

Journal of Gender, Social Policy & the Law

Volume 11 | Issue 2

Article 18

2003

Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imaging the Solutions

Joan S. Meier

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DOMESTIC VIOLENCE, CHILD CUSTODY, AND CHILD PROTECTION: UNDERSTANDING JUDICIAL RESISTANCE AND IMAGINING THE SOLUTIONS

JOAN S. MEIER*

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* Professor of Clinical Law, *George Washington University Law School*. The seeds of this Article were initially planted ten years ago when "Case 2" was litigated; a preliminary version of it was presented at the 1991 Annual Meeting of the American Association of Law Schools. I am grateful to Liz Schneider for publishing her powerful and invaluable book and to Ann Shalleck for organizing this Symposium, which provided me the motivation and opportunity to more fully develop the piece. I am especially grateful to Ann Freedman, who supported this Article's difficult birth in ways too numerous to list, and whose nuanced and deep thinking about these issues has informed much of my thinking in this piece. Thanks also to Evan Stark for his ever-present willingness to read drafts and offer incisive comments, as well as his brilliant expositions on the problem of battering and mothering. I also owe thanks to research assistants Lynn Eisinger and Anjali Kapur, and to the George Washington University Law School for its support in the form of a summer stipend. Finally, I thank my clients for their remarkable strength in withstanding their ordeals both in and out of court, and their generosity in sharing their stories.

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INTRODUCTION

In much of Liz Schneider’s work, she provides a powerful critique of our culture’s patriarchal legal and social responses to women as mothers. Noting that “motherhood is critical to women’s subordination,”¹ she points out that mothers are “likely to be held primarily or even exclusively responsible for any harm [to a child]. . . . Male violence in the family, even when it is extreme and lethal, seems like a natural extension of male patriarchal authority in general; women’s failure to mother makes them monsters.”² The invisibility in our society of both male violence and women’s mothering makes fair judgments about women (and men) as parents difficult at best. While acknowledging that mothers in some cases do deserve to be held responsible for harm to children, Schneider nevertheless concludes:

1. See ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 149 (2000).

2. See *id.* at 152-54.

[i]t is difficult to determine the contours of maternal responsibility in a culture that blames mothers for all problems relating to children, gives mothers so little material and social support, and absolves fathers of all responsibility. Unless we place problems of motherhood and battering within a framework of gender socialization and subordination, we cannot fully and fairly assess the contours of responsibility.³

Schneider's feminist critique, with which I agree,⁴ is important to bear in mind as the national conversation about children in families experiencing domestic violence heats up. In the last several years, the federal government,⁵ national judicial bodies,⁶ state legislatures,⁷ the American Bar Association,⁸ and individual judges, along with child welfare and domestic violence experts have finally⁹ turned their

3. See *id.* at 178.

4. But see *infra* note 26.

5. For example, in 1990 Congress passed a Resolution expressing the sense of the Congress that "for purposes of determining child custody, credible evidence of physical abuse of one's spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse." H.R. Con. Res. 172, 101st Cong. (1990). During the past decade, the Department of Health and Human Services has sponsored a number of initiatives. See LAUDAN ARON & KRISTA OLSON, URBAN INST., EFFORTS BY CHILD WELFARE AGENCIES TO ADDRESS DOMESTIC VIOLENCE: THE EXPERIENCES OF FIVE COMMUNITIES (1997), available at <http://aspe.hhs.gov/hsp/cyp/dv/intro.htm>. In addition, the federal government was a primary sponsor of the seminal "Green Book" and its subsequent pilot projects discussed below. See *infra* note 10. In June 1999, the federal government sponsored a national conference on the impact of witnessing violence on children. See OFF. OF JUV. JUST. & DELINQ. PROGRAMS, U.S. DEP'T OF JUST., SAFE FROM THE START: TAKING ACTION ON CHILDREN EXPOSED TO VIOLENCE (2000).

6. The National Council of Juvenile and Family Court Judges ("NCJFCJ") has led the way on this issue. See NAT'L COUNCIL OF JUV. & FAMILY CT. JUDGES FAMILY VIOLENCE PROJECT, FAMILY VIOLENCE: IMPROVING COURT PRACTICE 25 (1990). In particular, as is discussed further below, the NCJFCJ has pioneered the development of the collaborative approach to the overlap of child abuse and domestic violence, which has inspired this Paper. See *infra* note 10.

7. In addition to amending state custody statutes, see *infra* note 18 and accompanying text, some states have recently (and controversially) created an independent crime of child abuse for causing a child to witness adult domestic violence. See generally Laurel A. Kent, Comment, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337; Audrey Stone & Rebecca Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205 (1997); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1 (2001).

8. A.B.A., THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (1994).

9. Until approximately the mid-1990s, the implications of adult battering for children were virtually ignored by child welfare advocates and governmental entities addressing domestic violence. Excellent research has been done on this subject in the last decade. See, e.g., DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION AND SOCIAL POLICY (Sandra A. Graham-Berman & Jeffrey Edleson eds., 2001); BETSY MCALLISTER GROVES, CHILDREN WHO SEE TOO MUCH (2002); PETER JAFFE ET AL., CHILDREN OF BATTERED WOMEN (1990). This attention to

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attention to this issue in national reports, conferences, workshops and national policy development initiatives.

The most significant development in this area to date has been the 1999 publication of the so-called "Green Book," a set of joint recommendations developed over approximately two years of organized discussion and debate among child welfare and domestic violence experts, advocates and judges.¹⁰ The collaboration which spawned the Green Book was radical; it was the first time that domestic violence and child welfare advocates had systematically sought (at a national level) to actively bridge their profound gulfs and mutual mistrust.¹¹ This process, designed to assist the government in improving child abuse and neglect proceedings, created a model of collaboration for child protection, domestic violence and court officials. The Green Book (and projects it has spawned)¹² represents a paradigm shift with the potential for transforming the practice of child protection agencies. At root, it seeks to replace such agencies' conventional perspective, which typically treats any harm to children as the fault of mothers,¹³ with a more domestic violence-savvy perspective, which places responsibility on male abusers when appropriate, recognizes that children's interests require the safety of their mothers, and forms alliances with battered women to protect both their children and themselves.¹⁴

children's interests by researchers, and more recently policymakers, has not penetrated many court adjudications of custody, for the reasons discussed further below.

10. See *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice*, in RECOMMENDATIONS FROM THE NAT'L COUNCIL OF JUV. AND FAMILY CT. JUDGES FAMILY VIOLENCE DEP'T 12 (1999) [hereinafter Green Book]. The "Green Book" nickname derives from the color of the book's cover.

11. Regarding the history of mistrust between domestic violence advocates and child welfare advocates, see, e.g., Susan Schechter & Jeffrey Edleson, *In the Best Interest of Women and Children: A Call for Collaboration between Child Welfare and Domestic Violence Constituencies* (1994), available at www.mincava.umn.edu/papers/wingspr.htm.

12. Since the Green Book's publication, six "pilot projects" funded by a consortium of federal agencies [hereinafter Green Book Initiative] have been launched around the country. Participants are attempting to implement the Green Book's recommendations for collaborative practice and to develop some learning about what does and does not work. For further information regarding this Initiative, visit the website, <http://www.thegreenbook.info>.

13. In *Nicholson v. Williams*, a groundbreaking class action lawsuit filed by battered mothers, the New York City child protection agency's policy of treating mothers as neglectful and removing their children on the grounds that the victimized mothers were "engaging in domestic violence," was successfully challenged and held unconstitutional. See generally *Nicholson v. Williams*, 203 F. Supp. 2d 153, 171, 193, 208 (2002). Comparable practices are not uncommon around the country.

14. Green Book, *supra* note 10, at Ch. 3. This "re-frame" is profoundly needed: conventional child protection practice has not only blamed battered women for both their own victimization and their children's, but has failed to provide services and

While reform of child protection practice is critically important, the flurry of attention to this arena also highlights how little attention has been paid to the parallel problem of child welfare dispositions in *private* litigation concerning domestic violence. Children's safety and well-being are often just as much at stake in litigation for civil protection orders, custody and divorce awards, all of which frequently determine the terms of child visitation or custody for an adult batterer.¹⁵ Yet, far less policy or research attention has been directed to this arena.¹⁶

In fact, a clear understanding of what is happening in private custody/domestic violence litigation is a necessary extension of the Green Book process, and will shed light on the thought processes that contribute to woman-blaming where children are concerned. Unlike the child protection arena, where state policies have been either untouched by domestic violence awareness or blatantly victim-blaming,¹⁷ state statutes governing custody and visitation have already been revised to reflect some recognition of the relevance of domestic violence to custody and visitation dispositions. Most states now

interventions that could meaningfully assist both the children and their mothers, and then compounded children's suffering by depriving them of their non-violent mothers. The disturbing case histories documented in *Nicholson v. Williams* demonstrate the extent to which many children (as well as mothers) have suffered unnecessarily from these misguided, and too often traumatic, state interventions. *Id.* at 163, 207-12, 252-53; see also Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996); Evan Stark, *A Failure to Protect: Unravelling "The Battered Mother's Dilemma"*, 27 W. ST. U. L. REV. 29 (2000).

The Green Book Initiative seeks to reform child protection practice without explicitly naming the patriarchal social and cultural context within which these norms have flourished. It is thus a pragmatic, non-ideological attempt to transform patriarchy in this area; it remains to be seen how effective it will be in changing the cultures of child protection and the courts. While the pilot projects are still in the early stages, an initial "Evaluation Summary" will soon be available. See GREENBOOK INITIATIVE, FAQs (last visited May 3, 2003), available at <http://www.thegreenbook.info>.

15. See Case 1 *infra* Part I.A.

16. In 2002 a groundbreaking book appeared, which has charted a new course for those who work on the overlap of custody litigation and domestic violence. LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2002). Written by two mental health professionals with extensive background in batterers' counseling, this book not only marshals previous data on the impact of battering on children, but also draws on the authors' clinical experience to provide a powerful analysis of the reasons batterers pose emotional, as well as physical risks to children even after the parents separate. In addition, this book analyzes how batterers are able to be so successful in custody litigation. See *id.* at 115-28. Previously, Evan Stark was one of the first scholars and mental health professionals to identify how batterers use custody litigation to continue their abuse of the mother. See Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1018 (1995) [hereinafter Stark, *Re-presenting Woman Battering*].

17. See *supra* note 13.

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require, at minimum, consideration of domestic violence in custody adjudications; approximately seventeen states have adopted a presumption of some kind against custody to batterers.¹⁸ It is all the more striking, then, to realize that trial courts, even in these states, appear to be granting custody to alleged batterers more often than not.¹⁹

This pattern is also striking for another reason: The failure of many courts to apply new understandings of domestic violence in cases concerning custody actually contrasts sharply with the demonstrable increases over the past ten years in judicial awareness and sensitivity to domestic violence in more standard “domestic violence” cases, such as civil protection orders or criminal prosecutions. At the least, it is no longer “politically correct” or conventional wisdom in these settings to disbelieve battered women’s claims or trivialize them as petty family matters.²⁰ In contrast, the unreconstructed hostility of

18. See Nancy Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective are They?*, 28 WM. MITCHELL L. REV. 601 (2001); *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 199, 225 app. (1995) [hereinafter *Family Violence in Child Custody Statutes*]; Pauline Quirion et al., *Commentary: Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501, 519 n.119 (1997).

19. It is difficult to be sure what is happening in trial courts since only a small percentage of cases are appealed, but recent studies have identified a disturbing trend. See Kristen Lombardi, *Custodians of Abuse*, BOSTON PHOENIX, Jan. 9, 2003, at Part 1 (reporting on a variety of cases and studies indicating that, where abuse is alleged, a majority of courts award sole or joint custody to the abuser), available at http://www.bostonphoenix.com/boston/news_features/top/features/documents/02643516.htm. In 1989, the Supreme Judicial Court of Massachusetts’ Gender Bias Study found that more than 70% of fathers received sole or joint custody regardless of whether there was a history of abuse. See Lombardi, *supra* (citing AM. JUDGES ASS’N, DOMESTIC VIOLENCE AND THE COURTROOM (1996)); BANCROFT & SILVERMAN, *supra* note 16, at 115; see also Linda Neilson, *Partner Abuse, Children and Statutory Change: Cautionary Comments on Women’s Access to Justice*, 18 WINDSOR Y.B. ACCESS JUST. 115, 144 (2000) (reporting that a study of 1147 randomly selected court files in a Canadian jurisdiction found that “not only do abusers obtain unrestricted access to their children, they also obtain custody in a significant number of cases. . . . [j]oint, split or full custody was granted to, or obtained by abusers in 16% of the court-filed cases . . .”).

My own (and research assistant’s) admittedly unscientific survey of many of the United States cases (contained in Appendix A) found that, of thirty-eight cases in which mothers alleged abuse and sought to limit fathers’ access to children, *only two trial courts* agreed with the mother; the remaining thirty-six courts awarded at least joint, and often sole, custody to the father. Thirteen of these decisions were upheld on appeal; one of the two favoring the mother was reversed on appeal. See *Dinius v. Dinius*, 564 N.W.2d 300 (N.D. 1997). Most of these cases were decided in states with a presumption against custody to the batterer. That battered women are now frequently losing custody to batterers shocked even me when I first started researching the case law for this Article. However, it is also clear that, in those few cases where appeal is possible, appellate courts are more likely to recognize the validity and significance of domestic violence for child custody decisions. See Quirion et al., *supra* note 18, at 519-20. See generally *infra* App. A

20. See, e.g., Joan Meier, *Battered Justice*, WASH. MONTHLY, May 1987, at 37-45

courts (and sometimes even the same judges) toward the same battered women and domestic violence allegations, when raised in the context of custody or visitation litigation, can be stunning.²¹

This difference suggests that, while society and the courts have acquired a superficial understanding of the reality of domestic violence, that understanding is not sufficiently deeply integrated to survive the challenge of truly painful choices regarding families. Thanks to the battered women's movement and massive legal reforms of the past three decades, courts are now more willing to recognize domestic violence in some "first order" cases, e.g., protection orders, and criminal prosecutions. But, as Martha Fineman has pointed out, "it is far easier to work out a position when the focus is on the male/female (or equivalent) dyad than when the implications of any action are for those relationships with their children."²² Thus, when the issues become more fraught, and fathers' relationships with their children are at stake, hard won insights about domestic violence too often fall away as judges once again avoid facing the reality of women battering, and the difficult choices needed to protect women and children and hold abusers accountable.

The remainder of this Article first offers two case studies from my own practice which illustrate the resistance of family judges to battered women's claims concerning children. It then surveys changes in courts' understandings of domestic violence over the past two decades. Next, it discusses a series of analytic misconceptions that help fuel courts' resistance to battered mothers' claims in cases concerning children. While my analysis of family judges' ideology reflects some agreement with Schneider and other feminist theorists regarding the prevalence of patriarchy and sexism,²³ I focus more on

[hereinafter Meier, *Battered Justice*]; see also *infra* Part II.A.

21. See *infra* Parts I.A and II.B.

22. See Martha Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 216 (2002).

23. See SCHNEIDER, *supra* note 1, at 149 (quoting Martha Fineman, *Images of Mothers in Poverty Discourse*, 1991 DUKE L.J. 274, 289-90). Schneider states that motherhood is "a colonized concept," defined in our culture almost entirely by men in a manner that perpetuates women's social subordination to men. *Id.* From this perspective, it is not surprising that adjudications of the relative rights of mothers and fathers with respect to children would bring out the most patriarchal and woman-blaming attitudes in judges and other professionals. However, it seems over-determinative to suggest that the resistance of so many judges to mothers' claims is purely the result of sexism. Even reasonable, "enlightened" and/or "feminist" judges sometimes under-value domestic violence evidence in these cases. While patriarchal values may unconsciously be influencing even these judges' and evaluators' thinking, they are unlikely to be the sole explanation. Moreover, whereas conscious or unconscious sexism is not easily amenable to solutions, identification of other explanations for judges' blindness to the validity of mothers' claims may suggest other solutions.

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the apparently gender-neutral constructs which consciously drive many judges and allow them to see themselves as doing “justice” or “right” when they reject battered women’s claims on behalf of children. In so doing, I seek to open a dialogue between those like myself who start with an advocate’s perspective and those in evaluative roles (courts and forensic evaluators) who must start from a “neutral” perspective in these cases. Accusations of patriarchy, while unfounded, cannot bridge the gap between us and will only contribute to a hardening of positions. My hope is that a presumption of good faith—such as that which enabled the Green Book’s process to bridge the conflicting professional perspectives of domestic violence advocates, child protection advocates and the courts—may facilitate at least some movement toward better understanding and protection of children by those who seek to do their best in determining outcomes in these painful cases.

Finally, also in the spirit of the Green Book, I offer a thought experiment regarding two alternative forms of “collaboration” that could counter these dynamics. The Green Book Initiative’s new collaboration between courts, child protection agencies and battered women’s advocates has already triggered a re-visioning of the paradigm of public child protection actions. While aspects of my proposals for the private litigation realm are radical and raise practical questions, “out of the box” thinking about collaborative responses is needed to address the parallel problems in private litigation when domestic violence and child maltreatment overlap.

I. CASE STUDIES

A. Case 1

Ms. Green²⁴ had two sons, approximately six and eight years old, by two different fathers. She was living with a third man, who fathered her third child in the course of the litigation. The older boy’s father, Mr. Anders, was very attached to his son and had long fought, both physically and verbally, with Ms. Green over the boy. The history of domestic violence (much of it not concerning the boy) was severe, including a rape at knife-point in Ms. Green’s home after the parties were separated and an attempted strangling with a clothesline. The case came to court pursuant to Ms. Green’s motion for contempt for violations of her civil protection order (“CPO”), largely involving Mr. Anders’ verbal threats to kill her. A companion motion to modify the

24. The parties’ names have been changed.

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CPO was pending in which Mr. Anders was requesting that custody be transferred to him. This case was heard by a judge within a dedicated Domestic Violence Court that considered itself fairly well-educated on domestic violence and committed to proactively addressing it. In the course of the contempt litigation, the judge admitted extensive testimony about the history of domestic violence, and indicated at various points that he believed a fair portion of it.

The litigation was protracted over a series of months due to a hotly litigated due process issue concerning the investigative practices of the defense counsel. At the end of the first stage of the contempt litigation, with the next court date pending in two months, the court turned to the question of interim custody/visitation. Requesting no visitation with the father, Ms. Green's counsel (myself) argued that after returning from visits with his father, the boy had expressed violent hostility toward women including his mother, was incorrigible and impossible to control, expressed a desire to die, and pounded and kicked walls. After a month without seeing his father, his behavior had settled down. The court responded by saying "Where do you get this from? The *mother*?" in a tone of intense disgust, making clear that visitation was going to be awarded.²⁵ Within minutes, the mother decided to transfer custody to the father and gave up all contact with her son for the summer. She wanted to protect her own safety; and her continued dealings with both the courts and the abuser over the boy were traumatic and intolerable to her. Ultimately, she gave up custody for the remainder of the CPO (and to the best of my knowledge, permanently).

B. Case 2

This case came to court in approximately 1992, before structural reforms were instituted to improve the court's response to domestic violence, and before the judge (and most others on this bench) had significant experience or education in that topic. The history of violence in this relationship included the abuser, Mr. Benson, choking, punching and threatening to kill Ms. Turner and their baby, as well as grabbing the baby and threatening to throw her out the window. After Ms. Turner obtained a protection order removing him

25. Not atypically, this court refused to hold an evidentiary hearing on the "temporary" visitation/custody determination. Rather, it addressed this issue solely through "colloquy" with counsel. The court's hostility toward the mother's claims regarding the boy was in contrast with its objectivity and basic respect for her testimony about the history of violence. It also contrasted noticeably with the court's strong concern for the boy when the abusing father alleged that the *mother's* partner was physically abusing the boy by pulling him by the ear and spanking him.

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from their shared apartment, he broke in repeatedly one night. After the police did nothing, on the fourth break-in, he stabbed Ms. Turner with scissors while the child watched from her crib. (Ms. Turner's life was saved by a friend's intervention.) Both before and after this incident, Mr. Benson made threats in person, on the telephone and in writing, such as "we're all going to die," and "I give you dead baby." After the stabbing, Ms. Turner moved to her father's home in the next state, but Mr. Benson continued to stalk and threaten her and the then four-year-old child with death. After we obtained a temporary protection order, she withdrew the CPO petition because she could not accept any award of visitation to Mr. Benson, which I had to advise her was likely, based on my experience with that court. (Mr. Benson had been home with the baby for at least the first year of her life while Ms. Turner worked).

Subsequently, Mr. Benson filed for custody or visitation. (Early on, the custody request was dropped.) After one day of testimony in which the history of abuse—including the stabbing—was aired, the court opened the next hearing by loudly lecturing both parties for "mudslinging" and for subjecting their daughter to "the police" and not resolving their dispute out of court. Subsequently, the court granted Mr. Benson temporary visitation twice a week for four hours, under supervision. During one visit the supervisor witnessed him putting his tongue in the girl's mouth. He refused to stop, stating that she's his daughter and he could do what he wanted. Ms. Turner also experienced her daughter tickling her in her crotch and attempting to tongue-kiss her, while stating that Mr. Benson did that with her. During other court-supervised visits, he had tantrums against Ms. Turner and on one occasion lay down on top of his daughter to prevent Ms. Turner from taking her home.

The trial lasted for approximately eight days, and included expert testimony validating Ms. Turner's claims and the serious danger she and her daughter faced from Mr. Benson, as well as two court-appointed evaluations, both of which entirely ignored the domestic violence history, and one of which evidenced a distinct lack of comprehension of the dynamics of domestic violence. Both court evaluators suggested that both parties must be lying since their stories were so contradictory. Eventually, after more typed threats appeared, including one sent to the judge, the judge appointed a guardian ad litem ("GAL"), ordered more psychological evaluations (including one for sexual abuse in which the evaluator relied on the father's claim that he had a normal childhood and found no support for the suspicion), and continued visits supervised by the GAL. The outside psychological evaluations once again ignored the domestic violence

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and indicated a lack of comprehension of the issue. The GAL found the father-child bond to be positive (based on the child's tears when her father would leave) and the father's conduct during the visits she supervised to be appropriate. She found the mother (whose plastic demeanor, inappropriate giggling, and racing speech were indicative of post-traumatic stress disorder) to be highly non-credible. On numerous occasions, the judge stated that both parents were failing this child, threatened to put the child in foster care, and expressed his view that neither party was credible. Ultimately, after lengthy deliberation, the court ordered limited visitation conditioned on several kinds of counseling and supervision. The father never complied with these conditions, and the mother retained custody.

