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Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence

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INTRODUCING THE CONSTRUCT OF THE JURY
INTO FAMILY VIOLENCE PROCEEDINGS AND
FAMILY COURT JURISPRUDENCE

*Melissa L. Breger**

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INTRODUCTION

The jury is a fundamental component in the implementation of justice in America. Notably, Thomas Jefferson heralded the jury as more essential and critical to American justice than the right to vote.¹ Because the jury trial is central to the community's "vision of the legal system . . . [it] is important both symbolically and substantively."²

In many types of proceedings, however, a litigant does not have the option for a jury. Illustratively, in family violence proceedings³ in Family Court,⁴ the majority of the fifty states do not permit juries, and such a right has never been addressed by the United States Supreme Court.

The core premise of this Article proposes that litigants in family violence proceedings should be afforded the option of a jury trial in the adjudicatory phase of: (1) civil order of protection proceedings, and (2) child protective proceedings, particularly those cases involving physical violence or allegations of domestic violence.

This Article draws upon both the theory of and research on procedural justice holding that litigants often focus on the appearance of fairness rather than on the actual outcome.⁵ Thus, when litigants are

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1. John Guinther, *THE JURY IN AMERICA* xiii (Facts on File Publications, 1988). The right to a trial by jury in criminal cases is enunciated twice in the United States Constitution and has long been considered an essential right. *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. The right to a trial by jury in civil cases does not have the same status in American jurisprudence, in part because it was never incorporated against the states. U.S. CONST. amend. VII. This Article will not delve into Seventh Amendment issues, as it does not attempt to argue that a jury trial in Family Court proceedings is a fundamental or constitutional right.
 2. Janet Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1126 (1991); *see also* Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 439 (2002) ("If we believe[d] that judges were perfect dispensers of justice, then we would not need a jury system at all.")
 3. For the purposes of this Article, the term "family violence" includes what is commonly referred to as domestic violence or intimate partner violence, as well as violence between siblings, parents, children, and other family members. Although the dynamics of family violence differ when the violence is between intimate partners, as compared to violence between siblings, children, and parents, the power and control and the effects of violence are sufficiently similar to discuss both types of violence together for the purposes of this Article.
 4. Other versions of Family Courts may include Probate Courts, Juvenile Courts, or Dependency Courts.
 5. ALLEN E. LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 2 (Plenum Press, 1988); JOHN THIBAUT & LAURENS WALKER, *Procedural Justice: A Psychological Analysis* 1-3, 121-22 (Lawrence Erlbaum ed., 1975); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 71-74 (Yale Univ. Press, 1990); Raymond Paternoster *et al.*, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse*

able to choose the modality of fact-finding, they may be more accepting of the legal process, even if the outcome is not favorable to them.⁶ Allowing the option of a jury, even if not exercised, may dramatically improve the perceptions of litigants and may affect the legitimacy and longevity of case outcomes.

Family violence proceedings are particularly poised for the jury trial option for two main reasons. First, due to the personally consequential issues being decided in family violence cases and the resulting need for durable decisions issued with neutrality, litigants' satisfaction with the legal process is critical. Legitimacy, while indisputably important in all aspects of law, is especially crucial in the context of family violence matters, where the litigants are connected to each other by familial ties that will endure long after the litigation is completed. Hence, the need for faith in a just and impartial court system for families and children is paramount.⁷

Second, in many family violence proceedings the issues are cyclical and repetitive in nature. Thus, a single jurist has a long-standing role in adjudicating issues involving the same litigants in numerous proceedings.⁸ When critical family issues and life-altering decisions are at stake, even the mere perception of bias can undermine a litigant's faith in the justice system, the legitimacy of a given decision, and the willingness of that litigant to comply with that decision.⁹ Family Court judges hear cases with some of the most far-reaching consequences in the lives of litigants. A jury option in family violence cases will enhance the perception of unbiased decision-making and consequently may improve compliance with the resulting court orders.

Assault, 31 LAW & SOC'Y REV. 163, 166–71 (1997). A recent analysis of an earlier set of data showed that an abuser's sense of fair treatment has a statistically significant effect upon further recidivism. See Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM & MARY L. REV. 1843, 1876–80 (2002) [hereinafter Epstein, *Tempering*]; Roger K. Warren, *Public Trust and Procedural Justice*, 37 CT. REV. 12, 15 n.10 (2000).

6. LIND & TYLER, *supra* note 5, at 34–35.
7. "Perceptions of unfair treatment could weaken one's stake in conformity; fair treatment could strengthen it." Epstein, *Tempering*, *supra* note 5, at 1878.
8. Geraghty & Mlyniec, *supra* note 2, at 438–39; Victor Eugene Flango & H. Ted Rubin, *How Is Court Coordination of Family Cases Working?*, 33 JUDGE'S J. 10, 15 (1994). Some scholars have argued that this approach can be problematic, because some judges believe that women ask for orders of protection in order to gain an advantage in another case. See JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 55 (1999) (debunking the myth that victims try to gain leverage in other cases by asking for orders of protection).
9. See *supra* note 5 and accompanying text.

Throughout this Article, the term survivor will be utilized instead of victim when referring to those who have been abused, and a broader definition of family violence will be utilized as explained earlier.¹⁰ This Article will also refer to the survivor of violence in the female voice with the male pronoun for the perpetrator. Of course, domestic violence is prevalent in same-sex partnerships and also includes male survivors of female abuse.¹¹ Yet throughout history, and according to actual statistical data, women have been disproportionately affected by family violence as survivors and/or as primary caretakers of their children.¹²

Part I of this Article mentions briefly the federal constitutional right to a jury in the context of criminal cases and its foundations and then addresses the evolution of Family Courts across the United States. It also outlines the arguments both for and against jury trials in Family Court cases, arguments historically addressed in the context of juvenile delinquency cases. In addition, Part I delineates those states which actually permit jury rights in Family Court proceedings. Part II of this Article considers family violence dynamics in the context of the legal system and then addresses litigants' notions of fairness on a theoretical level. Part II focuses exclusively on the right to a jury trial in civil order

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10. See *supra* note 3; see also Edward Gondolf & Ellen Fisher, *The Survivor Theory*, in NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* 80–91 (2d ed., 2001); Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 *ALB. L. REV.* 371, 379–80 (2003). For further discussion of labeling survivors of domestic violence as victims, see Mary A. Lynch, *Designing a Hybrid Domestic Violence Prosecution Clinic: Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices*, 74 *MISS. L.J.* 1177, 1197 (2005); see also Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 *UMKC L. REV.* 33, 33 (2000).
 11. See Alexander Detschelt, *Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation*, 12 *KAN. J.L. & PUB. POL'Y* 249, 249 (2003); see also Carla M. Da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 *S. CAL. REV. L. & WOMEN'S STUD.* 251, 267–72 (1994); Kathleen Finley Duthu, *Why Doesn't Anyone Talk About Gay and Lesbian Domestic Violence?*, 18 *T. JEFFERSON L. REV.* 23, 23–24 (1996); Ruthann Robson, *Lavender Bruises*, 20 *GOLDEN GATE U. L. REV.* 567, 567 (1990).
 12. Perhaps one could argue that there is inherent discrimination against women and children by denying juries in those proceedings which affect their lives most. See generally Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 *S.C. L. REV.* 577, 584–85 (1997); Gary J. Maxwell, *Women and Children First . . . Why not Build Enough Lifeboats? News from the Front: A Report on the Honolulu Conference "Two Systems—One Family, Bringing the Child Abuse and Domestic Violence Communities Together"* (March 23–24, 2000), 10 *COLUM. J. GENDER & L.* 33, 39 n.22 (2000); Kristin L. Taylor, Note, *Treating Male Violence Against Women as a Bias Crime*, 76 *B.U. L. REV.* 575, 588–90 (1996).

of protection cases and child protective proceedings and does not propose the right to a jury in custody or other types of Family Court cases. Finally, Part III examines potential practical obstacles faced as a result of introducing the right to a jury in family violence proceedings. Ultimately, this Article proposes that a limited jury option be afforded at the fact-finding stage in two types of family violence cases.

I. THE HISTORICAL EVOLUTION AND RESISTANCE TO THE JURY OPTION IN FAMILY COURT JURISPRUDENCE

A. The Constitutional Right to a Jury in Criminal Cases

The founders of the English law have, with excellent forecast, contrived that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion.¹³

The notion of a jury dates back to ancient Greek and Roman times¹⁴ and was continued by early British rulers before it was introduced into the American legal system.¹⁵ Today, the right to a jury is a quintessential aspect of the United States' justice system¹⁶ and Constitution.¹⁷

The jury has been labeled an "inherent and invaluable right,"¹⁸ as well as a "great and inestimable privilege" and entitlement.¹⁹ Juries serve as mechanisms for educating the public, and at the same time they

13. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–50 (Cooley ed., 1899).

14. See generally Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 956–58 (2003); James B. Thayer, *The Jury and Its Development*, I., 5 HARV. L. REV. 249, 249–73 (1892); John T. Buckley, *Tradition with Deep Roots*, N.Y. L. J. 9 (col. 4) (May 2, 2005).

15. See generally *Duncan v. Louisiana*, 391 U.S. 145, 151–52 (1968); W. FORSYTH, HISTORY OF TRIAL BY JURY 1–5 (James Appleton Morgan ed., Cockcroft & Company 2d ed. 1878) (1852); Hoffman, *supra* note 14, at 958–65; see generally James B. Thayer, *The Jury and Its Development*, II., 5 HARV. L. REV. 295, 295–319 (1892); James B. Thayer, *The Jury and Its Development*, III., 5 HARV. L. REV. 357, 357–88 (1892).

16. See, e.g., *Duncan*, 391 U.S. at 149.

17. See *supra* note 1.

18. *Duncan*, 391 U.S. at 152.

19. *Id.*

“bestow legitimacy upon the adjudicatory process.”²⁰ Jurors act as a collective decision-making group²¹ and infuse a fresh perspective into each case. Despite the long-standing foundations of juries, which have “weathered criticism and attack, always to survive and to be cherished,”²² juries have been resisted in the Family Court setting.

B. The History and Overview of the Family Court System

Arguably, some of the most critical, delicate, and weighty legal issues are handled in Family Courts across the nation. In these courthouses, families' fates and futures are shaped every day. These Courts decide issues such as whether a child has been abused by a parent or caretaker; whether a child has been neglected; whether a protective order should be issued on behalf of one family member against another; whether a child should be tried as a juvenile or as an adult, and whether that child's liberty should be curtailed; whether a child is in need of more supervision than is available at home; whether the child's parents can be identified, and, if so, what their custodial rights and financial obligations are to that child; whether a child should live with a parent or a guardian; whether a permanent plan outside of the home is in the child's best interests; or whether or not parental ties to a child should be forever severed.

In 1899, Illinois created the first Juvenile Court in the United States.²³ The Court was created to provide an ameliorative and non-structured court system for juvenile delinquents who would otherwise be charged as adult criminals.²⁴ In 1914 in Ohio, the first official Family Court was formed, combining both juvenile court and domestic rela-

20. Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 470 (1997).

21. LIND & TYLER, *supra* note 5, at 91–92.

22. See VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 251 (2001).

23. See, e.g., CLEMENS BARTOLLAS, JUVENILE DELINQUENCY 12 (Macmillan Publishing 2000); ROBERT M. MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 130 (1973); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 101 (1977); Kerin C. Wolf, *Justice By Any Other Name: The Right to a Jury Trial and the Criminal Nature of Juvenile Justice in Louisiana*, 12 WM. & MARY BILL RTS. J. 275, 278–79 (2003).

