at 773 n.13.

(Reversal was also granted in *Ruisi v. Thieriot* on a second issue as to which the trial court accepted a recommendation from Dr. Lee, who had testified that it would harm an 8-year-old boy's development to move anywhere at all with his mother, even to a nearby county. The child lived with his mother and saw his father on weekends. On remand, in light of *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996), which articulated a new standard for relocation cases, the mother and child were permitted to relocate to the East Coast. *See generally*, Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996).)

62. California evidence law, for example, requires that judges recognize privileges such as patient therapist confidentiality on the motion of any party or, indeed, *sua sponte*, unless a specific exception applies. CAL. EVID. CODE § 916. Sullivan and Kelly's suggestions that courts order parties to waive such confidentiality asks, at least in the California context in which they practice, that judges violate their statutory duties.

Despite case law emphasizing the legal distinction between consensual and nonconsensual orders, several authors in a recent symposium (including one whose recommendation for a special master was overturned in the controlling case law) endorse Sullivan and Kelly's recommendations.<sup>63</sup> It is, however, unlikely that California's appellate courts would ignore the distinction between judicial coercion and voluntary agreements. The failure of these leading forensic specialists to address this issue leaves unclear whether they do not understand the distinction, or whether it is simply unimportant to them. In either case, the possibility that quasi-judicial decisions might be entered by those who do not find such distinctions dispositive is troubling at best.

Even if they were lawful, the authors concede that their proposed remedies are extremely costly.<sup>64</sup> Further, they provide no reasonable assurance that these recommendations will either serve the child's interests<sup>65</sup> or even improve the situation that would exist without judicial intervention.<sup>66</sup> As Sullivan and Kelly acknowledge,

Contrary to what is often asserted by child custody experts and parental alienation advocacy groups, there is little empirical research evidence to support any specific intervention, such as changing custody, in the severe, chronic cases. Furthermore, there is no empirical data that indicates whether entrenched alienation and total permanent rejection of a biological parent has long-term deleterious effects on children's psychological development. . . . Similarly, there is clinical support but no empirical research demonstrating that by letting go of the relationship, the rejected parent and child will at some later time reconcile and restore the relationship.<sup>67</sup>

As Johnston puts it, "The long-term outcomes [of therapeutic work with alienated children and their families] are a matter of conjecture and currently unknown."<sup>68</sup>

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63. See, e.g., S. Margaret Lee & Nancy W. Olesen, *Assessing for Alienation in Child Custody and Access Evaluations*, 39 FAM. CT. REV. 282, 295-96 (2001) (Dr. Lee was the expert who recommended the appointment of a special master in *Ruisi*). See also note 61 *supra*.

64. See, e.g., references to parties' abilities to pay in Johnston et al., *supra* note 56, at 330-31; Sullivan & Kelly, *supra* note 56, at 300, 311 (concerning cases in which the family's needs far exceed available resources), 314 (listing the special master, child's therapist, parents' therapists, co-parent counselor, parents' attorneys, and child's attorney or guardian ad litem as potential "collaborative team" members). Sullivan and Kelly repeatedly recommend orders splitting all uninsured costs equally between the parties; this recommendation is likely to cause serious hardship for the lower-earning parent, and it is puzzling that they do not account for that difficulty.

65. Sullivan & Kelly, *supra* note 56, at 309: "[S]anctions [of an uncooperative parent] that involve the child or custody (sometimes as extreme as hospitalization or incarceration) are rarely based on the best interests of the child."

66. See notes 68-77 *infra* and accompanying text.

67. Sullivan & Kelly, *supra* note 56, at 313-34.

68. Johnston et al., *supra* note 56, at 329.

As this discussion suggests, these authors share unexamined assumptions about the roles of courts and mental health professionals in inter-parental child custody disputes.<sup>69</sup> They employ a medical model, one that assumes that all serious interpersonal difficulties can and should be remedied by mental health interventions. As a consequence, they ask courts to order parties who are neither abusive nor neglectful to employ and cooperate with intrusive, costly teams of professionals, even when there is no assurance that improvement will be achieved before the family's resources are exhausted or that the results will be appreciably better than what is likely to occur without intervention.

Their belief that such intervention is appropriate may spring in part from the shift to the best-interests-of-the-child custody standard and from enhanced roles for noncustodial parents. Each of these well-intended developments has brought with it increased litigiousness in child custody cases and an expanded role for mediators and evaluators. Parents who were once assumed or even presumed to be the proper custodians for their children (and to be capable of making sound decisions for them) are now subject to close monitoring and to parenting orders that require extensive cooperation and contact between a child's parents. This, in turn, has extended custody mediation and evaluations to increasingly less-troubled and less-affluent families. The incremental nature of these changes, however, has masked the degree to which post-divorce or post-separation parenting is treated more intrusively than parenting in other settings.