II. JUDICIAL SCHIZOPHRENIA IN RESPONSES TO DOMESTIC VIOLENCE

While significant progress has been achieved in many state courts concerning basic understandings of domestic violence, including the commitment of resources, creative efforts to assist victims, and a genuine culture change, making the dismissal of such claims is no longer an acceptable norm,²⁶ there has been a striking insulation of custody/visitation adjudications from this new "enlightenment." Despite the widespread acceptance of the growing body of evidence that adult domestic violence is detrimental to children,²⁷ both courts and lawyers commonly separate the issue of domestic violence from custody/visitation, and even sometimes excuse it in a divorce context.²⁸ More notably, sympathy and concern to an adult battering

26. See *infra* note 35 and accompanying text.

27. "Children of battered women have been found to be at increased risk for a broad range of emotional and behavioral difficulties, including suicidal tendencies, substance abuse, depression, developmental delays, educational and attention problems, and involvement in violence." BANCROFT & SILVERMAN, *supra* note 16, at 9. Furthermore, children exposed to batterers are themselves at high risk to become direct targets of physical abuse and of sexual abuse. The danger even extends to homicide: one multiyear study found that in approximately one-fifth of domestic violence homicides and attempted homicides, a child of the battered woman is also killed in the process." *Id.* See also Green Book, *supra* note 10, at 9 (noting that 30-60% of battered mothers' children are also maltreated). Betsy McAlister Groves eloquently documents the profound impact even violence which courts might view as "minor," i.e., in which no injuries were received, can have on children. Groves, *supra* note 9, at 64-72 (describing an upper middle class family in which the father once held a knife to the mother's throat).

28. See *infra* Part I.B; Karen Czapan斯基, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 255-58 (1993) (explaining that "most of the studies of gender bias in the courts report that judges routinely ignore the issue or dismiss as insubstantial the impact of parental violence on children in the household"). The risks to children when in the care of a batterer, even after the adult parties are separated, are discussed *infra* Part III.D.2.

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victim can be transformed into an attitude of disdain and outright hostility when the battered woman seeks to limit the abuser's access to his child.²⁹ This disjunction can even occur within a single case, heard by a single judge, as Case 1 above demonstrates. And, as Case I also suggests, this judicial attitude all too often inures to the profound detriment of the children involved.³⁰

A. *Changes in Courts' Understanding of Domestic Violence*

If we consider domestic violence proceedings which are *not* focused on children, e.g., protection order cases, it is fair to say that a battle has been fought and at least partially won, regarding the seriousness with which domestic violence is taken by the courts. Back in the 1980s, before domestic violence was widely recognized and understood, women were often hounded out of court and overtly disdained for claiming domestic violence, even in protection order cases. It was possible then to hear judges saying things that one would be far less likely to hear today *in such proceedings*. Thus, one Maryland woman who sought a protection order recalled the judge saying:

I don't believe anything that you're saying. . . . The reason I don't believe it is because I don't believe that anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way that I would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can't believe that it happened to you.³¹

29. See *supra* Part I.A; see also *infra* Part II.B.

30. That child essentially lost his mother because the court was not willing to prioritize her safety and protection from trauma over the father's "rights" to his child. While the boy was unquestionably attached to his father, his behavior clearly indicated how destructive emotionally his father was for him. Regarding children's physical and psychological risks from batterers, see *infra* Part III.D. (discussing the future effects past domestic violence can have on a child's emotional well-being). Not only are the risks of physical and sexual abuse elevated where a father is a batterer, but the emotional manipulation and abuse that many battering fathers inflict on their children, as in Case 1, often pose an ongoing and significant threat to children's emotional well-being. *Id.*

31. See Czapanskiy, *supra* note 28, at 252 (citing victim's testimony contained in GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 2-3 (1989)). In one highly publicized case in the mid-1980s, the judge told one alleged abuser "[if] you want to gnaw on her and she on you, fine, but let's not do it at the taxpayers' expense;" this defendant later murdered his wife. See Meier, *Battered Justice*, *supra* note 20, at 38. It is not hard to find a litany of past examples of abusive judicial reactions to battered women seeking protection in the courts. See generally ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 15 (2000) (emphasizing that the law itself "contributes to the abuse abused women undergo" and describing various cases of domestic violence).

Similarly, in Case 2, litigated about ten years ago, after a day of testimony about the history of abuse, the judge opened the second day of proceedings by yelling at the parties (and myself) about “mudslinging.” Subsequently, the judge seemed inclined to treat all of Ms. Turner’s allegations of violence as fabrications.³² Similarly, the forensic psychiatrist found Ms. Turner’s “stories” of Mr. Benson’s abuse “puffed up,” “exaggerated” and “bizarre.” In particular, he characterized her statements that the abuse had caused her to lose her job (through absenteeism and accusations Mr. Benson made to her employer) and forced her to go live in a shelter, as not making sense.³³ (He also found Mr. Benson even more unbelievable.) The social worker, although he experienced Mr. Benson’s belligerence and coercion, and expressed concern (in private) about Mr. Benson’s dangerousness, steadfastly insisted on presenting him as reasonable and decent in his statements to the court.³⁴

We know now that the type of violence alleged in both Case 2 and the Maryland case just discussed is all too plausible, and that it plays out in many relationships. And in the past twenty years, in many jurisdictions, the litigation of domestic violence has been greatly transformed from what might fairly be called the “dark ages” to what might be called an “age of partial enlightenment,” where judges more often respect women’s right to seek protection and frequently credit their allegations. Many courts have instituted dedicated domestic violence dockets or courts, and in a growing number of jurisdictions it is no longer acceptable conventional practice, *at least in protection order or criminal cases*, to treat domestic violence allegations as implausible or trivial.³⁵ It is now at least somewhat

32. See *supra* Part I.B. The judge may have been influenced by Ms. Turner’s previous avoidance of the court proceedings, and his belief that she had lied about receiving notice. Ultimately, while the court did not in its opinion reject all of the abuse allegations, and did fashion a highly protective visitation order, even years later the judge still expressed doubt to this author as to the truth.

33. See Report Milton Engel, in D.R. 2029-92d 6, 13 (June 23, 1993) (on file with author). Ms. Turner lost her job because Mr. Benson’s abuse caused her to arrive late and miss work repeatedly. Ms. Turner’s claim that she had to go to a shelter was apparently incomprehensible to the evaluator because Ms. Turner’s father supposedly had a very nice house in which she had stayed with her daughter. The fact that she was being stalked at that location apparently did not enter in to the forensic psychiatrist’s assessment. *Id.*

34. See *generally* Report by Dan Feeney, in D.R. 2029-92c 3 (May 28, 1993) (on file with author) (choosing not to interview parties about abuse because they “disagree about everything”). In retrospect, it seems likely that the social worker was intimidated by Mr. Benson, who was very large and imposing, often angry and yelling, and could be quite menacing.

35. See *generally* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999).

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shocking for domestic violence victims and their lawyers to be dismissed out of hand in criminal and civil cases where the violence itself is the central concern.³⁶

A case in point is the District of Columbia's new Domestic Violence Court, which has been touted as a "model court" for its proactive approach and improved accessibility, efficiency and responsiveness to domestic violence claims.³⁷ As a litigator in the D.C. courts both before and since the Domestic Violence Court was instituted, I would agree that the new court has improved the handling of domestic violence cases in some respects,³⁸ and that the issue has risen to a

36. See Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1291 (2000) (noting that "the legal system has made great strides in its treatment of domestic violence"). But cf. Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly Between "The Truly National and the Truly Local"* 42 B.C. L. REV. 1081, 1126 (2001) (noting that "increased attention to domestic violence has resulted in unfounded assumptions about progress in the courts"). The findings of James Ptacek's landmark study of two Boston courts' responses to battered women in protection order cases support the widely held view that the courts' treatment of battered women has improved. See JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 106 (1999). In his survey Ptacek found that "most judges presented a supportive demeanor" to the battered women that appeared before them. *Id.* at 106, 150. In fact, the study found that eight out of eighteen judges presented a "good-natured" demeanor toward the women, and *only one judge was seen as "firm (condescending/harsh)" toward the women before him.* (Two more presented a "good-natured" but "condescending" demeanor to the women; six presented a "bureaucratic" (i.e., impersonal) demeanor.) *Id.* Seven judges were seen as "firm" toward the men, six as "bureaucratic," and only three as "good-natured" toward the men. *Id.* Interviews with eight of the judges confirmed that many of these seek to make battered women welcome and comfortable in the court, and to take the violence allegations seriously. *Id.* at 116-35. These findings are quite astonishing when placed next to the recent findings of a survey by the Wellesley Centers for Women which documents repeated instances of Boston judges demeaning and insulting battered mothers before them in *custody matters*. See WELLESLEY CTRS. FOR WOMEN BATTERED MOTHERS' TESTIMONY PROJECT, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS (2002) [hereinafter WELLESLEY BMTP REPORT], available at <http://www.wcwonline.org/wrn/battered.html>. Yet there are hints of a similar mental bifurcation between custody and "pure" domestic violence cases even among the "supportive" judges interviewed by Ptacek. See Ptacek, *supra* at 124 (observing that one supportive judge also expressed in his interview sympathy for batterer's visitation rights, which, according to Ptacek, "seemed to conflict with his initial remarks about the seriousness of the violence").

37. See e.g., Epstein, *supra* note 38, at 5, 28, 44 (writing that "the community has already witnessed substantial differences in judicial treatment of these cases").

38. The new court may also have made it harder for victims in some respects. For instance, there is now greater involvement of the defense bar in these cases, and the court is extremely sensitive to that bar's claims that the court is biased toward females. See *Robinson v. United States*, 769 A.2d 747 (D.C. App. 2001) (rejecting an equal protection challenge to the Domestic Violence Unit). Many judges make a point of emphasizing, as one did at a bench/bar meeting, that "women are violent too." Men now account for approximately 15-20% of the filings for CPOs in this court (including cross-petitions where women have also filed); some percentage of these are granted. Telephone Interview with Paul Roddy, Chief Clerk of the Domestic Violence Unit, D.C. Superior Court (Apr. 15, 2003).

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much higher level of importance and is now taken seriously more often than not. But it is these very improvements in the handling of domestic violence cases that have made the lack of such respect for battering claims in custody/visitation cases within the same court so striking.

B. Limits of the “New Enlightenment”: Custody and Visitation Determinations

Thus, in Case 1 above, which was litigated within the Domestic Violence Court, the judge’s very demeanor switched from being objective and basically respectful regarding the domestic violence allegations (which were related to the claim of contempt of the protection order), to hostile and demeaning when the subject of child visitation was addressed (as part of the abuser’s motion to modify the CPO). In response to my argument that the batterer should not receive visitation pending the next court date in two months, the judge snarlingly dismissed my description of the child’s destructive behaviors because it came from “*the mother*” (who was standing right next to me).³⁹ The judge’s hostility toward the abused mother’s claim of risk to the child was in marked contrast to his receptivity to the *abuser’s* claim that the mother’s new boyfriend was abusing the child. In fact, the court ordered a child abuse investigation of the *mother* and her boyfriend, but not the batterer. It is important to bear in mind that this judge, although known to have quite a temper, was generally considered fairly enlightened on domestic violence. Moreover, he has since been elevated to a significant administrative position, was previously credited as one of the more effective judges in the Domestic Violence Court, and has generally expressed a fair degree of openness to the concerns of domestic violence advocates.

I have had similar, albeit less intense, experiences elsewhere in the D.C. Domestic Violence Unit with a variety of judges, typically in cases where clients sought custody or visitation as a term of a CPO. Even in the context of these cases, brought specifically to seek protection from violence, many D.C. judges, including those in the Domestic Violence Unit, consciously strive to treat custody or visitation issues independently from the abuse, and to cabin off their knowledge of the abuse from their determination of custody or visitation.⁴⁰

39. See *supra* Part I.A (noting the impact of this comment and the hostile dynamic of the court proceedings on the mother’s decision to give up custody).

40. See Ptacek, *supra* note 36, at 124 (noting the judge’s co-existing attitudes of firmness against domestic violence but sympathy toward visitation requests).

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This sense that many family judges seem to retain a mental “bifurcation” between “custody/visitation” matters and “domestic violence” matters was crystallized during planning discussions in 2002 for the new Family Court in the District of Columbia. While the new court does not encompass the existing Domestic Violence Unit, where protection orders and criminal cases are handled, it adjudicates all other family law cases. When the question arose of how domestic violence would be handled in the new Family Court, both the judges and attorneys involved in the planning stated that this court would not be handling “domestic violence cases,” as though domestic violence is not an issue in divorce and custody cases.

Courts’ discounting of battered women’s claims that their children are at risk from the batterer is actually extraordinarily common and of late has received increasing public attention. For instance, the Wellesley Battered Mothers’ Testimony Project found, based on interviews of forty abused women and thirty-one victim advocates across Massachusetts, that these mothers were commonly treated as “hysterical and unreasonable,” with “scorn, condescension and disrespect,” and were prevented from being heard in court.⁴¹ According to interviewees, fifteen of the forty had joint or sole custody awarded to their abusive ex-partner, each of whom had also abused the children. Thirty-eight said that judges, family service officers, and GALs had ignored or minimized their claims. Nine said judges and GALs failed to investigate the alleged physical and sexual abuse. And six said judges and GALs refused to even consider documented evidence of child abuse.⁴²

While published opinions are harder to parse because their renditions of the evidence tend to support their legal rulings, it is apparent even here that both the majority of trial courts and some number of appellate courts are rejecting the implications of domestic violence for custody. For instance, in *In re Custody of Zia*,⁴³ the Massachusetts Court of Appeals upheld a trial court’s finding that there was “no history or pattern of domestic violence” despite two

41. See Lombardi, *supra* note 19, at Part 2.

42. See *id.* (reporting the findings of the WELLESLEY BMTP REPORT); WELLESLEY BMTP REPORT, *supra* note 36, at app. A. The Battered Mothers’ Testimony Project was a “multi-year, four-phase study using a variety of research approaches in which human rights fact finding was complimented by qualitative and quantitative social science research methodologies.” *Id.* at 6. It has been criticized because the researchers did not interview the accused abusers. Court records and other documentation were reviewed in 25% of cases; all confirmed the women’s reports. Lombardi, *supra* note 19, at Part 2 (citing an interview with Lundy Bancroft, author of the study).

43. 736 N.E.2d 449 (Mass. App. Ct. 2000).

restraining orders and multiple assault convictions against the father.⁴⁴ As justification, the court pointed to the mother's "thwarting" of the father's joint legal custody, her inadequate boundary-setting and arrest for possession of drugs.⁴⁵ In *Kent v. Green*,⁴⁶ the Alabama Court of Civil Appeals, over a troubled dissent, upheld an award of sole custody of a sixteen-month-old to the father despite the father's undisputed choking of the mother resulting in her hospitalization and his arrest. The court affirmed the trial court's determination of the "best interests of the child" based primarily on the testimony of a psychologist, who found that the father was not likely to commit violence again and was in treatment for his anger, whereas the mother was not receiving treatment for her psychological problems.⁴⁷ In *Gant v. Gant*,⁴⁸ the Missouri Court of Appeals upheld custody to the father, despite the mother's extensive testimony of a history of violence, threats of homicide and suicide, and property destruction, and the father's admission to some incidents. The appeals court noted that the lower "court may believe all, part or none of any witness's testimony."⁴⁹

It is notable that courts' resistance to domestic violence issues has not been constrained by state statutes which were adopted to do exactly that, e.g., by adoption of presumptions against custody to batterers. Several courts have evaded the legislative intent of such statutes by holding that, even where domestic violence was *proven*, those incidents are simply not sufficient to constitute "domestic violence" as contemplated by the statute.⁵⁰ Other courts continue to

44. *Id.* at 246.

45. *Id.* at 456 n.12.

46. 701 So. 2d 4 (Ala. Civ. App. 1996).

47. *Id.* at 5; see also *infra* Part III.E (discussing how and why mental health experts' predictions are so consistently misguided and damaging in this field); *infra* note 167.

48. 923 S.W.2d 527 (Mo. App. 1996).

49. *Id.* at 531.

50. See, e.g., *Couch v. Couch*, 978 S.W.2d 505 (Mo. App. 1998) (upholding the trial court's finding that the father's breaking of the mother's collarbone does not constitute a "pattern of domestic violence" under the statute, and discounting child sexual abuse allegations); *Simmons v. Simmons*, 649 So. 2d 799, 802 (La. App. Ct. 1995) (holding that the trial court properly found no "history of perpetuating family violence" as required by statute, where it accepted "only occasional incidents of violence that may have been provoked by the wife's adultery" and rejected abuse allegations which were not corroborated by a document or the husband's admissions); see also *In re Custody of Zia*, 736 N.E.2d at 456 (explaining that past restraining orders and a pending assault charge do not constitute "a pattern or serious incident of abuse that would give rise to the rebuttable presumption"); *Hamilton v. Hamilton*, 886 S.W.2d 711, 715 (Mo. App. 1994) (commenting that the two admitted assaults over twenty years and wife's testimony of ongoing "verbal and abusive" behavior do not prove the "pattern of violence" required by statute); *Brown*

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exclude evidence of domestic violence despite legislative requirements that it be considered.⁵¹

Still more disturbingly, courts' reactivity to mothers' domestic violence allegations in the custody/visitation context sometimes blinds judges to evidence of direct *abuse of the child* by the batterer. The failure to recognize such "co-abuse" flies in the face of the well-established correlation between adult domestic violence and child abuse by the adult batterer.⁵² Both the correlation and the court's refusal to consider it was classically present in Case 2 above. We presented substantial evidence of very troubling behaviors by Mr. Benson toward the child, including his tongue-kissing the child during court-supervised visits (and angry retort when the supervisor told him to stop); the child's report that she slept in the same bed with her father during an unsupervised visit and that he told her a "secret," and subsequent reports that he "tickles" her between her legs.⁵³ My client also testified to Mr. Benson's repeated threats to kill the child along with her mother (including a written threat, "I give you dead baby"), attempt to throw the child out the window, and excessive spanking of the child when the parties lived together. All of these allegations, along with the claims of spousal abuse, were virtually ignored.⁵⁴

Again, the horror stories abound. The kinds of child abuse

v. Brown, 867 P.2d 477, 479 (Okla. Ct. App. 1993) (holding that the mother's testimony that the father shoved her with force against a doorway, broke car windows, and made verbal threats of violence against her does not constitute "any evidence which supports . . . claim [of] 'ongoing domestic abuse' as required by the statute"); Cox v. Cox, 613 N.W.2d 516, 521 (N.D. 2000) (noting that a conviction for simple assault which caused bruises and hitting the car instead of the complainant did not constitute an incident causing "serious bodily injury," or a "pattern," where other allegations were found not credible); Brown v. Brown, 600 N.W.2d 869, 873 (N.D. 1999) (upholding the trial court's finding that "incidents of domestic violence by both parties" neither indicated a "pattern of behavior" nor "incidents of sufficient severity to trigger the rebuttable presumption"); Dinius v. Dinius, 564 N.W.2d 300, 303 (N.D. 1997) (reversing the trial court's finding that the father's use of physical force against the daughter entitled the mother to custody because both incidents occurred seven years prior, and holding they did not involve serious bodily injury or a "pattern of domestic violence").

51. See, e.g., Raney v. Wren, 722 So. 2d 54 (La. Ct. App. 1998) (upholding the trial court's exclusion of evidence of past domestic violence pre-dating a prior consent custody order, despite the lower court's finding that the mother's fear was unjustified and that it was "outraged" by her move away without notifying the father).

52. See *supra* note 27 and accompanying text.

53. See *supra* Part I.B (explaining that such evidence could be characterized as evidence of either "abuse" or of "grooming" for more full-fledged sexual abuse).

54. Allegations of child sexual abuse are especially charged and likely to be turned against the mother, regardless of whether adult domestic violence is in the mix. See Lombardi, *supra* note 19, at Part 3 (describing cases of alleged sexual abuse and courts' refusal to respond).

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ignored, minimized, disbelieved, or allowed to happen in the cases investigated by the Wellesley Battered Mothers' Testimony Project, included the following:

My husband took the baby and said, 'Shut this f***** kid up!' and threw him across the room. And all I could see was Nathan hitting the wall, and I grabbed him.⁵⁵

She told me that he put two fingers inside of her vagina.⁵⁶

When I first saw my son after that year with his father, he had on pants . . . that were ripped, he had eczema so bad, he had sneakers that were too small, with no laces, he was emaciated. . . . To this day, this boy is like a boy of stone.⁵⁷

III. WHY AND HOW COURTS RESIST DOMESTIC VIOLENCE CLAIMS IN CUSTODY CASES

It can generally be assumed that judges and forensic evaluators who react negatively to battered mothers' claims in custody/visitation contests do not (with some notable exceptions) consciously do so out of sexism. Rather, they often rely on apparently gender-neutral rationales, which undercut the likelihood that a battered mother is truly seeking to protect her children. Part A below explores one sometimes unspoken but extremely powerful "gender-neutral" norm which pervasively influences courts adjudicating custody and visitation, and militates against serious consideration of domestic violence: the emphasis on parental equality, which more specifically takes the form of a focus on fathers. It is my sense that the desire for greater parental involvement is exerting a magnetic pull in these cases which impels courts to avoid full consideration of domestic violence. Courts are assisted in this avoidance by their reliance on several rationales, or more accurately, misconceptions, which misconceive the role of domestic violence in custody litigation. These misconceptions are discussed in some detail in Parts B, C, and

55. WELLESLEY BMTP REPORT, *supra* note 36, at 13.

56. *Id.* at 14.