24. MENNEL, *supra* note 23, at 130–32; Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 39–40 (2003); Wolf, *supra* note 23, at 278–79; Korine L. Larsen, Comment, *Wish Liberty and Juvenile Justice for All: Extending the Right to a Jury trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 836, 841–43 (1994). But see PLATT, *supra* note 23, at 36–43 (arguing that the move toward juvenile court was more about the elite's social control over immigrant and minority youth).

tions matters.²⁵ Thereafter, a national movement integrated many Juvenile and Family Courts as states recognized the intersection between juvenile delinquency, child dependency, child support, and divorce.²⁶

By 1925, each state had some type of Juvenile Court, except Maine and Wyoming.²⁷ Today, every state in the United States has at least one Juvenile or Family Court,²⁸ as do almost all industrialized countries.²⁹ These courts have different titles, such as Dependency Courts, Family Courts, Juvenile Courts, Probate Courts, and the like, yet their genesis and purposes are largely the same; all were created to attend to the unique nature of childhood and family issues. Some states have a number of these courts, overlapping in powers, while other states have merged all child and family related issues into one court.³⁰

Bifurcated proceedings, akin to adjudication and sentencing in criminal cases, or liability and damages in civil cases, remain a vestige of many Family Courts today.³¹ In New York, for instance, every type of Family Court proceeding is bifurcated,³² with the fact-finding phase preceding the disposition.³³

The Family Courts, initially designed to protect children and families rather than to punish,³⁴ eventually expanded their role beyond

25. MENNEL, *supra* note 23, at 132.

26. MENNEL, *supra* note 23, at 150; PRESTON ELROD & R. SCOTT RYDER, *JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE* 236 (1999); Willis B. Perkins, *Family Courts*, 17 MICH. L. REV. 378, 378–81 (1919).

27. MENNEL, *supra* note 23, at 130–32; ELROD & RYDER, *supra* note 26, at 115.

28. See Ainsworth for a listing of the statutes designating family and juvenile courts in each state. Ainsworth, *supra* note 2, at 1083 n.1; *see also* ELROD & RYDER, *supra* note 26, at 233.

29. See Ainsworth for a listing of other countries which have family and juvenile court systems. Ainsworth, *supra* note 2, at 1084 n.2.

30. See ELROD & RYDER, *supra* note 26, at 233–34.

31. See generally N.Y. Family Court Act § 111 *et seq.* (McKinney 2006); *In re Snyder*, 566 N.W.2d 18, 20 (Mich. Ct. App. 1997) (acknowledging the “clear bifurcation between adjudicative *trials* and dispositional *hearings*”); *In re Oakes*, 220 N.W.2d 188, 190 (Mich. Ct. App. 1974) (acknowledging the rule of bifurcation).

32. See N.Y. Family Court Act § 111 *et seq.*

33. Disposition has been defined as the “final settlement of a matter.” *In re Rudolph M.*, 664 N.Y.S.2d 399, 401 (Fam. Ct. 1997) (citing *In re Carmelo E.*, 57 N.Y.2d 431, 471 (1982)). It addresses the outcome and relief sought by Petitioner. If the factual basis of a petition has been substantiated, the Court then proceeds to the disposition.

34. The state legislative history in New York, for example, states that its purpose for child abuse and neglect proceedings is to “protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being.” N.Y. Family Court Act § 1011. Likewise, New York law codifies that Family Court Orders of Protection are to be issued to “stop the violence, end the family disruption and obtain protection,” not to mete out punishment. *Id.* at § 812(2)(b); *see also* MENNEL, *supra*

parents patriae,³⁵ or substitute parent. The overall tenor of the Juvenile and Family Courts remained informal and even benevolent; yet over time this informality garnered criticism. For example, as the United States Supreme Court noted in *In re Gault*:

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.³⁶

Over time, the paternalistic role of Family Courts receded and gave way to a more formalistic role, as many landmark United States Supreme Court cases granted parents and juveniles a panoply of procedural and substantive due process rights.³⁷

C. *The Evolution of and Resistance to the Jury Option in Family Court*

Perhaps because jury trials invoke notions of punishment, legislatures historically deemed juries inapplicable to Family Courts, as the

note 23, at 130–32; Larsen, *supra* note 24, at 841–43; Wolf, *supra* note 23, at 278–79.

35. Literally, “parent of the country.” See *In re Gault*, 387 U.S. 1, 17 (1967); MENNEL, *supra* note 23, at 130–32; Larsen, *supra* note 24, at 841–42; Hon. Patrick R. Tamilia, *In Search of Juvenile Justice: From Star Chamber to Criminal Court*, 29 AKRON L. REV. 509, 509 (1996); Frank E. Vandervort & William E. Ladd, *The Worst of All Possible Worlds: Michigan’s Juvenile Justice System and International Standards for the Treatment of Children*, 78 U. DET. MERCY L. REV. 203, 211–12 (2001); Wolf, *supra* note 23, at 278.

36. *In re Gault*, 387 U.S. at 18–19.

37. Although the Supreme Court explicitly did not grant the right to a jury trial in juvenile delinquency cases, see *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), and did not grant the absolute right to an attorney in a termination of parental rights case, see *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Court has granted a number of other rights to parents and juveniles. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); see also *Kent v. United States*, 383 U.S. 541, 557 (1966); *In re Gault*, 387 U.S. at 57.

purpose of such Courts was treatment,³⁸ and the safety of children and families was heralded as the paramount concern.³⁹

1. Juvenile Delinquency Proceedings and the Jury

In juvenile delinquency cases, jury trials are much more common than in any other type of Family Court proceeding in the United States, yet they are still somewhat rare. The topic of jury trials in juvenile delinquency matters has been ably argued by many lawyers, scholars, and criminologists,⁴⁰ and this Article will not endeavor to re-argue the issue. Yet, the arguments for and against jury trials in juvenile delinquency matters serve as a useful backdrop to analyze whether a right to a jury option is suitable for family violence proceedings. Juvenile delinquency cases are quasi-criminal⁴¹ in nature in that the same acts would be considered crimes if perpetrated by adults.⁴² Similarly, in civil domestic

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38. Ainsworth, *supra* note 2, at 1101 (citing *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905) (“Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it.”)).
39. Today, some domestic violence advocates or child advocates might argue that another purpose of a family violence proceeding should be to hold the batterer or child abuser accountable, whether it is through Criminal Court or Family Court. *See, e.g.*, LUNDY BANCROFT, *WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN* 291–313 (G.P. Putnam’s Sons 2002); David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 176, 196 (Kersti Yllo & Michele Bograd eds., 1988); Maxwell, *supra* note 12, at 39.
40. *See, e.g.*, Susan E. Brooks, *Juvenile Injustice: The Ban on Jury Trials for Juveniles in the District of Columbia*, 33 U. OF LOUISVILLE J. OF FAM. L. 875, 875 (1994–95); Buss, *supra* note 24, at 51; Laura Cohen, *Jury Trials in Juvenile Proceedings*, 1998 *INDIGENT DEFENSE* 8, 8–9 (1998); Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 *WAKE FOREST L. REV.* 553, 556 (1998); Sandra M. Ko, Comment, *Why Do They Continue To Get the Worst of Both Worlds? The Case for Providing Louisiana’s Juveniles With the Right to a Jury in Delinquency Adjudications*, 12 *AM. U.J. GENDER SOC. POL’Y & L.* 161, 163–64 (2004); Larsen, *supra* note 24, at 836; Jaime L. Preciado, *The Right to a Juvenile Jury Trial in Wisconsin: Rebalancing the Balanced Approach*, 1999 *WIS. L. REV.* 571, 575 (1999); Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today’s Juvenile Court*, 76 *JUDICATURE* 230, 231 (1993); Wolf, *supra* note 23, at 277–78.
41. *In re Gault*, 387 U.S. at 23–24; *see also* Justice Ed Kinkeade, *Appellate Juvenile Justice in Texas—It’s a Crime! Or Should Be*, 51 *BAYLOR L. REV.* 17, 18 (1999) (recognizing the quasi-criminal nature of juvenile justice proceedings).
42. *See* Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 *ARK. L. REV.* 777, 777–79 (2002); Barry C. Feld, *Juvenile and Criminal Justice Systems’ Responses to Youth Violence*, 24 *CRIME & JUST.* 189, 189–90 (1998); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 *MINN. L. REV.* 691, 692–93 (1991).

violence cases and child protective cases involving alleged violence, the cases are predicated upon offenses which, if charged in criminal court, would be considered crimes.⁴³ The facts and circumstances are often severe with serious outcomes.⁴⁴ As Professor Winick states in the context of therapeutic jurisprudence, “the special repetitive nature of domestic violence and of the harm it brings warrants separate treatment.”⁴⁵ For these reasons and others stated in this Article, family violence proceedings are precisely those cases where litigants must maintain faith in the integrity of a bias-free court system.

Within the context of juvenile delinquency cases, the United States Supreme Court stated in *In re Winship* that “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.”⁴⁶ A few years earlier in the landmark case of *In re Gault*,⁴⁷ the Supreme Court afforded many of the constitutional safeguards and provisions in adult criminal trials to juveniles in delinquency proceedings under the Due Process Clause of the Fourteenth Amendment.⁴⁸

With respect to the specific issue of a jury, the Supreme Court held in *McKeiver v. Pennsylvania*⁴⁹ that trial by jury is not constitutionally required for juveniles, because the Sixth Amendment does not apply to juvenile proceedings, as such cases are not “criminal prosecution[s]” and are consequently outside the ambit of the Sixth Amendment.⁵⁰ Indeed, the *McKeiver* Court was very concerned that juries might irrevocably alter juvenile court proceedings.⁵¹ The Court, holding that the Constitution does not require jury trials in delinquency proceedings, left the

43. Some courts have even held that the civil legislative label is misplaced in civil order of protection cases and violations thereof. See *People v. Wood*, 742 N.E.2d 114, 117 n.3 (N.Y. 2000); *People v. Runyon*, 195 Misc. 2d 185, 186 (N.Y. App. Term 2002).

44. See, e.g., MICH. COMP. LAWS § 712A.19b(3)(k) (2005); N.Y. Soc. SERV. L. § 384-b (McKinney 2005); Adoption and Safe Families Act, 42 U.S.C. 670 *et seq.*

45. Winick, *supra* note 10, at 37.

46. *In re Winship*, 397 U.S. 358, 365–66 (1970).

47. *In re Gault*, 387 U.S. 1, 31–59 (1967). Some might argue that the idea of Family Courts being more therapeutic than adversarial is a theoretical construct alone. In other words, a benevolent court is no more the reality of Family Courts today than is *Gault*'s reference to a “kangaroo court.” See *id.* at 28. Family Court is just that—a court. All of the benefits and all of the downfalls of a judicial system exist therein.

48. The *Gault* Court found that a number of rights were applicable to juveniles, including: the right to notice of the charges, *id.* at 33; the right to counsel, *id.* at 36; the privilege against self-incrimination, *id.* at 55; the rights of confrontation and sworn testimony of witnesses for cross-examination, *id.* at 57.

49. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

50. *Id.* at 541–45.

51. *Id.* at 547.

option to the states.⁵² Nonetheless, the Court cautioned “[t]here is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.”⁵³ The Court also held that “if the jury trial were injected into the juvenile court system as a matter of right—it would bring with it into the system the trial track delay, the formality and the clamor of the adversary system, and possibly the public trial.”⁵⁴ The Supreme Court of Pennsylvania in *Terry* added: “[T]he juvenile court judge would of necessity have to concern himself much more with the technicalities of proper procedure, and would have a vastly reduced capacity to guide and mold the hearings.”⁵⁵

Some states subsequently implemented a right to a jury trial in juvenile delinquency proceedings, but the majority of states did not.⁵⁶ As of 2006, fewer than twenty states allow jury trials in juvenile delinquency cases;⁵⁷ some of these states only offer the option of a jury in limited situations.⁵⁸

The principal arguments against juries in juvenile delinquency cases include: (1) the jury will make criminal trials and juvenile trials synonymous, thereby allowing more stringent punishments;⁵⁹ (2) the

52. *Id.*

53. *Id.* at 545.

54. *Id.* at 550.

55. *In re Terry*, 265 A.2d 350, 355–56 (Pa. 1970).

