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Achieving Batterer Accountability in the Child Protection System

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Achieving Batterer Accountability in the Child Protection System

BY LEIGH GOODMARK*

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*"An advertisement placed in the New York Law Journal and announcements in court indicated that the court was prepared to recognize a subclass of alleged batterers who might have an interest in not being separated from the children or the mothers. No representative of the alleged batterers came forward."*¹ *As such, the court held that "[t]he case can proceed effectively without one."*²

During the summer of 2001, the Hon. Jack Weinstein held class certification hearings in *Nicholson v. Williams*.³ *Nicholson* fundamentally changes the way child protection services will approach child welfare cases involving domestic violence. In *Nicholson*, a class of battered mothers and their children challenged New York City's Administration for Children's Services' policy of bringing neglect actions against mothers who had "engaged in" domestic violence.⁴ Judge Weinstein, recognizing the stake that the alleged batterers of these mothers would have in the litigation, attempted to find a class representative for these men. He failed, and the case proceeded without the batterers.⁵

This absence of the batterer from dependency cases is hardly unusual in the child welfare system.⁶ The system is primarily mother-focused, for any number of reasons: because the identity of the mother is always known, because biological fathers are often nowhere to be found, because files are opened in the mother's name,⁷ because the mother is generally the child's primary caretaker, and because the mother is more

¹ *Nicholson v. Williams*, 205 F.R.D. 92, 94-95 (E.D.N.Y. 2001).

² *Id.* at 95.

³ *Id.* at 94.

⁴ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 171 (E.D.N.Y. 2002); *Nicholson*, 205 F.R.D at 94. For the majority of the members of the class of battered mothers, "engaging in" domestic violence meant being beaten, sometimes to the point of needing hospitalization, in the presence of their children. See *Nicholson*, 203 F. Supp. 2d at 169, 176, 180-81, 186.

⁵ *Nicholson*, 205 F.R.D at 95.

⁶ Ann Jones makes a similar point about the absence of the batterer in descriptions of domestic violence. "Do you notice we don't have any perpetrators here? It's the usual obscure language. No perpetrators exist in the English language when we start talking about domestic violence." Ann Jones, *Putting the Focus on the Batterer*, 16 PACE L. REV. 33, 36 (1995).

⁷ ELLEN PENCE & TERRI TAYLOR, BUILDING SAFETY FOR BATTERED WOMEN AND THEIR CHILDREN INTO THE CHILD PROTECTIVE SYSTEM 15 (Kate Reagan & John Adams eds., 2003).

likely to alter her behavior when faced with the threat of termination of parental rights.⁸ Domestic violence adds another dimension to this dynamic. Case workers may be afraid to engage batterers, decide that the batterer's participation in a case plan is unimportant because, given his violence, he should not be involved in the child's life, or ignore a batterer who is not biologically tied to the child.⁹ Some caseworkers never attempt to engage fathers because doing so simply creates more work; when the father fails to appear, the caseworker's responsibilities decrease.¹⁰ Process issues within the child protection service ("CPS") system—for example, the content of the forms caseworkers use to assess risk to children—may also steer caseworkers away from focusing on the batterer's behavior.¹¹ For whatever reason, as the child welfare system's focus on potential damage to the child from exposure to domestic violence has intensified, responsibility for this exposure has been placed squarely on the shoulders of abused mothers.¹² The burgeoning number

⁸ The child welfare system engages in the same type of cultural and gender assumptions that exist in the culture at large, making it unsurprising that mothers are seen as primarily responsible for their children's care. Some would argue that the child welfare system is not just mother-focused, but "mother-blaming," even misogynistic, as well. See Bernardine Dohr, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 3–9 (1995); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 703–13 (1998).

⁹ See David Mandel & Denise Stevens, Six-Month Interim Report: The Children and Batterer Accountability Initiative, at 9–10 (Jan. 22, 2004) (unpublished draft, on file with author).

¹⁰ E-mail from David Mandel, The Non-Violence Alliance/Domestic Violence Intervention Training Institute, to Leigh Goodmark, Assistant Professor, University of Baltimore School of Law (April 24, 2004, 07:28 EST) (on file with the author) [hereinafter Mandel E-mail].

¹¹ See PENCE & TAYLOR, *supra* note 7, at 24. A case worker commented:

What if the form was different, as some people here are suggesting? Then I would be looking for how the father's presence in a room influences everyone's interactions. I might be looking for how he has explained his violence to his children, how his behavior is undermining his partner's relationship with the children. That kind of assessment doesn't exist.

Id.

¹² *Id.* at 14. It explains that:

Because none of the men in the cases we reviewed were actively working to stop their violence or abuse, the CPS workers leaned more and more on the women whom the men were abusing to control the violence. The more the worker looked to the woman to control the man's violence, the more absent the man became from the file and the case. Although he was central to the case, he disappeared from sight and any real intervention plan. It was as if he were not on the CPS' radar screen.

Id.

of allegations in child welfare cases that battered women have “failed to protect” their children from domestic violence is directly attributable to the child welfare system’s failure to focus on the behavior of batterers.¹³

Advocates for battered women, recognizing the injustice of holding women responsible for the violence done to them and their children, have long contended that the system should shift its focus to “batterer accountability.” This principle—that perpetrators of violence, not their victims, should be held responsible for the effects of their actions on their children—is a cornerstone of the National Council on Juvenile and Family Court Judges’ seminal publication, *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice* (better known as the “Greenbook”).¹⁴ Communities throughout the United States have used the guidelines outlined in the *Greenbook* to shape their own projects; in fact, the term “Greenbook” has become synonymous with efforts to improve practice in child welfare cases involving domestic violence.¹⁵ Principle XIII of the *Greenbook* states, “[i]nterventions with perpetrators of domestic violence should be part of larger, coordinated networks of criminal justice responses and community services, should address the safety and well-being of both child and adult victims, and should hold perpetrators accountable for stopping violent and threatening behavior.”¹⁶

While many of those working to reform the child welfare system have wholeheartedly embraced this principle, realizing batterer accountability in practice has been more difficult. Child welfare agencies have primarily turned to the legal system to regulate the behavior of batterers, with decidedly mixed results.¹⁷ Institutionalizing batterer

This article will focus on cases in which child protection actions begin as a result of the child’s exposure to domestic violence and/or physical violence perpetrated by the batterer against the child. Cases in which the battered parent physically abuses the child will not be considered here.

¹³ For a discussion of cases involving “failure to protect,” see Jeanne A. Fugate, *Who’s Failing Whom? A Critical Look at Failure-To-Protect Laws*, 76 N.Y.U. L. REV. 272, 273 (2001); Melissa Trepiccione, *At The Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487, 1489 (2001).

¹⁴ SUSAN SCHECHTER & JEFFREY L. EDLESON, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999), available at <http://www.ncjfcj.org/publications/main.cfm?Action=PUBFILE&PfileID=3>.

¹⁵ The federal government has funded six “Greenbook” projects throughout the country to test the *Greenbook’s* guidelines in practice. See The Green Book Initiative, *Federal Initiative*, at <http://www.thegreenbook.info/demo.htm> (last visited May 27, 2004).

¹⁶ SCHECHTER & EDLESON, *supra* note 14, at 86.

¹⁷ This tendency to turn to the legal system for answers is not unique to the child welfare system. See generally Leigh Goodmark, *Law Is the Answer? Do We Know That*

accountability remains an elusive goal in most jurisdictions, leaving the child welfare system to default to victim-focused mechanisms for addressing cases involving domestic violence.

One possible reason for the child welfare system's inability to practice what it preaches is because it simply does not know how to do so.¹⁸ What tools can the child welfare system use to hold batterers accountable? How effective are these tools? Will the same carrots and sticks convince all perpetrators to change their behavior? What strategies work with which perpetrators? This article will consider whether and how one of the tools frequently cited as the key to holding batterers accountable—the legal system—can actually create the kind of safety for children and their battered mothers that the child welfare system seeks.

I. WHAT DOES BATTERER ACCOUNTABILITY MEAN?

The phrase “batterer accountability” appears in almost every discussion of domestic violence and child welfare, but few commentators have articulated a definition of the concept.¹⁹ Those that have posited a description generally stop at the idea of attributing responsibility for violence, and for the effects of that violence on children, to the perpetrator of the violence.²⁰ Batterer accountability is most frequently suggested as the alternative to mother—or victim—blaming.²¹

For child protection professionals, however, batterer accountability necessarily means something more than just holding the batterer responsible for past actions. It also requires some certainty that children are going to be safe from further exposure to violence—either because the child will no longer be exposed to the batterer or because the batterer will stop his violence.²² Child protection professionals involved in efforts

For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women, 23 ST. LOUIS U. PUB. L. REV. 7 (2004) [hereinafter Goodmark, *Law Is the Answer?*] (discussing legal interventions for domestic violence).

¹⁸ This is despite the fact that case workers seem to agree that holding batterers responsible for their violence should be their goal. See Mandel & Stevens, *supra* note 9, at 9.

¹⁹ But see Eric S. Mankowski et al., *Collateral Damage: An Analysis of the Achievements and Unintended Consequences of Batterer Intervention Programs and Discourse*, 17 J. FAM. VIOLENCE 167, 174 (2002) (describing the Duluth model of batterer intervention as asserting “that men must be held accountable for their violence, meaning that they must experience negative consequences of their behavior through punishment, particularly through the authority of the criminal justice system.”).

²⁰ See, e.g., SCHECHTER & ELDESON, *supra* note 14, at 14.

²¹ See, e.g., Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 577 (2004).

²² See, e.g., NEW JERSEY DEP'T OF HUMAN SERVS., DIV. OF YOUTH AND FAMILY SERVS., DOMESTIC VIOLENCE CASE PRACTICE PROTOCOL 13 (2003) [hereinafter NEW

to examine the way dependency cases involving domestic violence are handled frequently cite their mandate: child safety first.²³ All other concerns are rightly secondary for child protection professionals, and they are uneasy with focusing on the batterer unless that focus somehow will assuage their concerns about child safety. That discomfort is what pushes child protection professionals, even those who are thoroughly committed to the ideal of batterer accountability, to slide their attention back to mothers in cases where they are not convinced that focusing on the batterer will truly keep the child safe.²⁴

In the child protection context, then, determining whether we are achieving batterer accountability necessarily requires asking two questions. First, are we holding the batterer responsible for the outcomes caused by his violence? Second, by holding the batterer accountable, are we ensuring children's safety? Only if we can answer yes to both of these questions can we expect the focus of child protection agencies to shift from victim mothers to their batterers.

The legal system is widely viewed as providing the most promising opportunities for holding batterers accountable. But the potential of the legal system is limited, both as a function of what it can offer and whose behavior it is trying to influence. The next section will examine how the legal system can, in theory, hold batterers accountable, and the problems involved with relying primarily on that system.

II. USING THE LEGAL SYSTEM TO HOLD BATTERERS ACCOUNTABLE

The logical starting point for a discussion of using the legal system to hold batterers accountable in the context of child abuse and neglect is

JERSEY DEP'T OF HUMAN SERVS.] (explaining that DYFS case planning will focus on "the responsibility of the batterer to stop the abusive behavior in order to keep the children safe"); PENCE & TAYLOR, *supra* note 7, at 18 (explaining that the majority of child protection workers surveyed "were concerned that intervention with men must occur in a way that, most likely, would result in their stopping their violence"). One of the central tenets of the effort to reform child welfare practice in cases involving domestic violence is that child safety can best be achieved by keeping the mother—the primary victim of the violence—safe. See SCHECHTER & EDLESON, *supra* note 14, at 19. In discussing child safety in this article, I am operating from this premise as well.

²³ NEW JERSEY DEP'T OF HUMAN SERVS., *supra* note 22, at 1. This mandate is reinforced by the federal Adoption and Safe Families Act of 1997, 42 U.S.C. § 670; which requires that states make child safety the primary focus of their child welfare systems. 42 U.S.C. § 671(a)(15)(A)–(E) (1998).

²⁴ The focus on the mother also reflects child protection's assumption that this focus somehow guarantees that the child will be safe, a faulty assumption given that the violence causing child protection to intervene comes from an external source—the batterer—rather than from the mother. Caseworkers may be able to ignore the batterer, but the mother, knowing the source of the threat, certainly cannot. Mandel E-mail, *supra* note 10.

the dependency, or child welfare, system. But a number of other branches of the legal system could play a role in batterer accountability as well: criminal, civil, and family. The tools each of these systems has to hold batterers accountable will be discussed below.

A. *The Dependency System*

The debate on domestic violence and child maltreatment has centered on battered mothers charged with failing to protect their children from exposure to or abuse by their batterers.²⁵ But the dependency system could, and sometimes does, reach batterers as well. Four stages of a dependency case provide unique opportunities to hold batterers accountable: initial investigations and substantiations of child abuse and neglect; adjudications of child abuse or neglect; service provision post-adjudication; and termination of parental rights.