57. *Id.*; see also *Couch v. Couch*, 978 S.W.2d 505 (Mo. Ct. App. 1998) (upholding the trial court's award of primary residential custody to father, despite the court's refusal to appoint a GAL or investigate child sexual abuse allegations based on the child's "strange" sexual behaviors, and the undisputed evidence that the father had broken the mother's collarbone); *Dinius v. Dinius*, 564 N.W.2d 300, 303 (N.D. 1997) (reversing a custody award to the mother where the trial court found that the father committed domestic violence against his daughter, and holding that hitting the daughter in her face and pulling her from a car by grabbing her arm and hair may have been permissible parental discipline). In at least one instance the court of appeals corrected the trial court's error. *Russo v. Gardner*, 956 P.2d 98 (Nev. 1998) (reversing the trial court's award of joint legal custody where there was evidence that the father had abused his two children).

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D below. What I term the “Equality Principle” also powerfully influences forensic experts who have been major contributors to the courts’ denial of the significance of domestic violence for custody/visitation adjudications.⁵⁸ Because domestic violence is unquestionably relevant to children’s well-being, all of these factors work in conjunction to lead courts too often to fail to make custody awards that protect children’s needs and best interests.⁵⁹

A. Parental Equality at all Costs

The commitment to parental equality in custody and visitation litigation is driven both by “process” and by “substantive” norms. As a matter of process, all courts are ethically and legally obligated to adjudicate cases from a stance of judicial neutrality, to hear evidence with an open mind, and not to bring any personal biases to the determination of the case. In custody cases, courts’ “neutral” stance is linked to their unquestionable obligation to treat both parties as starting with equal rights to custody, and not to presume, for example, that children need their mothers more than their fathers.⁶⁰

In contrast to a presumption of equal fitness, allegations of domestic violence or child abuse seem to frame the parties at the start as “innocent victim” vs. “evil perpetrator.” This makes such allegations appear almost unfair, tilting the scales before a court hears and sifts all the evidence. Courts may resist such allegations because to accept them can have the effect of replacing the exercise

58. See *infra* Part III.E.

59. See *infra* Part III.D. Another hypothesis for why courts so often marginalize domestic violence in these cases is that confronting the horrors inflicted within families is sometimes simply too painful, and is resisted by a form of psychological denial. Few who work in this field doubt that denial frequently fuels resistance to battered women’s claims. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Ann 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 (2003). However, psychological denial does not fully explain the *difference* between how courts in custody litigation and courts in protection order cases respond to similar disturbing material about adult domestic violence. Part of the answer to that question is implicit in the discussion contained in Part A below. Parts B-D explore the particular rationales courts use to justify their decisions and how the custody context critically shapes those rationales. By crystallizing what it is about the child-centered context that rigidifies courts’ resistance to domestic violence issues, we may be able to find other approaches to integrating domestic violence knowledge into these decisions.

60. “The two parties stand on equal footing at the outset of trial, and the court determines the best interest of the child based on the relative fitness and ability of the competing parties in all respects.” *Simmons v. Simmons*, 649 So. 2d 799, 802 (La. App. Ct. 1995) (upholding the trial court’s refusal to find that testimony about a twenty year history of violence meets the statutory standard for triggering a presumption against awarding custody to the abuser, where only one incident had documentary corroboration).

of the court's unconstrained discretion under the "best interests of the child" test, with an implicit presumption of one party's unfitness (effectively erasing judicial discretion).⁶¹ Courts are reluctant to cede their discretion and judgment in this manner.⁶²

Nonetheless, courts' reluctance to accept domestic violence evidence, or sometimes even to hear it, cannot be explained by the neutrality norm alone. After all, the same norm does not prevent courts from "finding facts" in, for example, criminal cases where the two sides have diametrically opposed stories. The reality of all judging is that, at some point, the open-minded hearing of evidence must evolve into a judicial interpretation or conclusion about the facts, i.e., who is truthful, who has done what, etc. Yet, in custody/domestic violence cases, too often the court's emphasis on parental equality persists in the face of clear evidence that one parent is violent and abusive to the other. In other words, courts treat the equality principle as not just a starting point, but as the requisite outcome, a goal that overrides contradictory information.

It seems clear, then, that the equality principle is also powerfully driven by substantive values. Such values derive most obviously from the powerful (although incomplete) gender revolution of the 1960s, which ushered in the rejection of explicitly gendered standards in family law, in particular, the tender years presumption as a means of determining the best interest of the child.⁶³ One thing has been clear since "women's liberation": mothers are no longer supposed to be considered the pre-eminent parent. By the late 1970s-80s, notions of gender equality were taking a more affirmative form; "joint custody"—i.e., the physical and/or legal sharing of parenting responsibilities and rights after separation—was now increasingly touted by policy analysts, courts, and embodied in affirmative

61. I am describing only a mental analytic process, not explicit legal requirements. While many states have adopted a legal presumption against custody to a batterer, I argue that, even in states where domestic violence is only a "factor," domestic violence allegations are seen as reducing discretion and tilting the scales, something that courts resist.

62. The perennial debate over whether judicial discretion or legislative presumptions in custody cases better serve children does not change the fact that most judges likely believe that the exercise of their own discretion and judgment, after hearing the facts, is more conducive to a just outcome than would be the blunt application of a legislative presumption. See, e.g., David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984). The one exception to courts' dislike of presumptions may well be the presumption in favor of joint custody, which speaks to courts' strong attraction to this concept of parental equality. See *infra* notes 64-74 and accompanying text.

63. See, e.g., *Ex Parte Devine*, 398 So. 2d 686, 695-96 (Ala. 1981) (holding that a presumption in favor of maternal custody for children of "tender years" unconstitutionally discriminates on the basis of sex).

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legislation requiring a presumption in its favor.

Since that time, joint custody has been the subject of much debate. On the one hand, it has been defended as embodying an ideal vision of what children need and parents deserve, and a means of furthering gender equality and shared parental responsibility.⁶⁴ On the other hand, its imposition on unwilling parents in practice has been much criticized as profoundly unfair to primary caretakers, typically women, and often contrary to children's best interests.⁶⁵ There is also a considerable consensus about its inappropriateness in cases of "high conflict" between the separating parents.⁶⁶

It is notable, however, that this well-documented debate and the fairly widespread nuanced recognition of the limitations of joint custody do not seem to have penetrated judicial thinking to a significant degree. On the contrary, to the vast majority of custody courts, some form of joint custody has increasingly become not just an aspiration, invitation, or even a preference, but an absolute ideal. Buttressing the notion of co-equal parenting as the highest good for children and the only fair resolution for parents has been the rapid adoption of a series of other legislative and judicial policies, including "friendly parent" preferences and "parental alienation" claims. Both of these notions reflect and further the seductive assumptions that any parent who does not support co-equal parenting (typically mothers) is by definition a deficient parent, and that any parent who advocates joint parenting (typically fathers) is inherently virtuous.⁶⁷

64. See, e.g., ELEANOR MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 112 (1992) (cautiously endorsing joint legal custody as a means of encouraging joint involvement); Katharine T. Bartlett, *Feminism and Family Law*, 33 *FAM. L.Q.* 475, 483 n.37 (1999) (acknowledging her own earlier work suggesting that joint custody could further gender equality, and stating that she now supports the new American Law Institute standard of designing a custody award to reflect the prior parenting roles).

65. See, e.g., Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 *MD. L. REV.* 497 (1988) (arguing that court-imposed joint custody arrangements are an abdication by judges who are afraid of making tough custody decisions, and a sacrifice of children's best interests in favor of "equitable" results for parents).

66. See Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 *U.C. DAVIS L. REV.* 739 (1983); Jaffe et al., *supra* note 9, at 15.

67. These types of policies, along with joint custody presumptions, are frequently intensively lobbied for and pushed through by groups which see themselves as advocates for "fathers' rights." In the District of Columbia, joint custody was lobbied three separate times, over a period of several years, and was finally passed over substantial opposition from the Bar and domestic violence advocates. The initiators of the bill were from a national "Children's Rights Council" which engages in legislative advocacy around the country. Leading members of the organization were identified fathers' rights advocates. See Margaret Martin Barry, *A Leap Backward: D.C.'s Joint Custody of Children Act*, *WASH. LAW.*, Nov./Dec. 1996, at 41-42.

The problems with joint custody (and the related friendly parent and parental alienation concepts) in the domestic violence context, which are amply documented in the literature,⁶⁸ warrant brief recapitulation here. In essence, providing a batterer with maximum access to his children may only further his abuse by increasing his control over and harassment of the mother, and significant physical and emotional risks to both the children and the mother. “Friendly parent” provisions are implicitly “unfriendly” to battered women, who may need to avoid interaction with their abusers for their safety and mental health.⁶⁹ Similarly, application of “parental alienation syndrome” (discussed further in Section III.B.2 below) in cases with abuse allegations, seems intrinsically to deny the likelihood that some children appropriately want and need their exposure to fathers who abuse their mothers or themselves to be limited. While most statutes contain an exception to the preference for joint parenting where there is evidence of domestic violence, in practice, unfettered access to their children is increasingly being seen as a father’s “right,”⁷⁰ and joint legal and physical custody is frequently imposed despite mothers’ claims of domestic violence.⁷¹ Moreover, the concept of “parental alienation” was actually invented to rebut mothers’ claims of child abuse, particularly sexual abuse. Thus, despite the contrary assumptions of many courts that accept “parental alienation” claims, it is hard to avoid the conclusion that this theory is only a thinly

68. See generally Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 34 (1992); Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1122-23 (1996).

69. See Zorza, *supra* note 68, at 1122; see also *Ford v. Ford*, 700 So. 2d 191 (Fla. Dist. Ct. App. 1997) (reversing the trial court’s award of custody to a father who had admitted to abuse, because the trial court failed to address the domestic violence and, among other things, its implications for the “friendly parent” preference). See generally Fredrica Lehrman, *Factoring Domestic Violence into Custody Cases*, TRIAL, (Feb. 1996), at 32-39 (discussing the interaction between domestic violence allegations and friendly parent provisions).

70. Indeed, advocates have observed in judicial trainings that some judges apparently believe that they are not free to restrict fathers’ access to children because such restrictions would infringe a constitutional parental right. Telephone Interview with Roberta Valente, Senior Advisor, Domestic Violence Resource Network (Dec. 18, 2002). The notion that the constitutional rights attaching to parenthood, see, e.g., *Stanley v. Illinois*, 405 U.S. 645, 650-52 (1972), apply in contests between two private parties appears doubtful, and would essentially mean abandoning the “best interests of the child” test. However, even if custody litigation were to be appropriately recast as concerning parents’ constitutional rights, such rights would not mean that fathers are entitled to access to their children *regardless of the safety or well-being of those children or other individuals*. No constitutional right is this absolute. Of course, a complete exploration of this issue deserves its own article.

71. See SUPREME JUD. CT. OF MASS., GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS 59 (1989) [hereinafter MASSACHUSETTS GENDER BIAS STUDY], cited in WELLESLEY BMTP REPORT, *supra* note 36, at 4 n.22.

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veiled instrument for denying paternal abuse and furthering a bias against mothers.⁷²

Each of these policies, and the trend as a whole, deserves greater reflection than is possible here. However, what is important for present purposes is the recognition of and reasons for the remarkably powerful hold of these “equal parenting” principles on the courts.⁷³ It appears that these principles, which seek to ensure more access by fathers to children, fall on fertile ground. In essence, they tap into a widespread, deeply felt lack of fathering throughout our culture and courts. Anyone who has litigated custody knows that it is an unspoken “given” in most custody courts that fathers’ involvement with their children is both rare and very important. A concomitant assumption is the implicit sense that mothers start with an unfair advantage, presumably because they fit our intuitive image of “parent,” and are *assumed* to be primary and/or “natural” parents. The combined effect of these unspoken assumptions is that custody courts, while believing they are merely furthering parental “equality,” not infrequently give fathers’ claims and requests greater weight than mothers’.⁷⁴

In short, the judicial emphasis on both parental equality and father involvement in custody is powerfully driven both by process and substantive norms, which fuel resistance to considering domestic violence as determinative of custody or visitation. The next three Parts look more specifically at the ostensibly neutral rationales that allow courts to further this desire for equal parenting by marginalizing domestic violence claims in cases where custody or visitation is at issue. There are at least three “neutral” tenets that

72. See *Family Violence in Child Custody Statutes*, *supra* note 18, at 201-02; Richard Du Cote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. PUB. INT. L.J. 106, 141 (2002); Cheri L. Wood, Comment, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1373-75 (1994).

73. Parental Alienation Syndrome has been widely debunked as lacking any scientific basis, making its incredibly rapid and virtually universal adoption in the courts all the more striking. See *infra* note 105.

74. See WELLESLEY BMTP REPORT, *supra* note 36, at 4 (quoting MASS. GENDER BIAS STUDY, *supra* note 71, at 59, 62) (“When fathers contest custody, mothers are held to a different and higher standard than fathers.”); SCHNEIDER, *supra* note 1, at 170 (stating that the mere act of seeking custody is treated as prima facie evidence of paternal— but not maternal— fitness). In the District of Columbia, there is also an intense sensitivity to the lack of African-American father figures in the poor communities of color, which strongly reinforces the reluctance to reject any father who is actively seeking, by litigating custody or visitation, a parenting role.

Ironically, this modern emphasis on fathers’ roles appears to be recapitulating, in the name of modern values of equality and fairness, the old rule that gave fathers absolute “property” rights to custody of their children divorce. See generally Leigh Goodmark, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 252 (1999).

courts invoke in responding to domestic violence allegations: first, a skepticism toward the plausibility of the allegations; second, an assumption that the truth may be unknowable, but that in any case the problem is mutual; and third, an assumption that any past domestic violence is ultimately irrelevant to the future-oriented custody decision. The mechanisms by which these beliefs operate, and the fallacies upon which they rest, are discussed below. It should be noted that, while each is described in sequence, they are not intrinsically distinct concepts, but rather ideas which overlap in many respects.

One last caveat is appropriate: with the exception of the discussion of gender bias (*infra* Part B.2), I seek to take these rationales at face value and to respond to them objectively and analytically. While elements of gender bias can be found in many of the analyses which discount domestic violence, many—if not most—judges are struggling to cope as best they can with extremely difficult, disturbing material and very painful choices. The following discussion responds objectively to these perspectives in the hope that a dispassionate discussion will facilitate greater understanding, and more protective outcomes for children and parents who have suffered abuse.

B. *Discounting the Credibility of Domestic Violence Accusations*

The gulf between domestic violence advocates and those (predominantly judges and court-appointed forensic evaluators) who resist the characterization of fathers as batterers who are dangerous to their children, is defined in large part by advocates' willingness to believe women's claims (both about risk to themselves and to the children), and the courts' skepticism toward those same claims. These fundamentally contradictory starting perspectives are fueled by differing attitudes toward three core elements of factual assessment which shape the players' judgments in these cases: (i) the meaning of neutrality, (ii) gender bias, and (iii) demeanors of victims and perpetrators.

1. *The Meaning of Neutrality*

Defenders of judicial and evaluator "neutrality" often assert that news reports or surveys of only one party to a case, such as the Wellesley survey, cannot be taken at face value, and that the case decisions critiqued earlier⁷⁵ may well have been correct, because we can never know what the truth is in any given case without hearing all

75. See *supra* notes 43-51 and accompanying text.

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the evidence or at least reviewing the transcripts.⁷⁶ Furthermore, they will argue that neither judges nor evaluators should approach any given case with presumptions about who is telling the truth. While facially inarguable, there are two fallacies in this form of studied neutrality. First, it denies the working assumptions, or “life experience,” that inevitably color any evaluator or judge’s interpretation of the evidence. For instance, those who are predisposed to believe that women often fabricate or exaggerate domestic violence allegations are likely to be harder to persuade of the truth of such allegations, than those who are predisposed to believe that men frequently beat women. Despite the tendency of psychological evaluators to invoke a purely “scientific” basis for their opinions (often by relying on psychological tests), the reality is that it is not possible for human beings to eradicate their life experience or perspective from their interpretations of facts. Second, instead of genuine neutrality, which is receptive to information, many judges and evaluators actually exhibit skepticism or disbelief toward abuse allegations, which is somewhat resistant to contrary input.⁷⁷

Is such skepticism warranted? Both existing statistics and qualitative knowledge about domestic violence offer some objective guidance. Current understandings of domestic violence suggest something more than the mere possibility that, in any given relationship, allegations of violence may or may not be true: we know empirically that domestic violence is surprisingly widespread⁷⁸ and

76. See Lombardi, *supra* note 19, at Part 2 (indicating that the Massachusetts courts are, not surprisingly, critical of the Wellesley study because it only interviewed the mothers, and conducted a corroborative document review in only 25% of the cases). My understanding of the “pro-neutrality” view has been honed in part in discussions on electronic list serves, including the “CHILD-DV” list.

77. See Fineman, *supra* note 22, at 218-19 (reviewing NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES (Robert J. Levy ed., 1998)) (“[T]he *Deskbook for Judges* appears to anticipate that disbelief is to be not only expected but also encouraged as the initial judicial response.”).

78. The National Institutes of Justice found in 1998 that 52% of women surveyed said they were physically assaulted as a child or adult; it estimated that approximately 1.9 million women are assaulted by intimates each year in the United States. See PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUST., OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2 (1998). (It is worth noting that, contrary to the admonitions by critics of the recent reports (Wellesley BMTP and NOW-California) which were based on women’s “testimony,” this highly regarded “objective,” “scientific,” empirical research also uses women’s self-descriptions as the basis for discerning empirical fact.) Other research has demonstrated that wife-beating results in more injuries requiring medical treatment than rape, auto accidents and muggings combined. See Evan Stark & Anne Flitcraft, *Violence Against Intimates*, in HANDBOOK OF FAMILY VIOLENCE 298 (Vincent B. Van Haslett et al. eds., 1988). The Supreme Court has acknowledged studies on prevalence which “suggest that from one-fifth to one-third of all women will be

that it is perpetrated most often by males against females.⁷⁹ Further, we know that domestic violence is more prevalent in the relationships of parties who are divorcing, and still more common— with estimates of up to 75%— among couples in conflict over visitation or custody.⁸⁰

Moreover, contrary to the assumptions of many evaluators and judges, as best we can determine, fabricated claims of abuse are rare. This question has been examined with respect to child sexual abuse allegations. Here, despite the persistent belief among judges and evaluators that child sexual abuse is frequently fabricated, studies have consistently shown that fabricated allegations are quite rare. For instance, a national study of 9000 contested custody and visitation cases by the Association of Family and Conciliation Courts concluded that only 2% of the total contained child sexual abuse allegations: 50% of those allegations were valid, 33% were incorrect, (i.e., less than 1% of all contested cases reviewed), and 17% were indeterminate. Only 14% were found to be intentionally false.⁸¹ A more recent exhaustive study of child sexual abuse allegations in custody cases by *University of Michigan* professor of Social Work Kathleen Coulborn Faller found that 70% of the allegations were factually true.⁸²

While there appear to be no empirical studies of fabrication of

physically assaulted by a partner or ex-partner during their lifetime. . . .” *Planned Parenthood v. Casey*, 505 U.S. 833, 891-92 (1992) (quoting AMA COUNCIL ON SCIENTIFIC AFFAIRS, *VIOLENCE AGAINST WOMEN* 7 (1991)).

79. See AM. PSYCHOLOGICAL ASS’N PRESIDENTIAL TASK FORCE REPORT, *VIOLENCE AND THE FAMILY* 80 (1996) [hereinafter APA REPORT] (“Despite the contention by some researchers that women are as violent as men, clinical studies show that men more frequently are the abusers and that women more frequently are the victims of violence in the family.”). The Report’s finding is supported by numerous statistical surveys. The United States Bureau of Justice Statistics indicate that 85% of incidents of victimization by intimate partners are against women; that women are five times more likely to experience violence from an intimate than men; and that three out of four murder victims in 1998 killed by their intimate partners were women. See CALLIE MARIE RENNISON & SARAH WELCHANS, *INTIMATE PARTNER VIOLENCE 1-2* (Bureau of Just. Stat. Special Rep., NCJ 178247, May 2000). Surveys of United States and European police and court records consistently show that women make up 90-95% of the victims of reported domestic violence. See R. Emerson Dobash et al, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBLEMS 71, 71-91 (1992).

80. See BANCROFT & SILVERMAN, *supra* note 16, at 120.

81. See ASS’N OF FAM. & CONCILIATION CTS., *ALLEGATIONS OF SEXUAL ABUSE IN CUSTODY AND VISITATION CASES: AN EMPIRICAL STUDY FROM 12 STATES* (1988); Pamela Burke, *Fit Calif. Moms Losing Custody to Abusive Dads*, WOMEN’S ENEWS, Oct. 22, 2002, available at <http://www.womensenews.org/article.cfm/dyn/aid/1080>; see also Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 152-53 (1998). See generally Wood, *supra* note 72, at 1374 n.54 (citing additional sources discussing this question).

82. See Lombardi, *supra* note 19, at Part 4 (citing a study by Kathleen Coulborn Faller).

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domestic violence,⁸³ Dr. Evan Stark, a widely published and recognized author and researcher in the field of domestic violence, has testified that there is no documented instance of a woman fabricating a history of domestic violence, and that he independently knows of none.⁸⁴ On the contrary, women tend to minimize and deny abuse while understating the amount and severity of abuse.⁸⁵ Women's reluctance to reveal that they have been abused is widely recognized.⁸⁶ This uncontroversial truth is hard to square with the belief prevalent in the legal system that women in litigation (whether as plaintiffs or defendants) frequently fabricate such claims.⁸⁷ In short, much of the skepticism toward women's claims of domestic violence and child abuse appears to be based on an inaccurate understanding of the real prevalence of domestic violence among couples engaged in contested custody litigation.