56. Larsen, *supra* note 24, at 856–57; Sanborn, *supra* note 40, at 233.

57. *See, e.g.*, ALASKA STAT. § 47.12.110 (2004); MASS. GEN. LAWS ANN. ch. 119, § 55A (West 2005); MICH. COMP. LAWS ANN. § 712A.17(2) (West 2005); N.M. STAT. ANN. § 32A-2-16 (LexisNexis 2005); TEX. FAM. CODE ANN. § 54.03 (Vernon 2004); W. VA. CODE § 49-5-6 (2005); WYO. STAT. ANN. § 14-6-223(c) (2004). For statistics from 1998, see Cohen, *supra* note 40, at 8.

58. *See, e.g.*, ARK. CODE ANN. § 9-27-325 (2005); COLO. REV. STAT. § 19-2-107 (2005); IDAHO CODE ANN. § 20-509 (2005); 705 ILL. COMP. STAT. 405/5–820 (2005); 705 ILL. COMP. STAT. 405/5-815 (2005); KAN. STAT. ANN. § 38-1656 (2005); S.B. 261, 81st Leg., Reg. Sess. (Kan. 2006); MONT. CODE ANN. § 41-5-1502 (2003); R.I. GEN. LAWS § 14-1-7.3 (2006); *In re Jeffrey C.*, 781 A.2d 4 (N.H. 2001); *State v. Johnson*, 574 S.W.2d 739 (Tenn. 1978); *State v. Jackson*, 503 S.W.2d 185 (Tenn. 1973); *Arwood v. State*, 463 S.W.2d 943 (Tenn. 1970); Minn. R. Juv. Delinquency P. 19.09, available at <http://www.courts.state.mn.us/rules/juvenile/JUVDEL.doc> (last visited August 27, 2006)). Legislation is pending in Wisconsin as well. H.R. 110, 97th Leg., Reg. Sess. (Wis. 2005).

59. *See* David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 646 (2002); Ko, *supra* note 40, at 175; Sara E. Kropf, *Overturning McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 GEO. L.J. 2149, 2169–70, 2174

informality of Family Court will vanish;⁶⁰ and (3) these trials should be private and closed to the public.⁶¹ However, even without the presence of a jury, juvenile trials have become more formal, while punishments have become increasingly more severe for juveniles.⁶² Notably, this phenomenon has occurred across the nation and is not limited to just those states allowing juries. Thus, one cannot conclude that there is an established causal connection between the introduction of juries in juvenile delinquency cases and the concerns initially raised by opponents.

2. Termination of Parental Rights Proceedings and the Jury

Although a rarity, some states afford the right to a jury to parents facing termination of their parental rights.⁶³ As of 2006, fewer than ten states allow juries in termination cases.⁶⁴ Termination of parental rights proceedings are often referred to as the Family Court equivalent of the

(1999)(challenging some of the assertions by the *McKeiver* court in today's juvenile court system).

60. However, these ideals are not the reality of the current juvenile system. See Kropf, *supra* note 59, at 2166–70. There is an impression by some that Juvenile and Family Courts have relaxed evidentiary standards and relaxed standards of professional conduct even though this is not always the case.
61. See Danielle R. Oddo, Removing Confidentiality Protections and the “Get Tough” Rhetoric: What Has Gone Wrong With the Juvenile Justice System?, 18 B.C. THIRD WORLD L.J. 105, 111–12 (1998).
62. See Jeffrey A. Butts, *Speedy Trial in the Juvenile Court*, 23 AM. J. CRIM. L. 515, 516–17 (1996); Cohen, *supra* note 40, at 8–9; Tanenhaus & Drizin, *supra* note 59, at 642–43; John Gibeaut, *A Jury Question: Jurors Should Judge Youths in Juvenile Court, Some Say*, 85 A.B.A. J. 24, 24–25 (1999); Larsen, *supra* note 24, at 845–46; Oddo, *supra* note 61, at 113–16; Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 805–09 (2005); Wolf, *supra* note 23, at 275–76.
63. The right to a jury in termination of parental rights proceedings is beyond the scope of this Article; it is a complex, nuanced topic to be addressed in a future article.
64. Some states with this right include Rhode Island, Texas, Wisconsin, Wyoming, and Oklahoma. R.I. GEN. LAWS § 14-1-47 (2005); TEX. FAM. CODE ANN. § 105.002 (Vernon 2004); WIS. STAT. § 48.31 (2005); WYO. STAT. ANN. § 14-2-312 (2004); Gray v. Upp, 943 P.2d 592 (Okla. 1997); *In re D.D.F.*, 801 P.2d 703 (Okla. 1990); A.E. v. Okla., 743 P.2d 1041, 1048 (Okla. 1987) (“[P]arental rights are too precious to be terminated without the full panoply of protections afforded by the Oklahoma Constitution.”); *In re J.M.*, 858 P.2d 118 (Okla. Civ. App. 1993); *In re J.N.F.*, 116 S.W.3d 426 (Tex. App. 2003); *In re K.C., Jr.*, 23 S.W.3d 604 (Tex. App. 2000); Alexander v. Russell, 682 S.W.2d 370 (Tex. App. 1984); *In re G.P.*, 679 P.2d 976 (Wyo. 1984). Arizona recently implemented jury trials in termination of parental rights cases. See ARIZ. REV. STAT. ANN. § 8-537 (2005). The cases are expedited through the court system. Alaska had such a bill pending in 2003. See H.R. 17, 23rd Leg., 1st Sess. (Alaska 2003).

death penalty,⁶⁵ and thus an argument could be advanced for a jury option for parents facing such potential consequences. Notably, child abuse and neglect cases are often the precursor to termination of parental rights cases, and thus the right to a jury trial at the abuse and neglect phase deserves consideration.

Depending upon state law, Family Courts may also adjudicate: status offenses or incorrigibility cases, child custody and visitation, paternity, child and spousal support, civil orders of protection, child abuse and neglect, guardianships, adoptions, and sometimes divorces. Only one state, Texas, allows a jury trial in almost all Family Court matters⁶⁶ with few exceptions.⁶⁷

One could argue that the risks of privacy loss, delay, and disruption to the family may outweigh the benefits of a jury in some Family Court matters, such as proceedings involving divorce,⁶⁸

65. See, *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989) (“[T]ermination of a parent’s rights to her child is tantamount to imposition of a civil death penalty.”); Douglas E. Cressler, *Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785, 794 (1994) (“Termination is, quite literally, the family law equivalent of the death penalty.”); Michele R. Forte, *Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 193, 193 (2003) (citations omitted).

66. See TEX. FAM. CODE ANN. §§ 54.03, 105.002 (Vernon 2005); *In re J.N.F.*, 116 S.W.3d 426; *Alexander v. Russell*, 682 S.W.2d 370, *rev’d on other grounds*, 699 S.W.2d 209 (Tex. 1985); *Ex parte Franklin*, 393 S.W.2d 632 (Tex. App. 1965).

67. TEX. FAM. CODE ANN. § 105.002(b). A court cannot submit issues of (A) support under Chapter 154 or Chapter 159; (B) a specific term or condition of possession of or access to the child; or (C) any right or duty of a conservator, other than the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child under Subdivision (1)(D). *Id.*

68. This Article will not address matrimonial proceedings, even though issues of family violence are often raised in such proceedings. For a summary of states allowing juries in matrimonial proceedings, see Jeffrey F. Ghent, Annotation, *Right to Jury Trial in State Court Divorce Proceedings*, 56 A.L.R. 4th 955, § 1(a) (1987 & Supp. 2003). Nebraska legislation was introduced to allow jury trials in matrimonial and custody matters, but never passed. 2005 Bill Text NE L.B. 886. In New Jersey, jury trials are rarely permitted in divorce proceedings unless they are joined with tort claims. See generally *Brennan v. Orban*, 678 A.2d 667, 671 (N.J. 1996); Carole Pasternak, *Victims Once Again: The New Jersey Supreme Court’s Unwillingness to Provide All Marital Tort Victims the Right to a Jury Trial*, 7 SETON HALL CONST. L.J. 467, 467-68 (1997) (acknowledging the ambiguous state of New Jersey law regarding jury trials for marital tort claims). The issue was brought to the forefront in New Jersey by the landmark case of *Brennan*, 678 A.2d 667, which held that the Court must balance the interest in judicial administration with the need to curtail domestic violence. The Court held that the linchpin for whether a jury demand can be made is the readiness of the tort claim to be severed from the divorce claim. The exception to this rule seems to be a particularized finding when a tort claim is joined with a marital claim, and the Court finds that society has a strong interest in vindicating the marital tort

incurrigibility,⁶⁹ paternity,⁷⁰ or custody. Similarly, one could argue that child support proceedings are primarily statutorily driven and complex, and thus unsuitable for a jury.⁷¹

The benefits of juries may outweigh the obstacles in child protective and civil order of protection proceedings, however, due to the unique characteristics of family violence proceedings. As of 2006, fewer than ten states permit the right to a jury trial in child abuse or neglect proceedings pursuant to a state statute or a state constitution.⁷² Michigan, for example, has offered a jury trial option in the adjudicative

via a jury trial. The New Jersey Supreme Court held that such cases would benefit from having one judge decide all issues, even if this could be burdensome. In his dissenting opinion, Justice Stein opined that a jury trial should be allowed in all marital tort claims with a separate jury trial and a different judge on the divorce claim. *See* Brennan, 678 A.2d at 680. Some scholars have argued that the majority should have adopted Justice Stein's reasoning. *See, e.g.,* Pasternak, *supra*, at 492-93.

69. For example, in a status offense proceeding, a parent is often filing a petition against his or her own child. Perhaps a jury for this type of case would so invade a family's privacy and so destroy the relationship between parent and child that the harm would outweigh the benefit of a jury.
70. In a paternity proceeding, testimony is needed about the mother's sexual history: who has had "access" to her sexually, how often, how many partners. Again, this is highly private information, which arguably should not be revealed to a jury. Perhaps if a paternity proceeding might result in statutory rape or other criminal charges, a right to counsel and a right to a jury would be appropriate. Some states indeed have jury trials for paternity or "bastardy" proceedings. *See generally* David M. Holliday, Annotation, *Paternity Proceedings: Right to Jury Trial*, 51 A.L.R. 4th 565, § 2(a) (1987 & Supp. 2002) (summarizing the law in several jurisdictions regarding the right to a jury trial in paternity proceedings). *See also* NEB. REV. STAT. § 43-1412 (2004) (providing jury trial upon request by the alleged father or the mother); Wis. Stat. § 767.50 (2006) (providing jury trial upon request by defendant); B.J.Y. v. M.A., 617 So.2d 1061 (Fla. 1993); Pruitt v. Pruitt, 282 N.W.2d 785, 787 (Mich. Ct. App. 1979); Oregon, State *ex rel.* Jones v. Workman, 579 P.2d 1302 (Or. Ct. App. 1978).
71. The federal Family Support Act mandates that each state "must establish guidelines for child support award amounts within the State." Family Support Act of 1988, 42 U.S.C. § 667 (2005). Georgia recently enacted a statute which allows jury trials in child support modification cases. GA. CODE ANN. § 19-6-19 (2005) (effective Jan. 1, 2007). New York has attempted similar legislation in child support proceedings, but no legislation has passed to date. *See* A.B. 6670, 2005, Leg., 228th Sess. (N.Y. 2005).
72. *See generally* James L. Buchwalter, Annotation, *Right to Jury Trial in Child Neglect, Child Abuse, or Termination of Parental Rights Proceedings*, 102 A.L.R. 5th 227, § 1(a) (2002 & Supp. 2003) (summarizing the law in several jurisdictions regarding the right to a jury trial in neglect, abuse and termination of parental rights proceedings); *see, e.g.,* COLO. REV. STAT. § 19-3-202 (2006); MICH. COMP. LAWS § 712A.17 (2006); R.I. GEN. LAWS § 14-1-47 (2004 & Supp. 2005); TEX. FAMILY CODE ANN. § 105.002 (2006); WISC. STAT. § 48.31 (2006); WISC. STAT. § 48.30 (2006); WISC. STAT. § 48.243 (2006); WYO. STAT. § 14-3-423 (2006). Different states may term child protective proceedings as dependency, shelter, deprivation, child abuse or neglect proceedings, and the like.

portion of child abuse and neglect proceedings for decades.⁷³ In states which provide this option, the right to a jury trial typically applies to the fact-finding phase of the child protective proceeding, not to the dispositional phase,⁷⁴ which is the paradigm proposed in this Article.

