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ENDING THE DENIAL OF FAMILY VIOLENCE: AN EMPIRICAL ANALYSIS AND PATH FORWARD FOR FAMILY LAW

Joan S. Meier*

*Professor of Law, George Washington University Law School. I am grateful to GW Law for the summer stipend in support of this article, as well as multiple opportunities to present pieces of this research. Deep thanks to Naomi Cahn, June Carbone, Clare Huntington and Michael Wald for their invaluable comments and feedback. I am grateful to the many research assistants who worked on this article, including particularly Ellen Albritton, Jeanel Sunga, and Victoria Yamarone. This article is in honor of the many protective parents who soldier through the family courts while trying to keep their children safe and loved.

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INTRODUCTION

> *"He told me what could be worse is if he killed all of us, and then he said actually worse than that, if he killed the children and not me so that I would have to live without them."*[1]
>
> *The court-appointed evaluator and Maryland family court did not believe Dr. Amy Castillo's report of her husband's words or did not take them seriously. When Dr. Castillo refused to turn the children over for court-ordered visitation with their father, she was held in contempt and jailed. Months later, having learned her lesson, she let them go with their father. That day, March 29, 2008, he drowned Anthony (6), Austin (4) and Athena (2) in the bathtub, one at a time, in the hotel room he used for the visit.*

While the outcome of the above case was extreme,[2] the court's dismissive response to the mother's desperate warning was quite typical. Over the past 20-30 years a critical mass of research and social media has described family courts in private custody litigation denying and punishing of women's and children's abuse allegations, often with a custody reversal to the alleged abuser.[3] In particular, the literature has condemned courts' use of the controversial concept of parental alienation[4] to dismiss mothers' abuse allegations. This qualitative literature has been largely ignored or marginalized by leading mainstream family law scholars and family court

[1] *Family Law – Protective Orders – Burden of Proof: Hearing on H.B. 700 Before the H. Comm. on the Judiciary*, 2010 Leg., 427th Sess. (Md. 2010) (statement of Amy Castillo), https://www.washingtonpost.com/wp-srv/metro/pdf/HB_700_Testimony_Amy_Castillo.pdf.

[2] *But cf.* US Divorce Child Murder Data/Reported System Failures, CTR. FOR JUD. EXCELLENCE, https://centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/ (last visited January 30, 2021) (listing 106 "preventable homicides" in which courts were asked to restrict a parent's access but refused) (hereafter "Child murder data").

[3] *See* Part I, *infra.*

[4] Parental alienation lacks a singular definition but is generally understood as toxic behavior by a parent to undermine the children's relationship with the other parent. It is typically invoked whenever children resist contact with a (usually noncustodial) parent. See Part IV, *infra*.

professionals. While the reasons for this marginalization are complex and likely partially unintentional, this article is a call to bring family violence in from the margins of judicial, policy and academic attention. The article grounds that call in new empirical data from the first-ever quantitative national analysis of family court practices - data which empirically validates the reports and grievances of thousands of mothers and children in the United States.[5]

It is no secret within the family law world that family courts idealize shared parenting and prioritize it in custody determinations; but the degree to which the shared parenting ideal undermines consideration of family violence has not been widely recognized. Rather, family law, in both theory and practice, treats domestic violence and child abuse as exceptions to the norm and rarely legitimate, despite longstanding empirical evidence suggesting such histories are common in custody cases.[6] This marginalization and denial of family violence in law, theory and practice fuels and reinforces custody courts' denials of abuse and disfavoring of mothers who report it. This critique has been amply articulated in domestic violence and abuse scholarship and literature but ignored in mainstream family law scholarship.

This article argues that domestic violence and child maltreatment (together termed "family violence") need to be brought in from the margins of family law discourse to change the profession's systemic denials of the risks many children face from a custody-litigating parent. For the first time we now have empirical evidence that validates the domestic violence field's critiques. The new study's objective data put a point on the cognitive dissonance between the domestic violence field's critiques of family courts and mainstream family law and scholarship.

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[5] Documentation of the Study data and methods is posted at https://dataverse.harvard.edu/, and will be referred to herein as "Statistical Documentation."

[6] Regarding rates of abuse allegations in custody cases and other families, s*ee* Part I, *infra.* Some might argue that because the empirical data reflects only judicial decisions, this article has limited significance because only approximately 4-6% of filed custody cases are ultimately decided by a judge. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 150 (1994). Part I *infra,* however, explains why this article is pertinent to most contested cases, including those that settle out of court

The article then turns to the question the data beg: Why are mothers' claims of abuse so widely denied in court? In addition to common explanations such as emphasis on shared parenting, gender bias and misconceptions about abuse, it suggests another less recognized cause - unconscious psychological denial. Only unconscious denial can explain the commonality of court decisions which are both illogical and counter-factual, especially from respected judges.

Finally, the article urges changes in both the theory and practice of family law. It proposes two new modifications to custody statutes designed to counteract the types of reasoning and practices which fuel denial of credible abuse claims, in particular the role of parental alienation theory. It also urges scholars and law professors to support the integration of the realities of family violence into family law scholarship and practice. As trainers and mentors of new family law professionals and significant contributors to shaping both the law and judicial practice, family law scholars have power to help turn the tide of destructive family court outcomes.

Part I below draws from a case narrative and extensive scholarship and social media reports to depict family courts' common rejections of mothers' evidence of family violence. It then presents data from the author's first-ever national empirical study of family court cases involving abuse and parental alienation claims (the "Study").[7] The Study's findings confirm that family courts reject mothers' allegations of abuse by fathers at high rates and frequently remove mothers' custody, validating the domestic violence critical narratives and scholarship.