1. *Initial Investigations and Substantiation of Claims*

Reports of abuse by mandated reporters and others to state or local hotlines trigger child abuse and neglect investigations.²⁶ Workers screen calls to determine whether an investigation is warranted under state law; if the report meets the standards for investigation, a child protection worker is sent to examine the child, talk with the child's parents or caregivers, and assess for risk of harm to the child.²⁷ Based on those initial conversations and other information gathered by the child protection worker, workers determine whether the claim is supported by the available evidence, leading to a finding that the report was "substantiated," "indicated," or "founded."²⁸ Once this determination is made, the worker has a number of options: to close the case, open the case for services, divert the case to a differential response track, or ask the dependency court to intervene in the case.²⁹ At this point, workers

²⁵ Fugate, *supra* note 13, at 274.

²⁶ Lois A. Weithorn, *Protecting Children From Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 19 (2001).

²⁷ Colby Brunt & Leigh Goodmark, *Parenting in the Face of Prejudice: The Need for Representation for Parents with Mental Illness*, 26 J. POVERTY L. & POL'Y 295, 297 (2002); see The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 856 (2000).

²⁸ Brunt & Goodmark, *supra* note 27, at 297.

²⁹ *Id.*; The "Failure to Protect" Working Group, *supra* note 27, at 854–55.

may also decide whether removal of the child from the home is necessary.³⁰

Workers are sometimes hesitant to engage the alleged batterer during the initial investigation of calls involving domestic violence.³¹ This reluctance may stem from fear of the perpetrator, the difficulty of tracking the perpetrator down, lack of appropriate services to offer batterers, or the absence of a familial relationship between the perpetrator and the child.³² Jurisdictions looking at the intersection of domestic violence and child welfare are encouraging workers to connect with batterers, however, and providing guidance on how to do so in ways that are safe for both the worker and the battered parent. Workers are encouraged to approach alleged batterers cautiously to avoid triggering violent outbursts or inciting retaliation against the battered partner.³³ New Jersey's *Division of Youth and Family Services Domestic Violence Case Practice Protocol* warns, "[i]nterviews with batterers should not move beyond obtaining their account of the incident. Direct and specific inquiry or confrontational questioning *must* be avoided."³⁴ Workers are further cautioned that they must listen critically, as batterers will frequently attempt to minimize or deny their behavior, blame the victim, justify the violence, blame alcohol, drugs, or other stress, or claim loss of control.³⁵

Minnesota's *Guidelines for Responding to the Co-Occurrence of Child Maltreatment and Domestic Violence* tell workers not to confront the batterer with the victim's statements about abuse, but note that workers can use police or other agency reports to discuss violence during an interview.³⁶ Minnesota's guidelines further note that perpetrators need

³⁰ Leslie E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect; A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287, 293-94 (1998).

³¹ PENCE & TAYLOR, *supra* note 7, at 15. One survey of CPS workers and supervisors found that fear of retaliation against them kept 22.6% of them from focusing on batterers. Mandel & Stevens, *supra* note 9, at 11.

³² David Mandel suggests that because most social workers are female, and because few academic programs teach social workers "a critical approach to male socialization," social workers are uncomfortable working with men generally, as well as batterers particularly. Mandel E-mail, *supra* note 10.

³³ NAT'L ASS'N OF PUB. CHILD WELFARE ADM'RS, GUIDELINES FOR PUBLIC CHILD WELFARE AGENCIES SERVING CHILDREN AND FAMILIES EXPERIENCING DOMESTIC VIOLENCE 10 (2001).

³⁴ NEW JERSEY DEP'T OF HUMAN SERVS., *supra* note 22, at 8-11 (emphasis in original).

³⁵ *Id.* at 9-10.

³⁶ MINNESOTA DEP'T OF HUMAN SERVS., GUIDELINES FOR RESPONDING TO THE CO-OCCURRENCE OF CHILD MALTREATMENT AND DOMESTIC VIOLENCE 13 (1996) [hereinafter MINNESOTA DEP'T OF HUMAN SERVS.] (citing ANNE L. GANLEY & SUSAN SCHECHTER,

not admit to violence for workers to find that it has occurred; adult and child statements, worker observations and other agency reports are sufficient verification.³⁷ The way in which these observations are coded is important as well. As David Mandel and John Went note:

The language used to describe the domestic violence in the household needs to be precise, affirming of the perpetrator's role in harming the children and avoid blaming the victim for the behavior of the perpetrator. Imprecise phrases relegate the perpetrator and his responsibility to the background or make it disappear altogether.³⁸

Mandel and Went suggest that workers document the perpetrator's pattern of control, paying particular attention to "how the fear and uncertainty generated by prior behavior continues to impact current parenting, decision-making, risk analysis and safety planning of the adult victim," as well as the effect that the batterer's actions have had on the children.³⁹ Lien Bragg further suggests that workers pay particular attention to how the batterer interprets his violence—for example, minimizing the violence or blaming the victim—which will help the worker determine the prognosis for success in treatment.⁴⁰ Workers should also look for information about the batterer's parenting skills: whether he has used the children as weapons against his partner, neglected the children, or undermined his partner's parenting.⁴¹

When the investigation is complete, the worker must decide whether there is sufficient evidence to determine that the child has, in fact, been abused or neglected. In many states, exposure to domestic violence is defined as child abuse or neglect; in others, children exposed to domestic violence are considered victims of psychological or emotional abuse.⁴² Children are also deemed to be neglected by virtue of their caretaker's failure to provide appropriate care and control by shielding them from abuse.⁴³ Allegations can be substantiated against the perpetrator, the battered parent, or both. This ability to determine against whom the

DOMESTIC VIOLENCE: A NATIONAL CURRICULUM FOR CHILDREN'S PROTECTIVE SERVICES (CPS) (1996)).

³⁷ *Id.*

³⁸ David Mandel & John Went, Using Batterer Accountability Strategies to Increase Safety for Children 2 (Nov. 19, 2000) (unpublished manuscript, on file with author).

³⁹ *Id.*

⁴⁰ E-mail from Lien Bragg, MSW, to Leigh Goodmark, Assistant Professor, University of Baltimore School of Law (April 2, 2004, 03:53 EST) (on file with author).

⁴¹ Mandel E-mail, *supra* note 10.

⁴² Weithorn, *supra* note 26, at 24–26.

⁴³ See Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 358 (1995).

claim will be substantiated provides child protection workers with an opportunity to hold batterers accountable. Substantiating claims against batterers instead of their abused partners would send a clear message that child welfare agencies intend to focus responsibility for harm to children as a result of domestic violence on those who perpetrate the violence.⁴⁴ Substantiating against the batterer alone would also allow CPS workers to form alliances with battered mothers to keep children safe, and would have practical implications for the battered mother's future.⁴⁵

Substantiation of a claim presents a number of choices for workers: should a case be opened to allow the agency to provide the family with services? Should the case be diverted to a differential response track? Should the court become involved? Should the child be removed? Each of these decisions can be made in a way that would place responsibility for the child protection system's intervention on the batterer. When cases are opened for services, workers can ensure that batterers are given service plans specifically designed to address the violence. Mandel and Went suggest that service plans should require the perpetrator to do a number of things, including refrain from physically violent or intimidating behavior and physical discipline of children, remove weapons from the home, comply with court orders, obtain and follow the recommendations of a domestic violence evaluation, acknowledge past abusive behavior toward his victim and children, address substance abuse and/or mental health issues, pay child support, allow the adult victim and children access to services and supports, and share important personal information, including history of past abuse, financial information and court involvement, with the adult victim.⁴⁶ Service plans might also include supervised visitation, mental health services, fatherhood programs, substance abuse services, job training, or housing—whatever services are appropriate given the facts of the case.⁴⁷ Decisions about assignment of cases to a differential response track can be based, in part, on whether sufficient services exist in the community to ensure that

⁴⁴ In fact, according to the Hon. Bill Jones, chair of the Advisory Committee appointed by Judge Weinstein in *Nicholson v. Williams*, 203 F. Supp. 2d 153, 252 (E.D.N.Y. 2002), to monitor the city's compliance with his order, one positive result of the case has been a marked increase in the number of petitions filed against the abusive partner only. E-mail from Bill Jones, Retired Family Court Judge, Eastern District of New York, to Leigh Goodmark, Assistant Professor, University of Baltimore School of Law (June 1, 2004, 12:23 EST) (on file with the author) [hereinafter Jones E-mail].

⁴⁵ Two examples of the practical implications: because substantiation can keep the alleged perpetrator from working in professions involving children, substantiating only against the batterer leaves the battered mother with a number of employment options, including child care worker. Substantiation against the batterer can also help the mother in future litigation, like custody proceedings. Mandel E-mail, *supra* note 10.

⁴⁶ MANDEL & WENT, *supra* note 38, at 3.

⁴⁷ Jones E-mail, *supra* note 44.

batterers are held accountable.⁴⁸ Petitions asking the court to adjudicate abuse and neglect can be filed against the batterer only.⁴⁹ Perpetrators of violence can be removed from the home or precluded by court order from having contact with their partners and children, instead of removing children from the care of a nonabusive parent or requiring that the child and custodial parent uproot themselves and enter a shelter.⁵⁰ All of these options acknowledge that the batterer's violence is the reason the child protection system is engaged with the family, and they address that violence by looking to the batterer to change his behavior in a way that promotes victim and child safety.

2. Adjudication of Child Abuse and Neglect

After a petition is filed with the dependency court, the tribunal must determine whether the actions alleged meet the legal standard for finding that abuse or neglect has occurred. The burden is higher at this stage; while allegations of abuse or neglect can be substantiated on credible evidence alone, a decision by a court that abuse or neglect has actually occurred must be supported by a preponderance of the evidence or by clear and convincing evidence, depending on the jurisdiction.⁵¹

⁴⁸ What those services might look like is discussed in Section III of this article.

⁴⁹ Some states, like California, assert jurisdiction over the child rather than the parent. CAL. WELF. & INST. CODE § 300 (West 2000). In those jurisdictions, however, the allegations still involve the parents, and those allegations can be written in order to hold the batterer responsible for his violence.

Agency attorneys who are responsible for determining whether petitions should be filed have a role to play at this stage; encouraging workers to pursue cases against batterers and refusing to file cases against nonabusive battered mothers. Leigh Goodmark, *A Balanced Approach to Handling Domestic Violence in Child Welfare Cases*, 20 CHILD L. PRAC. 49, 58 (2001) [hereinafter Goodmark, *A Balanced Approach*].

⁵⁰ If a hearing is held to determine whether the child should be removed from the home, the "reasonable efforts" determination is another juncture at which courts can ensure that child welfare agencies are focused on batterer accountability. Federal law requires that reasonable efforts be made to prevent the child's removal from the home. Adoption and Safe Families Act ("ASFA"), 42 U.S.C. § 671(a)(15)(B) (2001). Reasonable efforts could include seeking a protective order against the batterer or requiring the batterer to leave the home. In some states, child welfare agencies can seek an order of protection on behalf of the child, which could mandate that the batterer refrain from contact with the child or the mother. *See, e.g.*, MD. CODE ANN., FAM. LAW § 4-501(m)(2)(ii)(2) (2004). This raises the question of whether the mother is willing to seek a restraining order or have one imposed upon her (raising issues about her safety if she seeks such an order, her desire to maintain a relationship with the abuser, etc.), a crucial question for child protective services to ask, but the philosophical and practical implications of which I do not discuss here.

⁵¹ Brunt & Goodmark, *supra* note 27, at 297 (explaining that standards "vary but are much closer to 'more likely than not' than 'beyond a reasonable doubt'"); *see also* Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the*

Courts can ensure that batterers are held accountable at adjudication in two ways. Courts can refuse to find that nonabusive battered mothers are responsible for the damage done to their children when those children are exposed to the perpetrator's violence. As Judge Weinstein noted in *Nicholson*:

As a matter of policy and practice, when [a child welfare agency] prosecutes a woman for neglecting her child when she has done nothing but suffer abuse at the hands of another, it does so under what might at best be termed false assumptions and findings. It infers from the fact that a woman has been beaten and humiliated that she permitted or encouraged her own mistreatment. As a matter of policy and practice [a child welfare agency] presumes that she is not a fit parent and that she is not capable of raising her children in a safe and appropriate manner because of actions which are not her own [A]pplying this presumption violates constitutional rights.⁵²

By declining to find battered mothers neglectful for failing to shield their children when their mothers are being beaten, courts tell child protection workers, attorneys, and others involved with the system that the courts' concern is with the perpetrator of the violence, not the victim. As Jill Zuccardy, plaintiff's counsel in *Nicholson*, has noted, shifting the focus would put battered mothers on equal footing with others victimized in front of their children. "We do not accuse mugging victims of 'engaging in a mugging.' The use of this type of language reflect[s] a victim-blaming attitude . . . that the violence was the mother's fault and was something that she could control."⁵³

Courts could also require that the batterer be a party to any case brought before the court.⁵⁴ The child protection system is mother-focused, as previously noted, allowing batterers to escape responsibility

Intersection of Child Protection, Due Process, and Equal Protection, 11 TEX. J. WOMEN & L. 1, 14–15 (2001) (stating that in some states the standard is as low as any "credible evidence" of child abuse or neglect).