Finally, when not dismissing domestic violence claims altogether, courts and evaluators often reject such claims as exaggerated or insufficient.⁸⁸ However, in many cases, the view that abuse is merely

83. Such studies are fundamentally indeterminate in that any researcher who seeks to measure rates of fabrication faces the same difficulty as judges and evaluators: there is no purely "objective" means of verifying such allegations. However, the reality is that most courts and evaluators do not ordinarily consider all existing evidence of abuse; hence it is quite possible that a researcher would be able to reach more satisfactory and "objective" conclusions based on a thorough factual investigation. See Freedman, *supra* note 60 (discussing the inadequacy of fact-finding in domestic violence cases); BANCROFT & SILVERMAN, *supra* note 16, at 120.

84. This testimony was presented in Case 2. See *supra* Part I.B. Stark now amplifies on that point to say that when one understands that domestic violence is defined by a "pattern of coercive control," instead of mere discrete incidents of violence, it becomes much harder to fabricate. E-mail from Evan Stark, Associate Professor, Department of Public Administration, Rutgers University-Newark, to Joan Meier (Dec. 27, 2002, 12:43 EST) [hereinafter Stark E-mail].

85. Report of Evan Stark, from Case 2 (June 27, 1993) (on file with author).

86. See Fineman, *supra* note 22, at 218 (noting that "women are reluctant to raise patterns of domestic abuse to their lawyers, let alone the judges and others who pass judgment on them in regard to custody petitions") (citing Mahoney, *supra* note 59).

87. See Jon R. Conte, *Has this Child Been Sexually Abused?: Dilemmas for the Mental Health Professional Who Seeks the Answer*, 19 CRIM. JUST. & BEHAV. 54, 62 (1992) (writing that "I am not aware of a single empirical study that has documented that in fact false cases of sexual abuse are more likely to arise in divorce/custody cases"). In fact, in my experience with my clients, all of whom were seeking legal protection, most were *reluctant* to fully acknowledge the domestic violence they had suffered, and many did not recognize low-level violence (e.g., hitting, shoving) as worthy of note. Moreover, contrary to the stereotype of vengeful mothers among custody courts, many of my battered clients were very reluctant to acknowledge that their batterers posed risks to their children.

88. See, e.g., *In re Custody of Zia*, 736 N.E.2d 449 (Mass. App. Ct. 2000) (stating that two prior protection orders and pending assault charge do not indicate a "pattern or serious incident" as required by statute); *Hamilton v. Hamilton*, 886 S.W.2d 711 (Mo. App. 1994) (commenting that two incidents over twenty year marriage do not create statutorily required "pattern" of domestic violence); *Brown v. Brown*, 867 P.2d 477, 479 (Okla. Ct. App. 1993) (holding a father's shoving a mother

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“minor” or “exaggerated” ignores both the better-documented phenomenon of minimization and denial, and the reality that domestic abuse spans a wide spectrum of behaviors (and that victims often reveal lesser incidents before they disclose the most traumatic ones). Not all domestic violence result in bruises or broken bones. Some forms of abuse are predominantly sexual. Yet the hallmarks of an abusive relationship, namely the power, control, domination and state of fear, even without much severe physical violence, may still be profoundly damaging.⁸⁹

While courts are quick to discount mothers’ claims of battering, they tend implicitly to over-value fathers’ claims of desire for custody. It is now well-established that many batterers seek custody primarily as an extension of their power and control over and abuse of the mother.⁹⁰ The American Psychological Association found that batterers are twice as likely to contest custody as non-batterers, and are more likely to contest custody of sons.⁹¹ In addition to seeking to impose their rigid views of gender roles on their children, many batterers see winning custody over the mother as a powerful means of vindicating their moral and functional superiority.⁹² As is discussed in greater detail in Part III.B.3, victims and perpetrators’ demeanors in

roughly against a door, smashing car windows of a man he believed she was seeing, and repeated threats of violence do not constitute “ongoing domestic abuse” under statute). See also cases cited *supra* note 50.

89. See Stark, *Re-presenting Woman Battering*, *supra* note 16, at 986.

Physical violence . . . they have been subjected to an ongoing strategy of intimidation, isolation, and control . . . the unique profile of ‘the battered woman’ arises as much from the deprivation of liberty implied by coercion as it does from violence induced trauma.”

Id.

90. *Id.* at 1017 (“Every aspect of this case indicated that David’s major interest in custody was to extend the control he had created through violence and withdrawal in the marriage into the post-marital period, an example of ‘tangential spouse abuse.’”); see also APA REPORT *supra* note 79, at 40 (“When a couple divorces, the legal system may become a symbolic battleground on which the male batterer continues his abuse.”). These findings about batterers’ frequent use of the court system to extend their power over their former partners are reinforced by the results of an in-depth study of divorced (but not necessarily abusive) fathers in New York State by Terry Arendell. Arendell’s findings have been characterized as elucidating common attitudes of divorced fathers, including “a consistent shared masculinist discourse . . . with emphasis on the central importance of fathers’ rights, the appropriateness of efforts to establish control over the former wife despite the divorce, the lack of male responsibility for post-divorce conflict, and the viability of absence as a strategy. . . .” Barabara Allen Babcock et al., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY 1284-85 (1996) (describing Terry Arendell’s article *After Divorce: Investigations into Father Absence*, in 6 GENDER & SOCIETY 562, 573-75 (1992)); see also TERRY ARENDELL, FATHERS AND DIVORCE 13-17, 45-67 (1995).

91. See APA REPORT, *supra* note 79, at 40.

92. See BANCROFT & SILVERMAN, *supra* note 16, at 114-15.

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court also powerfully influence, often inaccurately, courts' interpretations of fathers' and mothers' claims.

The net effect of the courts' unwarranted skepticism toward mothers' claims of battering and excessive deference toward accused fathers, then, is that it is highly unusual for a battered woman in private litigation to be recognized by a court to be sincerely advocating for her children's safety.⁹³ Rather, her very status as a litigant, a mother, and battered, seems to ensure that she will be viewed as, at best, merely self-interested, and at worst, not credible. Conversely, men's demands for access to their children are typically met with a presumption of good faith, even when those men are adjudicated batterers. Notably, this type of resistance to battered mothers' veracity in litigation over the children can co-exist with the court's basic acceptance of her claims for purposes of the non-child-centered aspects of the case.⁹⁴ In other words, the mere presence of children as a "stake" in the litigation can profoundly shift the culture of a case.

2. Gender Bias

Given what is known about domestic violence and batterers, the courts' insistence on "neutrality" or "objectivity" leads us inescapably back to the question of gender bias. And in fact, while the bulk of

93. This has consistently been my own experience in the D.C. trial courts. From exchanges on a listserv devoted to the subject of domestic violence and children, it appears to be the experience of others around the country as well. See Lombardi, *supra* note 19, at Part 4; WELLESLEY BMTP REPORT, *supra* note 36. While appellate decisions around the country are mixed, even the favorable ones reflect unfavorable trial court decisions. See *infra* app. A; Ford v. Ford, 700 So. 2d 191 (Fla. Dist. Ct. App. 1997) (finding abuse of discretion where the trial court barely mentioned an "established pattern of domestic violence" and applied a "friendly parent" principle against the victim); Lewis v. Lewis, 771 So. 2d 856 (La. Ct. App. 2000) (reversing the award of joint custody to the father as primary residential parent where the lower court failed to apply a presumption against custody despite the husband's admitted past abusive conduct); Nazar v. Nazar, 505 N.W.2d 628 (Minn. Ct. App. 1993) (reversing a custody award to the father and rejecting the trial court's finding that the mother had "falsely" and "maliciously" alleged violence); Russo v. Gardner, 956 P.2d 98 (Nev. 1998) (reversing joint legal custody where the father was convicted of wife abuse and there was evidence that he abused children); Zugar v. Zugar, 563 N.W.2d 804 (N.D. 1997) (rejecting the trial court's award of joint custody on grounds that the victimized parent was "over-protective," that the violence would not occur again, and that the violence was not directed at children); Smith v. Smith, 963 P.2d 24 (Okla. Civ. App. 1998) (reversing custody award to father and holding that the wife's affidavit and witness' testimonies demonstrated clear and convincing evidence of ongoing abuse). Unfortunately, these appeals are the exception: most custody litigants cannot and do not take appeals.

94. See Fineman, *supra* note 22, at 217 (characterizing as "schizophrenic" legal decision makers' tendency to accept established "stories and statistics" of domestic violence, yet to "ignore the stories and lessons they teach" in more complex policy contexts such as child custody and visitation); see also *supra* Part I.A.

this Article examines the neutral rationales that fuel rejection of the implications of domestic violence in custody cases, the discussion would be incomplete without some reference to what we know about gender bias in this area.⁹⁵

First, Case 1 provides a classic case in point: the court's snarling rejection of "the *mother's*" claims about the child's condition can hardly be understood in any other way than as an expression of hostility to "the mothers."⁹⁶ This comment is not explainable as reflecting the court's negative view of a party who the court had deemed excessively non-credible across the board, because the court had already indicated acceptance of many of her domestic violence allegations when presented in the contempt (non-custody) context.⁹⁷

In fact, strikingly, many courts themselves (through appointed commissions) have identified dynamics of gender bias in custody and/or domestic violence adjudications. The Massachusetts Gender Bias study of 2100 disputed custody cases found that courts consistently held mothers to higher standards of proof than fathers, a finding that it stated "directly contradicts the popular misconception that if gender bias does exist in child custody cases, it is in favor of mothers."⁹⁸ Karen Czapanskiy has found that states' gender bias studies consistently indicate that the "credibility accorded women litigants is less than that accorded men litigants" in domestic violence cases.⁹⁹ For instance:

95. There is still a fairly widely held view that family courts are biased against men. *Id.*; see, e.g., David Crary, *Preventing the Rage: Court Bias Plays a Role in Violence by Divorced Dads, Contend Groups for Fathers' Rights*, GUELPH MERCURY (Canada), Nov. 26, 2002, at B7. Not only the dynamics discussed in this Article but the available empirical findings counter this view. See BANCROFT & SILVERMAN, *supra* note 16, at 115, 120-21 (stating that "fathers have been at a marked advantage in custody disputes"). My own experience, as well as the survey contained in Appendix A, *infra*, suggests that batterers are *more* likely than non-batterers to win custody because of the courts intense negative reactions when mothers raise the issue of domestic violence in a custody dispute.

96. It is difficult to imagine a judge derogatorily referring to allegations by "the father" in a comparable context.

97. Nonetheless, the entire litigation was also highly charged with inidicia of gender bias. In her review of gender bias studies, Karen Czapanskiy has identified a "negative synergy" in cases with female attorneys advocating for female clients alleging battering. Czapanskiy, *supra* note 28, at 258, *passim*. Case 1 was a striking example of this: I was a female attorney with a battered woman client; the male batterer was represented by a very aggressive and highly-regarded male public defender. The male judge and defense attorney exhibited a great familiarity, including frequent jovial banter, jokes and even bets about various trivia, while I frequently found it difficult to get the court's attention. The judge's raw venom toward my client on the day we sought to eliminate the abuser's visitation with the child was merely the low point of a very charged trial.

98. WELLESLEY BMTP REPORT, *supra* note 36, at 2.

99. Czapanskiy, *supra* note 28, at 253.

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These responses reveal a strong perception by both the bar and the judiciary that, at least in rape and in domestic violence cases, a female comes to court in Georgia bearing a credibility burden, a burden based on a stereotypic view of gender that does not affect males in the same way. The effect of such undue skepticism frequently places female litigants in a position where they must offer more evidence than do male litigants.¹⁰⁰

Lest it be thought that this bias is limited to certain states or regions, similar observations have been made in most other states as well, e.g.:

A New York criminal court judge told me recently that although the court personnel in her courtroom are usually quite prosecution-minded, this attitude shifts when a woman testifies in a domestic violence case. Then, court personnel's body language clearly conveys to the judge and jury an acute skepticism.¹⁰¹

In custody cases, gender bias also often appears in a more masked form.¹⁰² For instance, the claim of "parental alienation" is being used with growing frequency against women alleging domestic violence (or child abuse). This concept was first invented by psychiatrist Richard Gardner, who himself stated that "parental alienation syndrome" ("PAS") is almost exclusively inflicted by mothers against fathers.¹⁰³ Gardner and others who have propounded the PAS in custody cases have asserted that it is grounds for denying custody to the perpetrator of such alienation.¹⁰⁴ Although the American Psychological Association has rejected it as a clinical phenomenon and states that there is no data to support it, use of this theory is increasingly prevalent in custody and domestic violence litigation.¹⁰⁵

100. *Id.* at 256 n.23.

101. Lynn Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53, 62 (1990), cited in Czapanskiy, *supra* note 28, at 253. See also Lombardi, *supra* note 19, Part 4 (citing results of the MASS. GENDER BIAS STUDY, the WELLESLEY BMTP REPORT, the NOW California Report and other cases).

102. See BANCROFT & SILVERMAN, *supra* note 16, at 122-31 (providing a fairly comprehensive list of "tactics" batterers use to discredit mothers' credibility in custody cases).

103. See *id.* at 135-36 (citing RICHARD GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEXUAL ABUSE (1991)). At one point the gendered basis for the "syndrome" was made explicit. See David Turkat, *Divorce-Related Malicious Mother Syndrome*, 10 J. FAM. VIOLENCE 253-64 (1995).

104. See BANCROFT & SILVERMAN, *supra* note 16, at 135 (citing RICHARD GARDNER, SEX ABUSE HYSTERIA: SALEM WITCH TRIALS REVISITED (1991)).

105. See APA REPORT, *supra* note 79, at 100 (noting that "although there are no data to support the phenomenon called 'parental alienation syndrome' terms such as 'parental alienation' may be used to blame the women for the children's reasonable fear of or anger toward their violent father"); Lombardi, *supra* note 19, at

Whatever the merit of the concept of “parental alienation” in the abstract, as it has been both constructed and typically used in court, it is both blatantly gender biased and fundamentally misguided. The very notion that fathers are the dominant victims of “parental alienation” is ludicrous to anyone who has worked with battered women in the courts. In the vast majority of cases I have litigated, the abusive father actively sought to “alienate” the children from their mother. Yet the PAS theory was invented to be—and usually is—used only against mothers claiming abuse.¹⁰⁶ And, while some evaluators will argue that it can be a gender-neutral concept, it is almost unheard of for an evaluator or court to even recognize, let alone penalize, a father by limiting access to a child because of his intentionally alienating conduct.¹⁰⁷ In contrast, women who allege fathers are abusing children are increasingly being subjected to draconian punishments, including complete loss of contact with the

Part 4 (“It’s a non-syndrome . . . [if] you cannot confirm a syndrome by stating that it exists.”) (quoting Robert Geffner, Founder, Family Violence and Sexual Assault Institute). The widespread appeal of PAS and parental alienation (“PA”) claims in the courts is all the more remarkable in light of the pedigree of the theory and its inventor: Gardner himself has advocated pedophilia, and has never concealed that he invented PAS to give accused fathers a tool against child sexual abuse allegations. Ducote, *supra* note 72, at 140 n.158 (noting Gardner’s claims that the United States is inappropriately punitive and moralistic towards sexual activity between parents and children) (citing RICHARD GARDNER, TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE (1992)); Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What is it and What Data Support it?*, 3 CHILD MALTREATMENT 100 (1998) (describing PAS as offering “an explanation for reports of sexual abuse when parents are divorcing”). Moreover, Gardner’s hypotheses for why so many women purportedly fabricate child sexual abuse allegations, such as that they are “women scorned,” or enjoy imagining pedophilia, *id.* at 104, are have been aptly called “ludicrous.” See *Hanson v. Spolnik*, 685 N.E.2d 71, 84 (Ind. App. 1997) (Chezem, J., concurring in part and dissenting in part) (criticizing the “women scorned” theory). Since Gardner has provided such an easy target for critics, other clinicians and researchers have begun to offer less outlandish analyses and defenses of parental alienation. However, the validity of the concept and its use in litigation cases remains highly contentious at best. See generally Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001) (reviewing and critiquing Gardner, Johnston and other theorists).

106. See APA Report, *supra* note 79, at 40; BANCROFT & SILVERMAN, *supra* note 16, at 135-36 (offering a brief critique of the parental alienation theory as used against battered women). Regarding abusers’ “alienation” of their children from their mother, see *infra* note 174 and accompanying text. Contrary to the beliefs of proponents of parental alienation theory, in over ten years of litigating these cases I have never experienced a client expressing comparable venom about her abuser, the children’s father. Rather, more often than I have liked, clients have insisted on preserving the children’s relationship through visitation.

107. In Case 2, in response to our request to protect the child from the abuser’s trashing of the mother, the courts enjoined both parties from speaking about the other to the child. See *supra* Part I.B. As is discussed further below, this “joint” or “mutual” accountability does not have the effect of holding a batterer accountable; rather, it perpetuates his claim that the mother is equally or more responsible for whatever abuse is at issue. See *infra* Part III.C.

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children.¹⁰⁸

3. *Demeanor Differences between Perpetrators and Victims of Abuse*

Battered women, and especially battered mothers, may be disbelieved for another, and arguably more “appropriate,” reason: the parties’ respective demeanors. Judges (and arguably, evaluators) are in the business of assessing credibility. Unfortunately, many common assumptions about witness credibility backfire when applied to victims and perpetrators of domestic violence.

While courts often find batterers to be sympathetic and convincing in their denials, these credibility assessments are often incorrect. Many who work in batterers’ counseling attest that a common characteristic of batterers is their passionate and eloquent denial of the abuse and the impact of their own conduct on others. As Bancroft and Silverman succinctly state, “it is common for our clients to be skillfully dishonest. . . .”¹⁰⁹ Batterers convince not only other people, but also themselves that they are “right” and their accusers are wrong and unworthy. Their denials are especially believable by courts in cases where the allegations of physical violence can be perceived as minor.

Many batterers also exhibit a smooth and charming persona in public and when it is in their interest.¹¹⁰ An unusually explicit

108. See Wood, *supra* note 72, at 1367 (describing a case in which a father was given sole custody and the mother was denied all contact with her young daughter after her child sexual abuse allegations were held to be unproven); Burke, *supra* note 81 (discussing a California NOW study which found in preliminary research that in thirteen counties that the parent charging child sexual abuse received supervised visitation or no contact at all in more than 50% of those cases, and the alleged perpetrators received full or partial unsupervised custody 90% of the time). A national study by sociologist Amy Neustein of over 1000 cases documented mothers being held in contempt, jailed, losing custody and having visitation restricted or cut off, as a result of pursuing allegations of child abuse against the father. See Amy Neustein & Ann Goetting, *Judicial Responses to the Protective Parent’s Complaint of Child Sexual Abuse*, 8 J. CHILD SEXUAL ABUSE 103, 105 (1999) (critiquing scientifically discredited psychological syndromes, such as Parental Alienation Syndrome and Malicious Mother’s Syndrome); Lombardi, *supra* note 19. A smaller study of 300 cases over ten years found that alleged child sexual abusers received unsupervised visitation or shared custody 70% of the time, and over 20% of cases resulted in the mother who alleged child sexual abuse losing visitation rights altogether. See Lombardi, *supra* note 19, at Part 4 (describing the Neustein studies). This trend is stunning, especially in comparison to the typical treatment of adjudicated child abusers or batterers, who rarely have their visitation even restricted, let alone terminated.

109. BANCROFT & SILVERMAN, *supra* note 16, at 124; (arguing that “[b]atterers rarely disclose their violence fully, even in the face of considerable evidence”).

110. See David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON B.J. 23 (1989) (noting that while the woman often appears agitated and hysterical, the man often appears calm and friendly, which makes it more likely that friends neighbors, police officers, and courts will believe the woman is exaggerating);

depiction of this problem was provided by a Maryland judge who had denied a protection order to a woman who was later killed by her abuser. The judge subsequently explained that the man did not come across in court as a “sick” person who would commit the violence she had alleged; hence he had disbelieved the woman’s claim of fear.

In contrast, battered women, particularly those who have made it to court, are often angry or emotional.¹¹¹ While this is a perfectly understandable reaction to domestic abuse and contests over custody,¹¹² these demeanors do not enhance women’s credibility in the eyes of a judge or other evaluator.¹¹³ Moreover, many battered women in court are experiencing some stage of post-traumatic-stress-disorder (“PTSD”), which may distort their affect.¹¹⁴ In particular, PTSD can cause victims to over-react to ostensibly trivial issues,¹¹⁵ to display a strange lack of affect when discussing the violence, or to

BANCROFT & SILVERMAN, *supra* note 16, at 15, 122-23 (stating that “[t]he great majority of batterers project a public image that is in sharp contrast to the private reality of their behavior and attitudes”); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1878 (1996) (noting that judges and others often identify with the batterers who may appear “charming, respectful, and persuasive”); Kathleen Waits, *Battered Women and their Children: Lessons from One Woman’s Story*, 35 HOUS. L. REV. 29, 54 (1998) (noting a survivor’s comment, “Russ, with his charming batterer’s demeanor, won every time”).

111. See Laura Crites & Donna Coker, *What Therapists See that Judges May Miss: A Unique Guide to Custody Decisions when Spouse Abuse is Charged*, 27 JUDGES J., 9, 40-41 (1988).

112. See BANCROFT & SILVERMAN, *supra* note 16, at 123.

113. See, e.g., *Canning v. Wieckowski*, No. C4-98-1638, 1999 WL 118509, at *5 (Minn. Ct. App. Mar. 9, 1999) (finding no error in the assessment of an evaluator and the trial court that the father is “willing and capable of toning down his anger and negativity toward [mother, but mother] seems preoccupied with making [respondent] out to be a villain without just cause”). It is conventional wisdom among advocates that angry victims of abuse are seen as less credible. One explanation is ignorance: some judges and evaluators expect a “victim” to act helpless or passive. When they appear angry or even strong, they contradict the stereotype. However, it seems likely that gender bias also plays a role. After all, while courts typically negatively judge a woman who is angry on the stand, they seem to have more sympathy for a father who is angry, e.g., because his wife has withheld the children from him.