Part II describes the marginalization of family violence within mainstream family law and leading family law scholarship, with particular

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[7] The final report for the funder can be found at Joan Meier et al, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations,* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448062 (hereafter "Child Custody Outcomes" or "the Study"). A portion of the Study's findings related to alienation were published in Joan Meier, *U.S. child custody outcomes in cases involving parental alienation and abuse allegations,* 42(1) J. Soc. Welf. & Fam. Law 92 (2020). But the majority of the data included herein has not previously been published.

attention to the shared custody idealism which shapes both. It also explains why, while the Study's data reflect only the small number of cases involving final adjudications, the larger critique is pertinent more broadly to cases which settle out of court and even some informally resolved cases.

Part III contrasts the widespread denial of family violence in family courts with the palpable shifts toward greater societal recognition of men's abuse of women ushered in by the #MeToo movement. Other scholars have suggested a number of causes for courts' and practitioners' rejection of mothers' abuse claims; this article explores a less visible and potentially more fundamental cause – the phenomenon of psychological denial. Individual and social denial of many humanly inflicted traumas, including not only violence against women and children but also political- and war-traumas, has been explicated and detailed in significant social science research.[8] Western society at large has recently begun to shed the denial of men's sexual abuse in response to the #MeToo movement, which has successfully brought abuse of women in employment into stark relief, although the implications of this new awareness remain highly contested even in the employment context.[9] In the family courts, where - unlike non-legal settings - both the facts and the consequences must be authoritatively decided, the cumulative forces favoring denial of family abuse still deter many courts from validating and acting on the implications of women's and children's abuse claims.

Part IV then elaborates on the "machinery" of courts' denial, the widely accepted quasi-scientific notion of parental alienation ("PA"). The PA concept invites courts to view mothers' abuse allegations as a product of – at best - mothers' pathology or excessive "gatekeeping" toward ex-partners they no longer love or trust - and at worst - of malice and vengeance. Without directly ruling out or confirming abuse, PA thinking deflects courts' attention

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[8] *See* JUDITH HERMAN, TRAUMA AND RECOVERY 28-32 (photo. reprint 1997) (1992) (analogizing society's early refusal to recognize and compassionately treat "shell-shock," to society's cyclical denial of the "war between the sexes").

[9] *See, e.g.*, Jane Mayer, *The Case of Al Franken*, THE NEW YORKER, Jul. 29, 2019, https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken (quoting lawyer Debra Katz stating "[a]ll offensive behavior should be addressed, but not all offensive behavior warrants the most severe sanction").

away from women's and children's abuse allegations and encourages them to essentially shoot the messenger. Despite the known lack of scientific support for key tenets of PA theory, judicial trainings on it are ubiquitous, family court conferences feature it, an extensive literature extolls it, and it permeates family court litigation. And even where alienation is not explicitly invoked, the ideology reinforces family court culture's reification of shared parenting while promoting punitive responses toward women who impede this goal by alleging abuse. The use and power of PA to fuel the rejection of abuse claims is now empirically proven by the Study's findings that fathers' crossclaims of PA virtually double the rates at which courts deny mothers' abuse claims and remove custody of their children.

Finally, Part V calls for a two-tiered legislative response and a new academic synthesis. First, laws governing custody should ensure that parental alienation is cabined and constrained so it cannot be used to short-circuit abuse investigations and brush aside children's reported experiences and feelings. While courts must of course remain free to reject the truth of any abuse allegations, PA is not a scientifically legitimate tool for that purpose, and it is framed and used in a manner that simply cements pre-existing predilections toward disbelief of women's and children's claims of abuse. Expert testimony in such cases must be limited to genuine experts in abuse – not alienation - and alienation claims by an accused parent should not be considered unless abuse has been ruled out.

Second, the law needs to change courts' zero-sum approach to abuse allegations, i.e., the presumption that "if it is not true, then it is false." Given that not all true abuse (particularly child sexual abuse) is easily proven, and given human nature's avoidance of such painful realities, the law should recognize the need for - and require courts to employ - a nuanced response in situations of indeterminacy: Wherever a court is not prepared to rule affirmatively on abuse, but it has not been ruled out, the court should assign therapeutic support from trauma professionals for both the child and the rejected parent. Such interventions should respond to children's actual feelings and *felt* experiences and should aid a disfavored parent in cultivating a loving and safe relationship with their child, rather than *either forcing or*

eliminating parent-child contact based simply on whether abuse is fully proven or not.[10]

The article closes with a plea to the family law academy to bring family violence in from the margins of scholarly research and theorizing, to ensure that students learn the realities of family court adjudications of cases involving abuse and are prepared for the battles ahead.

I. THE ERASURE OF ABUSE IN FAMILY COURT

The Gs' custody litigation had three stages – two are described here: The parties met when Ms. G was 18 and in high school, and Mr. G was 30. Nine years into the marriage they were divorcing and contesting custody of the parties' two sons and one daughter. Mr. G's frequent verbal abuse of Ms. G was admitted. Both the children and Ms. G lived in fear of Mr. G. While Mr. G had previously admitted to "battering. . . hitting . . . [and] slapping her. . ." and the neutral evaluator reported that he admitted to having "hit" her 4-5 times, at trial he asserted that she always hit him first. He did however admit to having grabbed and shaken his wife by the head while screaming "shut up shut up shut up!" in her face. The previous couple therapist corroborated his verbal aggression toward his wife and expressed the view that he had likely physically abused her more than the five times Ms. G reported. A police report describing Mr. G's fairly recent hospitalization for a deliberate overdose was admitted.