II. AFFORDING LITIGANTS A JURY IN FAMILY VIOLENCE PROCEEDINGS

Some scholars have wryly noted that “American law has always exhibited a distrust of the judges and has given the jury wide powers to decide criminal cases. The law, however, has distrusted the jury as much as the judges.”⁷⁵ Considering the inherent uncertainty in the fact-finding process, whether by a judge or by jury, the option of choosing a fact-finder may lend credibility and legitimacy to the legal system, thereby encouraging compliance with court orders.⁷⁶ Furthermore, the option to select a modality of fact-finding might well facilitate greater respect for the law, resulting in fairer resolutions that are more likely to endure over time without being sabotaged by the litigants.⁷⁷

A. *The Dynamics of Family Violence and Corresponding Proceedings*

Once violence permeates a family and progresses to a court case, the stakes are higher for the survivor,⁷⁸ the perpetrator, and the children.

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73. MICH. COMP. LAWS ANN. § 712A.17(2) (West 2005 & Supp. 2006); *In re Hubel*, 384 N.W.2d 849 (Mich. Ct. App. 1986); *In re Mathers*, 124 N.W.2d 878 (Mich. 1963).
 74. *See, e.g.*, MICH. COMP. LAWS ANN. § 712A.17(2); TEX. FAM. CODE ANN. § 105.002 (Vernon 2005 & Supp. 2006); R.I. GEN. LAWS § 14-1-47 (2004 & Supp. 2005); *In re K.S.*, 807 P.2d 292 (Okla. Civ. App. 1990); *Ex parte Franklin*, 393 S.W.2d 632 (Tex. App. 1965).
 75. Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power: The Nullification Debate, 1787–1988*, 15 LAW & HUM. BEHAV. 165, 166 (1991) (explaining this to be the case especially in light of jury nullification). *But see* LIND & TYLER, *supra* note 5, at 91 (citing MacCoun & Tyler studies, which find that juries, albeit more costly, are perceived as fairer and more accurate than judges).
 76. *See* Tyler, *supra* note 5, at 64–65; Epstein, *Tempering*, *supra* note 5, at 1846.
 77. *See* Epstein, *Tempering*, *supra* note 5, at 1846 (“Researchers evaluating why people obey the law have found that the manner in which an official directive is reached has an independent, and often more powerful, effect than does the outcome of the directive itself.”); *see also* TYLER, *supra* note 5, at 64–65. *See generally* LIND & TYLER, *supra* note 5, at 130–41 (citing Leventhal study).
 78. *See* Deborah Epstein *et al.*, *Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U.J. GENDER SOC. POL’Y & L. 465, 473 (2003) [hereinafter, Epstein, *Prioritizing*]; Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence*

Reunification is not always the goal for the family when physical violence is ongoing or severe.⁷⁹

Family violence cases are among the most delicate and critical of proceedings; such cases do not always fit within a neat legal rubric. The latter point was reflected aptly in the words of New York State Chief Judge Judith S. Kaye in the well-known decision of *Nicholson v. Scopetta*.⁸⁰ There, the Court “recogniz[ed] that in the inordinately complex human dilemma presented by domestic violence involving children, the law may be easier to state than to apply.”⁸¹

Abusers perpetrate violence against survivors as part of a coercive pattern of power and control.⁸² Physical violence, when present, is often coupled with emotional, financial, sexual, psychological, and other types of abuse.⁸³ Survivors of family violence do not always identify themselves as victims of crime; at times, survivors equivocate about whether or when to leave the abuser.⁸⁴ There are a number of theories and explanations as to why survivors in intimate partner violent relationships do not

Against Women Act of 2000, 13 COLUM. J. GENDER & L. 101, 107–8 (2004); Linell A. Letendre, *Beating Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 979 (2000); Myrna S. Raeder, *Proving the Case: Battered Woman and Batterer Syndrome: The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 792–95 (1996).

79. Serious or repeated physical abuse is often the basis for immediate termination of parental rights. See Adoption and Safe Families Act, 42 U.S.C. 670 *et seq.* (requiring states to pursue immediate termination on these grounds in order to obtain federal funding).

80. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 367 n.5 (2004).

81. *Id.*

82. See generally BANCROFT, *supra* note 39, at 49–75; DAWN BRADLEY BERRY, THE DOMESTIC VIOLENCE SOURCEBOOK 31–32 (Lowell House 3d ed. 2000) (1995); Duluth Domestic Abuse Intervention Project, Power and Control, <http://www.duluth-model.org> (last visited Aug. 27, 2006); Goelman, *supra* note 78, at 107; Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1883 (1996); 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, 696 (2003); Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 963–64 (2004); Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local”*, 42 B.C. L. REV. 1081, 1121 (2001).

83. See LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 1, 3 (2002); Duluth Domestic Abuse Intervention Project, *supra* note 82; BANCROFT, *supra* note 39, at 8–9; BERRY, *supra* note 82, at 3–4; Meier, *supra* note 82, at 691–92; Meyersfeld, *supra* note 10, at 378.

84. BANCROFT, *supra* note 39, at 222–23; Meier, *supra* note 82, at 684.

leave, and why it may take a survivor multiple attempts before he or she actually severs the abusive relationship.⁸⁵

Other unique characteristics of family violence cases include the phenomenon that violent incidents often occur without eyewitnesses⁸⁶ and often without subsequent police or medical assistance.⁸⁷ When there is a witness, it may be a child, who may also be a victim.⁸⁸ Abusers may prevent their victims from receiving medical treatment or insist that their victims disguise their injuries.⁸⁹

Because family violence proceedings often span the course of months, even years, and because the cases are often entrenched in the Family Court system, judges have an opportunity to observe the demeanor and behavior of each litigant over time. Judges see litigants under tense and artificial circumstances, as litigants appearing in court

85. The dynamics of family violence are incredibly intricate, nuanced and complicated, and certainly cannot be described with any sort of fullness or adequacy in a single article. That being said, “[b]attered women in the United States typically make 2.4 to 5 attempts to leave their abusers before they ultimately succeed.” Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL’Y & L. 95, 122 (2001) (citing Lewis Okun, *Termination or Resumption of Cohabitation of Women in Battering Relationships: A Statistical Study*, in COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 107, 113 (Gerald T. Hotaling *et al.* eds., 1988)); *see also* Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, in LAW IN A THERAPEUTIC KEY 243, 262–65 (David B. Wexler & Bruce J. Winick eds., 1996).
86. *See generally* BANCROFT, *supra* note 39, at 294; Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 370–71 (1996); Victoria L. Lutz & Cara M. Bonomolo, *My Husband Just Trashed Our Home: What Do You Mean That’s Not a Crime?*, 48 S.C. L. REV. 641, 654 (1997); Pamela Posch, *The Negative Effects of Expert Testimony on the Battered Women’s Syndrome*, 6 AM. U.J. GENDER SOC. POL’Y & L. 485, 499 (1998).
87. *See* Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 763 (1997); Laura J. Hickman & Sally S. Simpson, *Fair Treatment or Preferred Outcome? The Impact of Police Behavior on Victim Reports of Domestic Violence Incidents*, 37 LAW & SOC’Y REV. 607, 608 (2003) (“Whatever the actual rate of official reporting, it is clear that large numbers of victims continue to refrain from seeking the assistance of the police when they are assaulted by a present or former sexual intimate.”); Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 98 (1994).
88. *See generally* BANCROFT, *supra* note 39, at 8, 293; Justine A. Dunlap, Symposium, *The “Pitiless Double Abuse” of Battered Mothers*, 11 AM. U.J. GENDER SOC. POL’Y & L. 523, 524 (2003); Lynne R. Kurtz, *Protecting New York’s Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1345 (1997); Lillian Wan, *Parents Killing Parents: Creating a Presumption of Unfitness*, 63 ALB. L. REV. 333, 344 (1999).
89. *See* Schelong, *supra* note 87, at 98; De Sanctis, *supra* note 86, at 371; Epstein, *Prioritizing*, *supra* note 78, at 473.

are often frustrated, frightened, or anxious. Litigants may react to stress while in the courthouse hallways, or even inside the courtroom itself, and thus may unduly influence a judge's assessment of them. In the domestic violence context, a survivor may appear nervous and frantic, particularly if she is facing her batterer in court.⁹⁰ Moreover, psychologically traumatized litigants may present themselves as non-credible.⁹¹ Conversely, batterers often present themselves remarkably well in court and while interacting with law enforcement.⁹²

It is not uncommon for a survivor to file a complaint and then withdraw it, only to file again shortly thereafter,⁹³ which then may negatively impact the credibility of the litigant in the eyes of a judge. During the multiple appearances and adjournments on a specific case, when stress levels are high and testimony is not being elicited, the judge may not obtain an accurate image of the parties.⁹⁴ In such a circumstance, a trial judge already has a well-formed impression of the parties and families.⁹⁵ Yet, this same judge will determine not only the facts of the case and the credibility of the witnesses, but also issue the ultimate disposition regarding the family.⁹⁶

It is the intimate relationships among the litigants, coupled with the long-term involvement of the Family Court's original mandate to treat rather than to punish, that creates the opportunity for one jurist to resolve all questions of fact and decide all questions of law. Thus, a par-

90. See David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON B.J. 23, 23 (1989) (stating that the woman frequently appears hysterical, but the abuser appears composed, resulting in courts and police believing that the woman is embellishing her story); Meier, *supra* note 82, at 691-92.

91. See generally Meier, *supra* note 82, at 690-92.

92. See BANCROFT, *supra* note 39, at 291-313; Hanna, *supra* note 82, at 1878 (stating that judges identify with batterers who present themselves as "charming, respectful, and persuasive"); Kathleen Waits, *Battered Women and their Children: Lessons from One Woman's Story*, 35 HOUS. L. REV. 29, 54 (1998); Meier, *supra* note 82, at 690-92.

93. See BANCROFT, *supra* note 39, at 303-05; BERRY, *supra* note 82, at 161-62.

94. This is not dissimilar to law enforcement responding to the scene of domestic violence crimes repeatedly. After so many times, even well-trained judges and law enforcement officials may eventually stop believing the victim's accounts of violence and control by the batterer. See Hanna, *supra* note 82, at 1878. Domestic violence survivors do not always present well and may have secondary trauma, such as alcohol/drug abuse, or mental illness, often a consequence of the violence itself. See Epstein, *Prioritizing*, *supra* note 78, at 473-77; Epstein, *Tempering*, *supra* note 5, at 1861; Meier, *supra* note 82, at 691-92.

95. In *Santosky v. Kramer*, 455 U.S. 745, 786 n.12 (1982), the late Justice Rehnquist utilized the phrase "steeped in" to indicate the level of involvement Family Court judges have with some litigants.

96. Judges perform dual roles as fact-finders and sentencers. Ainsworth, *supra* note 2, at 1124-25.

ent or party who does not fare well in a court proceeding may question the objectivity of having only one person decide all questions of fact and law.⁹⁷

Checks and balances must be an integral part of the Family Courts to discourage the appearance of impropriety or unbridled discretion.⁹⁸ The appearance of legitimacy and neutrality is critical in cases involving the ever-changing lives of families and the need to achieve permanence and safety. Indeed, if the rehabilitative goals of the Family Court are to be realized, it is crucial to address the state of mind of the litigants and their perceptions of a bias-free result.

B. Litigants' Notions of Fairness in Family Violence Proceedings

There are a number of ways in which litigants involved in family violence cases might perceive bias on the part of the judges and lawyers involved in their cases. This section focuses on three areas in which bias may be routinely perceived: (1) on an institutional level; (2) on a personal level; and (3) from the perspective that a single jurist is privy to too much information.