114. See Joan Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1312 (1993) [hereinafter Meier, *Notes from the Underground*] (describing elements of PTSD and how they can affect battered women’s testimony). For a brilliant and nuanced discussion of trauma and survivors of domestic abuse, see JUDITH HERMAN, *TRAUMA AND RECOVERY* (1992).

115. On one occasion, the client in Case 2 became extremely agitated when her batterer walked down the hallway of the courthouse after her (and myself) and waved a newspaper in her face while making an angry statement. Such behavior may well have triggered her past experience of being stabbed by him (and other assaults) and may have felt far more threatening than it appeared to the outside observer.

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giggle inappropriately.¹¹⁶ Thus, the forensic psychiatrist in Case 2 described my client's affect as "very strange," noted that it was "hard to tell what she feels," and described a "plastic-like wall" between them. Both he and the expert witness on battering noted her inappropriate giggling; however only the latter was able to link that behavior to her traumatization.¹¹⁷ In short, all the professionals without specific domestic violence expertise who sought to evaluate the facts in Case 2 had trouble finding my client to be credible. Without the PTSD framework for understanding her demeanor, it was, at best, simply off-putting, and at worst, made her appear fake.

Thus, judges and evaluators lacking in-depth knowledge about domestic violence and PTSD may easily be misled into trusting the calm, sincere-sounding accused's veracity more than the "strange" or emotional purported victim's.¹¹⁸

C. *Insistence on Mutual Blame or Blamelessness*

For all the reasons discussed above, courts' first line of defense against domestic violence allegations is often disbelief. However, many courts also marginalize or neutralize such allegations without overtly taking a stand against the mother, merely by hewing firmly to the "neutral" role and treating both parents "equally." Thus a common response to the difficulty in evaluating the truth in these cases is to blame both parties for the "mess," and abdicate the duty to find the facts: the judge or evaluator simply says that the contradictions of the two parties make neither one credible. Judges' resistance to finding the facts is signaled when they characterize the dispute over abuse as "mudslinging" (as in Case 2) or, more politely, a "swearing contest."¹¹⁹

Thus, in Case 2 above, the forensic psychiatrist and the social worker who did the home study stated that they could not know the truth, given the contradictions between the parties' stories.¹²⁰ The judge even more explicitly repeatedly expressed his frustration with

116. See Meier, *Notes from the Underground*, *supra* note 114, at 1313 (explaining that such an affect can cause observers to see the victim as weird or fabricating).

117. Report of Evan Stark, *supra* note 85, at 20.

118. See Lombardi, *supra* note 19, at Part 4 (noting that often women are in a "no-win" situation and are criticized for *whatever* demeanor they exhibit) (quoting Eileen King, Director, D.C. office of Justice for Children). If they are emotional, they are treated as hysterical or vengeful. *Id.* If they are calm, they are characterized as "cold and calculated." *Id.*

119. See *Raney v. Wren*, 722 So. 2d 54, 58 (La. Ct. App. 1998); Freedman, *supra* note 60, at Part I (describing courts' avoidance of fact-finding).

120. See Reports of Social Worker and Forensic Psychiatrist in Case 2 (on file with author).

the contradictions between the parties, his inability to know the truth, and his distrust of both parties' testimony. He fairly quickly adopted the stance that the two parties should have no contact with each other, and that such contact was "a disaster." He willingly issued interim orders requiring both parties to refrain from derogatory comments in front of the child and requiring them to stay away from each other. He was careful to make clear that each such order was not premised upon any finding of responsibility or blame, but was essentially an acknowledgment that the parties "cannot get along." In fact, this re-frame was contradicted by the fact that most of the worst violence, including the stabbing, threats to kill, and stalking (and possibly sexual abuse of the child), had occurred after the parties had separated (against Mr. Benson's will).

Finally, both parties were berated for bringing this dispute into the courtroom, rather than working it out like "mature adults," and for subjecting their child to "the police." Both parties were also criticized for assaulting each other. (Ms. Turner had testified that she hit Mr. Benson with a vase the night he broke in and stabbed her; both parties received hospital treatment.) The judge repeatedly threatened to punish the parties by removing the child from both of them and placing her in foster care.¹²¹

Similarly, in a protection order case in Maryland, the judge told *both* parties "you're setting a real good example for your children. . . ." This was after the abusive father, who had already been criminally convicted of assaulting the mother, had repeatedly talked back to the prior judge, taunted the marshals by saying "you're going to have to put me in jail," and continued to threaten the mother. The judge to whom the abuser acted so contemptuously stated, "I don't want to pour kerosene on the fire that's already burning in this case. . . . [I try] . . . to de-escalate tense relationships between the parties."¹²² Such statements, while presented as neutral (because merely advocating a private settlement) are actually punishing the mother by assigning her partial responsibility for the father's abusive conduct.¹²³

121. See Mahoney, *supra* note 60, at 46 (describing a case in which a welfare department recommended that a baby stay in a temporary placement with the father's parents, on the grounds that "the fact that their stories [were] so contradictory makes both parents seem unreliable.") (citing ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (1987)).

122. See George Lardner, *Beating the System; Battered Wives, Battered Judges—and a Tsk Tsk for the Abuser*, WASH. POST, Aug. 1, 1993, at C5.

123. Such purported "neutrality" in response to domestic violence is not neutral in effect. Rather, it furthers the power of the abuser and the negative impacts of the abuse. By allowing abuse to be perpetrated and refusing to establish a consequence

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I believe this view—that domestic violence, like all other relationship issues, is a mutual problem—is, consistent with the equality principle, at the root of many courts' unsatisfactory responses to domestic violence allegations in custody cases. In particular, the belief in mutuality appears often to guide many mental health professionals involved in evaluations in such cases.¹²⁴ Because this construct is so central—and gaining a growing following, particularly among custody evaluators—I will take a moment to consider it more deeply here.

1. *A Hypothetical Debate on the Mutuality Perspective*

Let me posit the following view of a hypothetical custody evaluator: violence, like emotional abuse or any other cruel behavior, takes place within a relationship between two people. Few dynamics within relationships are solely caused by one person. Rather, the character of a relationship is typically defined by interactions and reactions between the two personalities. Moreover, the analysis advanced by analysts like Bancroft and Silverman, and many advocates, which focuses solely on *the batterer*, leaves out critical information, such as the parental capacity of the mother, and her contribution to the problems in the relationship. The “advocacy perspective,” as it might be termed, seems to absolve mothers of all responsibility for problems within the relationship or even within herself. In fact, even in an abusive relationship, neither party is perfect. Although some women manage to remain excellent mothers while experiencing partner abuse, at the other extreme some women themselves are violent or abusive. Most women are probably in the middle; they are human beings and mothers with their own flaws.

As an advocate I must acknowledge that, over my years of representing battered women, I have had clients with drug addictions, with mental illness, who liked to frequently go out and “party” at night despite having young children at home, and a few who were at least emotionally and sometimes physically abusive to their children. Some court opinions describe mothers who are

or accountability, it furthers the terrorizing and harassment, teaches children that abuse succeeds, and reinforces the batterer's insistence that the victim is equally (or more) to blame.

124. An ongoing theme in debates on the CHILD-DV listserv has been the advocates' assertion that battering is never amenable to joint responsibility and that it trumps most other deficits the mother-victim may have, countered by the mental health evaluators' assertions that to assume the woman is telling the truth, and that violence trumps all other issues, would constitute unethical bias on the part of an evaluator. A related perspective of many mental health professionals appears to be the view that relationship problems are never attributable to only one party.

sloppy, do not bathe the children regularly, and may feed the children inappropriately.¹²⁵ While most of my clinic's clients have actually been admirable mothers, one tragically killed her eighteen-month old daughter while hearing voices. It is also true that, as domestic violence advocates, we tend to say as little as possible about our clients' flaws.

However, custody evaluators and judges are obligated to look at those flaws, and to weigh them. The question for such neutral evaluators is whether to weigh the father's violence more heavily than the mother's non-violent flaws. To add to the "neutral" evaluator's position, I might note that our clients and many advocates have long argued that the violence does not capture the whole person of the abuser; indeed, the label "abuser" does not adequately convey that some violent fathers are also kind, loving, affectionate, humorous, and deeply involved with their children.¹²⁶ Our clients have loved the whole person in their partner and ask us to understand that; why should evaluators and courts not *similarly* consider the whole person, and not let a father's violence be his sole defining characteristic when assessing fitness for custody?

In response to this devil's advocacy, I want to suggest several reasons why violence is different, and cannot be treated as a "mutual" problem. First, the premise of the "mutuality" perspective *must* be that there are two equal, autonomous and more or less free individuals interacting in a relationship. For instance, equal mutual responsibility is not ordinarily considered an appropriate approach to problems in parent-child relationships, for the very reason that children are not and should not be seen as equal autonomous beings with adults.¹²⁷ However, even in adult relationships with nominally equal partners, violence acts as a "trump." The willingness to use violence puts the abused partner in fear for her life at all times, not just at the particular times when, for example, a gun or fist is being used against her. Hence, domestic violence at least impairs, if not destroys, the partner's autonomy, holds the mother and children hostage (metaphorically), and allows the father to take power over

125. See *Gant v. Gant*, 923 S.W.2d 527, 529-30 (Mo. Ct. App. 1996) (accepting these claims about the mother, and upholding primary residential custody to the father despite his admitted past violence against her).

126. See Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 344-45 (1995) (discussing the problem with stereotyping of battered women and abusers by advocates for battered women).

127. *But see* BANCROFT & SILVERMAN, *supra* note 16, at 136-38, (describing instances in which both Gardner and Johnston appear to treat children as partially or wholly responsible for sexual involvements with their fathers).

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the other individuals in the family. It is not appropriate to hold as “mutually responsible” a person who is necessarily and appropriately in fear from her partner. None of their interactions can accurately be viewed as occurring without his thumb on the scale, even if the last act of physical violence occurred years ago.

It is the use of violence as a means of ongoing power and control, and not just (as is often mistakenly believed) out of “lack of control,” that sets an “abuser” apart from a victim or partner who occasionally hits out in frustration or despair. And it is the use of violence to dominate and control another person that sets it apart from most other human flaws of the kinds illustrated above.¹²⁸

Second, violence is traumatic, and qualitatively different in impact on both adults and children, from other flaws many mothers exhibit, even potentially including drug abuse. Recent research indicates that children who even *witness* domestic violence suffer significantly altered brain chemistry or structural development.¹²⁹ Experts in post-traumatic stress disorder have long been familiar with the traumatic nature of experiencing or being exposed to violence, particularly when one is helpless.¹³⁰ Because violence triggers our fear of death, our survival instinct, it touches our deepest vulnerability and fear. And because intimate violence is inflicted intentionally, by a human being, and one whom we are supposed to be able to trust, few other human flaws, including those many mothers may display, are so profoundly damaging, terrifying, and traumatizing.¹³¹

Finally, too often evaluators and courts (and sadly, attorneys as well) overlook the fact that many of mothers’ “character” flaws are the *product* of the battering. For instance, drug abuse (or “self-medication” in the vernacular) is a common way of coping with abuse. Depression and other mental disorders are also recognized sequelae to domestic violence.¹³² Neglect of children, failure to keep

128. See Stark, *supra* note 16, at 986 (emphasizing “coercion and control” as key elements of battering). I do not include force used in self-defense within my definition of “violence.”

129. See GROVES, *supra* note 9, at 37-38 (citing research by Bruce Perry at Baylor University).

130. See *id.* at 58-62. See generally HERMAN, *supra* note 115, at 33 (“Psychological trauma is an affliction of the powerless.”).

131. See generally HERMAN, *supra* note 115, at 1-4 (describing and analogizing traumatic experiences in war and at home, and comparing some domestic abuse to the traumas endured in concentration camps).

132. See Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221-22 (1993); Penelope Eileen Bryant, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1231-33 (1999) (discussing the psychological impact of abuse and the system’s pathologizing of victims).

the house or children clean, and other “un-motherly” behaviors may be predictable occurrence circumstances when the mother is living in constant fear of violence, and is operating to survive rather than to further a healthy day-to-day existence.¹³³

Schneider and many others have painstakingly described the phenomenon of custody courts which appear to penalize a mother who is suffering from the effects of domestic violence, especially those diagnosed with “battered woman syndrome,” by awarding custody to the abuser.¹³⁴ Despite the apparent injustice of punishing the victim, it seems clear that many courts and evaluators, focusing on the forward-looking “best interest of the child” analysis, deem it irrelevant *why* the mother is depressed or traumatized. Under this view, if the father is a more capable parent, the child’s best interests may require him to receive custody, even if he also perpetrated the trauma or caused the mother’s depression. In short, courts may feel the “best interest of the child” must be determined independent of “justice” between the parents.¹³⁵

How the clash between “justice” principles and “best interests” principles should be resolved, in cases where they are genuinely incompatible, deserves its own article. For the purposes of this one, let me offer three reasons why, even where a mother’s functioning is compromised due to abuse, a child is likely nonetheless to be better off in her custody than in the abuser’s.¹³⁶ First, a child whose mother has been abused has already suffered a loss of full “mothering” by

133. I do not even address here other oft-cited “flaws” of battered mothers which are more obviously responses to battering, such as some women’s apparent “instability” or frequent relocations that are often triggered by efforts to escape abuse. This issue has been addressed repeatedly in the literature. *See, e.g.*, Mahoney, *supra* note 60, at 23; Enos, *supra* note 14, at 246 (1996).

134. *See* SCHNEIDER, *supra* note 1, at 170-71.

135. *See* Kinsella v. Kinsella, 696 A.2d 556 (N.J. 1997) (noting that the custody court does not adjudicate relative rights of parents but only the best interests of the child); Stark E-mail, *supra* note 84 (noting the difference between “justice” principles and a best interests analysis). It seems likely that this distinction is too gendered. It is much harder to imagine courts doing the same if the roles were reversed (e.g., being willing to “excuse” or cabin off a mother’s behavior, where she has perpetrated a crime or significant harm against the father). It seems far more likely that a mother found to have engaged in violence against the father (or *anyone*) would lose custody, even if the father’s functioning was found to be impaired by depression, trauma, and/or other symptoms of her abuse. *See, e.g.*, R.H. v. B.F., 653 N.E.2d 195 (Mass. App. Ct. 1995) (overturning the trial court’s award of custody to the father based on the mother’s violence, where the lower court had disregarded a psychologist’s testimony that the mother’s violence was defensive).

136. Of course there are always exceptions. Where a mother is herself violent to the child and is unlikely to cease upon separation from the batterer, where she is not providing a minimum of physical and psychological care for the child, or in comparable circumstances, foster care may be the least harmful resolution, until substantial supportive services can be provided and improvements are demonstrated.

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virtue of the abuse. Assuming that the mother was previously the primary parent, sending the child to live with the father would result in even greater loss and separation trauma. What that child needs is to get his or her mother back, ideally while she is supported, strengthened, and healed.¹³⁷

Second, an award of custody to an abuser is a powerful lesson to the child that violence and abuse *wins*, that power and control are their own law, and that the courts and society see (essentially) nothing wrong with what the father has done to the mother. There may be no more effective way to teach children to become abusers. This has been recognized by some of the more educated appellate courts.¹³⁸

Finally, and perhaps most importantly, is the point that advocates have not sufficiently made until now: men who batter women usually make bad parents.¹³⁹

Thus, while both mothers and fathers are usually imperfect as people and as parents, a history of committing violence in the family is, or should be, weighed as uniquely negative in the overall assessment. Moreover, even where a mother's functioning is compromised due to the impact of such abuse, a strong case can be made that "justice" principles are consonant with "best interest" principles because the children will *not* be better off with the batterer, even if he seems to be more "functional" in some respects.¹⁴⁰

2. A Brief Case Study—The Work of Janet Johnston

The problems with the mutuality perspective are crystallized in the work of Janet Johnston and Linda Campbell. Johnston and Campbell's work, based in part on their own research, studies relationships involving ongoing custody/visitation conflicts. To describe these cases they coined the term "high-conflict divorce,"

137. Moreover, the mother can be expected to regain her mental health, at least to some degree, if and when the abuse is terminated. See, e.g., Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1057 n.93 (1991) (citing LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 60 (1984)) (noting that battered women were eight times more likely to abuse their children when being battered themselves than when not in battering relationships).

138. See *Custody of Vaughn*, 664 N.E.2d 434, 439 (Mass. 1996) (discussing expert witness Peter Jaffe's testimony that if the son remained in the father's custody it would "reinforce the acceptability of the father's behavior to [the son] which has the potential to make [the son] a batterer himself in the future").

139. See *infra*, Part III.D.2 (discussing bad parenting at greater length).

140. In my view this analysis is a reasonable interpretation of best interests analysis under statutes (i.e., most) requiring consideration of multiple factors, and does not depend on the legislature's adoption of a rebuttable presumption.

itself an implicitly “mutual” label for relationships the majority of which involve the man’s violence.¹⁴¹ Several of Johnston’s case examples demonstrate how they subsume violence into a “mutual” responsibility model. For instance, in one case, “the authors acknowledge that the father’s abusiveness and controlling behavior toward the daughter were unrelenting after separation despite efforts at therapeutic intervention . . . [yet they state] incongruously that Julianne’s case illustrates *the impact of inter-parental conflict on the child* rather than the impact of the father’s abusiveness.”¹⁴² In another, Johnston and Campbell describe a couple in which the man had pointed a gun and physically assaulted his partner twice, yet they state that the parties have “somewhat irrational images” of each other, referring to the woman’s fear of the man.¹⁴³ Similarly, while citing several case examples in which the man used substantial violence, including death threats, and has continued to use “occasional violence,” the authors nonetheless criticize the women for their reluctance to believe the father has changed sufficiently.¹⁴⁴ Bancroft and Silverman also note that Johnston and Campbell “offer various explanations for children’s reluctance to visit with the non-custodial parent in ‘high-conflict’ cases, none of which has to do with the father’s abusiveness. . . .”¹⁴⁵ Finally, they state that in “dozens” of case descriptions, Johnston and Campbell “fail to offer even one in which a mother acts as an appropriate protective parent after separation;” rather, mothers who seek to restrict visitation are criticized, even in the face of continuing “sporadic” violence.¹⁴⁶

The premise of mutuality on which much of Johnston and Campbell’s analysis is predicated, then, simply repeats the blaming of mothers for their behaviors that respond to fathers’ violence. The authors’ lack of respect for the real damage and danger to children from domestic violence is evident in their discussion of protection

141. BANCROFT & SILVERMAN, *supra* note 16, at 131 (noting that a history of domestic violence existed in approximately 75% of the intractable custody conflicts Johnston and Campbell studied) (citing JANET R. JOHNSTON & LINDA E.G. CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* (1988)). The following discussion of Johnston and Campbell’s work is heavily indebted to the summary and critique contained in BANCROFT & SILVERMAN, *supra* note 16, at 130-49.

142. BANCROFT & SILVERMAN, *supra* note 16, at 135 (emphasis in original) (citing JANET R. JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* (1997)).

143. *Id.* at 133.

144. *Id.* (citing JOHNSTON & CAMPBELL, *supra* note 141, at 217-18).

145. *Id.*

146. *Id.* at 134.

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orders—which are referenced as being occasionally sought by mothers with purported “paranoid tendencies.”¹⁴⁷

Johnston’s work has been widely disseminated, both among mental health evaluators and to judges. It has become a popular new “authority” for custody cases involving domestic violence, because, unlike most mental health professionals’ discussions of custody and divorce, it acknowledges and discusses domestic violence in some detail. Unfortunately, in many respects it minimizes the significance and impact of the abuse, making the analysis both seductive and dangerous.

D. Treating Past Domestic Violence as Irrelevant to the Batterer’s Parenting or the Children’s Future Well-being

The third and extremely common dynamic in custody litigation in which domestic violence is alleged is courts’ resistance to hearing about the violence or to recognizing the relevance of those allegations to the future well-being of the children. Courts both explicitly and implicitly invoke two rationales for rejecting this link: (1) that harm to the mother is not the same as harm to the child; and (2) that the domestic violence will end when the parties are separated.

In some respects, battered women’s advocates have been least effective in educating courts and society as to why a history of battering is *per se* powerfully negative data about a parent’s fitness for custody.¹⁴⁸ The following discussion offers several examples of the problem and then briefly addresses the fallacies at the heart of courts’ (and evaluators’) tendencies to separate battering behavior from their thinking about a father’s suitability for custody.

1. Treating Adult Domestic Violence as Irrelevant to Children

A core challenge in litigating Case 2 was the need to refute the apparent belief of the judge and court-appointed forensic experts that domestic violence was not central to the custody decision. Early on, after hearing extended testimony of a history of severe abuse, including a stabbing, the judge called my client’s allegations “mudslinging,” clearly implying that all the claims of violence were

147. *Id.* at 133.

148. This past failure is understandable. We assumed that violence, particularly within the family, would be seen as *per se* inconsistent with good parenting. As we have been stunned to experience widespread judicial resistance to this equation, we have recognized the need to more explicitly articulate how battering is indicative of bad parenting. Bancroft and Silverman, *supra* note 16, at 29-53, offer an incisive exposition of this subject. See *infra* note 169.

irrelevant to the custody determination. Much of the opposing counsel's case was based on the claim that violence toward the mother is not harm to the child. Moreover, none of the "neutral" mental health evaluators investigated or even addressed the domestic violence allegations.¹⁴⁹

More recently, in Case 1, the judge's determination to give a respondent—whom even he appeared to believe had engaged in life-threatening violence against the child's mother—child visitation, indicated his unwillingness to hold a batterer accountable as a *father* for his violence against the mother. This was a man who had raped the child's mother at knife-point (while masked, after they had separated), had strangled her with a clothesline, and had threatened to kill her repeatedly. Had he been proven to have done these things to *another* individual, it is hard to imagine them being ignored in a custody decision.¹⁵⁰ In any event, while we had not alleged any direct child abuse by the father, the degree of aggression felt and expressed by the abuser against the child's mother should have been a cue to the judge that the child would be at least emotionally at risk.¹⁵¹

Other evidence that the child would be at least psychologically at risk was the abuser's extremely dysfunctional and unstable living situations,¹⁵² and the fact that he had been involved in litigation over domestic violence with at least three other women in addition to my client. Thus, the child was highly likely to be exposed to continued domestic violence while in the abuser's care, even if only for visitation. Yet the court would not consider the possibility of no visitation, and was extremely hostile and disparaging toward the

149. See *infra* Part III.E (regarding evaluators' response to domestic violence allegations).

150. As I have reflected on courts' willingness to subject children to extremely violent men, to whom it is inconceivable that judges would be willing to send their *own* children, I have concluded that it must at some level reflect the oft-noted view that there is something wrong with the mother for "staying" or "putting up with" the abuse. At root, I suspect that many judges award children to dangerous fathers because they feel that the minimum of safety they would demand for their own children does not apply where the mother has already "tolerated" or "subjected" the children to the man's abuse. In other words, consistent with many of the dynamics discussed herein and identified in the child protection world, see *supra* note 14, the mother is implicitly held responsible for whatever harm her children suffer from her partner's abuse.