⁵² *Nicholson v. Williams*, 203 F. Supp. 2d 153, 252 (E.D.N.Y. 2002).

⁵³ Leigh Goodmark, *New York City Ordered to Protect Nonabusive Battered Mothers and Children*, 21 CHILD L. PRAC. 14 (2002); see also *Nicholson*, 203 F. Supp. 2d at 252 ("It desecrates fundamental precepts of justice to blame a crime on the victim.").

⁵⁴ Giving the father party status does raise a number of red flags, however. Fathers who do become involved in the child welfare system often benefit from the general absence of men seeking responsibility for their children in these cases. As a result, even fathers with checkered histories are applauded for their desire to be involved and frequently granted custody of children inappropriately. Moreover, when the batterer has party status, in many jurisdictions he is entitled to a lawyer, which can further complicate cases and create a more powerful adversary for the victim mother. One question for further thought, then, is whether batterers can be held accountable within the child protection system without conferring party status on them. Given the basic rules of personal jurisdiction, however, I do not believe this to be possible.

for their actions. When the batterer is the child's biological parent, jurisdiction is not an issue (although in Sharwline Nicholson's case, the child's biological father, who returned to his home in South Carolina after beating her, was never held accountable for his actions in either the criminal or dependency systems),⁵⁵ and courts should ensure that CPS has attempted to find and work with the batterer.

Cases involving unrelated boyfriends who batter mothers, however, have posed jurisdictional challenges for courts. A number of states have expanded the dependency court's jurisdiction to include non-related caretakers, allowing them to exercise jurisdiction over battering boyfriends.⁵⁶ In some jurisdictions, courts then have the power to enter restraining orders against the batterer in the dependency court, enjoining him from committing further violence and, when appropriate, restricting his contact with the child or the adult victim or removing him from the home.⁵⁷ Even if the boyfriend is not a party, however, the court can still ask what steps the agency took to address his violence—for example, by working with the criminal court.⁵⁸

3. *Disposition and Post-Adjudication Service Provision*

Once the court has determined that the child has been abused or neglected, the court must determine who will have custody and control of the child and, if the child has been removed from the home, decide whether the child should return home or remain in out-of-home care. These decisions are known as “disposition.” If the disposition places the child outside the home, the agency must also begin “concurrent planning,” or working towards reunification while preparing for the child to be adopted if reunification efforts fail.⁵⁹ If the child is placed in foster care, the Adoption and Safe Families Act mandates that a permanency

⁵⁵ See *Nicholson*, 203 F. Supp. 2d at 168–70.

⁵⁶ See, e.g., COLO. REV. STAT. ANN. § 19-1-103(67), (101) (West 2001) (covering abuse by a spousal equivalent or other person residing in the home); DEL. CODE ANN. tit. 16, § 902 (1), (13) (2001) (applying abuse law to members of the household, adults within the household with responsibility for the child's well-being, and temporary caregivers); MICH. COMP. LAWS ANN. § 722.622(o) (West 2001) (defining a nonparent adult for the purposes of dependency court jurisdiction).

⁵⁷ See, e.g., CAL. WELF. & INST. CODE § 304 (West 1998) (allowing the court to order remedies available in CAL. FAM. CODE § 6320). This power can also be conferred informally, through memoranda of understanding, as was the case in Maryland. Interview with Jane C. Murphy, Professor, University of Baltimore School of Law, in Baltimore, Md., (June 16, 2004).

⁵⁸ See Leigh Goodmark, *Court Collaboration in Family Violence Cases*, 20 CHILD L. PRAC. 177, 186 (2002) [hereinafter Goodmark, *Court Collaboration*].

⁵⁹ Brunt & Goodmark, *supra* note 27, at 300.

plan be established for the child within twelve months of that placement.⁶⁰ The plan can call for returning home, legal guardianship, permanent relative placement, long-term foster care, emancipation, or termination of parental rights and adoption.⁶¹

If the permanency plan contemplates that the child will return home, the child welfare agency is required to provide the parents with services that will help prepare them to resume care for the child.⁶² A batterer's post-adjudication service plan might look substantially similar to the one outlined in Part II.A.1 of this article. Whatever services the agency mandates, however, should be tied both to having the batterer acknowledge his responsibility for the harm done to the child as a result of the violence and to the child's future safety.⁶³ If the adult victim has been found by the court to be neglectful or abusive, her service plan should enable her to keep herself and the child safe without placing responsibility on her to prevent the batterer from being violent or disregarding the violent context in which she is forced to make decisions (for example, requiring her to enforce restraining orders regardless of the batterer's threats to harm her or her children). Courts are required to hold review hearings at least every six months from the time the child enters foster care,⁶⁴ but could hold such hearings more often to ensure that the batterer is complying with his service plan.⁶⁵

4. *Termination of Parental Rights*

Termination of parental rights has been called the death penalty of the civil system,⁶⁶ permanently severing a parent's legal bond with her biological child. Under federal law, termination is required when a child has been in care outside of the home for fifteen of the most recent twenty-two months, or when an infant has been abandoned (as defined by state law), unless a compelling reason not to terminate parental rights exists.⁶⁷ Federal law also permits the agency to dispense with reasonable efforts to reunify a family when there are aggravated circumstances, when the parent has committed particular criminal acts involving this child or another child, and when the parent's rights to another child have

⁶⁰ 42 U.S.C. § 675(5)(C) (2001).

⁶¹ Cecilia Fiermonte, *Reasonable Efforts Under ASFA: The Judge's Role in Determining the Permanency Plan*, 20 CHILD L. PRAC. 17 (2001).

⁶² See Brunt & Goodmark, *supra* note 27, at 299-300.

⁶³ Simply mandating that the abuser enter batterer intervention counseling and comply with existing court orders is not a sufficient service plan. See *infra* Part III.A.

⁶⁴ 42 U.S.C. §§ 671(a)(16), 675(5)(C) (2001).

⁶⁵ Jones E-mail, *supra* note 44.

⁶⁶ Dohr, *supra* note 8, at 2.

⁶⁷ 42 U.S.C. § 675(5)(E) (2001).

been involuntarily terminated.⁶⁸ Eliminating the reasonable efforts requirement makes quicker terminations possible. Many state laws also require a showing that termination of parental rights is in the child's best interests.⁶⁹

Terminating a batterer's parental rights is the ultimate batterer accountability tool, forcing batterers to accept that, as a result of their violent behavior, they are no longer entitled to parent their children.⁷⁰ As Amy Haddix notes, "Admittedly, termination is a drastic means by which to achieve the goal of child protection. However, in light of batterers' high rates of recidivism and post-separation violence, termination is the only sure way to protect children from chronically abusive parents."⁷¹ But how likely are courts to terminate just the batterer's parental rights, particularly when children are living safely with a non-abusive parent and therefore do not need to be freed for adoption?

B. The Criminal System

In recent years, the criminal system has been touted as a primary tool in batterer accountability, and innovations like mandatory arrest and victimless prosecution have meant that greater numbers of domestic violence offenses have been prosecuted in the criminal system. But how can the criminal system ensure batterer accountability in the context of a child protection case? That question is considered below.

1. Criminal Prosecution

Holding the stick of criminal sanctions over a batterer's head can potentially both inform batterers that they are being held responsible for

⁶⁸ *Id.* § 671(a)(15)(D) (2001). State law defines aggravating circumstances, but abandonment, torture, chronic abuse, and sexual abuse are generally included.

⁶⁹ Nat'l Clearinghouse on Child Abuse and Neglect Info., *Statute at a Glance: Grounds for Termination of Parental Rights*, available at <http://nccanch.acf.hhs.gov/general/legal/statutes/groundtermin.cfm> (last visited June 2, 2004).

⁷⁰ This strategy raises questions about whether terminating a batterer's parental rights is always in the child's best interests. Terminating parental rights ends the batterer's obligation to pay child support, depriving the child of a source of income. It also ends the relationship between the child and the batterer, which could be detrimental to a child who has maintained a strong relationship with the batterer despite his violence.

⁷¹ Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 815 (1996). As Joan Meier notes, however, terminating parental rights could also expose the mother to greater risk. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 724 (2003).

their behavior and ensure that the child is shielded from further exposure to violence.⁷² Batterers can be prosecuted for the events that brought the family to the attention of child protection services as well as for other old incidents (if within the relevant statute of limitations). As a condition of release, batterers can be precluded from contact with the adult victim or child, removed from the child's home, or ordered to comply with conditions set by child protection services.⁷³ In a few states, batterers can be prosecuted for the substantive crime of committing domestic violence in the presence of a child; in others, the batterer's sentence can be enhanced if the violence occurred in the child's presence.⁷⁴

In a number of states, the batterer can plead guilty and, in lieu of sentencing, enter a diversion program. Diversion programs generally require abusers to complete counseling and prove their ability to remain violence-free for the term of the program. If the batterer complies with those requirements, the guilty plea is withdrawn and no criminal conviction is recorded.⁷⁵ Conditions for a batterer involved in the child protection system could include counseling specific to the child's needs and a showing that the batterer has posed no danger to the child or the child's custodial parent.⁷⁶ If the batterer is ultimately convicted of a domestic violence offense, he will either be jailed or placed on probation. In jail, he poses no immediate risk of harm to the child (although

⁷² However, as Ellen Pence and Coral McDonnell note, "[T]he threat of a conviction has a different meaning to men of different social classes and men from communities with different historical relationships to police and the courts." Ellen L. Pence & Coral McDonnell, *Developing Policies and Protocols*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM THE DULUTH MODEL 52 (Melanie F. Shepard & Ellen L. Pence eds., 1999) [hereinafter COORDINATING COMMUNITY RESPONSES]; see also Donna Coker, *Shifting Power for Battered Women: Law, Materials Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1042-43 (2000) (arguing that mandatory arrest policies and criminal prosecution affect people of color differently).

⁷³ OREGON DEP'T OF HUMAN SERVS., CHILD WELFARE PRACTICES FOR CASES WITH DOMESTIC VIOLENCE 64 (3d ed. 2005), available at <http://www.dhs.state.or.us/abuse/publications/children/a338350.pdf> (last visited March 2, 2005) [hereinafter OREGON DEP'T OF HUMAN SERVS.].

⁷⁴ Laurel A. Kent, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337, 1339 (2001); Weithorn, *supra* note 26, at 9.

⁷⁵ See Diane E. Reynolds, *The Use of Pretrial Diversion Programs in Spouse Abuse Cases: A New Solution to an Old Problem*, 32 OHIO ST. J. ON DISP. RESOL. 415, 422-23 (1998).

⁷⁶ Bruce Winick suggests that defense attorneys should encourage their battering clients to seek opportunities for treatment and rehabilitation, whether through diversion programs or other community resources, in order to help those clients address the violence that brought them to the attention of the court system. Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 U. MO. KAN. CITY L. REV. 33, 67-70 (2000).

harassment and terrorizing by jailed batterers is still common).⁷⁷ If the batterer is on probation, child protection workers can develop relationships with probation officers to ensure that the batterer is complying with the conditions of his probation (attending batterer intervention counseling, for example, or staying away from the victim and her child) that affect the child's safety and well-being.⁷⁸ In recommending and establishing conditions of probation, probation officers can consult with child protection workers to determine whether special conditions to protect the battered mother and her child are necessary.⁷⁹ If the batterer is released from jail on parole, the parole officer can play a similar role, monitoring the batterer's behavior to ensure that he poses no risk to the victim or child and discussing concerns with the child welfare agency.

2. *Violation of Probation/Parole*

Batterers who fail to comply with the conditions of their probation or parole can, in theory, be imprisoned, although how often this actually happens varies widely from court to court. However, the threat of imprisonment could operate to prevent some batterers from continuing to abuse or harass their adult and child victims, and could encourage them to comply with treatment programs intended to lessen or abate their violence.⁸⁰ Probation and parole officers and child protection workers can collaborate to remove the threat posed by a batterer who violates his probation or parole by ensuring that the sentencing judge is aware of the threat the batterer's actions poses to mother and child and by moving aggressively to recommend revocation of probation or parole in appropriate cases.

⁷⁷ See, e.g., *Cruz-Foster v. Foster*, 597 A.2d 927, 931 n.5 (D.C. 1991).

⁷⁸ Goodmark, *A Balanced Approach*, *supra* note 49, at 54. Again, child protective services agencies should be talking to the victim about her willingness to have such orders imposed.

⁷⁹ San Diego was one of the first jurisdictions to implement this type of program. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *FAMILY VIOLENCE: EMERGING PROGRAMS FOR BATTERED MOTHERS AND THEIR CHILDREN* 89–91 (1998).

⁸⁰ See ILLINOIS CRIMINAL JUSTICE INFO. AUTH., *THE IMPACT OF DOMESTIC VIOLENCE PROBATION PROGRAMS* 4 (2002), available at <http://www.icjia.state.il.us/public/pdf/oga/sptdvoga/pdf> (evaluating three domestic violence probation projects in Illinois and concluding that enforcing terms of probation is key to successful completion of probation and prevention of further offenses).