Although parental separation may, of course, cause or exacerbate intra-familial difficulties, the degree to which these difficulties justify public intervention is a question of policy and law. Some difficulties, although extremely unfortunate, are appropriately left to families and individuals to address as a private matter, if at all. When a parent dies, for example, no current family law doctrine imposes grief counseling on a minor child or surviving spouse absent behavior that provides an independent basis for coercive intervention (such as those imposed by laws regulating neglect, abuse, and criminal behavior). There is reason to question whether a different response is justified when emotional difficulties occur instead in the context of separation or divorce. The

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69. The works reviewed here from the Family Court Review July 2001 symposium and a recent friend-of-the court brief indicate that many mental health professionals hope to do far more than counsel parties. They seek quasi-judicial roles that will authorize them to prescribe the details of life for many parents and children. Most troubling of all is that they wish to do so in a framework that lacks due process protections such as a record, evidentiary privileges, and full access to the courts. *See Amici Curiae Brief, supra* note 37.

presence of two parents with differing desires is relevant, of course, but perhaps to a far lesser degree than current practice suggests.

Indeed, restraint of this sort is recommended for the custody context in the report of a twenty-five-year follow-up to a pioneering study of 131 children of divorcing California families. The original work, *Surviving the Breakup*,<sup>70</sup> revealed differences in children's responses to their parents' separation that reflected the children's developmental stages. The authors, Drs. Judith Wallerstein and Joan Kelly, noted distinctive, angry behavior by children aged nine to twelve, who often placed blame on the parent they believed caused the divorce and formed alignments with the parent they deemed innocent.<sup>71</sup> Gardner's reliance on this work demonstrates mistaken assumptions about the incidence,<sup>72</sup> causes and consequences of such parent-child alignments, and Gardner has hence made inappropriate recommendations concerning responses to them. It appears that the proponents of PA may have overreacted as well.

Most dramatically, Wallerstein reveals that these children's alignments were transient, with *every* child later abandoning his or her harsh position, mostly within one or two years and all before the age of eighteen.<sup>73</sup> She reports that the children remained with their primary caregivers throughout, yet were profusely apologetic to the parents they had previously treated so badly. This is dramatically different from Gardner's untested prediction that, absent immediate and dramatic intervention, the disfavored parent may well be permanently cut out of the child's life. As Wallerstein reports the chronology,

In these situations [which involved one-fifth of the children in the study], the child is usually a preadolescent or young adolescent and the targeted parent is the one who sought the divorce. . . . The child . . . seeks to restore the family or help the sorrowful parent. . . . The mischief wrought by presumably well-bred children was astonishing. . . .

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70. WALLERSTEIN & KELLY, *supra* note 10.

71. *Id.* at 74–75:

The single feeling that most clearly distinguished this group from the younger children was a fully conscious, intense anger. . . . Approximately half of the children . . . were angry at their mothers, the other half at their fathers, and a goodly number were angry at both. In the main children were angry at the parent whom they blamed for the divorce.

72. Gardner has suggested that PAS may be present, albeit in varying severity, in perhaps 40% to 90% of all contested custody cases. Note 4 *supra* and accompanying text. Wallerstein and Kelly's 20% overall figure deals with alliances rather than PAS and largely reflects the subset of 9- to 12-year olds in a sample of divorcing couples, not all of whom were disputing custody. They note that the anger and alignments of this age group distinguish it from other age ranges.

73. Telephone conversation with Dr. Judith Wallerstein, April 10, 2001.

In following these alliances over the years, I find that the vast majority are short-lived and can even boomerang. Children . . . soon become bored or ashamed of their mischief. Not one alliance lasted through adolescence and most crumbled within a year or two. . . . [M]ost children find their way back to age-appropriate activities as they enter adolescence . . . . With time they are likely to turn against the parent who encouraged them to misbehave. . . .<sup>74</sup>

In what seems a thinly veiled reference to those who advocate Gardner's PAS theory, she concludes,

There is great advantage in allowing natural maturation to take its course and to avoid overzealous intervention to break these alliances, which are usually strengthened by efforts to separate the allies. In this, the alliance may be akin to a moderate case of flu that mobilizes the immune system and generates antibodies. It is not a fulminant cancer requiring radical surgery or limb amputation, especially by poorly trained surgeons.<sup>75</sup>

Wallerstein's concern about overzealous intervention, although authored in the context of custody transfers, seems equally applicable to the broad range of coercive interventions proposed only a year later by Johnston, Kelly, Sullivan, and their co-authors.