Survivors of domestic violence often state that they feel abused by "the system"—referring to the law enforcement system, the court system, or both.⁹⁹ In fact, some survivors believe that they are more able to predict the abuse perpetrated by their batterers than to face the uncertainty of the court system.¹⁰⁰ Stated differently, some survivors of

97. See, e.g., Geraghty & Mlyniec, *supra* note 2, at 438–39.

98. See, e.g., Mary McDevitt Gofen, *The Right of Access to Child Custody and Dependency Cases*, 62 U. CHI. L. REV. 857, 857 (1995) (suggesting that access to Family Court cases provides a check on the parties and system involved).

99. See BANCROFT, *supra* note 39, at 291–313; PTACEK, *supra* note 8, at 150–51 (1999) ("Three dimensions of fear have been presented as important to women's court appearances—fear of the defendant, intimidation produced by the institutional setting, and fear of being treated unjustly by the judge. . . . [I]n some cases judges' responses amounted to a secondary traumatization."); Epstein, *Prioritizing*, *supra* note 78, at 468–69; Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1551–52 (1998); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 553–55 (1999); Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 726–27 (2004).

100. See generally *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 371 (2004); BANCROFT, *supra* note 39, at 291–313; Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 627 (2000); Meier, *supra* note 82, at 665–67; Waits, *supra* note 92, at 31 ("[B]attered women are often victimized a second time by police, prosecutors, lawyers, psychologists, and judges");

violence feel better equipped to withstand the familiar abuse of their batterers, rather than face what they perceive as abuse by a court process with which they are unfamiliar. Additionally, a survivor who does not perceive justice in the courtroom may not access the Family Court system in the future.¹⁰¹

Affording litigants the option of a jury trial may enhance the confidence those litigants have in the judicial system. In a family violence proceeding, a litigant may believe that a jury—bringing the composite experiences of twelve people to the case—will inject a more human element than would only one finder of fact. Many survivors of violence feel empowered when able to tell their stories and have their voices heard, voices which for so long have been silenced by their abusers. Perhaps a survivor of family violence will view a jury as a more welcoming forum in this regard. Furthermore, a jury might foster a non-formulaic approach to cases that are unique and complex. Petitioners for civil orders of protection might select a jury option for some of the reasons stated above, and also might re-engage the Family Courts in the future.

Similarly and consistent with procedural justice theories, if an accused abuser has the option of having his fate decided by strangers instead of a judge who knows him from prior court proceedings, he might be more likely to comply with the resultant orders.¹⁰² Scholars and researchers have advocated for procedural justice concepts in domestic violence cases on the theory and data that batterers more readily comply with orders rendered if the orders are fashioned in a bias-free manner.¹⁰³ Some have posited with accompanying data that “treating defendants with neutrality, respect, and consistency is solidly grounded. . . . If such treatment also improves compliance, however, it is of special importance to intimate partner abuse cases, where repetitive, escalating violence is a predictable scenario for most victims.”¹⁰⁴ In the intimate partner violence context, an abuser may increase violence or re-victimize his or her partner following an encounter with the court system.¹⁰⁵ Even further,

Lisa E. Martin, Comment, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 346 (1998/99).

101. Epstein, *Prioritizing*, *supra* note 78, at 468–69; *see also* Arlene N. Weisz, *Legal Advocacy for Domestic Violence Survivors: The Power of an Informative Relationship*, 80 FAMILIES IN SOC'Y 138, 138–47 (1999).

102. Winick, *supra* note 10, at 42–43 (advocating for therapeutic jurisprudence for a batterer so that he will not perceive rehabilitation as judicially coerced and then may voluntarily comply). *See generally* Paternoster, *supra* note 5, at 165–66; Simon, *supra* note 85, at 243–85.

103. *See, e.g.*, Paternoster, *supra* note 5, at 166–71.

104. Epstein, *Tempering*, *supra* note 5, at 1847.

105. Epstein, *Prioritizing*, *supra* note 78, at 467–68.

litigants “might become more clever in breaking [such] laws if [] convinced that the system used unfair procedures.”¹⁰⁶

In the child abuse and neglect context, parents may find that the jury serves as a check and balance to the governmental agency proceeding against them.¹⁰⁷ Thus, the resultant court orders may be viewed as workable instead of coerced. When the state removes a child from a family due to child abuse or neglect, the agency typically furnishes a case plan which allows parents to take further actions to reunify the family. Parental compliance with such case plans seems more likely if parents perceive a fair and bias-free trial.¹⁰⁸ Indeed, as Professor Shepard notes, “A violent parent is more likely to comply with a court order imposing restraints on his or her relationship with the child if the court makes an effort to ensure that the offender perceives the process that resulted in the order as fair.”¹⁰⁹ Other authors have opined that proceedings involving children must “not only be fair but also be so perceived by the contestants . . . because violence and/or child snatching may well ensue without it.”¹¹⁰ Procedural justice scholars have also argued that the perception of fairness by both the child and the parent could very well lead to finality and even full acceptance of a permanent order.¹¹¹

106. LIND & TYLER, *supra* note 5, at 83. Although the authors were discussing this prospect in the context of traffic laws, their data demonstrate that one can easily analogize to other areas of law. *See, e.g., id.* at 79 (citing a Friedland, Thibaut and Walker study which showed that persons were more “clever lawbreakers” if unfair procedures were utilized); *see also* Epstein, *Tempering*, *supra* note 5, at 1901. As Lind & Tyler caution, however, there are many other factors which play into obedience and compliance with the law.

107. *See generally* Lyons v. Wickhorst, 42 Cal. 3d 911, 920 (1986) (Bird, C.J., concurring); *see also* Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 347 (2005) (acknowledging that juries act as checks and balances on court proceedings).

108. I thank David Lansner, Esq., for this insight; *see also* LIND & TYLER, *supra* note 5, at 64–65.

109. Andrew I. Shepard, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* 86 (2004).

110. Gofen, *supra* note 98, at 876 n.120, (citing JAMES C. BLACK & DONALD J. CANTOR, *CHILD CUSTODY* 51 (1989)); *see also* K.M. Kitzmann & R.E. Emery, *Procedural Justice and Parents' Satisfaction In a Field Study of Child Custody Dispute Resolution*, 17 L. AND HUM. BEHAV. 553, 554–56, 564 (1993). Although the above authors discuss fairness in the context of custody disputes, this reasoning can readily be analogized to family violence proceedings.

111. Gary B. Melton & E. Allan Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, 5 LEGAL REFORMS AFFECTING CHILD & YOUTH SERVICES 65, 74, 76 (1982) (explaining also that “the child can feel that he or she had a ‘day in court’ and that the ultimate decision was made by a third party rather than the parent”).

1. Perceptions of Institutional Bias in the Bench and Bar

In any large metropolitan area in the United States, Family Court judges are understaffed and overburdened with hundreds of emotionally charged cases in any given week.¹¹² Thus, some judges may be less jarred by recounts of violence, child neglect, or criminal activity after hearing such issues repeatedly. A backdrop of jaded skepticism may permeate the courtroom, and violence may not resonate to the same degree to a fact-finder who has heard “the same story” before.¹¹³ Like the lawyers and social workers who work in the field of family law, Family Court judges are prone to vicarious traumatization¹¹⁴ and anesthetized empathy resulting naturally from constant exposure to descriptions of violence.

Jurors in domestic violence cases and child welfare cases involving physical violence may serve to relieve an overburdened judge experiencing vicarious traumatization. As Professor Ptacek noted after interviewing judges who presided over family violence cases in the state of Massachusetts, “[e]mpathetic engagement with women who are suffering from terrorizing violence can be exhausting,”¹¹⁵ and “the emotional cost to judges who genuinely engage with women seeking protection may be one reason that other judges sit so passively in restraining order hearings.”¹¹⁶ Undoubtedly, jurors can also be vicariously traumatized by hearing accounts of violence, yet jurors do not regularly decide hundreds of cases.

Another argument for juries advanced by judges and academics is that “jury trials should be favored over bench trials because judges can shield jurors from inadmissible information in ways that they cannot shield themselves.”¹¹⁷ Indeed, in criminal cases, judges often know about

112. See PTACEK, *supra* note 8, at 126–27; DOUGLAS ABRAMS & SARAH RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 12 (2003).

113. See generally Guggenheim & Hertz, *supra* note 40, at 574–75.

114. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 25–69 (1997)(Supp. 2001); see also Charles R. Figley, *Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview*, in COMPASSION FATIGUE: SECONDARY TRAUMATIC STRESS DISORDERS IN THOSE WHO TREAT THE TRAUMATIZED 1 (Charles R. Figley ed., 1995); Geraghty & Mlyniec, *supra* note 2, at 440; PTACEK, *supra* note 8, at 126.

115. PTACEK, *supra* note 8, at 126; see also ROBERT E. KEETON, JUDGING 3 (1990).

116. PTACEK, *supra* note 8, at 134. Ptacek further states that some judges might be tempted to “abandon the burden of vicarious traumatization and turn against women who have been victimized.” *Id.* at 127.

117. Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1259 (2005); see also *In re Jose L.*, 64 A.D.2d 598, 599 (1978) (stating in a dissenting opinion that “[n]o juror would be permitted to sit with regard to a defendant whom he had previously judged in another criminal case”).

prior convictions that are not allowed to be heard by a jury.¹¹⁸ There are times when the “jury is deciding a case which has n facts and the judge is deciding a case which has $n+1$ facts.”¹¹⁹ The issue of knowing more facts than are applicable to a specific proceeding may lead some judges to articulate a preference for juries in order to insulate themselves from accusations of bias.¹²⁰

Litigants might believe that a judge is influenced by his or her own prior cases, and thus will not give due consideration to the litigant’s pending case. It is human nature to compare and contrast cases from the previous day or year¹²¹ and perhaps make determinations about which cases involve “real” violence. Drawing again from the rich literature of procedural justice theory, “[f]ew would doubt that the objective fairness of a procedure is enhanced if the procedure reduces the effects of bias or prejudice arising from factors irrelevant to the decision at hand.”¹²² In the mindset of the litigants, it may be impossible for a single jurist to purge her mind of previously formed impressions of the litigants, witnesses, and their families, especially if they have appeared before this same trier of fact in other proceedings.¹²³

Furthermore, how and what a lawyer argues in one case, or whether a lawyer raises a controversial policy concern, may affect all future cases.¹²⁴ The institutional nature of courts such as Family Courts

118. See, e.g., HARRY KALVEN, JR & HANS ZEISEL, *THE AMERICAN JURY* 127–31 (1966).

119. *Id.* at 121; see also Guggenheim & Hertz, *supra* note 40, at 572 (stating that inadmissible information “may reach the judge as a result of off-hand remarks by a clerk or bailiff in the judge’s presence or as a result of the judge’s review of the court file”); Meier, *supra* note 83, at 677; Joseph B. Sanborn Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 *JUDICATURE* 206, 212 (1998).

120. For this insight, I thank Judge Betsy Lambert Peterson, Trinidad & Tobago, who suggested this possibility at the ISFL conference. Judges might also be concerned that litigants or the general public perceive that the judge acted improperly, even if untrue. See also *infra* note 147.

121. Geraghty & Mlyniec, *supra* note 2, at 439–40.

122. LIND & TYLER, *supra* note 5, at 20.

123. As Judge Cooke held in the 1979 New York case of *In re Leon RR*, 48 N.Y.2d 117, 122 (1979), allowing in inadmissible evidence “raises a substantial probability of irreparable prejudice to a party’s case for there is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact.” Interestingly, and highlighting the need for a fairly perceived justice system, Arizona introduced a bill under which parents may request a different judge to preside over termination of parental rights cases if the right to a jury is limited. See HB 2559, 47th Leg., 2d Reg. Sess. (Az. 2006).