3. *Criminal Penalties for Violation of Restraining Orders*

Batterers can be prosecuted in many jurisdictions for violations of civil restraining orders obtained by adult victims or child welfare agencies.⁸¹ In some states, violation of a restraining order is a misdemeanor offense.⁸² Other states permit the government or the victim to bring criminal contempt actions for violations of restraining orders.⁸³ Given the importance child protection workers frequently place on victims securing restraining orders to ensure their children's safety, child welfare workers should assist victims whose orders have been violated to ensure that police, prosecutors, and judges understand that the order is intended to keep both the child and the mother safe. Caseworkers should inform batterers that violations of these orders will be taken seriously and could subject them to criminal liability, or even imprisonment. As with violations of probation, in jurisdictions where probation officers monitor compliance with the provisions of restraining orders, child protection workers and probation officers can collaborate to ensure that batterers comply with the orders and that they face serious consequences when they do not.⁸⁴

C. *Domestic Relations*

Domestic relations actions provide a number of avenues through which batterers can be held accountable for their violence. Civil protection orders, custody and visitation decisions, and child support awards all provide judges and others within the legal system with an opportunity to educate batterers about the consequences of their actions in ways that can increase child safety.

⁸¹ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 897-98 (1993).

⁸² *Id.* at 898-99.

⁸³ *Id.* at 897-99.

⁸⁴ The consequences could involve serving the rest of a sentence, but could also include fines or restricted access to the child. Financial constraints may make such closely monitored probation impossible, however. See Michelle Maitre, *County Probationers Stashed Out of View: Low Funds, Reduced Staff Means Half of Those on Probation Get Little Supervision*, ALAMEDA TIMES-STAR, Feb. 8, 2004 (explaining that more than half of Alameda County's probationers receive minimal contact from probation officers, although officials assert that they continue to maintain close contact with those "involved with domestic violence").

1. *Civil Protection Orders*

Child protection agencies frequently suggest (or order) battered women to separate from their batterers in order to safeguard themselves and their children, and to provide the agency with some proof that the separation has occurred; the alternative is to risk removal of their children.⁸⁵ Social workers routinely require battered women to obtain civil protection orders—orders prohibiting batterers from engaging in a range of conduct, including abusing, harassing, approaching or contacting their victims—to enforce separation.⁸⁶

Putting to one side the practical problems of obtaining such an order and the philosophical concerns about mandating court action, which could trigger further violence, civil protection orders can serve to hold batterers accountable for their actions. Civil protection orders tell batterers that, as a result of their actions, they are no longer permitted to interact with their victims. Such orders can limit the batterer's access to his children, to their schools, and to other places that they frequent.⁸⁷ The batterer can be removed from the family home—frequently touted as an alternative to forcing the battered woman and her children into a shelter.⁸⁸ In many states, the batterer can also be ordered to complete a batterer intervention program or other form of counseling.⁸⁹ Compliance with restraining orders can be monitored by the issuing judge and, in some jurisdictions, probation officers.⁹⁰ Both criminal and civil penalties are available to address violations of the orders.⁹¹ These provisions not only force batterers to accept responsibility for their actions, but could also contribute to keeping children safe.

How can civil protection orders be employed constructively in child protection cases? Rather than simply ordering battered women to obtain them, social workers could provide battered women with support and assistance (for example, connecting them to legal resources). Caseworkers could testify on the battered mother's behalf about abuse or injuries they have witnessed or the impact of the violence on the child, helping courts understand that if an order is not issued, the child might be

⁸⁵ Daigle, *supra* note 30, at 289–90.

⁸⁶ *Id.* at 289 n.9.

⁸⁷ Klein & Orloff, *supra* note 81, at 919–22.

⁸⁸ *See id.* at 884.

⁸⁹ *See id.* at 886.

⁹⁰ Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 343–44 (1994).

⁹¹ Klein & Orloff, *supra* note 81, at 895.

removed from the mother's custody—an inappropriate outcome if the guiding philosophy is batterer accountability. In some states, caseworkers can even file for protective orders on the child's behalf, asking that the batterer be removed from the home.⁹² Caseworkers could work with probation officers to ensure that batterers are complying with orders and contact police and probation officers to report violations and pursue misdemeanor or criminal contempt prosecution. Caseworkers could also establish ties to community police officers or members of a domestic violence law enforcement unit who specialize in enforcement of orders to help monitor compliance. When violations are appropriately addressed through civil contempt, caseworkers can help battered mothers secure legal assistance and provide supporting testimony.

2. *Custody and Visitation*

The ultimate goal of the child welfare system is to ensure that children are living with safe and stable families. Safety and stability can be achieved through custody and visitation orders that are appropriately protective and that recognize the danger the batterer can pose to the nonabusive parent and her child. When custody and visitation orders are cognizant of these risks and recognize the responsibility of the party creating the risks, the need for the involvement of the child protection agency can be abated altogether.

The vast majority of states and the District of Columbia permit judges to factor domestic violence into custody and visitation determinations.⁹³ Evidence about the impact of domestic violence on children motivated states to enact such legislation.⁹⁴ Whether these statutes have been as effective in ensuring that children are protected from post-separation violence as hoped is debatable,⁹⁵ but their existence is another tool in the box available to child protection workers striving for batterer accountability and child safety.

When custody and visitation and dependency cases co-exist, particular care must be taken to ensure that courts do not issue conflicting orders. The battered mother may be told by the dependency

⁹² See, e.g., DEL. CODE ANN. tit. 10, § 1041(3)(b) (2004); MD. CODE ANN., FAM. LAW § 4-401(m)(2)(ii)(2) (2002); MINN. STAT. § 260C.148(1) (2004).

⁹³ Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 610, 613 (2001).

⁹⁴ See generally PETER G. JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 63–72 (2003) (discussing changes in legislation and legal practice with regard to domestic violence in child custody proceedings).

⁹⁵ See Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do For Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 253 (1999) [hereinafter Goodmark, *From Property to Personhood*]; Meier, *supra* note 71, 661–63.

court that she must not allow the batterer access to the children, but must comply with the court order to allow him weekend supervision. This creates a Catch-22 for her: comply with the dependency court and risk losing custody for withholding the child, or comply with the custody court and risk losing custody for further exposing the child to domestic violence. These cases are even more complicated when the order of the custody or visitation court conflicts with the dictates of the child protection agency rather than the court. Child protection agencies may counsel battered mothers to disregard or violate custody or visitation orders, impressing on the battered mother her responsibility to shield her child from the batterer regardless of the court order. Ensuring that battered mothers do not face such choices is an essential part of the custody judge's job.⁹⁶

Custody and visitation cases can serve as exit strategies from an unnecessary child protection case if child welfare workers are willing to work with battered mothers to ensure that the ensuing custody and visitation orders protect children.⁹⁷ Child protection workers can close dependency cases after final custody orders are adjudicated if the orders are sufficient to assuage their concerns about child safety. As in the protection order context, child welfare workers could testify on behalf of battered parents regarding abuse or injuries they witnessed directly. Clinical social workers could testify as experts to the impact of violence on the children and the potential consequences of granting custody or unsupervised visitation to the batterer. By remaining involved with the family in the custody/visitation arena, child protection workers send batterers the message that their behavior has repercussions beyond the confines of the child protection system. Moreover, the testimony of a neutral professional like a social worker can convince a judge of the harm that the batterer can do to the children in a way that a "biased" or "unfriendly"⁹⁸ parent may not.

As Barbara Hart has argued, if we are going to assert that battered mothers have a duty to protect their children, we must give them the

⁹⁶ This problem also arises in the protective order context, when visitation is ordered as a condition of the protective order, but forbidden either by the dependency court or the child welfare agency.

⁹⁷ Goodmark, *Court Collaboration*, *supra* note 58, at 182.

⁹⁸ "Friendly parent" provisions in custody statutes weigh which parent is more likely to foster continuing contact between the child and non-custodial parent. Not surprisingly, battered women can be found to be unfriendly parents because they fear ongoing abuse of themselves and their children as a result of such close contact. LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 122 (2002). If their claims of abuse are discounted, battered women may be deemed "unfriendly," creating a disadvantage in the custody case.

tools to protect them.⁹⁹ These tools must include appropriate custody and visitation orders. Many judges have been unwilling or unable to make the connection between violence against a parent and the abusive parent's relationship with the child and have, as a result, ordered custody and visitation arrangements that ignore the potential for future violence and create new dangers for the children and the battered parent. Judges must be open to hearing testimony, receiving evidence about the history of violence in the relationship, and making connections between that violence and the batterer's parenting skills. Making these connections will, in turn, lead judges to enact custody and visitation orders that focus on the safety of the child and the nonabusive parent, and recognize that batterers have a number of very real parenting deficits unrelated to physical abuse of the child, although child abuse and domestic violence frequently co-occur.¹⁰⁰ Courts can incorporate permanent protective orders and/or other safety-focused provisions (supervised visitation and/or exchange, no-contact orders, batterers' counseling, orders prohibiting the abusive parent from discussing the custodial parent with the child) into their custody and visitation determinations. Courts can also provide the batterer with two clear messages: these custody and visitation provisions are a result of your violence against the child's mother, and violations of these orders will have serious consequences.

3. *Child Support*

Economics are frequently cited as a primary barrier to leaving an abusive relationship.¹⁰¹ The prospect of being unable to feed, house, and/or clothe one's children certainly prevents untold numbers of battered mothers from leaving abusers upon whom they are economically dependent. Battered mothers' economic concerns are frequently met with reassurances that they will be able to collect child support to care for their children. But once these mothers leave, they frequently encounter the harsh, and fairly predictable, reality: child support can take a long time to secure, batterers are less likely than other men to pay child support,¹⁰² and the legal system is often unable to ensure that fathers comply with child support orders.

⁹⁹ Goodmark, *Court Collaboration*, *supra* note 58, at 186 (citing Barbara Hart).

¹⁰⁰ See BANCROFT & SILVERMAN, *supra* note 98, at 42-45.

¹⁰¹ Carolyn D. Schwarz, *Unified Family Courts: Saving Grace for Victims of Domestic Violence Living in Nations With Fragmented Court Systems*, 42 FAM. CT. REV. 304, 307 (2004).

¹⁰² Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 276-77 (1995).

For some battered mothers, accessing child support is frightening. Some have been told that violence will follow if they seek child support; others fear that receiving child support will require them to disclose their whereabouts to the batterer. Battered mothers told to seek Temporary Assistance for Needy Families are often not told that they can opt out of cooperating with naming the child's father if doing so could pose a risk to the mother or child.¹⁰³ Child protection workers must be sensitive to these concerns and work with battered mothers and other government agencies to ensure that seeking child support is an appropriate and safe choice for the victim.

When child support is a viable option for the battered mother, the legal system should address the many problems that battered women encounter when seeking child support in ways that would hold batterers accountable, which, in turn, would help to ensure children's safety. Child support hearings could be expedited in cases involving domestic violence. Child support could be awarded in civil protection order proceedings (as it is in some jurisdictions),¹⁰⁴ or courts could establish systems allowing victims of domestic violence to file and litigate permanent child support cases at the same time that their civil protection order cases are being heard.¹⁰⁵ Wage garnishment helps to ensure that employed batterers pay their child support, but crafty batterers have learned that frequently changing jobs or working "under the table" can help them avoid their obligations. For those fathers, strict court enforcement of child support orders, including imprisonment for failure to pay, may be necessary. How would these measures keep children safe?—by providing battered mothers with the financial ability to initially separate and remain apart from their batterers. When the alternative is homelessness or a child's hunger, battering can seem a small price to pay for economic stability. By working with battered mothers to institute child support proceedings, and working with courts to put teeth into the enforcement of their orders, child protection workers could address one of the most daunting impediments to permanently leaving an abusive relationship while also working to ensure that batterers are responsible for their children's needs.

¹⁰³ See Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 152-53, 156-59 (2002).

¹⁰⁴ Klein & Orloff, *supra* note 81, at 891-92.

¹⁰⁵ Such services are available in the District of Columbia. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 YALE J.L. & FEMINISM 3, 30 (1999). In Louisville, Kentucky, the dependency courts can also enforce these child support orders. Jones E-mail, *supra* note 44.

D. *Expanding Jurisdiction*

Seeking lasting solutions to seemingly intractable social problems, the legal system has turned to court reform as a strategy. Experiments in expanding and specializing court jurisdiction have become fairly common. Two of these kinds of experimental courts—domestic violence courts and unified family courts—offer opportunities to simultaneously increase batterer accountability and child safety.