The court-appointed evaluator was not receptive to Ms. G's descriptions of Mr. G's family violence, and without reviewing any corroborative evidence, concluded that the children were not "currently" afraid of their father. The court-appointed guardian ad litem declined to discuss abuse but did raise the fact that Ms. G owed her fees from the first trial. Both neutral appointees viewed Ms. G as an inadequate parent with two hard-to-control boys, and

[10] *See infra,* Part V.

recommended continued physical custody of all three children with Mr. G. The court also characterized Ms. G as having emotional problems. Despite the corroboration described above, including testimony from past counselors, the uncontested fact that the family repeatedly sought treatment for family abuse, and even the neutral evaluator's statement that Ms. G "was a victim of domestic violence," the court stated in 2010: "[i]f all this abuse happened as you testified, ma'am, I'm shocked that there is not any corroborative evidence of it." The judge awarded physical custody to Mr. G, who moved them to Tokyo.

After four more years of living with their father in Tokyo, in 2015, during a summer visit with their mother, the children reported ongoing physical and emotional abuse. One child told his mother about his plans to commit suicide if forced to go back to his father. The Virginia Commonwealth University Child Protection Team interviewed the children, diagnosed one child with post-traumatic-stress-disorder and recommended a "full [child welfare] assessment." In the emergency court hearing, the 14-year-old daughter testified in Chambers about the physical abuse at home. At the subsequent hearing, Mr. G admitted that the Japanese school had called him in after seeing one child's bruises, to tell him to cease using physical "discipline." The same custody evaluator now found the children were "highly stressed," acting out, and had uncontrollable tics, but felt this was not an emergency nor raised anything new. The same judge again ruled that "the court finds that there is no abuse of the children and no history of family abuse," and ordered custody to remain with the father.[11]

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[11] *See* Brief Amici Curiae of DV LEAP et al in support of Appellant, *Mrs. G v. Mr. G*, (Va. App.) (2011). A fourth custody round, triggered by the father's secret and unlawful move with the children to the United Arab Emirates ("UAE"), produced the same result. Brief of Appellant, (Va. App.) (2015), https://drive.google.com/file/d/1C3khVMAttSTQtVTsf7N8TG1lzy1IjJqm/view. In her final year of high school the oldest daughter refused to return to her father from her summer visit with her mother, spent her senior year with her mother in the U.S., and is currently enrolled in college in the U.S. A year later, one son remains with his mother after his 2019 summer visit, due to suicidality, requiring a month in full-time mental health care.

OF FAMILY VIOLENCE

A. Qualitative Research and Narratives

Narratives like the *G* case are regularly echoed by thousands of professionals and parents throughout the country. Thousands of self-described "protective parents"[12] share their struggles in court on social media, and a growing body of scholarship describes similar cases, while critiquing family courts.[13] Domestic violence organizations such as the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)[14] are regularly flooded with pleas for help from battered women litigating custody, reporting that judges and court-appointed custody evaluators reject their claims of abuse and seek to maximize fathers' access to children instead.[15] Over the past 14 years an annual national conference has brought together protective mothers wrestling with the family courts.[16]

The third child remained with his father in the UAE. Electronic communications from Ms. G to Joan Meier (January 6, March 9, 2020).

[12] *See, e.g.*, CALIFORNIA PROTECTIVE PARENT ASSOCIATION, https://www.caprotectiveparents.org/; CENTER FOR JUDICIAL EXCELLENCE, centerforjudicialexcellence.org; ONE MOM'S BATTLE, https://www.onemomsbattle.com/blog/; THE COURT SAID, https://www.thecourtsaid.org. Localized activist efforts have had piecemeal success. *See* CTR. FOR JUD. EXCELLENCE, CA COMMISSION ON JUDICIAL PERFORMANCE AUDIT & REFORM, https://centerforjudicialexcellence.org/cje-projects-initiatives/ca-commission-on-judicial-performance-audit-reform/ (concerted effort by several California groups resulted in legislative mandate for audit of state family courts' performance).

[13] *See* citations *infra* at notes 18-21.

[14] In 2003 the author founded - and until late 2019 served as Director and/or Legal Director of - the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP). DV LEAP's mission is to provide appellate advocacy in cases involving domestic violence or family abuse or of importance to those constituencies. For more information go to www.dvleap.org.

[15] Although I no longer work with DV LEAP, I continue to receive 5-10 emails and calls per month from (mostly) mothers desperate for assistance to undo or prevent court decisions putting their children in harm's way.

[16] But for the pandemic, 2020 would have been the Battered Mothers' Custody Conference's 15th annual conference. *See* https://www.batteredmotherscustodyconference.org/.