124. This is the subject of the author’s work-in-progress, *Making Waves or Keeping the Calm: Institutional Lawyering in the Clinical Legal Education Context*. See generally Martin Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13, 13–21

crystallizes when the same lawyers and the same judges meet day after day. Such institutional lawyers have been termed by Professor Marc Galanter as “repeat players.”¹²⁵ The influx of many repeat players creates an atmosphere and culture in the Family Court that may contribute to a predetermined mindset and myopic decision-making rather than to a fresh and objective approach to new cases.¹²⁶

Hence, litigants may have concerns not only about the objectivity of the bench, but also about the lawyers involved in the cases, including the agency lawyer pursuing the case or the lawyer representing the child.¹²⁷ A jury option has the potential to curb concerns of bias or institutional lawyering by disenfranchised litigants,¹²⁸ thereby minimizing the perception that the bench and the bar are operating hand-in-hand.

2. Perceptions of Value and Identity Bias: A Jury of One’s Peers

To achieve public confidence in a court system, intangible issues, such as litigants’ perceptions of judges and juries, must be afforded weighty consideration. At times, a litigant may perceive a disparity or divide between his or her own value system or identity and that of the judge. For example, a litigant who is of color or of low socio-economic status, or who is transgendered, or an atheist, may make assumptions that a particular judge represents a more traditional or conservative societal viewpoint. This disenfranchisement may occur regardless of the judge’s actual views of the litigant or similarly situated litigants.

(1986); *see also* Melissa Breger, Gina Calabrese and Theresa Hughes, *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries and Judges*, 55 S.C. L. REV. 303, 338 (2003); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L. J. 2419, 2425 (1996).

125. Galanter utilizes the term “repeat players” in his scholarship and distinguishes from the term “one shotters” to describe lawyers who may have a single case in a particular courthouse and are not regulars in that courthouse. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97 (1974).
126. For further discussion of the concept of Groupthink, *see generally* Christopher Neck & Gregory Moorhead, *Groupthink Remodeled: The Importance of Leadership, Time Pressure, and Methodical Decision-Making Procedures*, 48 HUM. REL. 537, 537–57 (1995).
127. *See generally* Guggenheim & Hertz, *supra* note 40, at 571–75; Cohen, *supra* note 40, at 8.
128. On a more theoretical note, some have argued that when judges rather than juries “decide custody and dependency cases, the parents are not able to appeal to the community conscience, as embodied in the jury, to protect against government oppression.” Gofen, *supra* note 98, at 877.

A litigant might believe, albeit mistakenly, that a privileged judge is unqualified to act as a jurist making decisions about cases riddled with poverty, lack of opportunity, and violence—all circumstances which the judge has perhaps never personally experienced in his or her own life. A litigant might prefer a jury of one's peers in terms of class, race, religion, exposure to intimate partner violence, or the like.¹²⁹ As Professor Ainsworth aptly states, “jury pools include men and women, blacks and whites, [and thereby] add valued dimension to jury fact-finding that judges cannot share.”¹³⁰

The class, race, and background of a given judge or juror are, of course, not always proxies to core beliefs or the resultant decision-making.¹³¹ Nonetheless, a litigant may believe that like-minded or similarly situated jurors may be more empathetic to his or her case.

Some sociologists would argue that bias is part of human nature,¹³² yet judges are expected to transcend such internal biases.¹³³ Six or twelve

129. *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny highlight the issues about the racial component of a jury and the essence of fairness in a jury room. The same can be said about the racial composition of the judiciary. “Inclusion of these groups [women & minorities] is vital in maintaining and even increasing the legitimacy of the nation’s judicial tribunals. . . . The presence of political minorities in the U.S. judiciary provides enormous symbolic, and perhaps political, import to a vital branch of government.” Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches: A Cross-Time Comparison, 1985 and 1999*, 85 JUDICATURE 84, 85 (2001). Some research has shown that juries are not sympathetic to victims of rape or spousal assault charges, while other data shows jurors are more sympathetic. Recent research shows these fluctuations may change as juror pools include more women. See HANS & VIDMAR, *supra* note 22, at 153, 205. *But see* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1262 (2000) (noting that despite the *Batson* Court’s efforts to diversify jury pools, “the complexion and composition of juries have barely changed”).

130. Ainsworth, *supra* note 2, at 1125.

131. *See generally* Anthony Champagne & Stuart Nagel, *The Psychology of Judging*, THE PSYCHOLOGY OF THE COURTROOM 261 (Kerr & Bray eds., 1982) (showing that while “a black judge . . . would be expected to have greater understanding of the problems of racism than a white judge,” this is not always the case). *But see* *Batson*, 476 U.S. at 135 (stating in a dissenting opinion that group affiliations such as age, race, or occupation as proxy for potential juror partiality have long been accepted as basis for peremptory challenges); *see also* HANS & VIDMAR, *supra* note 22, at 50–51.

132. *See, e.g.*, Peter D. Blanck, *What Empirical Research Tells Us: Studying Judges’ and Juries’ Behavior*, 40 AM. U. L. REV. 775, 777 (1991); *see also* Bennett L. Gershman, *How Juries Get It Wrong—Anatomy of the Detroit Terror Case*, 44 WASHBURN L.J. 327, 327–28 (2005); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 5 (1994).

133. As retired West Virginia Justice Neely observed about checks and balances: “There is, therefore, always an element of human judgment that enters any complicated case, which is why the process traditionally calls upon the organized collective intelligence

jurors would bring different life experiences and viewpoints to the courtroom thereby increasing the likelihood that one view does not predominate the jury room. With a jury, there is also an opportunity for *voir dire*, which cannot be exercised formally with a judge.¹³⁴

As scholar and federal judge Jack Weinstein has argued, there are procedural safeguards in the group process protecting against individual biases,¹³⁵ and thus “[t]rial by jury retains its legitimacy precisely because of its long history of impermeability to the vicissitudes of politics and fashion.”¹³⁶ The jury has often been described as the “conscience of the community,”¹³⁷ because “[i]t is unaffiliated with party or cause and speaks for the entire community.”¹³⁸

3. Perception of the Single Jurist Model

Unified courts and specialized domestic violence courts have proliferated in the United States. The “one judge, one family” unified model of Family Courts allows for continuity and consistency.¹³⁹ Specialized courts also foster integration of services and offender

of a trial court judge, trial jury, and at least one appellate court.” *State v. Morgan Stanley*, 459 S.E.2d 906, 914 (W. Va. 1995).

134. Ainsworth, *supra* note 2, at 1125. Recusals are rarely viable options in any type of court proceeding, and forum-shopping is not a real option in Family Court. See Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 295–96 (1993); Geraghty & Mlyniec, *supra* note 2, at 439–40.
135. For example, Judge Weinstein states that “it is unlikely that twelve persons chosen at random from the community will at the same time be struck with a collective will to ignore a just law or with the same burning political zeal.” Hon. Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 244 (1993).
136. *Id.* at 240; see also Martin F. Kaplan, *Cognitive Processes in the Individual Juror*, in *THE PSYCHOLOGY OF THE COURTROOM* 197–98 (Norbert L. Kerr & Robert M. Bray eds., 1982) (showing that even when biases are expressed in jury deliberations, other jurors serve as neutralizers or correctors).
137. *U.S. v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969); see also *Witherspoon v. Illinois*, 391 U.S. 510, 519–20 n.15 (1968) (“[O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’”) (citation omitted); Gofen, *supra* note 98, at 877; Stephan Landsman, *Of Mushrooms and Nullifiers: Rules of Evidence and the American Jury*, 21 ST. LOUIS U. PUB. L. REV. 65, 79 (2002).
138. Landsman, *supra* note 137, at 79.
139. See, e.g., ELROD & RYDER, *supra* note 26, at 236; *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 2099, 2108 (2003) [hereinafter *Developments*]; Integrated Domestic Violence Courts, <http://www.courts.state.ny.us/ip/domesticviolence/index.shtml> (last visited Aug. 27, 2006).

monitoring.¹⁴⁰ Furthermore, in many cases, these courts may improve a judge's access to information, remedies, and services for an entire family, as well as her expertise in a certain subject matter.¹⁴¹ In applying the paradigm for a jury option as proposed in this Article, a litigant may select a jury to provide a fresh perspective on the facts, followed by a judge who can then fashion an appropriate dispositional remedy for the particular family.¹⁴²

The family represents the fabric of society, and yet, as it stands currently, one person alone can alter a family's entire future. A litigant might perceive that the capriciousness of a single judge could wreak havoc upon his or her family. For this reason and others stated previously, litigants in family violence proceedings should have the option of whether a judge or a jury will extract, weigh, and consider the complicated and unique facts of their cases.

Some litigants prefer the singular accountability of having one jurist decide the ultimate fate of their cases. For example, in the infamous case of Leopold and Loeb,¹⁴³ Clarence Darrow selected a judge to determine the fate of the two defendants in a capital case, saying:

[W]e were afraid to submit our cause to a jury I know perfectly well that where responsibility is divided by twelve, it is easy to say: "Away with him". But . . . if these boys hang, you must do it. There can be no division of responsibility here. You can never explain that the rest overpowered you. It must be by your deliberate, cool, premeditated act, without a chance to shift responsibility.¹⁴⁴

140. See Winick, *supra* note 10, at 39; Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 142-43 (2004).

141. See *Developments*, *supra* note 139, at 2108 ("[O]ne family, one judge' case management system aims to improve consistency for the family, to eliminate the problems associated with different judges evaluating discrete aspects of a case, and to increase the judge's ability to make informed decisions regarding proper outcome goals and services for the family.")

142. *Id.* at 2108-09.

143. *People v. Leopold and Loeb*, http://www.cookcountyclerkofcourt.org/Archives_/Famous_Cases/Leopold_and_Loeb/leopold_and_loeb.htm (last visited Aug. 27, 2006).

144. MAUREEN MCKERNAN, *THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB* 216-17 (Gaunt 1996) (1924). A similar analogy can be drawn to a line of death penalty cases where the jury was led to believe that the ultimate responsibility for determining the appropriateness of a death sentence did not rest with them. See *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988); *Wheat v. Thigpen*, 793 F.2d 621, 627-28 (5th Cir. 1986). I thank Professor Randy Hertz for this insight.

Other litigants, however, are empowered by being able to tell their stories to a new or varied audience of peers. This Article advocates that providing litigants with a choice of forum in family violence cases¹⁴⁵ will enhance their perception of an unbiased decision and likely strengthen the legitimacy of and compliance with the resultant court orders.

III. RECONCILING THE PRACTICAL OBSTACLES OF JURIES IN FAMILY VIOLENCE PROCEEDINGS

Despite the theoretical arguments favoring a jury option in family violence proceedings, those who oppose the right to a jury trial in such proceedings may raise a number of practical concerns that have not yet been addressed. Certainly the creation of a jury option where such an option has been absent is not without logistical obstacles. Valid criticisms may include: (1) privacy loss; (2) delay, congestion, and cost; and (3) legal complexities not suitable for juror decision-making. The final part of this Article will address some of these concerns and logistics as the theory of the jury option in family violence proceedings is applied in practice.

A. Issues of Privacy

Allowing a jury option in family violence proceedings injects a semblance of fairness, but may at the same time compromise privacy. Family Courts historically were closed to the public due to privacy issues, yet today, "Sunshine Laws" have swept the nation¹⁴⁶ to allow in the public and the media. These laws have been enacted, among other reasons, to monitor attorney professionalism and judicial discretion in Family

145. In fact, this author praises the benefits of unified court system models and specialized domestic violence courts, but thinks a choice should be offered to highlight how these court models may be perceived by litigants. The paradigm proposed in this Article dovetails nicely with the "one judge, one family" system in that a jury determines the facts, and a seasoned judge still determines the disposition. For an excellent description of how domestic violence courts can operate within the therapeutic jurisprudence context, encompassing procedural justice theories, see Winick, *supra* note 10, at 60–87.

146. See generally Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 29–30 (1991); Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 69–70 (1996); David S. Jackson, *Privacy and Ohio's Public Records Act*, 26 CAP. U. L. REV. 107, 111 (1997) (stating that all 50 states have open records statutes).