1. *Domestic Violence Courts*

Implementing a coordinated community response is a key to addressing domestic violence, and dedicated courts are an essential component of such a response. Beginning with Quincy, Massachusetts, in 1976, and spreading to hundreds of courts throughout the country, dedicated domestic violence courts have become one of the most common legal system innovations in response to heightened awareness of domestic violence.¹⁰⁶ While the characteristics in various jurisdictions differ, domestic violence courts generally are those that have created “some type of specialized process for handling cases involving domestic violence, including, for example, centralized intake processes, separate calendars for civil protection order petitions and criminal domestic violence cases, and domestic violence units.”¹⁰⁷

Domestic violence courts are intended to allow judges to closely scrutinize batterer behavior. Judges can periodically monitor conditions of probation, treatment orders, and compliance with protection orders.¹⁰⁸ This ongoing monitoring, coupled with the court’s ability to “make it clear to [batterers] that the court is serious and will enforce its rulings . . . can greatly increase the ability of the court to hold perpetrators accountable and to increase their compliance with court orders and conditions.”¹⁰⁹ Moreover, because domestic violence courts are intended to focus on prevention as well as punishment, “the domestic violence court can play a more proactive role, reaching out to both offenders and victims and stimulating community resources to deal with this devastating social problem.”¹¹⁰ Bruce Winick has argued that domestic

¹⁰⁶ Salzman, *supra* note 90, at 338–39.

¹⁰⁷ Nat’l Center for State Courts, *Family Violence Frequently Asked Questions: Knowledge and Information Services*, available at http://www.ncsconline.org/WC/FAQs/KIS_FamVioFAQ.pdf (last visited May 27, 2004).

¹⁰⁸ Winick, *supra* note 76, at 40. Probation officers can also assist in these tasks. State Attorney General’s Office, *Report on Domestic Violence: A Commitment to Action*, 28 NEW ENG. L. REV. 313, 330–31 (1993).

¹⁰⁹ Winick, *supra* note 76, at 40–41.

¹¹⁰ *Id.* at 41.

violence courts “can play an important role in the rehabilitation of offenders,” providing batterers with motivation to participate in and successfully complete counseling programs.¹¹¹

Lack of communication among various systems impedes batterer accountability. Domestic violence courts confront that problem by bringing all of the information and services about and for the batterer within the jurisdiction of one judge (or set of judges).¹¹² Protection orders, family law matters, criminal and contempt cases, and service referrals—all of the legal system tools that the child protection system could use to hold batterers accountable—may be within the domestic violence court’s jurisdiction. Information about all of the matters involving the batterer and the family is, in theory, coordinated and accessible. Child protection workers could get a snapshot of the family’s legal involvement and monitor the batterer’s compliance with court orders and service plans by accessing the domestic violence court’s records and by participating in court hearings in these collateral proceedings.

Child abuse and neglect cases involving batterers could even be heard within the domestic violence court, affording the child protection system easy access to all of the domestic violence court’s tools for holding batterers accountable.¹¹³ Placing child abuse and neglect cases within the domestic violence court’s jurisdiction would enable judges to gain a better understanding, from the child welfare worker’s perspective, of the danger posed to the child by the violence, prevent child welfare workers from having to appear in multiple courts to assist victims of

¹¹¹ *Id.* at 41–43. Winick believes that domestic violence courts should avoid a paternalistic approach and instead treat batterers with dignity and respect, display good faith and caring, and listen attentively. This strategy will foster a feeling in the batterer that treatment is his choice, rather than a sentence imposed by the judiciary. *Id.* at 43. Winick also recommends that the courts become actively involved in “risk assessment” or “risk management” to determine the batterer’s potential for future violence. *Id.* at 52. This focus is consistent with the growing use of risk assessment tools in child welfare. See generally Thomas D. Morton, *The Role of Assessment and CPS Strategy*, in ISSUES AND STRATEGIES FOR ASSESSMENT APPROACHES TO CHILD MALTREATMENT 26 (Thomas D. Morton & Wayne Holder eds., 2000) [hereinafter *The Role of Assessment*]; Aron Shlonsky & Eileen Grambrill, *The Assessment and Management of Risk in Child Welfare Services*, 23 CHILD. & YOUTH SERVS. REV. 1 (2001).

¹¹² Nat’l Center for State Courts, *supra* note 107.

¹¹³ In some jurisdictions, child protective services may have better batterer accountability resources than the family court. One way to take advantage of those resources and create a more streamlined system for handling such cases is to grant dependency court judges the ability to issue domestic violence restraining orders. This was the situation in California, where such legislation was eventually adopted. Telephone interview with Wendy Seiden, Esq., (May 18, 2004).

violence in securing restraining orders and other civil remedies, and give all of the legal system actors involved with the family access to the same information, enabling closer monitoring of the batterer's compliance and quicker action when court orders are violated.¹¹⁴

2. *Unified Family Courts*

Unified family courts are intended to give judges comprehensive jurisdiction over all matters involving a family. The courts were developed in response to a number of problems plaguing the family law system: litigants making numerous appearances before a variety of courts because no one court had jurisdiction to resolve the family's problems; the need for vast resources (judicial and otherwise) to sustain the growing family law caseload without an accompanying increase in revenue; the inability to address the social problems that fuel family law disputes, rendering them much more difficult to resolve; and the growth of pro se representation and the accompanying need to make courts more user friendly and find alternative means of resolving disputes.¹¹⁵ Divorce, child custody, visitation, paternity, child abuse and neglect (civil and criminal), child support, termination of parental rights, domestic violence (civil and criminal), adoption, juvenile delinquency, guardianship, mental health matters, legal-medical issues, emancipation, and name changes might all fall within a unified family court's jurisdiction.¹¹⁶ Other defining characteristics of unified family courts include specialized family law training for dedicated judges; a one judge/one case or family case management system; the availability of social services to address the nonlegal dimensions of family problems; the use of alternative dispute resolution where appropriate; and court structures that make the court "user-friendly."¹¹⁷ The theoretical underpinning for the unified family court is therapeutic jurisprudence, the notion that the law should

¹¹⁴ Domestic violence courts cannot operate as intended without sufficient resources, however. One of the nation's first domestic violence courts, in Clark County, Washington, is radically restructuring because of resource issues, and those involved with the court fear its effectiveness will decrease as a result. See Stephanie Rice, *No Cure—all for Domestic Violence*, THE COLUMBIAN (Clark County, Washington), April 18, 2004, at A1.

¹¹⁵ Andrew Shepard, *An Introduction to the Unified Family Court: A Legal Home Base for Children and Families*, in ABA SUMMIT ON UNIFIED FAMILY COURTS: EXPLORING SOLUTIONS FOR FAMILIES, WOMEN AND CHILDREN IN CRISIS C-2-4 (1998).

¹¹⁶ Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 518 (1998); see generally James W. Bozzomo and Gregory Scolieri, *A Survey of Unified Family Courts: An Assessment of Different Jurisdictional Models*, 42 FAM. CT. REV. 12 (2004) (summarizing the results of an ABA study on unified family courts).

¹¹⁷ Babb, *supra* note 116, at 514-25.

operate to maximize the therapeutic outcomes for those engaged with the legal system and avoid antitherapeutic consequences.¹¹⁸ In family law matters, therapeutic jurisprudence is intended to ensure that courts facilitate positive relationships or outcomes and strengthen families' functioning.¹¹⁹

While holding batterers accountable is not a primary goal of unified family courts,¹²⁰ batterer accountability is certainly consistent with the notion that the courts should facilitate positive outcomes and strengthen family functioning. In child protection cases involving domestic violence, these goals are achieved by preventing children's exposure to further violence by protecting the battered parent and child, and by working with the batterer to curtail the violence. The courts' broad jurisdiction should help to enforce accountability by facilitating communication and collaboration among the various professionals working with the family in much the same way that a domestic violence court should. Unified family courts' commitment to securing (rather than suggesting) services for involved families can provide batterers with access to counseling services and courts with crucial information about the batterer's progress in treatment and his understanding of the impact of his violence on his children.

Unified family courts may be "well-suited" to hear child protection cases.¹²¹ Questions have been raised, however, about how well suited unified family courts are to hearing cases involving domestic violence. Unified family courts depend heavily on alternative dispute resolution methods to attempt to find mutually agreeable solutions that benefit

¹¹⁸ *Id.* at 509–10 ("Therapeutic jurisprudence requires an examination of 'the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.'").

¹¹⁹ Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 *IND. L.J.* 775, 799 (1997). *But see* Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 *FAM. CT. REV.* 435, 441 (2002) (arguing that calling court sanctions "therapeutic" does not change their inherently coercive nature and questioning whether the focus on therapy diverts the court from its responsibility to resolve disputes).

¹²⁰ *But see* Robin Hassler, *The Civil Justice System and Domestic Violence: Evaluation and Benchmarking Requirements*, in *ABA SUMMIT ON UNIFIED FAMILY COURTS: EXPLORING SOLUTIONS FOR FAMILIES, WOMEN AND CHILDREN IN CRISIS G-I* (1998) (stating the Florida Governor's Task Force on Domestic and Sexual Violence's position that "any court, whether it is organized as a completely unified family court system or whether it utilizes only parts of that unified court model, should be structured to have policies, procedures and services that: . . . [h]old the perpetrator accountable for the violence (and will not make excuses for the perpetrator's failure to be responsible)").

¹²¹ *See* Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 *FAM. L.Q.* 147, 147 (1998).

children and strengthen families. But “win/win” outcomes are inappropriate in domestic violence cases; justice requires “holding the abuser accountable for compliance with civil and criminal court orders and subjecting him to constraints, sanctions, and restitution.”¹²² From a batterer accountability perspective, the orientation towards conciliation can become particularly problematic when criminal matters are within the unified family court’s jurisdiction.¹²³ Such obstacles are not impossible to surmount, however, if unified family courts are particularly attentive to concerns about victim safety, justice, prevention, and availability of special resources for domestic violence cases.¹²⁴

III. BATTERER ACCOUNTABILITY IN PRACTICE

The previous section highlighted a variety of ways in which the legal system *could* hold batterers accountable in ways that *could* promote child safety. The next logical question, then, is whether the various components of the legal system will—in practice rather than in theory—sufficiently address the concerns of child protection professionals concerned first and foremost with child safety.

A. Separation and Change

Child protection professionals concerned with keeping children who are exposed to domestic violence safe are looking to keep the children and the abuser apart or for the abuser to change (or ideally, both). How likely are either of these things to happen using the legal system?

The legal system is very good at separating battered women from their abusers,¹²⁵ but has a somewhat spottier record in keeping children

¹²² Billie Lee Dunford-Jackson et al., *Unified Family Courts: How Will They Serve Victims of Domestic Violence?*, 32 FAM. L.Q. 131, 133 (1998).

¹²³ *Id.* at 138; see also Geraghty & Mlyniec, *supra* note 119, at 443–44 (questioning whether a court focused on therapeutic justice will hold offenders appropriately accountable). The child welfare system is increasingly turning to alternative dispute resolution methods as well. See Kelly Browe Olson, *Lessons Learned From a Child Protection Mediation Program: If At First You Succeed and Then You Don’t . . .*, 41 FAM. CT. REV. 480 (2003) (explaining that thirty states currently use some form of alternative dispute resolution in child protective cases). This trend raises similar issues for domestic violence victims.

¹²⁴ Dunford-Jackson et al., *supra* note 122, at 132–33.

¹²⁵ See Goodmark, *Law Is the Answer?*, *supra* note 17, at 19–21; see also PENCE & TAYLOR, *supra* note 7, at 28 (explaining that in the child protection system, “[w]hen a battered woman is successful at obtaining a protection order and ‘keeping him out,’ there is a general assumption that this is a successful outcome,” despite the lack of any additional monitoring of his behavior around his prior children or any other children with whom he might come into contact). *Id.* As Jane Murphy and Margaret Potthast noted in their study of the Maryland courts, however, “a disposition that dealt with domestic

away from their battering parents. In the child welfare context, caseworkers readily remove children from both parents but are less willing to directly confront the batterer by seeking his removal from the home or filing for a protective order on the child's behalf.¹²⁶ Criminal stay-away orders can include provisions prohibiting contact with children, but judges frequently refer those requests to the civil system. Criminal court judges could also order batterers involved with child protection services to comply with CPS mandates as a condition of release, probation, or parole, but such orders are not the norm.¹²⁷ Incarceration for domestic violence is rare, and most domestic violence cases (even those involving felony-level violence) are prosecuted as misdemeanors, making only short sentences (and therefore short absences from the child's life) possible.¹²⁸ Domestic batterers also tend to receive shorter periods of probation than those convicted of batteries against strangers, decreasing the period of time in which oversight through the criminal system is possible.¹²⁹ Relying on the oversight of

violence through a 'no contact' order did not provide the mother with any services or resources to handle herself in the presence of a partner who batters her and/or her children." Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse, and Child Welfare: The Legal System's Response*, 3 J. HEALTH CARE L. & POL'Y 88, 116 (1999).