The importance of adult domestic violence for custody determinations was first addressed in legal scholarship decades ago;[17] and since the early 2000s, domestic violence professors, lawyers and researchers have been reporting the failure of family courts to act on that link.[18] Experts and

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[17] *See, e.g.*, Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

[18] For just some examples of the critical literature, *see* Debra Pogrund Stark, Jessica M. Choplin & Sarah Elizabeth Wellard, *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1 (2019) (describing ideological battle between fathers' rights and domestic violence advocates over custody adjudication, analyzing social science research, and concluding that courts are more protective of fathers' rights than survivors of abuse and recommending legislative changes); Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 L. & INEQ. 5 (2011) (discussing 18 Minnesota cases involving domestic violence and parental alienation); MIKE BRIGNER, DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 13-1, 13-12 to 13-14 (Mo Therese Hannah & Barry Goldstein eds., 2010) (parents expressing concern about child safety with the other parent in state courts are routinely labeled an "unfriendly parent," "uncooperative," and/or guilty of "parental alienation); SHARON ARAJI ET AL, DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES, 6-2, 6-7 (Mo Therese Hannah & Barry Goldstein eds., 2010) (describing five separate state-based studies of Child Custody Outcomes in cases involving domestic violence finding that domestic violence rarely resulted in protective or limited parenting time); Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER, SOC. POL'Y & L. 163 (2009) (describing problematic exercises of judicial discretion in custody cases involving domestic violence and calling for less deference on appellate review); Michelle Bemiller, *When Battered Mothers Lose Custody: A Qualitative Study of Abuse at Home and In the Court*, 5 J. CHILD CUSTODY 228 (2008) (discussing 16 Ohio cases and finding denial of due process, gender bias and corruption led to maternal losses of custody); AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY MOTHERS ARE RUNNING FROM THE FAMILY COURTS – AND WHAT CAN BE DONE ABOUT IT (2005) (documenting cases in which accusations of child sexual abuse resulted in forced contact with the alleged abuser, and sometimes complete termination of parental contact with a loving parent who seeks to protect the child); Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991 (2005) (mothers in cases with a violent partner were no more likely to obtain custody than mothers in non-abuse cases; fathers with a history of committing abuse were denied visitation in only 17% of cases); Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform,* 37 Ariz. St. L J. 709 (2007)(arguing that battered mothers' narratives are as essential as data for making change, but were dismissed by the courts due to gender bias). *See also* Mary Przekop, *One More Battleground: Domestic*

researchers have reported that many custody courts fail to acknowledge domestic violence or child abuse, and are often driven by myths and misconceptions about perpetrators and victims.[19] Others have pointed out that family courts often fail to understand the implications of domestic violence for children and parenting,[20] are awarding unfettered access or custody to abusive fathers,[21] and even cutting children completely off from their protective mothers.[22] These draconian responses are particularly

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Violence, Child Custody, and the Batterer's Relentless Pursuit of Their Victim Through the Courts, 9 SEATTLE J. FOR SOC. JUST. 1053 (2011); Joan Meier, *Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 657 (2003).

[19] Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57, 60, 62 (2003); Stephanie J. Dallam & Joyana L. Silberg, *Six Myths that Place Children at Risk in Custody Disputes*, 7 FAM. & INTIMATE PARTNER VIOLENCE Q. 65 (2014); Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES J. 38 (1997).

[20] Evan Stark, *Rethinking Custody Evaluations in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287 (2009); Clare Dalton, Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11 (2003); Meier, *supra* note 19.

[21] LUNDY BANCROFT, JAY G. SILVERMAN & DANIEL RITCHIE, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2d ed. 2012); Gina Kaysen Fernandes, *Custody Crisis: Why Moms are Punished in Court*, MOMLOGIC, www.momlogic.com/2010/01/custody_crisis_why_mothers_are_punished_in_family_court.php (last visited April 21, 2014); Sally Goldfarb, The Legal Response to Violence Against Women in the United States of America: Recent Reforms and Continuing Challenge: Expert Paper prepared for the United Nations Division for the Advancement of Women (Apr. 14, 2014) (expert paper provided to United Nations) (on file with United Nations), https://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Sally%20Goldfarb).pdf; Meier, *supra* note 19 at 662, n.19, Appendix (of 38 appealed custody and domestic violence cases, 36 involved award of joint or sole custody to an alleged or adjudicated batterer; 2/3 were reversed on appeal).

[22] *See, e.g.*, Joan Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 219, 228-29 (2010) (describing five such cases); Poster presentation by Nancy Stuebner, Linda Krajewski & Geraldine Stahly at the Int'l Violence and Trauma Conf., https://irp-cdn.multiscreensite.com/0dab915e/files/uploaded/IVAT%20Poster%202014.pdf (2014) (75% of mothers in survey lost custody to abusers); Neustein & Lesher, *supra* note 22; *Dombrowski v. United States*, http://claudinedombrowski.blogspot.com/2013/08/dombrowski-et-el-v-usa-2007-

apparent where mothers (and children) allege child sexual abuse.[23] It is also now clear that this pattern of family court resistance to mothers' pleas to protect their children in the context of custody determinations is global.[24]

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petition.html (2007) (Petition to Inter-American Commission on Human Rights detailing 10 cases in which U.S. family courts both suppressed evidence of adult and child abuse and awarded custody to abusers).

[23] Kathleen Coulborn Faller & Ellen DeVoe, *Allegations of Sexual Abuse in Divorce*, 4 J. CHILD SEXUAL ABUSE 1 (1995) (some courts sanctioned mothers for reporting child sexual abuse, especially those with *more* corroborative evidence); Neustein & Lesher, *supra* note 19; S. R. Lowenstein, *Child Sexual Abuse in Custody and Visitation Litigation: Representation for the Benefit of Victims*, 60 UMKC L. REV. 227 (1991) (of 36 cases sexual abuse cases, 2/3 of the alleged perpetrators received unsupervised visitation and in custody cases in which 63% of mothers alleged some kind of abuse, 48% lost custody); Bancroft & Miller, *supra* note 19 at 107-22. *See also* Madelyn Milchman, *Misogyny in New York Custody Decisions with Parental Alienation and Child Sexual Abuse Allegations*, 14 J. CHILD CUSTODY 234 (2017).