151. As noted above, the mother reported that every time the eight-year-old child returned from a visit with his father he was uncontrollable, aggressive and hostile to women, and sometimes declared he wanted to die. The court refused to hear or consider this information. See *supra* Part I.A.

152. While it appears that the father did love the child (in a narcissistic manner), he was not in fact capable of taking adequate care of him. During the first year of being in his father's custody, the child was left with other relatives, some of whom physically abused him.

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mother and myself for suggesting it might be appropriate.

In her survey of the state Gender Bias studies, Czapanskiy has noted that attorneys as well as judges see spousal violence as a function of problems in the relationship, rather than as the perpetrator's own dysfunction. In Washington State, where family violence is a statutory ground for limiting custodial access, a number of attorneys participating in a study indicated that they would not investigate or raise allegations of family violence even where it would benefit their client's case because "some inappropriate behavior" is pretty typical of people going through a divorce." No judge investigated the behaviors even where they were alleged, despite being statutorily required to do so.¹⁵³

Perhaps more surprising is the prevalence of courts which acknowledge a father's perpetration of domestic violence, yet treat it as irrelevant to custody. Fully half of the Maryland judges and masters who responded to a custody hypothetical, stated that their decision would not change if they learned that the father had beaten the mother before the parties separated.¹⁵⁴ This attitude is commonly seen in real cases as well. For instance, a Florida court accepted a psychologist's statement that the man's "past violence was related to the deterioration of his relationship with [his wife]" and upheld "shared parental responsibility" for the man, despite a history of severe violence when she was pregnant, and threats to kill her, her father, and himself.¹⁵⁵ Many courts state explicitly that they see no link between domestic violence and custody: for instance, in Georgia, "[w]hile judges may restrict visitation with minor children because of alcoholism, drug use, indiscreet relationship, or other [sic] criminal behavior, they are not likely to do so because of repeated spouse battering . . . judges disregard or minimize domestic violence in custody disputes and visitation due to the gender-biased belief that these are just 'family squabbles.'" ¹⁵⁶

153. See Czapanskiy, *supra* note 28, at 257-58.

154. *Id.* at 256.

155. Collinsworth v. O'Connell, 508 So. 2d 744 (Fla. Dist. Ct. App. 1987); see also Gant v. Gant, 923 S.W.2d 527, 531 (Mo. App. 1996) (noting that a custody award was not precluded by a history of violence, among other reasons because the "incidents of violence were not recent and were not directed at the children"); Hart v. Hart, 766 S.W.2d 131 (Mo. App. 1989) (upholding an award of custody to the father despite violence before birth and a later assault not directed at, and purportedly not adversely affecting, the child); McDermott v. McDermott, 946 P.2d 177 (Nev. 1997) (reversing the trial court's modification of custody in favor of the father despite his conviction for assault of the mother when she came to get child); Waits, *supra* note 110, at 55 (reporting the client's statement that "the psychologists and the judge bought the idea that Russ's abuse of me was irrelevant to child custody issues").

156. Czapanskiy, *supra* note 28, at 258 n.33.

As previously noted, even judges who are fairly proactive and firm on domestic violence generally, such as the one in Case 1, and others in D.C.'s Domestic Violence Court, cabin off that issue from their thinking about the abuser's relationship with his child. A similar bifurcation is also evident in Ptacek's research into Boston judges' attitudes toward domestic violence.¹⁵⁷

In short, while judges trained in and "enlightened" about domestic violence are unlikely to voice such opinions explicitly, it appears that some are not far from the view of the Massachusetts judge who, in refusing to deny a batterer visitation, stated "[e]ven Dillinger could have made a good father . . . How about Manson?"¹⁵⁸ While such sarcasm may be more rare nowadays, the willingness to tolerate extreme violence by a father persists: a number of courts have awarded custody to fathers who have even killed their wives, on the ground that the violence against the children's mother was not directed toward the children and did not indicate the father would be a poor parent.¹⁵⁹

2. *Why Past Domestic Violence is Necessarily Relevant to Future Parenting*

The fallacy in the mental separation of custody and domestic violence is at least four fold: first, as has been detailed extensively in the literature, domestic violence is quite harmful even to children who only witness it, and most children do.¹⁶⁰ While some might say (incorrectly) that past violence is "water under the bridge,"¹⁶¹ the fact

157. See *supra* note 36 and accompanying text (describing the Ptacek interview in which the judge was firm on domestic violence but sympathetic to the batterer regarding visitation); see also *supra* Part II.B.

158. See Meier, *Battered Justice*, *supra* note 20, at 40 (quoting Massachusetts Judge Tempone).

159. See, e.g., *In re Lutgen*, 532 N.E.2d 976, 986-87 (Ill. App. Ct. 1988) (upholding an award of custody of daughters to the father who killed the mother, in a contest with the maternal aunt and uncle). In the O.J. Simpson custody battle between Simpson and the maternal grandparents, the custody court refused to hear the evidence (from the civil liability trial) that Simpson had killed the children's mother, and awarded custody to Simpson. An appellate court reversed this decision, but the case was ultimately settled, allowing Simpson to retain custody. See SCHNEIDER, *supra* note 1, at 163, 286 n.58. Courts have even rejected States' petitions to terminate parental rights of men who have killed children's mothers. See *Painter v. Barkley*, 276 S.E.2d 850 (Ga. Ct. App. 1981) (affirming the trial court's refusal to terminate parental rights of a father convicted of murdering the child's mother); *Bartasavich v. Mitchell*, 471 A.2d 833 (Pa. Super. Ct. 1984) (reaching the same result after the father's guilty plea to voluntary manslaughter); *In re James M.*, 65 Cal. App. 3d 254 (Cal. Ct. App. 1976) (rejecting the State's petition to terminate the father's parental rights after he pled guilty to the mother's murder).

160. See BANCROFT & SILVERMAN, *supra* note 16, at 37-39; Hart, *supra* note 68, at 33-34.

161. Or that both parents are responsible: Stark E-mail, *supra* note 84. See also *supra* note 13 (describing the New York child protection agency's policy of penalizing

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remains that causing harm to one's children—even only psychological harm, and even if it is unintentional—is normally considered a form of either child abuse or neglect. In fact, the reality that adult domestic violence constitutes a form abuse or neglect is reflected in the growing number of states which are criminalizing domestic violence as a form of child abuse.¹⁶² And certainly, past abuse or neglect of children has always been seen as indisputably relevant to who should retain future custody.

Second, the notion that the domestic violence between the parents is in the past, and that the children will no longer be subjected to it,¹⁶³ ignores the realities of separation abuse and serial battering. Without rehashing the many extant discussions of the continuation of domestic violence after separation, suffice it to say that many batterers refuse to let their victims “leave” and be safe. Rather, separation from their adult victim, even after a legal divorce proceeding, often triggers greater and more serious violence against her or other members of the family.¹⁶⁴

While many batterers continue to harass and abuse their adult victims after separation, many also direct their abuse to the children as the easiest way to accomplish the goal of punishing the mother. At its extreme, this need to punish the mother can lead to the batterer's decision to kill her children.¹⁶⁵ At its less extreme, such batterers may abuse the children physically, sexually or emotionally.¹⁶⁶ Contrary to

battered mothers for “engaging in domestic violence”). Even if both are held responsible, the violent parent could and should still be deemed less fit.

162. See *supra* note 9 (citing articles discussing the merits and risks of these statutes).

163. See *infra* note 185 (quoting a psychologist who said, “she's young; she'll get over it”).

164. See Mahoney, *supra* note 60, at 6 (coining the term “separation assault” to describe the violence inflicted on women by batterers when they learn that their victim is taking steps toward independence or separation); see also SCHNEIDER, *supra* note 1, at 77-78; WELLESLEY BMTP REPORT, *supra* note 36, at 17 (noting that a majority of mothers interviewed were abused or mistreated by an ex-partner after separation).

165. See Paul Duggan, *Parolee in Slaying of First Wife Charged in Stepdaughters' Deaths*, WASH. POST, Sept. 6, 1996, at A20 (writing that the “police said the suspect . . . killed the girls in a fit of rage over his estrangement from his current wife, the children's mother”). A high profile case in Dallas involved John Battaglia's murder of his two daughters while their mother listened on the telephone, allegedly because he was angered that she had gotten an arrest warrant against him. His second wife, a law professor, also survived two years of his abuse. Posting of Michelle Ghetti, to CHILD-DV (Nov. 18, 2002) (copy on file with author).

166. See BANCROFT & SILVERMAN, *supra* note 16, at 1, 71-75 (describing batterers' use of children “as weapons” after separation, including kidnapping of children); Green Book, *supra* note 10, at 9 (stating that 30-60% of batterers abuse children); Hart, *supra* note 68, at 33-34 (citations omitted). Evan Stark states that “[t]angential spouse abuse occurs when the batterer determines he can best hurt his partner by

the assumptions of many court personnel,¹⁶⁷ these risks *increase* after the batterer's separation from the mother, both because batterers so often use the children as a means of furthering their abuse of the mother, and because they are freer to indulge their own inappropriate needs or emotions with children when their mother is not there.

Finally, and most importantly, even those batterers who do not necessarily intend to harm the children are unlikely to be good parents, and are often quite destructive. As previously noted, many batterers seek custody, not out of a genuine desire to take care of the children, but to retaliate against or further their control of their partner.¹⁶⁸ The persona of many—though not all—batterers, is inconsistent with the qualities needed to make a good parent.¹⁶⁹ People who need to control and abuse their intimate partners are unlikely to be capable of the loving, nurturing and self-disciplined behavior that good parenting requires. By definition, a father who abuses the mother has indicated that he cannot put the children's interests first, since their mother's abuse, by undermining her well-being, inherently harmful to the children. Many batterers expect children to meet *their* needs, rather than vice versa; this can lead him to expect children to give up their other interests to spend time with him; to demand quiet to an inappropriate degree, to demand physical affection regardless of their feelings; and to become blaming, tearful, or yelling when they fail to meet his needs.¹⁷⁰

hurting her children." Stark, *Re-Presenting Woman Battering*, *supra* note 16, at 976 n.15.

167. See, e.g., *Kent v. Green*, 701 So.2d 4, 5 (Ala. Civ. App. 1996) (commenting that the therapist and "psychological profiles" indicated that the abuser was "unlikely to be violent in the future," resulting in his receiving custody). In fact, the only factor considered to be predictive of future violence is past abuse. See generally BANCROFT & SILVERMAN, *supra* note 16, at 118 (noting that "[n]o psychological test exists that can determine whether an individual is a batterer or which batterers are most likely to re-offend"); *id.* at 150-177 (discussing how best to assess risk to children from future contact with batterers).

168. Batterers can and often do use contacts with their former partner through the children to continue to harass, obstruct, undermine, and generally interfere with their former partners. See Lehrman, *supra* note 69, at 34; Zorza, *supra* note 68, at 1124.

169. Bancroft and Silverman note that we "can expect that one or more of the following problems will be present in the parenting of the great majority of these men." See BANCROFT & SILVERMAN, *supra* note 16, at 29-53 (describing batterers' parenting as characterized by authoritarianism, under-involvement, neglect and irresponsibility, self-centeredness, and manipulateness). They also caution that batterers' "parenting characteristics" are less universal than are their attitudes and behaviors toward their adult partners. *Id.* at 29. The following discussion is drawn liberally, but not solely, from their discussion.

170. This is most evident in batterers who are intolerant of babies or young children crying, see BANCROFT & SILVERMAN, *supra* note 16, at 34, which sometimes

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Batterers are often patriarchal, believing in strict gender roles and subordination of females, and can be controlling or authoritarian toward children of both sexes. Batterers “tend to be rigid, authoritarian parents.”¹⁷¹ They tend to expect their will to be obeyed unquestioningly, or to be inflexible in their arrangements, extremely angry at any sign of non-compliance or disrespect, spank more often and be angry more often than other fathers. In short, they tend to use “power parenting.”¹⁷² They are unlikely to possess the empathy that allows parents to treat their children with respect and to validate their feelings, two qualities considered important to raising emotionally healthy, conscientious, caring children.¹⁷³

Many, if not most, batterers both consciously and unconsciously undermine the children’s mother and relationships with their mother.¹⁷⁴ Many tell the children that it is their mother’s fault that the parents are separated, that they cannot see their father more, that they cannot have certain things, or any other source of sadness in the child’s life. Many of my clients’ batterers would demean the mother to the children, telling them their mother is a “whore” or “slut,” and in at least one case, demanding that the children come out of their rooms to watch him beat her up as punishment for some purported wrong.

Finally, batterers are often manipulative to children as well as partners, denying their own conduct and its effects, blaming the mother, and seeking to persuade the children that they are the “nicer” or “better” parent.¹⁷⁵ Often batterers use the children to further their control over the mother, explicitly or implicitly enlisting

leads to shaken baby syndrome.

171. *Id.* at 30.

172. *Id.* at 29-30. However, “[h]arsh disciplinary practices, negative or critical interactions with children, or explosive anger toward children teach them the wrong lessons.” GROVES, *supra* note 9, at 132.

173. See, e.g., BECKY A. BAILEY, EASY TO LOVE, DIFFICULT TO DISCIPLINE: THE 7 BASIC SKILLS FOR TURNING CONFLICT INTO COOPERATION 8, *passim* (2000) (advocating “loving guidance” which teaches respect and self-control rather than punitive discipline which teaches power and conflict); BANCROFT & SILVERMAN, *supra* note 16, at 104 (stating that traumatized children need to be with a parent who is able to “acknowledge, recognize and bear witness to the child’s pain”); GROVES, *supra* note 9, at 133-34 (stating that all children need parents to model respect, tolerance and non-aggression).

174. See BANCROFT & SILVERMAN, *supra* note 16, at 33-34. This behavior is well-recognized to be characteristic of batterers, yet appears to have been entirely overlooked by those who subscribe to the theory of “parental alienation” as a problem paradigmatically created by mothers who falsely allege abuse.

175. *Id.* at 36 (“After separation, battered women in our cases raise concerns about manipulation of the children by the batterer with greater frequency than any other single aspect of his parenting.”).

the children in his vendetta. In Case 1 above, the abuser sent his son to spy on his mother, to report to him about who she spent time with, and to make sure that he could keep tabs on her. When the boy went to live with his father, the mother could not tell him where she was going to be moving because she knew the boy would tell his father.

In short, it is simply fallacious to assume that past domestic violence is in the past, that it is not directly relevant to future custody, or that it can ever really not impact the children.

E. Over-Reliance on “Neutral” Experts

Very often courts are assisted in sustaining the foregoing misconceptions by the input of so-called “neutral” professionals, typically mental health experts. These neutrals include Guardians Ad Litem (“GALs”), custody evaluators, and a host of other possible players in custody litigation.¹⁷⁶ The discussion below focuses on the first two roles, as the most prevalent and most likely to impact the court’s decision.

Because the “best interest of the child” standard is both amorphous—a vacuum to be filled by the decision-maker’s personal values—and prospective—i.e., unlike most legal causes of action it does not intrinsically require an inquiry into past events—family courts have increasingly looked to mental health professionals, or other “neutral” professionals, to assess this murky psychological concept. The reliance on neutral “experts” or even lawyers (in the case of many GALs), is understandably seductive. Courts feel they are more likely to hear a recommendation that truly reflects the children’s interests from somebody whose sole obligation is to ascertain those interests and who has no other personal or professional stake in the outcome, than from anyone—even a psychological expert—hired by one of the parents. Reliance on forensic evaluations or recommendations by mediators also enables courts to manage an overwhelming caseload by reducing the time spent on fact adjudications.¹⁷⁷ However, this reliance is excessive by many estimations, and it is especially problematic in domestic violence cases.

176. See Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 270-73 (2002).

177. See *id.* at 302-03 (positing that “practical concerns [i.e., docket control], rather than scientific or legal considerations, appear to be the primary motivating force behind the increasing delegation of judicial responsibility to mental health professions in custody proceedings”).

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1. Ignorance of Domestic Violence

First, with rare exceptions, mental health professionals tend to be uneducated about domestic violence and to underrate it in importance.¹⁷⁸ While certain psychologists have pioneered the development of some of the fundamental concepts in the field,¹⁷⁹ as a whole, the mental health professions have yet to integrate education about domestic violence into mainstream training and degree programs.¹⁸⁰ Thus, surprising though it may seem, the typical custody evaluator does not recognize basic domestic violence dynamics, does not ask about abuse or know how to ask questions in ways that will facilitate disclosure of pertinent information,¹⁸¹ does not know the domestic violence literature, and simply does not consider domestic violence to be a major factor in custody.¹⁸² This is especially true where the abuse is not highly visibly physical, as evidenced by broken bones and the like, but takes more subtle forms such as psychological (and physical) intimidation and abuse, power and control, and/or sexual abuse.

Indeed, most neutral evaluators appear to have a bias toward disbelieving abuse allegations (which they find easier to assume are fabricated or exaggerated by angry mothers), perhaps because they are unaware of the high rate of domestic violence among divorcing couples and especially among those litigating custody.¹⁸³ Strikingly, evaluators' ignorance of the prevalence of abuse appears to fuel a punitiveness toward mothers who allege abuse. At least one evaluator recommended that the mother lose custody merely on the ground that she alleged abuse, while he had investigated facts that might corroborate the woman's allegations.¹⁸⁴

178. See BANCROFT & SILVERMAN, *supra* note 16, at 119.

179. See, e.g., LENORE WALKER, *THE BATTERED WOMAN SYNDROME* (1984); MARY ANN DUTTON, *EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION* (1992).

180. See BANCROFT & SILVERMAN, *supra* note 16, at 119 ("Graduate training programs for psychologists 'have largely ignored abuse as a specific content area.'").

181. In one case with which I am familiar, the custody evaluator found, in his interviews of several third parties, no corroboration of the mother's claims of psychological and physical intimidation and abuse. (In part, the evaluator did not recognize that some of the information he received was, in fact, corroborative.) Yet a domestic violence expert interviewing the same individuals received more detailed and relevant information clearly corroborating the mother's claims.

182. See BANCROFT & SILVERMAN, *supra* note 16, at 119.

183. See *id.* at 120; *supra* note 78-87 and accompanying text. Where concern about child abuse is alleged, the likelihood of a neutral mental health professional confirming it is at its nadir. See generally Lombardi, *supra* note 19, at Part 4; *supra* note 108.

184. See BANCROFT & SILVERMAN, *supra* note 16, at 120 (describing a GAL who

Thus, even in Case 2 above, where the violence included a life-threatening stabbing documented with medical records and a police report, other written threats, and some witnessed threats, with the exception of the domestic violence expert I hired, not one of the forensic examiners (including the court-employed psychiatrist and social worker, a private psychologist chosen by the other party, and the alleged child sexual abuse expert on contract with the court), nor the GAL, paid the slightest attention to these incidents other than in some instances to suggest that the complainant was not altogether stable and not credible. In a more recent story told by Kathleen Waits about a domestic violence client in a custody battle, three separate psychologists, including the one *she hired*, dismissed the history of severe domestic violence as doubtful or irrelevant.¹⁸⁵

The power of these “neutral experts” is immense. Scratch the surface of many cases where courts have discounted proven abuse, and you will often find a mental health “expert” opinion or GAL recommendation underlying the decision.¹⁸⁶ Moreover, where a GAL

recommended a switch of custody to the father because the mother had fled to a battered women’s shelter when (he believed, without investigation) that was unnecessary); *see also* E-mail from Sharon Farmer, Child Advocate, Arizona Protective Parents Network, to Joan Meier (Oct. 17, 2002, 11:50 EST) (writing that the custody evaluator labeled Farmer an “alienating parent” because of her repeated claims of the child’s sexual abuse by her father, based on the toddler’s statements and sexual acting out); Lombardi, *supra* note 19, at Part 4; WELLESLEY BMTP REPORT, *supra* note 36.

185. In that case the client reported that her psychologist said, “[s]o he’s abused you. But he loves those kids.” Waits, *supra* note 110, at 48-54. When reminded that the three-year-old had seen the abuse, this psychologist responded, “She’s young, she’ll get over it.” *Id.* at 55. There have been suggestions that professionals are disinclined to recognize domestic violence among upper middle class white people. While that is often true, my experience is that professionals in custody cases are disinclined to credit or give it any weight in all races and classes. Both Case 1 and Case 2 involved African-American middle or lower-middle class families.