Courts.¹⁴⁷ Many of the arguments made in favor of opening Family Courts to the public and to the media can likewise be made for opening the Family Court to juries.¹⁴⁸ Furthermore, in those states where Family Courts are already open, privacy concerns may be somewhat ameliorated.¹⁴⁹

Some advocates might argue that a jury's invasion of privacy would have a chilling effect and dissuade parties from pursuing trials, especially survivors of family violence. Yet, once a survivor files for an order of protection, or a governmental agency files a child abuse or neglect petition, privacy is already jeopardized by that filing. The judge will hear the allegations, as will the court clerks, the court bailiffs, the lawyers, and the other parties present. In cases of domestic violence, facing the batterer in court may be far more traumatic than facing a group of strangers.¹⁵⁰ More significantly, litigants are not obligated to choose a jury if privacy concerns are paramount.¹⁵¹ Several scholars have argued that a more formalized adversarial court system actually helps to level the playing field for survivors of family violence.¹⁵²

147. Laura Cohen, *Kids, Courts, and Cameras: New Challenges for Juvenile Defenders* 18 QUINNIAC L. REV. 701 (1999).

148. In First Amendment cases there is a definite "nexus between openness, fairness, and the perception of fairness," which then enhances public confidence in the judicial system and offers "significant community therapeutic value." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570 (1980). A similar argument could be advanced for the jury option.

149. See generally Fred L. Cheesman, *Key Findings From the Evaluation of Open Hearings and Court Records in Juvenile Protection Matters*, 1 NAT'L CTR. FOR ST. CTS. 4 (2001) (finding in 2001 that eighteen states have open child protective proceedings); Cohen, *supra* note 147, at 708–09. But see William Wesley Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement*, 38 SUFFOLK U. L. REV. 303, 304 (2005).

150. BANCROFT, *supra* note 39, at 303–05.

151. One could argue that jury trials are more public and therefore more dangerous to a family violence victim, due to possible exacerbation of the offender's anger. Because of this, each survivor needs to balance the risks and benefits of filing a petition or even testifying. Each survivor must decide whether she thinks a jury trial would outweigh the risks inherent in her case. The risk of a batterer using just one more tool against his partner—in this case, a jury—is a serious concern of the jury option model. Perhaps some states will require that all parties consent to a jury trial before it is afforded. Another interesting issue is the child's right to privacy. Perhaps a parent's right to demand a jury is nullified if a child will be testifying, unless the testimony is elicited in a less traumatic or less intrusive manner than open court, such as in camera or closed circuit. See, e.g., WIS. STAT. ANN. § 48.31(2) (West 2005) ("If the hearing involves a child victim or witness . . . the court may order the taking and allow the use of a videotaped deposition."); *Maryland v. Craig*, 497 U.S. 836 (1990).

152. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1608–09 (1991) (arguing that more formal procedures may be safer for the woman and her interests than the less formal mediation process); Geraghty & Mlyniec, *supra* note 2, at 444. Moreover, as Professor Ptacek notes "[u]nlike judges in criminal cases, judges hearing requests for restraining orders have no standard list of things that must be said

Thus, the option of a jury in such cases may actually empower these survivors.¹⁵³

Additionally, some may perceive the Family Court to be a somewhat “second-class court system.”¹⁵⁴ The introduction of the jury into Family Court jurisprudence may very well elevate this oft-referenced lower status. If nothing else, the injection of the jury may encourage the public to envision the Family Court as being on par with other courts, as juries are part of the popular culture or traditional expectation of how court systems operate.¹⁵⁵

B. Issues of Delay and Limited Resources

Opponents to a jury option in family violence cases may argue that the costs and delays of juries are prohibitive. Indeed, one of the essential benefits of Family Court jurisprudence is its goal of swift justice to promote safety, stability, and the interests of justice for families and

about the right to counsel, the right to a trial by jury, or other rights. In these hearings, judges write their own scripts.” PTACEK, *supra* note 8, at 98–99. Professor Barbara Atwood argues that less procedure and less formality can lead to dangerous results and possible violations of due process rights. See Barbara Atwood, *Therapeutic Jurisprudence and American Family Law: A Modest Caveat About Our Good Intentions* (Aug. 1, 2005) (unpublished manuscript, on file with author). Looking at law through a so-called therapeutic lens can sometimes be “anti-therapeutic” to litigants. *Id.*

153. See, e.g., Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women’s Assessment of the Criminal Processing System’s Responses*, 13 VIOLENCE AND VICTIMS 251, 264 (1998) (“[T]he ‘one size fits all’ solution to battered women’s plight . . . is likely to deepen the sense of powerlessness and exacerbate the frustration characteristic of those enmeshed in battering relationships.”).
154. See generally Hon. Nancy Corsones, *A Week in the Life of a Family Court Judge*, 24 VER. B. J. & L. DIG. 17, 17 (1998); ABRAMS & RAMSEY, *supra* note 112, at 1185 (and citing *In re Javier A.*, 159 Cal. App. 3d 913 (Ct. App. 1984)); Ainsworth, *supra* note 2, at 1119 (“The perfunctory bench trial typical of juvenile court is not what [litigants] imagine a trial to be.”); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 68 (1997) [hereinafter Feld, *Abolish*] (asserting that Family Courts in some states have morphed into “scaled-down, second-class criminal court[s] for young people.”).
155. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1598–1606 (1989). Some have argued that privacy in custody proceedings should depend upon an individual case analysis, and presumably the same could be true regarding a jury option in family violence cases, if juries would compromise the safety of children or survivors of violence. Gofen, *supra* note 98, at 879–80. One could argue that due to the delicate and private nature of family violence proceedings and the underlying goal of reunification for a family, Family Courts should be closed to the public. See *San Bernardino County Dept. of Pub. Soc. Servs. v. Superior Court*, 283 Cal. Rptr. 332, 340 (Cal. Ct. App. 1991), as cited in Patton, *supra* note 149.

children.¹⁵⁶ Concerns that juries would cause delay are mitigated, however, by judges remaining as finders of fact in cases needing immediate decisions, such as emergency removals of children or temporary protective orders.¹⁵⁷

Moreover, many cases in Family Court are heard in small segments over the course of months, even years.¹⁵⁸ Perhaps a jury will actually expedite the trials and ensure continuous and uninterrupted testimony over days instead of fragmented segments of evidence over months and years, as is common in Family Courts. Not all bench trials themselves result in instant decisions immediately following a hearing;¹⁵⁹ many complex issues require judges and law clerks to review case law and statutory law, review transcripts, weigh the testimony, consult treatises, and encapsulate decisions in writing. Thus, a concern about the deliberations themselves taking up time may be in truth misplaced, as jury deliberations may actually quicken the process.

Research shows that the number of litigants who would in fact choose to have a jury trial, as well as those who actually proceed to jury trial, would probably not be as numerous as anticipated.¹⁶⁰ As author

156. See, e.g., N.Y. FAMILY COURT ACT § 1011.

157. In some states like Maine and Pennsylvania, where civil protective order hearings must occur within a certain number of days, the jury option may not be realistic. 19-A ME. REV. STAT. ANN. § 4006 (1964); 23 PA. STAT. ANN. § 6107(a) (West 2001). Yet, some have argued that temporary orders of protection could be extended further so as to allow due process and procedural rights to the accused abuser. Epstein, *Tempering*, *supra* note 5, at 1873 n.137.

158. One of the major complaints about the current Family Court system is the lengthy delay that often occurs. See *In re C.R.*, 843 N.E.2d 1188, 1189 (Ohio 2006); Flango & Rubin, *supra* note 8, at 15; Geraghty & Mlyniec, *supra* note 2, at 445; Hon. Gerald W. Hardcastle, ADVERSARIALISM AND THE FAMILY COURT: A FAMILY COURT JUDGE'S PERSPECTIVE, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 64 n.16 (2005).

159. See Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147, 193-94 (1998). However, this is not always the case, as some judges make up their minds regarding a case well before closing arguments are made. See Guggenheim & Hertz, *supra* note 40, at 581.

160. See, e.g., Winick, *supra* note 10, at 44 (explaining that the "overwhelming majority" of batterers do not request trials). Arizona has implemented jury trials in termination of parental rights cases; less than 175 jury trials were requested over the course of a year across the entire state. See H.B. 2559. 47th Leg., 2d Reg. Sess. (Ariz. 2006); Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U.J. GENDER SOC. POL'Y & L. 567, 584 (2003) ("Domestic violence victims often settle out of court for less protection, aware that making the case before a judge may expose them to unacceptable safety risks or require more evidentiary and advocacy resources than they have available."). In fact, some have even referred to the percentage of custody cases which result in trial as "miniscule." Harriet Newman Cohen, *When Custody is Truly Contested, Who Decides Best Interests?*, N.Y.L.J., June 6, 2005, at 9; see also Melton & Lind, *supra* note 111, at 74; Marc Galanter, *At a Glance: The Changing U.S. Jury*

John Guinther argues, “juries have a function even when they aren’t functioning.”¹⁶¹ In other words, litigants often decide whether or not to proceed to trial based on the expected result.¹⁶² The prospect of a jury trial could increase favorable pre-litigation resolutions, thus decreasing the backlog and delay inherent in many of today’s Family Courts.¹⁶³

In terms of resources, states could utilize smaller jury pools and juries. For example, some states allow for six jurors instead of twelve in certain proceedings, which has been held constitutional by the U.S. Supreme Court.¹⁶⁴ Virginia has a statute that allows for a jury of three in certain civil cases.¹⁶⁵ In Colorado and Wisconsin, for instance, a jury of six is allowed for questions of fact in child protective proceedings.¹⁶⁶

Other jury models deserve mention as well. For example, as the Court proffered in *McKeiver*, an advisory jury might be an appropriate option, and is already permitted in many types of cases under current state law.¹⁶⁷ If the judge agrees, members of the jury may render a discretionary opinion to the bench,¹⁶⁸ although it is unclear if the specific argument for an advisory jury has ever prevailed in a Family Court proceeding.¹⁶⁹ The option of a jury of six peers, or an advisory jury, while

System, National Public Radio, available at <http://www.npr.org/templates/story/story.php?storyId=4695497> (last visited Aug. 27, 2006) (“On the criminal side, some 15 percent of criminal defendants were tried in 1962, but less than 5 percent in 2002. In spite of rising numbers of defendants, the absolute number of trials was 30 percent lower in 2002 than in 1962.”); *id.* (“The percentage of civil cases reaching trial in the federal courts has fallen from 11 percent in 1962 to 1.8 percent in 2002. Trials have declined despite an increase in case filings over 1962–2002. In the federal courts, civil filings increased by a factor of five; trials fell by some 20 percent.”).

161. GUINThER, *supra* note 1, at xv.

162. *Id.*

163. See generally Geraghty & Mlyniec, *supra* note 2, at 441.

164. *Ballew v. Georgia*, 435 U.S. 223, 236–237 (1978). See generally *Williams v. Florida*, 399 U.S. 78 (1970) (holding that a twelve-person jury is not a constitutional requirement in state trials).

165. VA. CODE ANN. § 8.01-359(D) (2006).

166. COLO. REV. STAT. § 19-3-202 (2005); WIS. STAT. § 48.31 (2005).

167. See Kropf, *supra* note 59, at 2167. New Jersey permits litigants to consent to the use of a jury, even if the claim was not one in which a right to a jury trial historically existed. See N.J. STAT. ANN. § 4:35-2 (West 2004); Pasternak, *supra* note 68. Some states which have a right to an advisory jury include: Virginia, VA. CODE ANN. § 16.1-296 (2004); Colorado, COLO. R. CIV. P. § 39 (2005); Kentucky, KY. R. CIV. P. 39.03 (2006); Michigan, MICH. COMP. LAWS ANN. § 712A.17(2) (West 2005); Ohio, OHIO CIV. R. 39 (2005); and Vermont, VT. R. CIV. P. § 39 (2005).