¹²⁶ PENCE & TAYLOR, *supra* note 7, at 29. The St. Louis County Greenbook Initiative Site is considering implementing a pilot project to use child orders of protection to remove offending parties from the home and monitor compliance with court orders. *Id.* at H-7. This idea of separating parents and children conflicts with the trend in child welfare toward family-centered, strength-based practice and, as a result, may face opposition from social workers schooled in these ideas. The National Association of Public Child Welfare Administrators has provided guidance, however, on how the principles of family centered practice can be safely and effectively implemented in cases involving domestic violence. See NAT'L ASS'N OF PUB. CHILD WELFARE ADM'RS, *supra* note 33, at 21–22. The other issue raised by the idea of separating children and batterers is what to do in those cases where the victim and batterer are committed to continuing their relationship. I have argued in previous articles that the legal system has little to offer these families. See Goodmark, *Law Is the Answer?*, *supra* note 17, at 19–21. The child protective system seems to have little to offer them as well, given the tendency of caseworkers to mandate that victims seek protective orders and enter shelters in such cases.

¹²⁷ In one small study, only 53% of the batterers involved in criminal court while an open child protective services case existed were ordered to comply with child protective services. Mandel and Stevens, *supra* note 9, at 7.

¹²⁸ Barbara J. Hart, *The Legal Road to Freedom*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE (1993), available at <http://www.mincava.umn.edu/documents/hart/legalro.shtml> ("Judges have been reluctant to incarcerate batterers.").

¹²⁹ David E. Olson & Loretta J. Stalans, *Violent Offenders on Probation: Profile, Sentence, and Outcome Differences Among Domestic Violence and Other Violent Probationers*, 7 VIOLENCE AGAINST WOMEN 1164, 1182 (2001); see also Edward W. Gondolf, *Mandatory Court Review and Batterer Program Compliance*, 15 J. INTERPERSONAL VIOLENCE 428, 428 (2000) (describing court response to probation violations as "slow and uncertain.").

probation officers in a time of scarce resources is problematic; judges recognize that maintaining close supervision of batterers can be difficult for “understaffed and overworked” probation departments.¹³⁰ Findings of contempt are rare for failure to comply with court orders, particularly the failure to attend and complete batterer intervention programs.¹³¹

In civil protection orders, grants of visitation are common even in cases involving horrendous violence.¹³² Despite statutory provisions requiring judges to consider domestic violence in their custody and visitation rulings, inappropriate custody and visitation arrangements are common, creating the very real possibility that children will experience violence during child exchanges.¹³³ Convincing courts that batterers should not have joint custody or should have supervised visitation remains difficult despite repeated judicial training on these issues.¹³⁴ Even judges who understand the dynamics of domestic violence still refuse to connect a batterer’s behavior against his partner with his

¹³⁰ Memorandum from the Hon. Michael D. Burton, Circuit Court of St. Louis County, to Batterer Intervention Program Leader/Probation Officer/Prosecutor (Sept. 29, 2003) (on file with the author). Judge Burton addressed this problem by establishing a “compliance docket” for domestic violence offenders, requiring batterers to provide evidence that they are enrolled and participating in required batterer intervention programs. Those who fail to appear for compliance hearings or do not satisfactorily participate in the programs face revocation of probation. *Id.* There is some evidence that such close court monitoring increases batterer compliance. See generally Gondolf, *supra* note 129.

¹³¹ PENCE & TAYLOR, *supra* note 7, at H-11.

¹³² Goodmark, *From Property to Personhood*, *supra* note 95, at 270-71.

¹³³ *Id.* at 270-75. One New York case highlights just how extreme the violence must be before all visitation ceases. In *S. L.A. v. A.A.*, the father sought to modify an order suspending visitation with his children. In denying that motion, the Court explained:

The decision regarding suspension of visitation rendered on December 12, 2000 [Skelos, J.] was a painstaking depiction by the Court of the execrable incidences of domestic violence that the plaintiff and the five children were subjected to. Acts of corporal punishment were vividly detailed, cogently enumerated and aptly characterized as “severe, violent, and totally unjustifiable physical beatings.” Notwithstanding Court intervention and a myriad of services offered to defendant, “court-imposed visitation under the supervision of defendant’s brother and sister-in-law did not prevent the continuation of the abuse.”

Decision of Interest; Court Denies Father’s Motion to Modify Order Suspending His Visitation Rights, 70 N.Y. L.J. 20, 20 (2004) (emphasis added). Apparently, in this case severe, violent and totally unjustifiable abuse of both the mother and children was not sufficient to convince the court to suspend visitation; visitation ended only after the violence continued during court-ordered supervised visitation. *Id.* This case provides some insight into the lengths to which an abuser can go without losing his visitation rights.

¹³⁴ Goodmark, *From Property to Personhood*, *supra* note 95, at 270-75; Lemon, *supra* note 93, at 610-14; Meier, *supra* note 71, at 677.

dealings with his children.¹³⁵ Ironically, when the battered mother follows a child protection worker's mandate to seek protection from the courts, the potential remains for being charged with failure to protect her children from witnessing violence by following the provisions of the orders she was told to secure. These problems persist even in courts, such as domestic violence courts, which are designed to hold batterers accountable for their actions.¹³⁶

As a result, even when batterers are being held accountable for their behavior by the legal system, the potential for exposure to future violence persists because of the system's unwillingness to separate batterers from their children. Changes in batterer behavior, then, must be the primary vehicle for ensuring child safety using the legal system. In addition, change is tied directly to the effectiveness of batterer intervention programs. Convincing the child protection system to focus on batterer accountability using the legal system hinges on the belief that batterer intervention programs work.¹³⁷

Almost every part of the legal system that addresses domestic violence has a mechanism for referring batterers to counseling.¹³⁸ Batterers are ordered to participate in and complete counseling in child welfare case plans, criminal sentences, civil protection orders, and

¹³⁵ Maria Eriksson & Marianne Hunter, *Violent Men as Good Enough Fathers?: A Look at England and Sweden*, 7 VIOLENCE AGAINST WOMEN 779, 786 (2001).

¹³⁶ Goodmark, *From Property to Personhood*, *supra* note 95, at 262–84.

¹³⁷ The term “batterer intervention” is still used to describe anger management programs by some court and child protection professionals. Anger management and batterer intervention programs are not the same, however, and anger management programs are inappropriate for cases involving domestic violence. See MANDEL & WENT, *supra* note 38. Nonetheless, the anger management industry, unlicensed and unregulated, is thriving. A recent article in *Forbes* explains why:

Putting a wife-beater in prison runs several hundred dollars a day—far more than it costs to put the guy on probation while requiring that he accept counseling. So just about all the country's probation departments have lists of known counselors. It's a good deal for the state, also for the spousal abuser, who pays less than \$100 for a weekly one-on-one session, still less for a group session. There also appears to be demand for Internet and telephone counseling. Jennings Anger Management Counseling Practice Corp. of Toronto gets \$125 (Canadian) plus any long-distance charges for a prepaid hour on the phone, perhaps with Kathryn Jennings, Ph.D. whose cheerful blonde visage adorns the Web site. Visa, debit cards and checks accepted.

Dan Seligman, *It's All the Rage*, FORBES, Dec. 8, 2003, at 89. The research in this section focuses on batterer intervention—not anger management—programs.

¹³⁸ About 80% of batterers are referred to batterer intervention counseling by the criminal justice system. Larry Bennett & Oliver Williams, *Controversies and Recent Studies of Batterer Intervention Program Effectiveness*, at http://www.vaw.umn.edu/documents/vawnet/ar_bip/ar_bip.html (last visited Nov. 25, 2003). Referrals can also be made in civil protection order cases, child protection cases, and custody and visitation matters.

custody orders. So while the legal system could do all of the things mentioned in Part II to hold batterers accountable in ways that promote child safety, what the system actually does is refer batterers to counseling at every turn. Is this faith in batterer intervention counseling founded? One expert on counseling batterers in the child protection context answers, "If there is a reasonable basis to assume that many physically abusive men can stop violent behavior if they attend appropriate batterer intervention programs, then making efforts to have these men attend such programs is an important intervention for women and their children."¹³⁹ Studies have looked at a variety of issues around batterer intervention counseling to determine its effectiveness. This body of work is the subject of intense debate.

It is important to note that the majority of batterers referred to treatment never complete their programs.¹⁴⁰ As many as 50% of the men who contact a program for an intake appointment never appear.¹⁴¹ Among batterers mandated to participate, one study found that more than half of the men attended fewer than the required twenty sessions, and almost one-third attended five or fewer.¹⁴² It is possible that as few as 25% of men referred to programs actually complete them.¹⁴³ This failure to complete treatment has serious implications for child protection agencies relying on batterer intervention programs to change batterer behavior, as it is questionable how much change can occur when treatment is not completed.¹⁴⁴

"The effectiveness of batterer intervention programs reported to date has not inspired envy."¹⁴⁵ An analysis of four experimental studies of

¹³⁹ Fernando Mederos, *Child Protection Services, The Judicial System and Men Who Batter: Toward Effective and Safe Intervention* 12 (Feb. 2000) (unpublished manuscript, on file with the author).

¹⁴⁰ Jennifer E. Daly et al., *Predictors of Batterer Program Attendance*, 16 J. INTERPERSONAL VIOLENCE 971, 971 (2001).

¹⁴¹ Edward Gondolf, *Mandatory Court Review and Batterer Program Attendance*, J. INTERPERSONAL VIOLENCE 428 (2000) (citing Edward Gondolf & Robert Foster, *Preprogram Attrition in Batterers Programs*, 7 J. FAM. VIOLENCE 337 (1991)).

¹⁴² Daly et al., *supra* note 140, at 985.

¹⁴³ Gondolf, *supra* note 129, at 428; *see also* NORA K. PUFFETT & CHANDRA GAVIN, *PREDICTORS OF PROGRAM OUTCOME & RECIDIVISM AT THE BRONX MISDEMEANOR DOMESTIC VIOLENCE COURT* 2 (2004) (reporting that half of all defendants failed to complete the program).

¹⁴⁴ *See* EDWARD GONDOLF, *BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES AND RECOMMENDATIONS* 139-40 (2002) (comparing reassault rates of program dropouts with those of men who complete two months or more of a batterer intervention program). *But see* Mederos, *supra* note 139, at 35 ("It is important for child protection and other professionals who intervene with physically abusive men to avoid equating the abuser's attending a program like a BIP with actual change. A sizeable number of men attend such programs, but do not change.").

¹⁴⁵ Larry Bennett & Marianne Piet, *Standards for Batterer Intervention Programs: In Whose Interest?*, 5 VIOLENCE AGAINST WOMEN 6, 9 (1999).

batterer intervention programs found “modest but positive” outcomes, with “small but significant reductions in recidivism” for men in two of the four programs.¹⁴⁶ Recidivism in those studies was determined both by victim report and by official records, and averaged 26% by victim report and 9% by official report over the four studies.¹⁴⁷ A recent study of outcomes in batterer intervention programs in four cities found reassault rates of 35%, 36%, 30% and 27% after completion of the programs, with an average over the four sites of 32%.¹⁴⁸ Note, too, that physical abuse is only one aspect of domestic violence; over the same four sites, researchers found rates of continued controlling behavior of 45%, rates of verbal abuse of 70%, and rates of threats of 43%.¹⁴⁹ Because exposure to any of these types of violence could be harmful to children, all are relevant in determining whether it is appropriate to rely on batterer intervention to safeguard children.¹⁵⁰

Does batterer intervention change batterers’ beliefs about violence or the way in which they react violently? This is a crucial question if the goal in sending batterers to batterer intervention is to change their behavior. Although batterer intervention programs attempt to foster “behavioral changes such as skill building, attitude change, and emotional development,” the question is, “[d]o batterers acquire skills and change their beliefs about women and the acceptability of violence as a result of batterer programs?”¹⁵¹ Studies in Broward County, Florida,

¹⁴⁶ Bennett & Williams, *supra* note 138.

¹⁴⁷ *Id.*

¹⁴⁸ Edward W. Gondolf, *A Comparison of Four Batterer Intervention Systems: Do Court Referral, Program Length, and Services Matter?*, 14 J. INTERPERSONAL VIOLENCE 41, 53 (1999).

¹⁴⁹ *Id.*

¹⁵⁰ Moreover, as Larry Bennett and Oliver Williams note, “A long-standing suspicion of batterer intervention is that men may learn to avoid physical abuse by substituting more economical and legal forms of control such as intimidation, isolation, and surveillance Consequently, ignoring non-physical abuse over-estimates the effectiveness of batterer programs.” Bennett & Williams, *supra* note 138. One question raised by these statistics is: what does child safety mean to child protective services? Is ending physical abuse sufficient to satisfy child protective workers? Or, are they concerned about exposure to any form of domestic violence that could harm a child or trigger trauma based on past events? Battered women frequently comment that once the batterer has used physical abuse to underscore his control, he does not necessarily need to do it again; the threat of future violence is sufficient to regulate her behavior. Although no study exists that controls for the impact of verbal or emotional abuse on children after witnessing physical violence, it would not be surprising if these forms of abuse had the same impact on children. Because I believe that all of these kinds of violence are harmful to children, particularly once they have been exposed to physical violence, I would argue that child protective services should be concerned not just with the cessation of physical violence but with these other forms of abuse as well.