186. *See* WELLESLEY BMTP REPORT, *supra* note 36, at 20 (stating that more than one “state actor” ignored, minimized or refused to believe women’s reports of partner or child abuse, resulting in court decisions to place children in abusers’ care); *see also* R.H. v. B.F., 653 N.E.2d 195, 199 (Mass. App. Ct. 1995) (noting that the trial court followed a GAL recommendation of joint legal custody and primary residential custody to the father despite the GAL’s acknowledgment of battering and a failure to “analyze . . . the family relationships in respect to the characteristics to be found in a battered family”); Kent v. Green, 701 So.2d 4, 5 (Ala. Civ. App. 1996) (noting that two psychologists, including the father’s therapist, stated that the father was “unlikely” to be violent in future and that the mother had psychological problems likely to deteriorate without treatment); Brown v. Brown, 867 P.2d 477 (Okla. Ct. App. 1993) (affirming the trial court’s award of an infant to the father, despite evidence of some “violent or aggressive behavior,” where the expert witness, who had performed psychological tests on both parties, recommended custody be given to the father because of the mother’s “high degree of evasiveness”); Raney v. Wren, 722 So. 2d 54, 62-63 (La. Ct. App. 1998) (upholding the trial court which relied in part on a psychologist’s finding that a psychological test would suggest she is “in the dumps,” while rejecting the custody evaluator’s recommendation of custody to the mother); In re Custody of Zia, 736 N.E.2d 449, 452 n.6 (Mass. App. Ct. 2000)

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has been appointed to represent the children's best interests, his or her failure to link adult domestic violence to the welfare of the children virtually ensures that that relationship is rendered invisible.¹⁸⁷ Even if the mother's attorney points out the link and makes arguments about the children's best interests, such advocacy is typically discounted as merely "partisan" and largely ignored.

2. *Bias Against Terminating Relationships*

The second problem with reliance on neutrals in custody cases is the nature of such experts' so-called "neutrality." The "equality principle" discussed above in connection with judges is actively at work here too. Mental health professionals, and, it appears, most GALs, seem to equate neutrality and objectivity with preserving an equal role for both parents, which takes the form of a widespread professional bias for joint custody and shared parenting.¹⁸⁸ This preference derives not only from the view that joint custody is in the best interests of children, but also from these professionals' *process* norms. The principles underlying most mental health professionals' work, that relationships are a two-way street, and that problems in families are the shared responsibility of the family, militate against the severing of relationships, while reinforcing an emphasis on developing more constructive post-divorce interactions between the former married partners.¹⁸⁹ For most mental health professionals,

(upholding the trial court's award of sole legal and physical custody to the father on the grounds that the mother had "consistently denied the father participation in fundamental decisions" and where the GAL recommended joint legal and physical custody); *Canning v. Wieckowski*, No. C4-98-1638, 1999 WL 118509, at *15 (Minn. Ct. App. Mar. 9, 1999) (upholding the trial court's award of physical custody to the father despite the child's preference for the mother based in part on the recommendation of the psychologist who performed psychological tests, observed both parties with the child, and suggested that the mother's claims of abuse were "trumped up"); *Owan v. Owan*, 541 N.W.2d 719 (N.D. 1996) (reversing the trial court's award of custody to the father, in part because of improper reliance on the father's social worker witness as an "expert" on his violent conduct).

187. While GALs are harder to categorize (they tend to be either mental health professionals or lawyers), they also are typically minimally educated about domestic violence, and have generally been not only unhelpful but detrimental in these cases. This was true in Case 2. See *R.H.*, 653 N.E. 2d at 199; E-mail from Linda Carnahan, to Joan Meier (Apr. 24, 2003, 13:44 EST) (on file with author) (detailing another horror story involving both a GAL and mental health evaluators). See generally, Du Cote, *supra* note 72, at 106; Patricia Wen, *Report Assails Family Courts*, BOSTON GLOBE, Nov. 26, 2002, at B2 (noting that "GALs have been accused of lining up along ideological lines that predispose them to believing—or not believing—allegations of abuse").

188. See Bowermaster, *supra* note 176, at 290.

189. I am grateful to Janet Bowermaster for crystallizing this point. *Id.* at 290-91. This understanding of mental health perspectives on divorce is also informed by Martha Fineman. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 747 (1988)

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except those with expertise in abuse, there is a deep resistance to cutting off contact between the parents, let alone reducing contact between a parent and child. Ironically, and sometimes tragically, the communication and process values that mental health professionals privatize are anathema to many battered women, for whom such communication and “process” represents an opportunity for continued harassment and/or trauma.¹⁹⁰ Moreover, the power of the “equality” or shared parenting norm is such that even some GALs with domestic violence experience and alleged expertise, subtly or not so subtly discount mothers’ claims of abuse and recommend joint custody.¹⁹¹

Furthermore, as in the work of Johnston discussed above, the mental health emphasis on shared responsibility for relationship problems, and the perception of abuse as no one person’s fault, almost inevitably translates into judgment and blame of mothers who resist contact with the abuser for themselves or their children. Bancroft and Silverman note that in their experience with custody litigation, allegations of domestic violence or of incest perpetration tend to require a high measure of supporting evidence, whereas allegations that a mother is attempting to alienate the children from their father (e.g., by making “false” accusations of abuse) are sometimes accepted with little or no factual basis.¹⁹²

Indeed, it is becoming almost normal to see a claim of “alienation” wherever abuse is alleged in a custody case.¹⁹³ Given the prevalence

(noting that the influence of mental health experts on divorce has been to encourage the process to be viewed less as one of termination of the relationship than of re-structuring the family to develop new, post-divorce relationships). While Fineman focuses particularly on the social work profession, these biases are implicit in other mental health professions as well.

190. In one case with which I am familiar, the custody evaluator, while discounting the mother’s claims of sexual abuse, physical intimidation and psychological abuse, insisted that more direct communication between the parents must be required, against her will, and despite her fear of her ex-husband, “for the sake of the children.”

191. In one case in Washington, D.C., the GAL, who had previously litigated domestic violence cases on behalf of victim, and was seen by the courts as having domestic violence expertise, recommended joint custody despite the clear allegations of abuse. Even if the mother had been lying about the abuse, it is difficult to imagine how joint custody could work under such conditions.

192. See BANCROFT & SILVERMAN, *supra* note 16, at 121.

193. Sadly, the alienation claim also has the effect of silencing children’s voices. In cases with which I have been associated, when the children voiced a preference *not* to see their father, or otherwise indicated troubling behaviors by the father, the courts and forensic professionals presumed they were “programmed” by their alienating mother. The inevitable corollary is that *more* rather than less contact is ordered, so as to reduce the mother’s alleged ability to alienate the children from their father. It is almost unheard of for a court or forensic expert to conclude that the children were appropriately alienated from their father because of *his* abusive

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of this unscientific theory, its almost sole use *against mothers* (despite the widespread reality of abusers intentionally alienating children from their mother), and the frequent rejection of mothers' claims of abuse, it seems obvious that "parental alienation" is the abuser's most potent weapon. Its remarkable success in the courts is evidence not only of gender bias, but of the power of false "neutrality" and "parental equality."

3. Over-Reliance on "Scientific" Tests

The third problem with reliance on forensic experts in these cases is the inappropriate weight they often give to so-called objective, scientific, or clinical testing, such as the Minnesota Multiphasic Personality Inventory ("MMPI"), the "MMPI-2," the Thematic Apperception Test ("TAT") and others.¹⁹⁴ As in Case 2, and several other cases with which I have been involved, these tests are regularly administered and reported by custody evaluators as though they provide relevant information about the parents' parenting capacity.¹⁹⁵ Unfortunately, like other aspects of forensic evaluations that fail to properly assess domestic violence, they are, at best, of minimal use, and at worst, extremely damaging in these cases, because they tend to pathologize victims and normalize the personality traits of perpetrators.

First, even outside the world of domestic violence, there is significant doubt about the validity of the use of these tests—most of which were invented for *clinical* use—for forensic purposes. For instance, the MMPI was invented as a "gross screening device for severe psychiatric disorders . . . to identify significant psychopathology, not the small differences in relatively mild pathologies more often found in parties to a custody dispute."¹⁹⁶

conduct. Even if it were true that many women lie about abuse and wrongfully seek to alienate their children from their fathers (which, as previously stated is the opposite of common experience) surely *sometimes* it would be true that an abusive father's children would appropriately seek to reduce their contact. Yet, I have seen virtually no published decisions to this effect. *But see* Ford v. Ford, 700 So. 2d 191, 195-97 (Fla. Dist. Ct. App. 1997) (reversing the trial court's opinion and admonishing the lower court for failure to take into its consideration that the mother may not have behaved as a "friendly parent" due to the father's abusive behavior).

194. See generally Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 142-47, 149-50 (2002).

195. See cases cited *supra* note 186.

196. See Bowermaster, *supra* note 176, at 297 (quoting David N. Bolocofsky, *Use and Abuse of Mental Health Experts in Child Custody Determinations*, 7 BEHAV. SCI. & L. 197, 207 (1989)).

Use of such a test “without scientific validation for use in child custody contexts”¹⁹⁷ would appear to render the results non-scientifically valid; yet, this type of test is commonly relied on in custody evaluations as providing “objective,” “scientific” data which can inform the court about the parties’ relative fitness for custody. While other tests were invented specifically for use in custody evaluations, these have also been criticized “for their lack of demonstrated reliability and validity, the unrealistic or untested assumptions they contain, and problems with the sample populations through which they were developed.”¹⁹⁸

The traditional psychological tests are even more problematic where domestic violence is concerned. Studies conducted to assess how these tests work in cases involving a history of domestic violence have consistently found, for example, that battering men “often look unexceptional on psychological tests such as the MMPI.”¹⁹⁹ Studies of the MMPI and the Milton Clinical Multiaxial Inventory (“MCMI”) as applied to batterers have found that there were “few scale elevations indicating pathology.”²⁰⁰ Conversely,

[t]he MMPI-2, for example, includes many questions that, if answered accurately by a battered woman, will contribute to elevated scale scores, such as whether she believes that someone is following her, whether she has trouble sleeping at night, whether she worries frequently, or whether she believes another individual is responsible for most of her troubles.²⁰¹

Indeed,

[i]n an earlier study of the MMPI, battered women tended to have quite elevated scores for anger, alienation, and confusion, somewhat elevated scores for paranoia and fearfulness, and low scores for intactness and ego strength . . .²⁰²

197. *Id.*

198. *See id.* at 298. Bowermaster concludes that “[w]ithout . . . validation, even these newly developed measures cannot be used with confidence.” *Id.* Bowermaster offers a number of additional critiques of mental health forensic experts’ practices in custody evaluations, including that there is a lack of empirical research to support many of the value judgments evaluators make about desirable parental characteristics; that the psychological tests are both over-used and mis-used; that mental health professionals are not skilled at “making clinical judgments for normal [as opposed to pathological] populations;” and that their judgments are often “in fact inaccurate.” *See id.* at 296-30; *see also* BANCROFT & SILVERMAN, *supra* note 16, at 118 (standardized psychological tests that purport to measure parenting capacity “are poor predictors of parenting capacity and are commonly given inappropriate weight by custody evaluators”).

199. *See* BANCROFT & SILVERMAN, *supra* note 16, at 296-30.

200. *See* Stark, *Re-presenting Woman Battering*, *supra* note 16, at 1018 n.196.

201. *See* BANCROFT & SILVERMAN, *supra* note 16, at 118.

202. *Id.*

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Psychological testers are apt to believe their tests tell them something. When that “something” is “normal,” it is difficult, if not impossible, to convince the evaluator—and thereby the court—that this “normal” father is in fact violent and dangerous. Conversely, when the tests indicate “elevated scales” for the mother, i.e., indications of “personality disorders” or pathology, evaluators will naturally conclude that the mother is “sick” or less psychologically healthy than the father. The net effect is that existing psychological tests tend to pathologize battered women, certify the batterer as “normal,” and deflect attention altogether from domestic violence. Yet once such data are provided to a court, often without sufficient caveats, it is seen as “objective” and “scientific” and given inappropriate probative weight.

Unfortunately, most courts are not aware of the limitations and inadequacies of the psychological “experts” and tests on which they rely. Moreover, for the reasons already discussed, courts tend to rely quite heavily on these apparently “objective” recommendations. Sadly, the result often is that children’s best interests in custody cases concerning domestic violence are neither accurately assessed nor protected in the outcome.

One remedy for these widespread failures of forensic assessment for which there is a growing demand is the appointment of domestic violence experts to assess for domestic violence in these cases.²⁰³ However, while inclusion of some domestic violence experts might improve on the track record of other mental health professionals, caution is called for: increasingly, some forensic professionals, such as Johnston, are developing enough knowledge of domestic violence to qualify as “experts,” but still appear to retain the biases toward mutuality, shared responsibility, and shared parenting, which ensure that they perpetuate many of the current problems. In short, until the system can transform its mistaken preference for parental “equality” in these cases into a fuller, more complex, and more honest understanding of the role of battering and the needs of children, the underlying source of the problem will remain.

F. Where From Here?

The problems detailed above do not lend themselves to simple, clean solutions. Indeed, if we do nothing else, this Article urges us to take a step back from our positions as “advocates” or “neutrals,” and try to consider what is valid, and even admirable, in the “other”

203. Stark E-mail, *supra* note 84; BANCROFT & SILVERMAN, *supra* note 16; WELLESLEY BMTP REPORT, *supra* note 36, at 73.

perspective. For, as I have noted earlier, while not true of all, many of those who do destructive things in these cases are good and well-meaning people who do not intend to be gender biased, and who want to help children. To some degree, any meaningful improvement in the practice in these cases will rest on the opening of minds and the deepening of peoples' understandings, something for which I have no magic prescription.²⁰⁴

However, this Article was inspired in part by the Green Book process currently taking place at both a national and local level among child protection, domestic violence and judicial personnel. Given the obvious overlap in the nature of the issues and problems confronted in the child protection arena and the private custody litigation discussed here, what might we take from that process (not least, its optimism and energy)?

While the Green Book Initiative is certainly confronting numerous challenges, and success is far from assured, it is inspiring for one reason. This initiative, in less than five years, has broken open a frozen area of legal practice which advocates had long despaired of improving, i.e., the mother-blaming culture and bureaucracy of child protection agencies. The Green Book Initiative's intentional, concerted and careful process of collaboration has begun to shake up old ways of looking at these families and has opened dialogue and even spawned new practices to a degree that would have been difficult to imagine fifteen years ago.²⁰⁵ And while gender bias is not directly addressed in the Green Book, it is necessarily a sub-text to much of the collaborative dialogue that takes place between domestic violence advocates, courts and child welfare representatives.

Because the Green Book Initiative has in fact generated remarkable momentum and some excitement about the potential for deep change, a consideration of its implications for the parallel custody context seems worthwhile. The following section, therefore,

204. *But see* Freedman, *supra* note 60 (arguing that application of "compassionate witnessing" by all involved parties is critically needed and may be the only avenue to the profound types of social and legal change called for in this area).

205. In the early 1990s, I was involved in some discussions about bringing domestic violence advocacy to child protection agencies. National domestic violence advocates were intensely opposed to this effort based on previous negative experiences they had had which convinced them that these agencies would only use any domestic violence education they received to further blame and punish mothers. To some extent, the *Nicholson* case, and that agency's policy of removing children because their victimized mothers were "engaging in domestic violence," proved them correct. However, at the same time the *Nicholson* decision ultimately represents a groundbreaking victory for domestic violence advocates. The court's strongly favorable opinion was informed in part by the Green Book. See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 200 *et seq.* (2002).

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draws on that precedent to offer some imaginative thinking, akin to a “thought experiment,” about how a collaborative response to the problems in the private litigation arena could make a difference.

IV. THINKING OUT OF THE BOX ABOUT COLLABORATIVE RESPONSES TO PROTECT CHILDREN IN PRIVATE DOMESTIC VIOLENCE/CUSTODY LITIGATION

“Enlightened collaboration” in the child protection setting has begun to address the traditionally mother-blaming attitudes of child protection agencies (and courts), and to develop a model of a respectful collaborative process in which both state actors and private advocates seek to ally with adult victims of battering in order to best protect both the mother and the children. In this context it has been recognized that it is critical to enhance child protection workers’ understanding of battering and sympathy for adult victims, as well as domestic violence advocates’ knowledge of the child welfare system’s goals and process, and all parties’ commitment to helping battered mothers protect their children. A collaborative approach seems inevitable and necessary.

In private custody litigation, as in the child protection arena, battered mothers’ claims of battering have been discounted or used against them, and the tendency has been to blame the mother, while excusing the father, for whatever harms the children have suffered. The next two Parts envision alternative forms of collaboration which could help negate the courts and psycho-social professionals’ tendency to discount mothers’ claims, and enhance their responsiveness to the risks to children from their mothers’ batterers. I call this a “thought experiment” because I am well aware that the practical realities of child protection practice may mean that it would not work, at least not until child protection agencies are far more transformed than is likely to happen soon. However, the experiment seems worth considering, if only to better crystallize the problem we face in domestic violence/custody litigation; and to imagine how we might structure the process if the promise of the Green Book Initiative is even partly fulfilled.

From that stance, I would argue that, if, as the Green Book Initiative suggests, the State were serious about improving the protection of children in families with domestic violence, it would take a more aggressive stance to restrict the rights of fathers whose abuse of the mother and/or the children makes them unsafe (physically or psychologically) for the children. There are two means by which it could do this: (1) by intervening in private litigation

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where child welfare is at stake; and (2) by initiating termination of parental rights in cases (public *or* private) where a batterer has demonstrated an inability or unwillingness to eliminate the threat he poses to the family.

A. *Public/Private Partnerships*

Many judges' and mental health professionals' resistance to taking seriously a battered mother's claims of risk to children is driven, at least in part, by the fact that she is a litigant with a presumed self-interested bias against the opposing party, which casts doubt on all of her claims about the children's welfare. In this context, the fact that she may have been battered can be—and often is—seen as only compounding her reasons to seek to hurt the father, and thereby may only fuel the system's skepticism that she is actually advocating for the children's best interests. Moreover, because the court is hearing only from two warring parents, because there is already strong sympathy for fathers who seek involvement with their children, and for all the reasons discussed earlier, courts become deaf to mothers' claims that they are advocating for the best interests of their children. What if, however, the very agency whose mission is to protect children, were to join the litigation on behalf of the children, and to support the mother's claim that the batterer poses a risk to the children?

In the world I am envisioning, in which child protection agencies have been through the Green Book process, have learned to be battered mothers' allies in order to protect children, and have established a collaborative, respectful relationship with domestic violence advocates, it would be a natural extension of their protective role to intervene in private litigation where the same kinds of child welfare issues are present. In this vision, such intervention should occur only when invited, i.e., when the court or the parent alleging abuse requests their assistance.

The presence of the State as a party (or *amicus curiae*) intervening on behalf of the children, and supporting the mother's claims, would force courts to take the mother's allegations about the children's safety seriously, and would make it much harder to discount the credibility (and relevance) of her allegations of domestic violence. This is a potentially powerful antidote to the deep-seated tendency toward mother-blaming that resides in custody courts. The presumptive neutrality of a state agency whose mission is to protect children would give automatic credibility to the claim that a batterer's history of violence against the mother, and threat to the children, should be given significant weight in determining child dispositions.

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At the same time, the collaboration of the child protection system with a battered mother should facilitate making services available to both the mother and children, which may be critical to achieving safety as a practical matter “on the ground.” Such services might include assistance with re-location and finding new housing, with welfare, employment and education, safety planning and methods, and of course, counseling to recover from trauma and to strengthen them in the challenges ahead. Many of these services would come from domestic violence organizations, but some, e.g., employment, housing, etc., might also be part of the agencies’ existing spectrum of services for their traditional abuse and neglect caseload.

I envision this “proposal” as both an imaginative idea for those of us who are frustrated with the courts’ responses in these cases, and as a challenge to the State. On the one hand, it would of course only be beneficial to mothers and children if the agency were able to join the litigation in a supportive role that does, in fact, understand the domestic violence issues, the risks to children, and seeks to strengthen the mother’s protective role. Many will say that day will never come—yet the Green Book invites us to imagine it. At the same time, the proposal challenges the State to make good its commitment to child protection. There has been significant attention given to the Green Book process by states and federal authorities. As an advocate for battered women and their children I want to challenge these entities to recognize that the same issues, and sometimes the same children, are at stake in private cases. If the state is serious about developing an enlightened, supportive response to battered mothers where children are at risk, child protection (or other involved) agencies should be available to speak for the children in such cases.

The notion of collaboration between child protection agencies and battered mothers, while hard to imagine, is not new.²⁰⁶ In *Nicholson*,

206. Child protection agencies’ unwillingness to assist mothers seeking to protect their children from batterers has been a source of great frustration to mothers and advocates. Discussants on the “CHILD-DV” list serve have repeatedly raised this issue. For instance one former child protection worker and domestic violence specialist within a child protection agency wrote,

[a]s a former CPS worker and DV specialist in a CPS agency, CPS does have the resources, ability and responsibility to keep not only children, but mothers—families, safe). CPS has enormous power, it’s how CPS uses its power, and how they leverage their resources and the paradigm from which they practice that determines and guides safety. Rather than relying solely on shelters and police to secure safety, consider partnering with them.

Posting of Lien Bragg, to CHILD-DV@mail.abanet.org (Jan 2, 2003) (copy on file with author). Too often the State’s response in these cases has been to dismiss the allegations as mere litigation tactics. As discussed *supra* Part III.B, however, the fact that abuse is raised in the litigation context is not alone an adequate basis for

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for example, plaintiffs' lawyers critiqued New York's child protection agency's failure to assist some mothers in obtaining arrest of the batterer. Even though the batterer had hit the child, and the agency had opened a case against the *mother*, they refused to advocate with the police for the batterer's arrest, preferring to remove four teenagers from the house and put them in temporary foster care, which caused obvious trauma and disruption to their well-being.²⁰⁷ In instances such as this, a simple phone call to the police might save the child protection agency from opening a new case and adding to their own caseload.

The idea of state child protection agency and private collaboration also appears to have been touched on during the Green Book process. One recommendation in the Green Book is that child protection workers should monitor perpetrators' compliance with service plans and protection orders, and should testify in court about their protection order violations. While the Green Book does not specify in which courts it envisions those orders being heard,²⁰⁸ most protection order cases are privately litigated.

Imagined benefits aside, this discussion is not complete without at least briefly acknowledging the obstacles to such a collaboration. First and foremost is the inarguable reality that child protection agencies are notoriously under-funded, overwhelmed, bureaucratically dysfunctional, and, despite the small dent made by the Green Book Initiative, fairly universally conditioned to see mothers as the problem. Thus, I cannot say enough that this thought experiment proposal is predicated on the assumption that we are working with a well-educated, enlightened, moderately functional and sympathetic agency.²⁰⁹

dismissing most mothers' abuse allegations.