168. VA. CODE ANN. § 8.01-336(e) (2005); *In re Bates*, 38 Va. Cir. 515 (Cir. Ct. 1992); *In re Nichols*, 14 Va. Cir. 341 (Cir. Ct. 1989).

169. This right was requested in *In re Nichols*, 14 Va. Cir. 341, for a child custody action, but the request was denied.

not ideal, could be the first step in a transition toward jury options in Family Court proceedings.

Moreover, scholars who have studied the actual data and statistics regarding American jury trials have found that “[t]he availability of the jury does not lengthen the time a case stays in the court system,”¹⁷⁰ and, in fact, “in civil cases juries may represent a net savings in taxpayer dollars due to the settlements their presence induces.”¹⁷¹

Although jury trials are costly, bench trials also incur substantial costs.¹⁷² If an argument against juries is based solely on a lack of financial resources, it communicates to family violence litigants that there are adequate resources to protect liberty interests in some cases,¹⁷³ but not enough resources to protect lives at risk or children who are being removed from their homes. Ultimately, we as a society are sending an implicit message that the value we place on justice is inextricably linked to the cost.¹⁷⁴

C. Issues of Legal Complexity

The complexities and depths of family violence cannot always be distilled into mere legal theories or laws. The facts and frailty of families in the court system are wrought with intricate and highly sensitive issues. Nevertheless, lack of a formal legal education is not a valid reason to be disqualified from deliberating such important cases. In fact, life experiences often supersede formal education in terms of wisdom. Family violence proceedings may be more suitable for jurors as decision-makers to parse out facts, as the complexity of facts in many such cases might be better considered from several individual perspectives. Moreover, the body of law governing family violence proceedings in most states is not overly complex. The combination of potentially complex facts without a complicated body of law may be well-suited to juror decision-making. Additionally, jurors address issues of domestic violence

170. GUNTHER, *supra* note 1, at 168.

171. *Id.*

172. *See, e.g.*, E. Allan Lind, *The Psychology of Courtroom Procedure*, in *THE PSYCHOLOGY OF THE COURTROOM* 13, 33 (Norbert L. Kerr & Robert M. Bray eds., 1982).

173. *See* U.S. CONST. art. III, § 2, cl. 3.; U.S. CONST. amend. VI.

174. *See* Flango & Rubin, *supra* note 8, at 38–39; Kropf, *supra* note 59, at 2176 (arguing that denying the right to a jury “should not depend on the potential for delay or cost”); Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 354 (1990).

regularly in the criminal courts and are capable of reaching sound verdicts.¹⁷⁵

Jurors routinely consider complicated areas of law in cases such as securities fraud and intellectual property.¹⁷⁶ In medical malpractice cases, for example, a jury must decide whether a physician exercised the standard of care that an average physician in the community would exercise.¹⁷⁷ Likewise, in a child neglect case, a jury should be able to determine whether or not a parent exercised a “minimum degree of care.”¹⁷⁸ Such issues are not outside the ken of jurors who are entrusted to decide cases by linking intricate facts with their own knowledge and experience.

Another concern may be that a jury deciding the facts in family violence proceedings may reflect misconceptions about domestic violence. Indeed, the public’s erroneous beliefs might include any number of the following misconceptions: (1) Men are always the abusers, and women are always the victims;¹⁷⁹ (2) Violence does not exist or is just a private matter; (3) He or she could have or should have left the abuser;¹⁸⁰ (4) A large

175. See generally Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 812–14 (2005); HANS & VIDMAR, *supra* note 22, at 153 (noting that even as far back as the 1950s “juries responded sympathetically to victims of spouse abuse in a manner reminiscent of today’s public concern with this major social problem”). But see De Sanctis, *supra* note 86, at 374 (“The jury may be gender biased, prejudiced against victims of domestic violence, and suffer from a ‘belief in a just world’ [and thus not want to believe domestic violence exists].”) Yet, De Sanctis also argues that judges can have some of these same misconceptions in domestic violence cases. De Sanctis, *supra* note 86, at 367 n.46.

176. See generally Philippe Signore, *On the Role of Juries in Patent Litigation*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 791, 793–94 (2001) (acknowledging that juries have a role in patent litigation in the United States); Lisa von der Mehden, *The Role of the Jury and the Court in Assessing Front Pay Awards Under the Age Discrimination in Employment Act*, 58 U. CHI. L. REV. 1475, 1494 (1991).

177. See John Gibeaut, *The Med-Mal Divide*, 85 A.B.A.J. 39, 39–44 (March 2005). See generally *Costantino v. Herzog*, 203 F.3d 164, 174 (2d Cir. 2000). In other countries, citizens often decide cases as lay magistrates in conjunction with actual judges. See Valerie P. Hans, *The Jury’s Role in Administering Justice in the United States: U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 85 (2002). Those who advocate for mixed tribunals and those who advocate for juries often argue the same reasons, such as legitimacy, community values, diversity, and group decision-making. *Id.*

178. See N.Y. FAMILY COURT ACT § 1012(f); see also *Nicholson v. Scopetta*, 3 N.Y.3d 357, 368 (2004).

179. See *supra* note 11; see also Detschelt, *supra* note 11, at 249; Suzanne K. Steinmetz & Joseph S. Lucca, *Husband Battering*, in HANDBOOK OF FAMILY VIOLENCE 233–46 (Vincent B. Van Hasselt *et al.* eds., 1988).

180. Kurtz, *supra* note 88, at 1360; PTACEK, *supra* note 8, at 121 (“[W]omen’s feelings about themselves, their abusive partners, and their situations are part of a dynamic interactional process . . . [The] response of institutions to women’s help-seeking has a great impact on women’s emotional and cognitive responses to violence.”)

brawny survivor of violence abused by a small scrawny batterer is not believable;¹⁸¹ or (5) Survivors always return to their abusers, so how bad could it have been, or was he or she lying in the first place?¹⁸²

Yet, even when trained, judges and lawyers may harbor some of these same misconceptions.¹⁸³ Moreover, if one were to argue that due to a judge's training,¹⁸⁴ acumen, and experience, he or she is most equipped to determine cases involving family violence, one must remember that our legal system is not founded upon who is better equipped to hear a case, but rather upon fundamental fairness in the courtroom. Again, litigants in family violence proceedings need to have confidence in the court system and court rulings. A jury option may be a viable alternative for litigants who fear the power granted to a single jurist, and who suspect that any order from a single jurist is inherently unjust.

Also, a judge already trained in the dynamics of domestic violence retains the option of rejecting the theories and foundations of such training and may not choose to draw upon this knowledge in making her decisions and rulings. Notably, many Family Court judges do not encourage expert testimony about the dynamics and basics of domestic violence, nor do they favor lawyers pontificating about the dynamics during bench trials.¹⁸⁵ Expert witnesses, who might enhance a bench trial by addressing the textured nuances associated with family violence in a particular case, are ultimately more of an anomaly in domestic

181. Duthu, *supra* note 11, at 30 (acknowledging the myth that "the batterer will always be bigger and physically stronger than the victim").

182. See PTACEK, *supra* note 8, at 70; Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & LAW 141, 144 (1995); De Sanctis, *supra* note 86, at 373; Letendre, *supra* note 78, at 981; Raeder, *supra* note 78, at 794-95.

183. BANCROFT, *supra* note 39, at 294-96; De Sanctis, *supra* note 86, at 372; Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 6 (1999) (discussing "the long-standing hostility exhibited by court personnel and judges toward domestic violence complainants"); Meier, *supra* note 82, at 688.

184. The National Council of Juvenile and Family Court Judges mandates: "All judges must be trained in the dynamics of family violence and how to address it fairly and properly. . . . Additional training will better enable judges to understand these complex issues, become more sensitive to the barriers facing victims, and eliminate any gender bias which contributes to the judicial system's failure to afford the protection of the law to the victims of family violence." HON. STEPHEN B. HERRELL & MEREDITH HOFFORD, *FAMILY VIOLENCE: IMPROVING COURT PRACTICE* 11, 16 (1990).

185. See generally Jane H. Aiken & Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, 39 CT. REV. 12, 12-13 (2002); Freedman, *supra* note 160, at 582 n.45.

violence cases in Family Court.¹⁸⁶ This is true despite the fact that expert testimony may provide invaluable assistance to a judge or jury and prevent decisions based solely on emotions or misconceptions.¹⁸⁷

This Article proposes a paradigm that offers litigants an opportunity to have the facts determined freshly by the jury and the law applied keenly by the experienced judge. In this model, the judge decides the ultimate disposition for a family. The judge also retains the customary judicial authority and control, such as ruling on evidentiary objections and on which facts are relevant, dismissing or severing charges, vetoing a highly unreasonable verdict,¹⁸⁸ and ultimately determining the best interests of the child. Thus, the judge addresses the legal complexities and technicalities and allows the jury to focus upon the facts.

Ultimately, we can refer back to the 1968 seminal case of *Duncan v. Louisiana*,¹⁸⁹ in which Justice White explains:

[A]t the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and

186. See generally Aiken & Murphy, *supra* note 185, at 13–15; Freedman, *supra* note 160, at 578–79; Evan Stark, *Symposium on Reconceptualizing Violence Against Women By Intimate Partners: Critical Issues, Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 974 (1995) (“Among the most important legal innovations in criminal and civil proceedings involving domestic violence is the admission of expert testimony.”)

187. Certainly, there are costs associated with expert witnesses, yet such witnesses could include domestic violence advocates or shelter counselors who may even testify for low cost (assuming they would qualify as experts under state law). Furthermore, concerns that juries are overly swayed by emotion or irrelevant factors have not been replicated in actual research. See Horowitz & Willging, *supra* note 75, at 174–75 (citing Vishner studies). Some have argued that juries operate fairly and equitably instead of focusing merely upon the intricacies of the law. See HANS & VIDMAR, *supra* note 22, at 116. Moreover, with expert testimony or education about how survivors may present themselves, finders of fact can see beyond the mere appearances of survivors during the fact-finding process. Meier, *supra* note 82, at 688. Studies show that after serving on juries, jurors leave the courtroom more educated, more informed and with a higher regard for the court system overall. See HANS & VIDMAR, *supra* note 22, at 19. See generally STEPHEN J. ADLER, *THE JURY* 242 (1994). If adding the jury option to family violence cases secondarily educates the public about the issue, then the model is that much more worthwhile.

188. Judges can overrule juries at times. See, e.g., FED. R. CIV. P. 50(b). Rule 50 consolidated both directed verdicts and judgments notwithstanding the verdict into “judgment as a matter of law.” See *id.*

189. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.¹⁹⁰

CONCLUSION

Regrettably, a paucity of state statutes allow juries in family violence cases. Jury trials should be an option in limited circumstances in Family Court cases. Specifically, it is critical to consider the option of a jury trial in the adjudicative portion of family offense proceedings and child protective proceedings addressing allegations of family violence. A litigant should have the option to have the jury decide the facts, and then have the judge apply the law and craft the appropriate remedy.

Confidence in the judicial system, as held by the public in general and the litigants in particular, is undoubtedly critical on many levels. There may initially be valid concerns that juries in family violence proceedings might affect privacy or backlog. Yet in the final analysis, introducing the construct of juries into Family Court jurisprudence will assuredly improve the perception and trust in the legal system overall. Increased formality in the Family Court system and the right to a jury option may very well enhance the integrity and perceived legitimacy of such proceedings, as well as the legal system as a whole.¹⁹¹

If a judicial system is to operate fairly, it must engender the good will and trust of the community that it seeks to protect and upon which it will dispense its justice. In family violence cases, the perception of unfairness may jeopardize a family's ability to function beyond a court case and adhere to durable and workable solutions. If litigants and families who entrust their lives to be judged and determined by a court perceive a biased system—whether or not such bias exists—it threatens to erode the perception of fairness and balance that the court system was intended to provide. ❀

190. *Id.* at 157 (citing H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 4, n.2 (1996)).

191. *See generally* Gofen, *supra* note 98, at 861 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)).