[24] See *https://www.facebook.com/thecourtsaid/; Elizabeth Sheehy & Simon LaPierre,* Introduction to the Special Issue*, 42 J. SOC. WELFARE & FAM. L. 1 (2020) (papers from Italy, Spain, UK, Canada, U.S., Australia, New Zealand and Wales detail consistent family court problems for abused women and harmful impact of parental alienation crossclaims); JESS HILL, SEE WHAT YOU MADE ME DO: POWER, CONTROL AND DOMESTIC ABUSE (2019)(describing the problem in Australia); Owen Bowcott,* Family courts not safe for domestic violence victims, lawyers say*, THE GUARDIAN (Feb. 19, 2020), https://www.theguardian.com/law/2020/feb/19/family-courts-not-safe-for-domestic-violence-victims-lawyers-say (letter signed by 130 legal professionals describes UK pattern of not understanding or appropriately responding to family violence);* Sigri Sigrun Joelsdottir & Grant Wyeth, *The Misogynist Violence of Iceland's Feminist Paradise,* Foreign Policy, https://foreignpolicy.com/2020/07/15/the-misogynist-violence-of-icelands-feminist-paradise/ (July 15, 2020); MICHELLE LEFEVRE & JERI DAMMAN, *WHAT IS THE EXPERIENCE OF LAWYERS WORKING IN PRIVATE LAW CHILDREN CASES? (2019), https://www.sussex.ac.uk/webteam/gateway/file.php?name=pd12-report-of-survey-final-11th-feb-2020.pdf&site=387 (survey in Sussex, UK, finds courts avoid and ignore family violence allegations, and refuse to hold evidentiary hearings despite legal directive to do so); Lois Shereen Winstock,* Safe Havens or Dangerous Waters? A Phenomenological Study of Abused Women's Experiences in the Family Courts of Ontario *39 (Oct. 2014) (Dissertation, York University) (on file with York University) (describing, among other things, how "the [Canadian] legislative framework, and the dominant patriarchal discourse it promotes, inform and are reflected in judges' responses to women's legal claims in family law proceedings").*

OF FAMILY VIOLENCE

1. Harm to Children

The damage to children subjected by family court orders to the care and custody of allegedly dangerous parents has yet to be fully documented, but some research exists. One study of New York cases concluded that most custody evaluators' recommendations were unsafe for children in homes where abuse was alleged, and even substantiated.[25] Another study provides troubling and concrete evidence of what happens to children in cases that go awry. Psychologist Joyanna Silberg and RN Stephanie Dallam analyzed a case series of "turned around" cases, i.e., those in which a first court disbelieved the abuse and failed to protect the child, but a second court found abuse and then protected the child. They found that in the 59% of the study's cases in which children had been removed from their protective mother and ordered into the custody of their allegedly abusive fathers, children spent an average of three years in the abusive parent's custody before another court believed them and the decision was reversed.[26] Court records showed the children's deteriorating mental and physical conditions, including anxiety, depression, dissociation, post-traumatic stress disorder, self-harming, and suicidality. Thirty-three percent of these children became suicidal; some ran away.[27] Some children survive the custody of an abusive parent only to commit suicide once they reach adulthood, due to the legacy of

[25] MICHAEL DAVIS, CHRIS O'SULLIVAN, KIM SUSSER & MARJORY FIELDS, CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf

[26] Joyanna Silberg & Stephanie Dallam, *Abusers gaining custody in family courts: A case series of overturned decisions*, 16 J. CHILD CUSTODY 140 (2019) (analyzing factors leading to custody reversals, harm suffered by children, and factors aiding in correcting the outcome). The study is not a statistically significant sample, because "turned-around" cases were referred to the researchers from a variety of sources. *Id.* However, as a "case series," the study rigorously records the types and degree of injury to children when courts erroneously deny true abuse. Of course, the grief and suffering this causes loving mothers is almost incalculable. Vivienne Elizabeth, *It's an Invisible Wound: The disenfranchised grief of post-separation mothers who lose care time*, 41 J. SOC. WELFARE & FAM. L. 34 (2019).

[27] Silberg & Dallam*, supra* n. 27 at Table 12.

psychological torment they carry from their court-ordered suffering.[28] Even apart from ongoing abuse, the trauma and psychological harm to children who are precipitously removed from their loving, safe parent should be obvious.[29] The suffering and trauma caused by such court orders are reported by now-adult children and protective parents in social media.[30]

The most drastic outcomes can be found in a compilation of children's killings by a separating or divorcing parent. The Center for Judicial Excellence's growing database of over 700 filicides at the time of this writing identifies over 100 cases where family courts ordered – against a protective parents' pleas - the parental access used to kill the child.[31]

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[28] Rhonda Case, *Louis' Life Still Matters*, FREE AS THE SUN, Mar. 18, 2019, https://freeasthesun.com/2019/03/louis-life-still-matters/.

[29] *See* Statement of APA President regarding Executive Order Rescinding Immigrant Family Separation Policy (June 20, 2018), https://www.apa.org/news/press/releases/2018/06/family-separation-policy (describing immigrant child removals as traumatizing and causing "severe mental distress"); Silberg & Dallam, *supra* note 27 at 160 (citing attachment research); Jennifer Collins, *Jennifer Collins Responds to Joan Meier's Article "When Abduction is Liberation,"* AMERICAN CHILDREN UNDERGROUND BLOG, http://americanchildrenunderground.blogspot.com/ (last visited Aug. 29, 2020)(after the court told the mother she should just "get over" the father's extreme violence, "[w]e were ripped out of the arms of our loving mother and handed over to the man who was beating us! To make it even worse we were denied all contact with our mother; no visits, no phone calls, not even letters. We loved our mom so much"). In the G narrative above, one child became mentally ill and suicidal, others were diagnosed with post-traumatic stress disorder. *See* n. 12, *supra* and accompanying text.