Johnston's work is less easily reconciled. In writing about the apparently intractable cases she observed in her studies of high-conflict custody disputes, she initially went further than Wallerstein in expressly criticizing Gardner's recommendations:

It has been our experience that forcibly removing . . . children from the aligned parent and placing them in the custody of the rejected parent, as recommended by Gardner (1987), is a misguided resolution; it is likely to be not only ineffective but actually punitive and harmful because it usually intensifies the problem.<sup>76</sup>

Indeed, Johnston questioned whether children should even be asked to visit the rejected parent in such hostile circumstances. Noting that the literature did not clarify the circumstances under which visitation benefits children, she concluded,

Despite the fact that mental health professionals are recommending and courts are ordering visitation arrangements for thousands of children daily, there is yet a meager knowledge base to justify their decisions.<sup>77</sup>

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74. WALLERSTEIN, LEWIS & BLAKESLEE, *supra* note 10, at 115–16.

75. *Id.* at 116–17.

76. Johnston, *Children Who Refuse Visits*, *supra* note 10, at 132.

77. *Id.*

In more recent publications, Johnston points out that “profound alienation . . . most often occurs in high-conflict custody disputes [and] is an infrequent occurrence among the larger population of divorcing children.”<sup>78</sup> She also recommends against frequent transitions between parents if children show continued stress reactions to them.<sup>79</sup> Her points are well taken.<sup>80</sup> Given these insights, however, it is puzzling that Johnston expressly endorses many coercive aspects of Sullivan and Kelly’s legal framework.<sup>81</sup> Until she provides further clarification, Johnston’s apparent support for forced contact between the members of high-conflict families should be construed narrowly, given her many publications questioning the wisdom of or need for such approaches.

The PAS debacle and the troubling recent PA recommendations make clear that the time has come for deep thinking about realistic family law goals. Children ought not to be asked to function under circumstances that would challenge or overwhelm even the strongest adults.<sup>82</sup> A child’s chance for healthy development requires that parents, judges, and mental health professionals face the realities of the child’s situation. This includes a realistic understanding of the limitations of dispute resolution techniques, therapy, and legal compulsion in high-conflict cases. Overly ambitious efforts with only small chances of success should be shunned in favor of reducing the child’s emotional burdens, respecting the child’s fears, and enhancing the child’s emotional stability.

## V. Recommendations and Conclusion

Children whose parents do not agree or cooperate concerning their care are placed in the middle of loyalty conflicts that can only stress

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78. Kelly & Johnston, *The Alienated Child*, *supra* note 55, at 254.

79. JANET R. JOHNSTON, HIGH-CONFLICT AND VIOLENT PARENTS IN FAMILY COURT: FINDINGS ON CHILDREN’S ADJUSTMENT, AND PROPOSED GUIDELINES FOR THE RESOLUTION OF CUSTODY AND VISITATION DISPUTES, Access/Visitation: General Principles No. 2 & n.2, at <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications%20folder/hcvpfcs.pdf>.

80. See generally Carol S. Bruch, *The Effects of Ideology and Mediation on Child Custody Law and Children’s Well-Being in the United States*, 2 INT’L J.L. & FAM. 106 (1988); Carol S. Bruch, *Taking Ourselves Seriously Enough to be Cautious: A Response to Hugh McIsaac*, 5 INT’L J.L. & FAM. 82 (1991); Bruch & Bowermaster, *supra* note 61, at 262–69.

81. A case in point is Sullivan and Kelly’s recommended order in high-conflict cases that would literally require children to pass through a no-man’s land each time they leave or return from a visit. Sullivan and Kelly, who display helpful insight into the dynamics of alienation cases, are far less convincing when they suggest legal responses. See notes 58–69 *supra* and accompanying text.

82. Kelly and Johnston suggest, for example, that children who evidence PA may have already endured unbearable pressures. Kelly & Johnston, *The Alienated Child*, *supra* note 55, at 255.

and sometimes break them.<sup>83</sup> We do not yet know enough about how children develop loyalties and antipathies or resolve them as they mature, whether in intact or divided households. Until we do, caution should guide therapists and courts. A growing body of research documents the harsh and sometimes violent world that a large percentage of children in high-conflict custody disputes seeks to escape.

PAS as developed and purveyed by Richard Gardner has neither a logical nor a scientific basis. It is rejected by responsible social scientists and lacks solid grounding in psychological theory or research. PA, although more refined in its understanding of child-parent difficulties, entails intrusive, coercive, unsubstantiated remedies of its own. Lawyers, judges, and mental health professionals who deal with child custody issues should think carefully and respond judiciously when claims based on either theory are advanced.

More generally, far greater interdisciplinary training and competence in scientific methodology are needed. These should be brought to bear whenever a new assertion is made that, if accepted, will shape the interpretation or application of family law principles (for example, the concept of a child's best interest). Although the use of expert testimony is often useful, decision-makers need to do their homework rather than rely uncritically on experts' views. This is particularly true in fields such as psychology and psychiatry, where even experts have a wide range of differing views and professionals, whether by accident or design, sometimes offer opinions beyond their expertise. Lawyers and judges are trained to ask the hard questions, and that skill should be employed here.