¹⁵¹ *Id.*

and Brooklyn, New York, found that batterer intervention programs did not change participants' attitudes toward domestic violence.¹⁵² Another study suggests that batterers are more likely to use "interruption methods" (leaving the room or the house, taking a "time out," stopping arguments, thinking before acting or using "self talk") rather than discussion or developing respect for women to avoid reassaulting their partners.¹⁵³ The same study suggests that men who change their attitudes towards women are less likely to reassault their partners.¹⁵⁴

Although an unacceptably high number of batterers continue to physically, emotionally, and verbally abuse their partners after completing batterer intervention programs, many men do successfully change their behavior and stop using these forms of violence post-counseling. What characteristics mark these men? Seventy-five percent of men in one small study who described changing their behavior credited taking responsibility for their past behavior, developing empathy, reducing their dependency, and learning to communicate.¹⁵⁵ Men who successfully changed their behavior were able to stop denying and minimizing their behavior and to explain the experiences and/or personal style that contributed to the abuse.¹⁵⁶ These men came to understand how a variety of actions other than physical abuse could be intimidating to their partners, and began to understand their partners' emotional reactions to the abuse.¹⁵⁷ They realized that they were self-sufficient and responsible for their own behavior, that the choices they made were not dependent on their relationships, and that their partners had the right to decide whether to continue in the relationship and, if they chose to continue, to have "emotional autonomy" within the relationship.¹⁵⁸ Finally, men who changed their behavior learned conflict management, resolution, and listening skills, which allowed them to discuss issues with their partners without having the discussions escalate into violent incidents.¹⁵⁹

What lessons can child protection professionals draw from the research on batterer intervention? Making a referral to batterer's counseling is not enough; child protection professionals interested in seeing batterers change must ensure that their clients actually complete

¹⁵² NAT'L INST. OF JUSTICE, DO BATTERER INTERVENTION PROGRAMS WORK? TWO STUDIES I (2003).

¹⁵³ Edward W. Gondolf, *How Batterer Program Participants Avoid Reassault*, 6 VIOLENCE AGAINST WOMEN 1204, 1212-13 (2000).

¹⁵⁴ *Id.* at 1218.

¹⁵⁵ Katreena L. Scott & David A. Wolfe, *Change Among Batterers: Examining Men's Success Stories*, 15 J. INTERPERSONAL VIOLENCE 827, 834 (2000).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 835.

¹⁵⁸ *Id.* at 836.

¹⁵⁹ *Id.* at 837.

counseling. Child protection professionals must also ensure that other issues, like employment and substance abuse, are being addressed; batterers who are employed and who are not abusing drugs or alcohol are more likely to complete treatment.¹⁶⁰ Child protection professionals should attempt to refer batterers to programs that are focused on behavioral change, rather than “interruption methods,”¹⁶¹ and should use the characteristics described above for men who have successfully changed their behavior as benchmarks for measuring and assessing compliance and degree of change. Batterers should be sent to programs that are culturally appropriate.¹⁶² Attending, even completing, a program should not be equated with actual change. “A sizeable number of men attend such programs, but do not change. More than attendance, the real measure of accountability is behavior change both with the partner and with child protection personnel.”¹⁶³

Child protection professionals should partner with programs that address fatherhood issues. Until recently, this would have been a challenge; few batterers programs focused on men’s roles as parents, in addition to their roles as partners.¹⁶⁴ But batterers frequently exhibit a number of parenting deficits.¹⁶⁵ Moreover, some evidence suggests that understanding the impact their violence has on their children can spur batterers to change.¹⁶⁶ Programs that include a fatherhood component

¹⁶⁰ See Daly et al., *supra* note 140, at 973 (summarizing studies).

¹⁶¹ Gondolf, *supra* note 153, at 1205.

¹⁶² See generally Rhea V. Almeida & Ken Dolan–Delvecchio, *Addressing Culture in Batterers Intervention: The Asian Indian Community as an Illustrative Example*, 5 VIOLENCE AGAINST WOMEN 654, 654 (1999) (“[T]he impact of culture is either minimized or dangerously misunderstood by domestic violence practitioners embedded within treatment systems that are guided by domestic—that is, White—centric—theories.”); Edward W. Gondolf & Oliver J. Williams, *Culturally Focused Batterer Counseling for African American Men*, 2 TRAUMA, VIOLENCE AND ABUSE 283, 283 (2001) (stating that “culturally focused counseling should supplement conventional counseling”). The way in which a program is presented may affect the batterer’s successful completion of the program, given the stigma placed on such programs in communities of color. ABIGAIL GEWIRTZ & RESMAA MENAKEM, WORKING WITH YOUNG CHILDREN AND THEIR FAMILIES: RECOMMENDATIONS FOR DOMESTIC VIOLENCE AGENCIES AND BATTERER INTERVENTION PROGRAMS 17 (2004).

¹⁶³ Mederos, *supra* note 139, at 35.

¹⁶⁴ JEFFREY L. EDLESON ET AL., PARENTING IN THE CONTEXT OF DOMESTIC VIOLENCE 23 (2003) (describing the few emerging programs addressing fatherhood issues); see also PENCE & TAYLOR, *supra* note 7, at 33 (noting that a number of men interviewed stated that court ordered batterer groups failed to address parenting issues).

¹⁶⁵ For a lengthy discussion of these issues, see generally BANCROFT & SILVERMAN, *supra* note 98.

¹⁶⁶ David Mandel, A National Study of Batterers’ Perceptions of Their Children’s Exposure to Their Violence and Abuse 57 (June 13, 2003) (unpublished manuscript, on file with author); see also DAVID MATHEWS, RESTORATIVE PARENTING: A STRATEGY FOR

both help men move beyond violence and teach them to nurture their relationships.¹⁶⁷ Linking batterer intervention to fatherhood programming addresses child protection professionals' concerns about batterer accountability and children's further exposure to violence by giving men an understanding of how their violence affects their children and "practical strategies for improving their parenting skills and rebuilding the relationships with their children."¹⁶⁸ David Mathews of the Restorative Parenting program explains:

[T]he ongoing focus is on the men taking responsibility for their own behaviors and exercising self-control. As men look at how their behaviors have affected their children, they are better able to acknowledge the harms they have caused and to hold themselves accountable This program assists men in being realistic about what they can expect from their children, and to realize that their past actions will not be forgotten. The relationship will not be "fixed" by participation in this program, but the men can prepare themselves for the possibility of responsible interaction with their children in the future.¹⁶⁹

Some professionals maintain, however, that incorporating a fatherhood curriculum into existing batterer intervention programs will not give batterers enough of a foundation to rebuild their relationships with their children. Ending violence and repairing relationships with children cannot, in most cases, "be completed during a whole cycle at a [batterer intervention program], no matter how long the program is."¹⁷⁰ The Family Violence Prevention Fund recommends that batterer intervention programs either offer additional support after the batterer completes the standard program or have a strong referral base to fatherhood programs.¹⁷¹ Nonetheless, linking fatherhood programming to

WORKING WITH MEN WHO BATTER AND ARE FATHERS (2003), *available at* <http://endabuse.org> (last visited Mar. 4, 2005) (explaining the impetus behind the Restorative Parenting program in Minnesota).

¹⁶⁷ BUILDING BRIDGES BETWEEN FATHERHOOD PROGRAMS AND PROGRAMS WORKING TO END MEN'S VIOLENCE: AN INTERVIEW WITH JACQUELYN BOGGESS, JERRY TELLO, AND OLIVER WILLIAMS, <http://endabuse.org/bpi/discussion3/Discussion3-long.pdf> (2003) [hereinafter BUILDING BRIDGES].

¹⁶⁸ MATHEWS, *supra* note 166.

¹⁶⁹ *Id.*

¹⁷⁰ JUAN CARLOS AREAN, THE FATHERING AFTER VIOLENCE PROJECT: DEALING WITH A COMPLEX AND UNAVOIDABLE ISSUE, *available at* <http://endabuse.org/bpi/discussion3/V.pdf>.

¹⁷¹ *Id.* The project also suggests an expanded notion of batterer accountability in the context of rebuilding relationships with children. "Fathers involved in a reparation process need to understand that facing the consequences of their behavior may also

batterer intervention make the kind of change that will safeguard children from exposure to further violence far more likely.

B. One Size Fits All?

Batterer intervention can be a powerful force for change. While substantial numbers of men continue their abusive behaviors, many others do curtail their violence. The relevant question for child protection professionals is: who is likely to change? And in addition to the factors discussed above, child protection professionals must consider how the relationship of the father (or father figure) to the child will affect attempts to change his behavior. Child protection professionals are likely to see three kinds of relationships: 1) fathers who care about maintaining their relationships with their children; 2) fathers who don't care about their ties to their children; and 3) boyfriends unrelated biologically to the child but acting as father figures.

1. Fathers Who Care

Fathers who care about maintaining ties to their children should be the easiest batterers for child protection professionals to engage.¹⁷² Because they are vested in their relationships with their children, they should be more likely to cooperate with the child protection agency's requests that they seek counseling and fulfill the other requirements of a service plan. They may also be more willing to comply with requests that will keep their adult victims and children safe in order to avoid having the children removed from the nonabusive parent's care.¹⁷³ The threat of termination of parental rights (the primary "stick" available to judges in child abuse and neglect cases) should be sufficient to motivate these fathers, given the value they place on continuing their relationships with their children. Fathers who care are more likely to be open to learning about and accepting responsibility for the impact of their actions on their children, and should be more motivated to change their behavior using the tools available through batterer intervention and fatherhood

include accepting rejection and the loss of trust, love and even contact with their children." *Id.*

¹⁷² There may be a variety of reasons why fathers want to maintain relationships with their children—because they genuinely love and care about the children, because of pride, because of culture, to maintain control over the mother, and because of anger at the system. Some of these issues are addressed in batterer counseling, others through parenting skills classes that incorporate domestic violence. Building on the positive reasons that men want involvement with their children is key.

¹⁷³ See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 178 (E.D.N.Y. 2002).

programs.¹⁷⁴ Previously violent men who are willing to change their behavior can positively affect their children's development and decrease the effects of their violence on the children.¹⁷⁵

Child protection agencies should aggressively engage with these fathers to implement service plans that include batterer intervention programs and parenting programs specifically for battering fathers. Moreover, these fathers should have supervised visitation with their children from the beginning of the case, with the understanding that as they complete the counseling required by the service plan and demonstrate changed behavior as a result, they will be able to spend unsupervised time with their children. Visitation plans should ensure that adult victims are insulated from their batterers; most supervised visitation programs that handle domestic violence cases have specific requirements for pick-up, drop-off, and interactions with children that should be adopted by child protection agencies.¹⁷⁶ Ultimately, these fathers must understand, and are most likely to understand, that continued violence against their children's mothers will mean the destruction—court-imposed and otherwise—of their relationships with their children. With this group of fathers, child protection agencies are most likely to achieve meaningful batterer accountability—the batterer is more likely to be held responsible for his actions, and children are more likely to be safe from further exposure to violence.

2. *Fathers Who Don't Care*

Fathers who do not care about maintaining relationships with their children will be more difficult for child protection agencies to engage. Termination of parental rights is unlikely to motivate uninterested fathers to change their behavior.¹⁷⁷ Ironically, that fact ultimately makes these fathers better candidates for termination of parental rights; because there is little to motivate them to curtail their violence around their children, there is little reason to provide them with the kinds of services that agencies would provide to fathers willing to work with batterer intervention and other programs. Child protection agencies could screen

¹⁷⁴ See MATHEWS, *supra* note 166 (explaining staff experience that men in batterers' programs "seemed genuinely interested in talking about their children and how their children may have been affected by violence in the home").

¹⁷⁵ GEWIRTZ & MENAKEM, *supra* note 162, at 18.

¹⁷⁶ Goodmark, *From Property to Personhood*, *supra* note 95, at 278–81.

¹⁷⁷ Fernando Mederos warns that the child protective system should not "penalize uncooperative abusers by removing children, since this step traumatizes children and may penalize a partner who has taken appropriate protective measures." Mederos, *supra* note 139, at 30. Removing from the child's life the abusive parent who is unwilling to change, however, remains a viable option.

to determine whether there are other factors likely to motivate these fathers to change their behavior and build on those factors, but ultimately the agencies will have to decide whether devoting dollars to fathers who are uninterested in their children makes sense in a world of diminishing resources for the child protection system—particularly for “front end,” preventative programs.

3. *Unrelated Boyfriends*

Unrelated boyfriends create huge problems for child protection professionals working on cases involving domestic violence. Because they are not biologically related to the children, the child protection agency may feel that its mandate does not extend to working with these men, despite the fact that their violence (and the mother’s “failure to protect” her children from that violence) may have been the reason for initially intervening with the family. Some states are remedying that problem by expanding the child welfare system’s jurisdiction to reach these unrelated boyfriends; others have been unwilling to do so.¹⁷⁸ Moreover, the child protection system’s most potent weapon, termination of parental rights, means nothing to these men, since they are not the children’s fathers. In these cases, termination can only sever the mother’s ties to the children, perpetuating the victim-blaming that led the system to reexamine the way that it handled domestic violence cases in the first place.