[30] *See www.courageouskids.net, e.g., Alex's Story*, Feb. 2005, ("DCFS had indicated 4 reports of abuse against him, yet the judge still made me go with him"); *Stephanie's Story*, December 4, 2008 ("Evie's face was bloody, her lips swollen, and her forehead black and blue. He did hit us again, mostly Evie and I. He would pin our arms behind our backs and throw us on the floor or against walls… the judge awarded him full custody").

[31] Child Murder Data, *supra* n. 2; R. Dianne Bartlow, *Judicial Response to Court-Assisted Child Murders*, 10 Fam. & Intimate Partner Violence Q. 7, 8 (2017). These stories often include repeated pleas for child protection by protective parents to authorities, which are rejected. *See, e.g.*, Rebecca Liebson, *Officer Charged in Murder of Son, 8, Kept in Freezing Garage, Police Say*, N.Y. TIMES, Jan. 25, 2020, https://www.nytimes.com/2020/01/24/nyregion/michael-valva-thomas-nypd.html (describing autistic boy's killing by father after forced to sleep on concrete floor in freezing cold garage and then bathed in cold water; mother had reported abuse for years; court and child welfare agency insisted on leaving children with their father).

B. Quantitative Evidence – Family Court Outcomes Study Findings

The domestic violence and child abuse scholarship which sounds the alarm about courts' treatment of abuse allegations has had little impact on courts and affiliated professionals. Rather, mainstream family court professionals regularly dismiss abuse professionals' critiques as ideological, extreme,[32] or too trusting of women's allegations.[33] Such dismissals have been made easier by the absence of objective, neutral, nationwide data.

Previous empirical validation of the trends represented by these reports has been sparse and, for practical reasons, limited to particular jurisdictions or courts. In 2005, four then-groundbreaking quantitative studies were published showing that courts in four different states variously lacked full information about the history of violence, failed to protect women and children at child exchanges, awarded as much *or more* custody or visitation to batterers than to non-batterers, and treated "friendly parent" statutory provisions outweighing domestic violence provisions.[34]

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[32] *See* Richard Warshak, *When Evaluators get it Wrong: False Positive Ids and Parental Alienation*, 26 PSYCHOL., PUB. POL'Y, & L. 54 (2019) (describing abuse experts' critiques of parental alienation, and advocacy to restrict its use in such cases, as an "extreme viewpoint"); Nicholas Bala, Parental alienation: social contexts and legal responses, slide 10 (2018) (PowerPoint made at 5th Annual Conference of AFCC) (on file with author) (depicting abuse critiques and aggressive PAS advocacy as two extremes, with the presumptively reasonable approach to alienation in the middle); Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 57 FAM. CT. REV. 5, n.5 (pre-publication) (2020) (citing several abuse experts' scholarship as subject to "scholar advocacy bias").

[33] Nicholas Bala, High Conflict Separations and Children Resisting Contact With a Parent, Slide 7 (2018) (PowerPoint) (on file with author) ("A huge limitation of the research of the Backbone Collective (and others) is that it is premised on assumption that the woman is always accurate, honest and complete in her reports!").

[34] *See generally*, Joan Zorza & Leora Rosen, *Guest Editors' Introduction*, 11 VIOLENCE AGAINST WOMEN 983 (2005) (contextualizing the issue and describing the studies).

Recognizing the importance of national trend data and seeking data on courts' responses to child maltreatment as well as partner violence, in 2015 an expert team of colleagues[35] and this author applied for and were awarded a grant from the National Institute of Justice ("NIJ") to produce a nationwide study of child custody outcomes in cases involving abuse and alienation claims.[36] The only way to gather national data on court outcomes was to examine judicial opinions posted online. Fortunately, by 2015, most appellate court opinions were available online, and, to our surprise, so were hundreds of trial court opinions.[37] The Study's search for published opinions covered the 10-year period from January 1, 2005 through December 31, 2014. Two law graduates triaged over 15,000 cases which had been identified by our comprehensive search string, and then coded, in detail, the 4338 cases which fit the Study's criteria.[38]

A critical *caveat* in any discussion of the Study's quantitative findings is this: The Study could not and did not seek to analyze or second-guess courts' factual determinations of the truth or credibility of abuse or alienation claims, or children's best interests. Therefore, while the data objectively indicate a high level of judicial skepticism toward mothers' claims of domestic violence and child abuse and frequent custody reversals to allegedly abusive fathers, they cannot and do not demonstrate the rightness or wrongness of these outcomes. Other research, however, can be brought to bear and is discussed in I.B.2 *infra.*[39]

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[35] The Study team included this author as Principal Investigator; Sean Dickson, Esq, MPh, Chris O'Sullivan, PhD, and Leora Rosen, PhD, as social science consultants; and the Institute for Women's Policy Research as quantitative analyst and managers of the archiving of the data.

[36] *https://nij.ojp.gov/funding/awards/2014-mu-cx-0859*.

[37] The dataset of 4388 e-published opinions ultimately included over 600 trial court opinions. Over three-quarters of these were from Connecticut and Delaware; the remaining quarter were primarily from New York, Pennsylvania, Ohio, and Montana.