207. Posting of Jill Zuccardy, attorney for plaintiffs, to CHILD-DV@mail.abanet.org (Jan. 2, 2003) (copy on file with author). (stating "[w]e were actually happy when the police called in to CPS on the assault on the child. But when ACS showed up, they refused to call the police to advocate for his arrest! Instead, they removed the 4 teenagers. . . . It took me over a week to get the police to arrest him, and ACS wouldn't even weigh in on it"). As this instance indicates, while many discussions of battering focus on women's ambivalence and failure to take action, in reality many battered women repeatedly seek protection and assistance, from police and other agencies, without success. The intervention of a state agency on their behalf with, e.g., the police, would almost certainly get more results. *Id.*

208. See Green Book, *supra* note 10, at 65.

209. People involved in the Green Book Initiative have observed clear improvement in some CPS agencies' response to these cases in the few years of the Project. There is some cautious optimism that these improvements can be expected to continue. Telephone Interview with Jerry Silverman, Senior Policy Analyst, U.S. Department of Health & Human Services (Jan. 23, 2003). However, even if the agency were "enlightened" on domestic violence, there remain well-documented

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Secondly, even assuming what I am denominating an “enlightened” agency, i.e., one sympathetic to the problem of battering and capable of responding appropriately, the most obvious downside to such collaboration would be the private litigant’s loss of control of the case. As a matter of structure and mission, once a state agency joins the litigation, it will inevitably pursue its own agenda. Even an “enlightened” agency may disagree with the mother about some things, e.g., exactly how much visitation the father should have and under what conditions, and it may also wish to raise some concerns about her parenting as well. Would these risks outweigh the potential benefits of a supportive stance regarding the risks to the children from the batterer? This cannot be answered as a general policy matter; it would have to be weighed in each case by the litigant (and hopefully her counsel), based on their assessment of the particular agency in their jurisdiction and the particular issues in their case.

Third, substantial practical and philosophical problems attach to the question of how a child protection agency would intervene: for instance, how it would determine when and whether it should intervene in such cases; how it would structure such an intervention, e.g., whether it would need to open a formal case file, how much investigation would be required to support such intervention in the case, etc. Of course, the answers to each of these questions would affect whether such an intervention proved beneficial to the children and mothers or not.

Finally,²¹⁰ from the State’s standpoint the proposal is likely to be a non-starter if it means an increased caseload for these already absurdly over-burdened agencies. While this issue is undeniably fundamental, we need not assume it is prohibitive. There is a real possibility that fruitful collaboration with private litigants, which was effective in increasing the protection of children, would actually decrease the agency’s caseload, by making its interventions more effective.²¹¹ Helpful interventions in private cases could reduce the

and pervasive concerns about racial and class bias that historically has shaped child protection practice. Freedman, *supra* note 60, at 598 n.95.

210. I do not purport to raise all the problems with this proposal, but only several of the most obvious and fundamental ones for purposes of the “thought experiment.”

211. Posting of Patricia Weel, to CHILD-DV@mail.abanet.org (Jan. 7, 2003) (copy on file with author) (stating “the typical CPS formulas for addressing DV, have the mother get a protection order, have mother leave her abuser, get shelter, etc. do not necessarily offer safety for either the mother or the children”). Another list member, from the Non-Violence Alliance/Domestic Violence Intervention Training Institute has stated:

number of child abuse and neglect cases in the current caseload, including cases opened (i) when children wrongfully placed in batterers' care are abused, (ii) against mothers who have been unable to protect their children, or (iii) against mothers who have become abusive due to their own victimization and inability to obtain sufficient support and protection for themselves and their children.²¹²

B. Terminating Parental Rights

Unfortunately, even where judges and child protection systems do the right things to protect children and their mothers, some of those families will remain at risk. Our focus on the failures of the legal and social service system should not blind us to the painful fact that many batterers, even after appropriate legal interventions, such as court-mandated counseling or even incarceration, do not change enough to make their original victims safe.²¹³ And since even those batterers who are incarcerated will ordinarily be incapacitated for no more than a few years, their ability to continue abusing their original victims remains a threat to many families. The women most likely to achieve long-term safety are those whose batterers were merely "opportunistic," or who shift their focus to other women. But for the significant proportion of women whose batterers remain "invested" in them or their children, the potential for future abuse—and the

It's my estimation that we have no idea how successful we can be in intervening successfully with batterers to protect children and remove the burden of blame and responsibility for his behavior from the shoulders of adult victims of domestic violence . . . [in one case] the shift in focus of the case worker from the victim to the perpetrator seemed to improve outcomes . . . the worker decided to petition the juvenile court to have the batterer mandated to inpatient substance abuse treatment. Once the batterer was out of the home, the mother became much more forthcoming about the extent of the violence and began to participate in a local battered women's support group.

Posting of David Mandel, to CHILD-DV@mail.abanet.org (Jan. 8, 2003) (on file with author).

212. More than one study has found that "once the women leave the battering relationship, the number of women who continue to engage in aggression toward their children drops." George W. Holden et al., *Parenting Behaviors and Beliefs of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES 289, 325-30 (George W. Holden et al. eds., 1998) (cited in CLARE DALTON & ELIZABETH SCHNEIDER, *BATTERED WOMEN AND THE LAW* 272 (2001)).

213. See Joan Zorza, *New Research: Broward County Experiment Shows No Benefit from Batterer Intervention Programs*, DOM. VIOLENCE REP., Dec./Jan. 2003, at 23, 25 (arguing that "[i]f the best research keeps finding that these programs do not reduce man's violence, it may be time to rethink what accountability we need to demand from men who abuse their intimate partners"). In contrast to counseling, anecdotal evidence (i.e., the experience of myself and many colleagues) suggests that the factor most reliably associated with safety for a given victim is the batterer's moving on to a new victim.

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fear triggered by the possibility thereof—may remain for the long term.²¹⁴

While in the majority of cases this painful reality may be unavoidable, there are a small percentage of cases in which I would like to see a second thought experiment considered. In those cases, it is not enough to do what is typically done, i.e., impose temporary restraints or sanctions in one case and then move on to the next. So long as children (and mothers) remain at grave risk even after “successful” interventions, i.e., those in which available civil and criminal restraints have been imposed, the State has an obligation to take whatever steps are lawful and possible to minimize those risks.

In the most egregious cases, the mother and the State should seriously consider terminating parental rights. As with the first proposal, this proposal envisions such an intervention to be appropriate only if it is chosen by the mother and the children after well-counseled, careful consideration of the potential risks and benefits. Because, as is discussed below, the risks of taking this action may be as great as or greater than the risks of not doing so, mothers considering pursuing it should receive sophisticated risk assessment and safety planning before deciding whether it is their best option.²¹⁵

The critical question of course is, in which cases should such an extreme measure be taken? I do not intend to fully answer that question here, other than to say it should be considered in those cases where most objective people would agree that the mother or children continue to be at extremely serious risk of severe harm or death as long as the abuser’s access to the children continues. The purpose of this proposal is not to define this category of cases, but merely to put on the table for further conversation this under-utilized tool in the effort to reduce violence against women and children.²¹⁶

214. In one case handled by students in my clinic, the client successfully obtained a protection order, and repeatedly sought to have it enforced when the batterer violated it, with only limited success. Several years later, although she has no ongoing contact with her child’s father, she is still experiencing some harassment from the abuser in connection with their child.

215. It could be argued that using termination of parental rights in this way is asking the civil law to do the work of the criminal law. That is, if someone is that dangerous, they “should” presumably be behind bars. In fact, there are all kinds of reasons, some valid and some not, why such men are only rarely incarcerated for any length of time. In any case, what seems certain is that we can expect this to be the reality for the foreseeable future. And while the criminal law remedy may be preferable as more directly responsive to the “crime,” rectifying the civil law status of parental relationships, based on a parent’s unacceptable risk to the children, is also appropriate.

216. I am not to first to suggest this. See Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 768 (1996); Lillian Wan, *Parents Killing Parents: Creating a*

It may be asked what difference termination of parental rights will make, especially with respect to extremely dangerous batterers who are not deterred by criminal sanctions. The answer is that, while it will not help in all cases, there is reason to believe that termination of parental rights (“TPR”) will, in some instances, slow or end a batterer’s harassment and abuse of his victim and their children. This conclusion flows from an in-depth understanding of the psychological motivations of batterers. Because battering is at core typically about the batterers view of his “rights,” his moral superiority, and his need to prove his children’s mother “wrong,”²¹⁷ in certain cases, the TPR action would powerfully challenge such a batterer’s view of his prerogatives and his right to possess and control his children. Insofar as much male abuse is fueled by a sense of entitlement and “property” rights over children and mothers,²¹⁸ TPR actions—which send a clear message that batterers have lost their “rights” to their children—might actually impact many abusers more powerfully than the more common civil or criminal justice restraining orders or criminal adjudications. TPR actions would also mean that those abusers who, for whatever reasons, have not been adequately restrained or reformed by civil or criminal justice interventions, would no longer be legitimized in their claims of access to the children, and would no longer be empowered by the State’s endorsement (in the form of legal recognition of his parental rights) of that access. At the least, TPR would eliminate the State and legal system’s inclination to award these batterers access to their children.

This proposal is less radical than the first one (intervention in private litigation), in that it does not require the State to create a completely new kind of legal action. However, it remains well beyond current practice, both because current TPR statutes do not extend this far,²¹⁹ and because it invites state agencies to intervene in cases

Presumption of Unfitness, 63 ALB. L. REV. 333 (1999).

217. See Karla Fisher et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117, 2126, 2130-31 (1993) (describing an abusive relationship as “the ruler and the ruled” in which “batterers . . . consistently blam[e] women for everything that goes awry in their lives,” and say things like “I’m gonna teach you a lesson; raise you right”).

218. See Goodmark, *supra* note 74, at 252-53.

219. A cursory review of termination of parental rights statutes and the relevant legal literature indicates that this proposal is in fact “out of the box.” As recently as 1998, no state termination statute provided that domestic violence against a parent constitutes per se parental unfitness. Leslie Johnson, *Caught in the Crossfire*, 22 L. & PSYCHOL. REV. 271, 281 (1998). More amazingly, only three states provided for termination based upon murder of one parent by the other. Haddix, *supra* note 219, at 768. However, some courts have terminated parental rights for the murder of the other parent. See, e.g., *Brown v. Dep’t of Human Resources*, 276 S.E.2d 155 (Ga. App. Ct. 1981); *In re Abdullah*, 423 N.E.2d 915 (Ill. 1981); *In re Adoption of A.P.*,

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which have not previously come into the child protection system.²²⁰ This type of “family protection” is, however, a logical extension of the Green Book’s admonitions, which include, most importantly, the recommendation to keep children with their non-offending parent, and to assist battered mothers in minimizing the risks from the batterers.²²¹ Indeed, the Green Book acknowledges that TPR may be appropriate in some instances.²²²

There are of course also serious concerns attached to this proposal—perhaps even more serious than those identified for the first. Most obviously is the question of whether a TPR action would backfire and put women and children at greater risk, by provoking the abuser to kill them. Since some men do this when “only” deprived of custody,²²³ or merely after being taken to court by their victims, we can assume that more may do so after their parental rights are terminated. My response is that, while this risk is serious and disturbing, it cannot dictate legal policy, any more than the risk that losing custody will trigger homicide should dictate custody awards, or the risk that prosecuting gang members will trigger homicides of “snitches” should preclude such prosecutions.

The second powerful concern associated with this proposal is the possibility of its backfiring in a different manner: i.e., when state agencies start to terminate the parental rights of women who have fought back or used self-defense against abusers (and presumably still been convicted of homicide). Such TPRs may have already occurred.²²⁴ But again, I would point to my original predicate for both thought experiments: neither could be seriously considered unless the child protection agency with which we were working was genuinely enlightened about domestic violence, high-functioning and trustworthy. With this predicate, it seems plausible that the risks of the “wrong” parents having their rights terminated would be less than the risks we currently face when we allow extremely violent, possessive and vindictive men continued rights to their children.

982 P.2d 985 (Kan. Ct. App. 1999). More surprisingly, however, some courts have also refused to do so, despite petitions by the state child protection agency. See cases cited *supra* note 159.

220. The same questions raised for Proposal 1 about how cases would be selected and investigations performed would apply equally here.

221. See Green Book, *supra* note 10, at 19, 64, 66.

222. *Id.* at 23.

223. See Crary, *supra* note 95 (describing several instances of men who killed themselves and/or their children after losing in court).

224. Terminations of mothers’ parental rights has already been disturbingly common for the lesser wrong of alleged “failure to protect” children from the batterer. See generally Enos, *supra* note 14.

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CONCLUSION

These suggestions for potential State intervention in private litigation seek to imagine a way to counter the entrenched attitudes of courts that prevent them from taking seriously battered mothers' claims, and that lead them repeatedly and disturbingly to place children (and women) at unnecessary risk. Although it is unlikely that such proposals will be accepted easily, or that they are without risk to those I seek to help, they, like the Green Book Initiative, represent a sincere attempt to think "out of the box." While cognizant of some of the obvious potential pitfalls in these proposals, I take seriously the premise of the Green Book: that people of good will, both in state agencies and private advocacy roles, can work together to better protect children (and battered mothers), by increasing understanding of and empathy for adult victims of battering. If, as the Green Book does, we genuinely seek to reform and improve the State's response to child maltreatment in the context of domestic violence, we should at least consider bringing the power of the State affirmatively to bear in support of mothers who seek to protect their children in other legal fora. In other words, if it is protection of children that the State and we are seeking, the State and we must recognize and address the multiple fora in which that safety (or lack thereof) may be determined.

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APPENDIX A²²⁵APPELLATE COURTS UPHOLDING TRIAL COURT AWARDS OF
CUSTODY TO FATHERS DESPITE MOTHERS' DOMESTIC VIOLENCE
CLAIMS²²⁶

Cases	Reasons
Supreme Court of Alabama: Ex Parte Fann, 810 So. 2d 631 (Ala. 2001) (sole custody to father).	<ul style="list-style-type: none"> ➤ Insufficient evidence of abuse ➤ Evidence that they frequently abused alcohol
Court of Civil Appeals of Alabama: Kent v. Green, 701 So. 2d 4 (Ala. Civ. App. 1996) (sole custody to the father, subject to the mother's visitation).	<ul style="list-style-type: none"> ➤ The father began counseling (after choking his wife resulting in her hospitalization and his arrest). ➤ The psychologist testified that the father's violence was unlikely to recur. ➤ Mother refused counseling, and therapist testified that without treatment, problems would deteriorate.
Court of Appeals of Florida, 1st District: Ward v. Ward, 742 So. 2d 250 (Fl. Cir. Ct. 1996) (primary residential custody).	<ul style="list-style-type: none"> ➤ Mother was in a lesbian relationship; child exhibited inappropriate sexual statements and behavior believed to be a result of inappropriate exposure to sexual conduct. ➤ Although the father was convicted of murdering his first wife, he claimed it was the result of "stupidity, jealousy, and anger." The father was in a new marriage and had no new criminal offenses since his release from prison.

225. The following chart contains a sample, but not a comprehensive overview, of United States cases concerning domestic violence and custody.

226. The one exception is *Dinius v. Dinius* (N.D.), in which the appellate court reversed an award of custody to the *mother*.

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<p>Court of Appeal of Louisiana, 1st Circuit: Raney v. Wren, 722 So. 2d 54 (La. Ct. App. 1998) (joint custody).</p>	<ul style="list-style-type: none"> ➤ Modification of custody— trial court excluded evidence of history of family violence because it occurred prior to the stipulated custody consent decree. ➤ The resulting record did not support the allegation of violence. ➤ The court found the mother’s allegations “suspect.”
<p>Court of Appeals of Louisiana, 2d Circuit: Simmons v. Simmons, 649 So. 2d 799 (La. Ct. App. 1995) (father designated primary domiciliary parent).</p>	<ul style="list-style-type: none"> ➤ One instance of violence, admitted by the father but claimed provoked by the mother’s adulterous affair, did not rise to the level of a “history of perpetrating family violence” as required by statute to trigger rebuttable presumption.
<p>Appeals Court of Massachusetts: In re Custody of Zia, 736 N.E.2d 449 (Mass. App. Ct. 2000) (sole legal and physical custody).</p>	<ul style="list-style-type: none"> ➤ The father’s past conduct and criminal history gave the court “pause” but the court did not find, and the mother did not argue, that the father’s conduct constituted a “pattern” or “serious incident of abuse” as required by statute. ➤ The mother was living in public housing, and had been arrested for possession of drugs. ➤ The father encouraged physical and mental stimulation of the child. ➤ The mother failed to set adequate boundaries. ➤ The father participated in therapy for controlling his anger.
<p>Court of Appeals of Minnesota: Canning v. Wieckowski, No. C4-98-1638, 1999 WL 118509 (Minn. Ct. App. Mar. 9, 1999) (physical custody to father).</p>	<ul style="list-style-type: none"> ➤ A finding of domestic abuse was not made. ➤ The father was willing and capable of “toning down his anger and negativity toward [the mother, whereas the mother] seem[ed] preoccupied with

	<p>making respondent out to be a villain.”</p> <ul style="list-style-type: none"> ➤ The father was comfortable with his son and capable of strengthening the bond with more contact.
<p>Court of Appeals of Missouri, Western District: Hamilton v. Hamilton, 886 S.W.2d 711 (Mo. App. 1994) (physical custody to father every weekend).</p> <p>Gant v. Gant, 923 S.W.2d 527 (Mo. Ct. App. 1996) (joint legal custody with the father as primary residential custodian).</p> <p>Couch v. Couch, 978 S.W.2d 505 (Mo. Ct. App. 1998) (physical custody to the father).</p>	<ul style="list-style-type: none"> ➤ Court did not believe that two incidents of violence, “occurring years apart during a 20-year marriage . . . constituted a ‘pattern of domestic violence.’” ➤ “Husband was learning to exercise more self control.” ➤ Violence was not directed at the children. ➤ The husband was a good homemaker and better aware of the daily needs of children. ➤ The wife was lacking in child care skills— did not always bathe them, brush their teeth, or feed them appropriate foods. ➤ Violence was not directed towards children. ➤ The child’s relationship with paternal grandmother who was the primary caretaker weighed in favor of granting custody to the father.
<p>Supreme Court of North Dakota: Cox v. Cox, 613 N.W.2d 516 (N.D. 2000) (custody to the father).</p> <p>Dinius v. Dinius, 564 N.W.2d 300 (N.D. 1997) (father awarded custody) (<i>appellate court reversed trial court’s award of custody to mother</i>).</p>	<ul style="list-style-type: none"> ➤ Most of the mother’s allegations of domestic violence were not credible, and those that were (including hitting and grabbing that left marks and bruises) did not qualify as domestic violence. ➤ Two instances of physical force toward the child not considered domestic violence; instances were far apart in time, and could have been considered reasonable force to discipline child.

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Brown v. Brown, 600 N.W.2d 869 (N.D. 1999) (custody to the father).	<ul style="list-style-type: none"> ➤ Both parties had committed violence against one another; none of the incidents were severe enough to trigger the presumption.
<p>Court of Appeals of Oklahoma:</p> <p>Brown v. Brown, 867 P.2d 477 (Okla. Ct. App. 1993) (custody of father).</p>	<ul style="list-style-type: none"> ➤ Violent/aggressive behavior did not amount to “ongoing domestic violence.” ➤ Evidence that the mother had propositioned at least two men (other than her husband) during the marriage.

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APPELLATE COURTS REVERSING TRIAL COURTS' CUSTODY AWARDS
TO FATHERS²²⁷

Alabama Civil Appeals Court	Jackson v. Jackson, 709 So. 2d 46 (Ala. Civ. App. 1997).
Connecticut Supreme Court	Knock v. Knock, 621 A.2d 267 (Conn. 1993) (<i>upholding award of custody to mother</i>).
Florida District Court of Appeals	Ford v. Ford, 700 So. 2d 191 (Fla. Dist. Ct. App. 1997).
Louisiana Court of Appeals	Lewis v. Lewis, 771 So. 2d 856 (La. Ct. App. 2000). Hicks v. Hicks, 733 So. 2d 1261 (La. Ct. App. 1999). Michelli v. Michelli, 655 So. 2d 1342 (La. Ct. App. 1995).
Massachusetts Supreme Judicial Court	In re Vaughn, 664 N.E.2d 434 (Mass. 1996).
Minnesota Court of Appeals	Nazar v. Nazar, 505 N.W.2d 628 (Minn. Ct. App. 1993).
Supreme Court of Nevada	Hayes v. Gallacher, 972 P.2d 1138 (Nev. 1999). Russo v. Gardner, 956 P.2d 98 (Nev. 1998). Lesley v. Lesley, 941 P.2d 451 (Nev. 1997). McDermott v. McDermott, 946 P.2d 177 (Nev. 1997).
New York Appellate Division	Pratt v. Wood, 210 A.D.2d 741 (N.Y. App. Div. 1994).
Supreme Court of North Dakota	Kasprowicz v. Kasprowicz, 575 N.W.2d 921 (N.D. 1998). Zuger v. Zuger, 563 N.W.2d 804 (N.D. 1997). Anderson v. Hensrud, 548 N.W.2d 410 (N.D. 1996). Engh v. Jensen, 547 N.W.2d 922

227. The one exception is Knock v. Knock (Conn.), in which the appellate court *upheld* an award of custody to the mother.

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	(N.D. 1996). Kraft v. Kraft, 554 N.W.2d 657 (N.D. 1996). Owan v. Owan, 541 N.W.2d 719 (N.D. 1996). Bruner v. Bruner, 534 N.W.2d 825 (N.D. 1995). Heck v. Reed, 529 N.W.2d 155 (N.D. 1995). Helbing v. Helbing, 532 N.W.2d 650 (N.D. 1995). Krank v. Krank, 529 N.W.2d 844 (N.D. 1995).
Oklahoma Court of Appeals	Smith v. Smith, 963 P.2d 24 (Okla. Civ. App. 1998).