The unrelated boyfriend may be devoted to either the children or the children’s mother, and thus may want to change his behavior. In these cases, if the child protection system is truly concerned with limiting the child’s exposure to further violence, it should extend the same kind of programs to unrelated boyfriends as it does to fathers, without regard to the boyfriend’s lack of a biological relationship with the child. However, too often the unrelated boyfriend is unmoved by the possibility that the mother could lose her parental rights as a result of his violence. As such, he is beyond the reach of the tools available to the child protection system. In these cases, child protection agencies are more likely to rely on the legal system’s tools of separation—criminal cases and restraining orders—and place on the mother to choice to either end the relationship or face the consequences. In such cases, child protection agencies must remember that the mother alone cannot stop the violence against her, nor

¹⁷⁸ See *supra* note 53 and accompanying text.

should she be expected to do so. Providing the mother with services and supports is essential if the children are to be shielded from harm.¹⁷⁹

Both the legal system and batterer intervention programs offer some promise for ending children's exposure to violence and holding batterers accountable. But these two options are frequently the beginning and the end of the discussion about batterer accountability. Given the limitations of batterer intervention counseling,¹⁸⁰ and the unwillingness of many parts of the legal system to hold batterers accountable despite having the ability to do so, relying on these two options will be ineffective in a substantial number of cases, leading the child protection system to focus on the battered mother. As a result, it is important to ask what else the child protection system can do to hold batterers accountable.

C. What Else Could Child Protection Do?

1. Beyond the One-Dimensional Batterer

Batterer intervention programs can help men to change their behavior and reinforce that they are responsible for their own violence. But professionals working with batterers who are fathers argue that this kind of counseling does not provide the batterer with the tools he needs to be a better parent—the concern of child protection services. Oliver Williams explains:

In batterers' treatment, I do not think that we value the person because I think it is more about accountability. The fact is that people do have to be held accountable for the bad things that they've done to someone else. It is important to be able to hold people accountable and to confront them. But one of the things you have to do is value the person. Fatherhood programs do this in a way that batterer intervention programs have not.¹⁸¹

Williams and others working with battering fathers argue that while these fathers need skills that will help them stop their violence, they also

¹⁷⁹ For a discussion of the kinds of services and support a victim of violence involved in the child protective system might need, see Goodmark, *A Balanced Approach*, *supra* note 49, at 53–54.

¹⁸⁰ Batterer intervention has come to resemble another staple of child protection case plans: parenting classes. Like batterer intervention, the research on parenting classes does not show that they make much difference in parental behavior, and completing parenting classes alone does not ensure changed parental behavior, a reduced risk of harm to the child, or any elevation of safety for the child. E-mail communication from Bill Jones, Retired Family Court Judge, Eastern District of New York, to Leigh Goodmark, Assistant Professor, University of Baltimore School of Law (June 4, 2004 04:06:00 EST) (on file with author). My thanks to the Hon. Bill Jones for this observation.

¹⁸¹ BUILDING BRIDGES, *supra* note 167.

need to learn nurturance to help them understand how to behave in their relationships with their partners and their children.¹⁸² They need to “deal with the person and with healing and restoration.”¹⁸³ This type of work, they say, does not usually happen in batterer intervention programs, but does occur in fatherhood and other programs for men.

Moving beyond batterer intervention in treating batterers requires child protection professionals to look at the batterer as more than a cause of violence. Engaging batterers on an emotional level—as people rather than criminals—raises flags for some domestic violence advocates, who fear that reinforcing batterers’ responsibility for their violence will be lost in discussions of abusive childhoods, feelings of confusion or self-doubt, or concerns about children. As Ellen Pence has noted, advocates may be so conditioned to look for power and control issues (and so unwilling to acknowledge other causes of violence) that they are only able to find “what we had already predetermined to find.”¹⁸⁴ But moving beyond one-dimensional stereotypes of batterers is essential if the goal is to find ways to make these men positive forces in their children’s lives. Battering parents can’t just be wished away. Some women remain with their partners, others seek to co-parent with them, and even if the adult victim ends the relationship, barring exceptional circumstances, the batterer will remain a part of the child’s life.¹⁸⁵ The deficits in his parenting, and the reasons for those deficits, must be addressed.

For purposes of child protection, batterer accountability means more than holding abusers responsible for their actions, and could even mean more than protecting children from exposure to future violence. Batterer accountability could also mean holding batterers responsible for addressing the effects of their past violence and taking steps to improve their parenting to minimize the long-term damage caused by that violence. To that end, it is essential to engage battering fathers in ways that allow them to confront and work through difficult emotional and relationship issues. Expanding the concept of batterer accountability to include developing healthy parenting skills addresses the concerns of fatherhood advocates about the need to engage batterers on multiple levels, while still remaining attentive to the underlying notion of the

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Ellen L. Pence, *Some Thoughts on Philosophy*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH MODEL AND BEYOND 25 (Melanie F. Shepard & Ellen L. Pence eds., 1999).

¹⁸⁵ Ellen L. Pence & Melanie F. Shepard, *An Introduction: Developing a Coordinated Community Response*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH MODEL AND BEYOND 25 (Melanie F. Shepard & Ellen L. Pence eds., 1999).

batterer's responsibility for his violence that domestic violence advocates fear will disappear in the face of such efforts.¹⁸⁶ Ultimately, increased involvement with batterers as parents will help the legal system assess whether and how to safely reintegrate the batterer into the child's life, a determination currently made with little real information about the batterer's parenting skills.

2. *Assessing the Risk of Future Violence*

Both the child welfare and domestic violence fields have been searching for ways to determine whether perpetrators will continue to be violent towards their victims.¹⁸⁷ Assessing for future risk of harm can help those responding to child abuse and neglect and domestic violence determine whether safety for the victim in an individual case is actually achievable, or whether special precautions need to be taken to safeguard the victim. But some assessments, particularly in the field of child welfare, go beyond simply asking whether there is a future risk of harm to ascertain whether change is possible, and whether change is occurring. Thomas Morton defines assessment within the context of change, as follows:

Functionally, assessment serves four critical decisions. The first is whether change is necessary The second decision concerns what must change and what actions are necessary to promote change The third decision concerns whether or not change is occurring and the intervention is working. The fourth concerns the prognosis for change.¹⁸⁸

This kind of functional assessment of risk of future harm, diagnosis for change, necessary actions, and potential for the future is essential for the child protection system to hold batterers accountable both in the sense of accountability for their actions and in keeping children safe. Determining whether change is necessary and, specifically, what must change—the batterer's behavior and attitudes—sends the message of

¹⁸⁶ For a discussion of successful parenting programs for batterers, see GEWIRTZ & MENAKEM, *supra* note 162, at 21–22.

¹⁸⁷ See, e.g., Amy Karan & Lauren Lazarus, *A Lawyer's Guide to Assessing Dangerousness for Domestic Violence*, 78 FLA. B. J. 55 (2004); Alan W. Leschied et al., *The Empirical Basis of Risk Assessment in Child Welfare: The Accuracy of Risk Assessment and Clinical Judgment*, 32 CHILD WELFARE 527 (2003); LAURA RICHARDS, MPS DOMESTIC VIOLENCE RISK ASSESSMENT MODEL (2003), available at <http://www.met.police.uk/csu/pdfs/AppendixIII.pdf>.

¹⁸⁸ *The Role of Assessment*, *supra* note 111, at 26.

responsibility for actions. Deciding how to promote change in the batterer's behavior and attitudes, whether that change is occurring, and whether the children will be safe around the batterer in the future gives child protection services the reassurance it needs that the batterer is being held accountable in a way that keeps children safe.

While tools to determine the level of risk (from standard to lethal) to the adult victim of domestic violence exist, no tool has been developed that looks specifically at the level of risk posed for children in families experiencing domestic violence.¹⁸⁹ Child welfare agencies are doing a far better job of screening for domestic violence,¹⁹⁰ but few agencies translate that information into an assessment of what the violence means for the children in those families. As a result, case plans offer the default service for batterers—batterer intervention programs (where available)—but do not address whether attending such programs, or participating in any other service mandated by the agency, will actually increase child safety. Child protection workers, domestic violence advocates and child witness to violence specialists should work together to develop a functional assessment tool that will screen not only for whether the batterer continues to pose a threat to the adult victim, but also whether and what kind of threat he potentially poses to the child. Here's the distinction: while the batterer's continued verbal abuse might pose a minimal threat to an adult victim, the child might be unable to separate this verbal abuse from the physical abuse he previously witnessed. While current assessment tools might find that the adult victim has little to fear from the batterer, the child's well-being could be compromised by continued exposure to him. Without being able to assess the threat to the child along with the threat to the adult, child protection services cannot be sure that the second prong of their batterer accountability test—child safety—is being satisfied.

¹⁸⁹ Lien Bragg has suggested a number of factors that child protective workers should examine to determine whether adult domestic violence poses a safety threat to children. Those include factors that increase the child's vulnerability to physical abuse and/or injury where adult domestic violence exists; factors that indicate a high level of dangerousness posed by the batterer; factors that influence recidivism by the batterer; and factors that moderate children's responses to adult domestic violence. Lien Bragg, *Adult Domestic Violence and Child Maltreatment: The Effectiveness of Intervention Methods to Reduce Batterer Generated Safety Threats in Child Protection Cases 23–24* (2002) (on file with the author).

¹⁹⁰ The protocols developed by many state child welfare agencies include screening tools for domestic violence. *See, e.g.*, MINNESOTA DEP'T OF HUMAN SERVS., *supra* note 36, at 9; OREGON DEP'T OF HUMAN SERVS., *supra* note 73, at 53–55.

3. *Community Accountability*

The child protection system does not operate in a vacuum. Its values and standards are shaped by the values and standards of the surrounding community. Community expectations about when a child should be removed from a home or when the agency has taken appropriate action are manifested most visibly in cases of child deaths, with newspapers, community leaders, and private citizens all commenting on whether the agency has performed in an acceptable manner. But community accountability should work both ways: not only should the agency be held accountable to the community, the community should set standards that make the agency's job more manageable. The agency, in turn, should reflect those standards in its dealings with its clients.

Communities, and child protection services agencies, as members of communities, must create a culture of zero tolerance for domestic violence. This kind of culture is not intended to demonize batterers or victims—zero tolerance is focused on the behavior, not the individuals involved. A zero tolerance culture sends the message not only that family violence is unacceptable, but also that services exist to help families who need assistance. It also teaches batterers about what their violence does to their victims—adult and child—and offers them help in developing non-violent alternatives. While a zero tolerance culture holds batterers accountable for their violence, the central focus is not blame, but changing behavior.

Child protection services agencies can embrace a zero tolerance culture by being clear about who is perpetrating violence and who is being victimized by violence in case plans, in staff meetings, in interactions with clients, and in court proceedings. While child protection services workers will, ideally, work with both parents in a case involving domestic violence, workers must be clear that the batterer's violence is the reason for the intervention and refrain from holding the victim responsible when it is easier to do so. Child welfare agencies can provide counseling resources for batterers in their offices, post signs announcing the zero tolerance policy, and develop policies to address domestic violence in the workplace.¹⁹¹

Sending a clear message that perpetrating domestic violence (as opposed to “engaging in” or “exposing a child to”)¹⁹² is not tolerated in the child welfare system should spill over into those components of the

¹⁹¹ My thanks to Lien Bragg for these creative ideas about how CPS can embrace a zero tolerance culture.

¹⁹² *Nicholson v. Williams*, 203 F. Supp. 2d 153, 250–52 (E.D.N.Y. 2002); see also Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 109–10 (2002).

legal system that the child welfare system touches. When child protection workers make it clear that batterers are responsible both for their behavior and for the impact of that behavior on child safety, other parts of the system working with child protection may incorporate these principles into their dealings with batterers as well, fostering a greater sense of community accountability within the legal system. That message, in turn, will be communicated to the wider community, telling batterers from all sides that their violence, and the effect of that violence on their children, is their responsibility. Until communities, and community entities like child protection services and the legal system, are consistently clear that perpetrating domestic violence is unacceptable and has real ramifications, batterers will have no incentive to change.

IV. CONCLUSION

“We have a bucket full of tools but we just keep jumping in with the same old worn-out jigsaw.”¹⁹³ This comment, directed generally at child protection services efforts in domestic violence cases, certainly applies to the question of how the child protection system holds batterers accountable. The “worn-out jigsaws” of the legal system as it currently operates and the limited success of batterer intervention counseling are not cutting through the problem of how to hold batterers accountable for their actions in a way that promotes child safety. Until we improve the operation of the legal system and begin to look beyond that system for other ways by which to hold batterers accountable, the child welfare system will continue to default to victim-blaming, and we will have made no progress at all in truly changing the nature of the child protection system’s response to cases involving domestic violence.

¹⁹³ PENCE & TAYLOR, *supra* note 7, at 47.