[38] Far more information was coded than was capable of being analyzed during the Study time-frame; the complete dataset is available from the NIJ Archives for secondary analyses. https://www.icpsr.umich.edu/web/NACJD/studies/37331.

[39] Some additional limitations of the Study are described in Meier (2020), *supra* n. 7. It should be noted that much of our data consists of simple frequencies, i.e., the percent of cases in which one thing or another occurred. Frequencies speak for themselves and are not subject to significance testing, especially in this dataset, which is a complete census, not a sample.

1. Skepticism Toward Mothers'[40] Abuse Claims

The Study netted 2189 cases in which mothers accused fathers of any kind of abuse (mutual abuse cases were excluded for this analysis). Strikingly, while courts credited (believed) mothers' claims of intimate partner abuse 43% of the time, they believed mothers' claims of child abuse only 21% (physical) and 19% (sexual) of the time.[41] This means that courts have 2.8 lower odds of crediting child physical abuse ($p<0.001$, CI 2.1-3.8) and 3.1 lower odds of crediting child sexual abuse claims than domestic violence claims ($p<0.001$, CI 2.3-4.2). On average, courts credited mothers' abuse allegations only a little over 1/3 (36%) of the time.[42] These data (and others)[43] pointedly contradict the common conventional wisdom that women need merely to claim abuse in court to win custody of their children.[44]

Courts' even greater rejection of mothers' *child abuse* claims (crediting roughly only 1/5) is particularly stunning. The lack of attention to

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Where we make gender or other comparisons, we report odds ratios. These meet statistical significance standards unless otherwise noted.

[40] This article focuses on mothers' abuse claims and custody losses to shed light on the abuse field's critiques of family courts. A smaller number of gender-reversed cases, i.e., where fathers accuse mothers of abuse and mothers crossclaim alienation, are also discussed for purposes of a direct gender comparison.

[41] *See Statistical Analysis Appendix*.

[42] *Id.*

[43] Teresa E. Meuer et al., *Domestic Abuse: Little Impact on Child Custody and Placement*, WIS. LAWYER (Dec. 13, 2018), http://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=91&Issue=11&ArticleID=26737 (even criminal convictions for domestic violence did not affect 50% of cases, which resulted in shared legal custody, including negotiated settlements).

[44] *See, e.g.,* ALEC BALDWIN, A PROMISE TO OURSELVES 196 (2008) (quoting Harvard Law Professor Jeannie Suk claiming "the relative ease with which legal actors today seem able to view husbands as violent or potentially violent . . . [explains why] "so many child custody disputes [contain an] allegation of violence"); ALEXA DANKOWSKI ET AL., REAL WORLD DIVORCE 2017 CUSTODY, CHILD SUPPORT, AND ALIMONY IN THE 50 STATES ch. 9 (2017) (ebook), http://www.realworlddivorce.com/DomesticViolence ("[a]ll a woman needs to say is "'I'm afraid of him.' She gets a house, the kids, and money every month without ever having to give evidence, be cross-examined, or bring any additional witnesses to corroborate").

this subject in even the domestic violence literature[45] is beyond the scope of this article but will be addressed in future scholarship. Given the substantial degree of overlap of both these phenomena and of courts' responses to them, this article and the Study will hopefully spur future integrated research and analysis.[46]

a. Outside Research on Women's Perceived Credibility

As noted above, the Study did not attempt to second-guess courts' factual findings about the truth or falsity of abuse, but merely to quantify courts' rulings. Thus, a skeptic might be within her rights to argue that courts' low rates of crediting of mothers' abuse claims is not problematic, because women do, in fact, often falsely allege abuse. While it is not clear how many unbiased skeptics[47] would believe that *most* women's allegations are false, as the courts appear to believe, a brief review of what is known about the credibility of women's abuse claims is warranted.

Bringing objective research to bear on this question is, of course, quite difficult, since it is rare that even a researcher can confidently and objectively assess the truth or falsity of any individual's abuse claims. However, what research exists suggests that, before parental alienation labels became *de rigueur*, even relatively conservative institutional assessors found the majority of women's claims of partner abuse in court to be valid, ranging

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[45] In contrast to the silence in the legal literature, there are a small number of relevant social science publications. *See, e.g.*, Madelyn Simring Milchman, *Misogynistic cultural argument in parental alienation versus child sexual abuse cases*, 14 J. CHILD CUSTODY 211 (2017); Silberg & Dallam, *supra* n. 27 (majority of children in the sample had been physically or sexually abused).

[46] *See* Claire Houston, *What Ever Happened to the 'Child Maltreatment Revolution'?*, 19 GEO. J. GENDER & L. 1 (2018) (advocating for more feminist activism to strengthen legal responses to child maltreatment). *See also* Joan Meier and Vivek Sankaran, *Breaking Down the Silos that Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals,* (in progress)(describing tensions and contradictions between the two fields).

[47] It is not hard to find fathers' rights advocates who assert that the vast majority of women's abuse claims are false. *See, e.g.,* https://fathers4kids.com/issues/domestic-violence ("[f]athers' organizations now estimate that up to 80% of domestic violence allegations against men are false allegations"). Many parental alienation specialists also retain significant skepticism, without scientific basis. *See e.g.,* notes 33-34, *supra.*

from 67% to 93%.[48] The Study's finding that contemporary courts only believe 45% of mothers' adult domestic violence claims, is well below this range.