The first question is whether scientific sufficiency has been indicated by respected professional vetting, for example, inclusion in the American Psychiatric Association's DSM-IV<sup>84</sup> or the World Health Orga-

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83. The author of this article first learned of PAS from a psychologist who was called for assistance when an 8-year-old girl became suicidal while institutionalized. The child had been totally cut off from her mother by a court that followed the recommendation of a custody evaluator who applies Gardner's principles rigorously. This evaluator and his partner continue to apply Gardner's principles fully, even in the face of serious abuse concerns, although now referring to "a parental alienation matter" rather than PAS, according to investigative reporter Karen Winner, who was commissioned by a parents' organization to investigate family law practices in the Sacramento, California courts. *See* Winner, *supra* note 22. Psychologist Vivienne Roseby of the Judith Wallerstein Center for the Family in Transition in Corte Madera, California reports that she and her colleagues have confronted similar difficulties with PAS-inspired custody transfers, including a case in which a 12-year-old boy died when he hanged himself on the day his custody was to be transferred. Telephone conversation with Dr. Vivienne Roseby, May 6, 2001, in Davis, California.

84. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 11.

nization's ICD-10.<sup>85</sup> Where no such imprimatur exists, one must ask whether approval has been sought and denied or whether submission would be premature. Insights that are too new, or for which no established gold standard exists, may nonetheless be valuable,<sup>86</sup> but their probity and limitations should be clearly understood. This can be accomplished by inquiries into the sample (if any) on which the theory is based, the methodology and assumptions affecting the collection of data, how conclusions have been drawn from the data, the likelihood that fair extrapolations can be drawn, the degree to which assertions are internally consistent and compatible with established knowledge, and the balance of potential benefits and harms if the insight later proves unsound.<sup>87</sup>

The challenge is to bring professional skills and standards to the task: an unbiased mind, healthy skepticism, rigorous thinking, and sound policy analysis. But just as the responsibility is great, so too is the opportunity. As the noted legal philosopher Jerome Frank put it,

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85. WORLD HEALTH ORGANIZATION, *supra* note 11.

86. An outstanding example is the series of publications by Wallerstein and her colleagues over the course of what developed into a 25-year project. Initially designed as exploratory research to help define questions for later studies, the sample (which was neither randomly selected nor scientifically controlled) has nevertheless provided major advances in knowledge. Many of Wallerstein and Kelly's initial clinical insights (for example, that children respond to their parents' divorce differently according to their developmental stage) brought to light connections that had been uniformly overlooked, but seemed obvious once pointed out. Subsequent, controlled studies by others have borne out that insight, while other suggestions have required refinement or retrenchment in the years since (such as their early suggestion concerning joint physical custody). Compare, e.g., Carol S. Bruch, *Parenting At and After Divorce: A Search for New Models*, 79 MICH. L. REV. 708, 708–10 (1981) (discussing methodology) and 722–25 (questioning joint custody conclusion) with WALLERSTEIN, LEWIS & BLAKESLEE, *supra* note 10, at 212–19 (significantly narrowing and refining position on joint custody).

87. In its decision refusing to hear testimony from Gardner on PAS, the *Fortin* court indicated that it was being guided in part by a concurring opinion of Chief Judge Kaye of the New York Court of Appeal in a case examining the admissibility of DNA evidence. *People v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Crim. Ct. 2000). The cited language in Judge Kaye's opinion reads, "It is not for a court to take pioneering risks on promising new scientific techniques, because premature admission both prejudices litigants and short-circuits debate necessary to determination of the accuracy of a technique." *People v. Wesley*, 633 N.E.2d 451, 462 n.4 (N.Y. 1994). See also *Chambers v. Chambers*, No. CA99-688, 2000 Ark. App. LEXIS 476 (Ark. Ct. App. June 21, 2000): On de novo review, the appellate court affirmed the trial court's refusal to force visitation and be prepared to transfer custody, an order the father's expert witness said he fully expected the court would have to implement because the child would refuse to comply. The expert, an adolescent and child psychiatrist, testified that the steps he was recommending "will almost certainly be traumatic and painful [for the child]." The appellate court concluded that "even [the father's expert] swore that the result [the father] sought posed a substantial risk of damage to the child," and held that "[t]he chancellor correctly refused to inflict the threat of that harm."

Some wishes, of course, no matter how hard we work on them, never come true. But it is always open to us to substitute for neurotic “wishful thinking” what Neurath happily called “thankful wishing.” Let us thus use the wish that the administration of justice may be improved. If we do, we will . . . admit that [trial courts’] fact-finding frequently results in grave injustices. We will then seek to discover in what ways that job can be done better. I surmise that, although such efforts will fall far short of perfection, they will, by no means, go wholly unrewarded.<sup>88</sup>

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88. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 79 (1949).