More research is available regarding perceptions of mothers' and children's allegations of child abuse. A comprehensive review of the extant research by leading University of Michigan expert Kathleen Faller found that only 14% of child sexual abuse allegations in custody litigation were considered intentionally false, while over 50% were found valid, the remainder being uncertain. She also surveyed other studies which identified 1/3 or fewer false or incorrect allegations, deeming 70% or more "likely valid."[49] A large Canadian study across several jurisdictions found that only 12% of child sexual abuse allegations were deemed by the child welfare agency to be intentionally fabricated. Most interestingly, custodial parents (mostly mothers) and children were found to be the *least* likely to fabricate (14%). Most false claims were by noncustodial parents (mostly fathers)

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[48] Martha Shaffer & Nicholas Bala, *Wife Abuse, Child Custody and Access in Canada*, 3 LEGAL ISSUES & POL'Y IMPLICATIONS 253, 260 (2003) (judges believed 30 out of 42 (71%) women's allegations of partner abuse in custody context); MATTHEW BILESKI & PHILLIP STEVENSON, STATISTICAL ANALYSIS CTR., ARIZ. CRIMINAL JUSTICE COMM'N 2 (2012) (study identified only one reported case of false reporting of spousal sexual assault over 5-year period); Wendy Davis, *Gender Bias, Fathers' Rights, Domestic Violence and the Family Court*, 4 BUTTERWORTHS FAM. L. J. 299, 304 (2004) (New Zealand Law Commission found "no empirical or qualitative evidence to substantiate allegations that 'women were making strategic use of POs to prejudice fathers' positions in custody'"… author's own experience was that only 7% of contested factual hearings in PO cases resulted in court finding against woman's credibility, and even in those two cases the parties agreed that the incidents had occurred); Johnston et al., *supra* note 49, at 284–85 (summarizing several other studies of false allegations). *But cf.* Johnston et al., *Allegations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 298 (2005) (custody evaluators substantiated 41% of mothers' spousal abuse allegations).

[49] Kathleen Faller, *The Parental Alienation Syndrome: What is it and What Data Support it?*, 3 CHILD MALTREATMENT 100, 107 (1998). *See also* N. Thoennes & P.G. Tjaden, *The Extent, Nature and Validity of Child Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151 (1990); Bancroft & Miller, in Bancroft, Silverman & Ritchie, *supra* n. 22 at 119-120 (surveying research on credibility of child sexual abuse allegations in custody litigation context and noting that even most skeptical researchers found over half such allegations credible).

(43%).[50] This is supported by other research finding that the primary fabricators of child abuse/neglect reports to child welfare agencies are noncustodial parents, primarily fathers.[51] Nonetheless, the belief among court professionals that women commonly fabricate false child abuse claims persists.

The persistence of this view is not merely the product of a history of societal misogyny and denial of violence against women, as is described by other scholars.[52] Disturbingly, mistrust of women reporting abuse is sometimes even taught in judicial on-boarding and training, as well as informal "mentoring." Two sources from opposite coasts have independently reported that experienced judges regularly warn new family court judges against believing women's abuse allegations.[53] Former San Diego Judge

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[50] Nico Trocmé & Nicholas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, 29 CHILD ABUSE & NEGLECT 1333 (2005). A subsequent analysis of the 2003 Canadian Incidence Study found that agency caseworkers deemed 49% of all child abuse and neglect allegations to be valid, 13% suspected, and 4% intentionally false. Nicholas MC Bala et al., *Sexual abuse allegations and parental separation: Smokescreen or fire?*, 13 J. FAM. STUD. 26, 30 (2007). Again, very few of *mothers'* allegations were deemed intentionally false – noncustodial parents (usually fathers) were more likely fabricators. Child sexual abuse allegations were substantiated much less often (26%), but 54% were deemed made in good faith and another 15% were "suspected." *Id.* Caseworkers deemed slightly more allegations to be intentionally false when there was simultaneous custody litigation, although most possibly-false allegations were made by noncustodial parents and third parties. *Id.*

[51] Heather Douglas & Emma Fell, *Malicious Reports of Child Maltreatment as Coercive Control: Mothers and Domestic and Family Violence*, J. FAM. VIOLENCE 3, (2020), https://link.springer.com/article/10.1007%2Fs10896-019-00128-1 (study of batterers' malicious use of false abuse reports to child welfare agencies).

[52] *Id.*; Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399 (2019); Catherine A. MacKinnon, *Where #MeToo Came From, and Where it's* Going, THE ATLANTIC, Mar. 24, 2019, https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/. *See also* Bancroft, Silverman and Ritchie, *supra* n. 22.

[53] Maryland Working Group Minutes (Jan. 29, 2020) (judicial interviews indicated that "the older seasoned judges warn[ed] the incoming judges not to believe women"); Fox News 11, *Lost in the System: Former Family Court Judge/Whistleblower Speaks Out*, YOUTUBE (Oct. 6, 2012), https://www.youtube.com/watch?v=MvA5hfTdsWI (same, in interview with former San Diego Judge DeAnn Salcido).

DeAnn Salcido has described classes for new judges in which they were warned to be skeptical of the timing of child abuse allegations by women.[54] And, as is discussed in Part III, *infra,* ubiquitous "parental alienation" trainings implicitly teach courts that women's and children's abuse allegations should be received with skepticism.

The studies of false abuse allegations described above relied on the opinions of evaluators and child welfare workers, thereby reflecting the opinions and potential biases of these assessors. Such professionals are known for their skepticism, especially of child sexual abuse claims.[55] Yet even these relatively conservative reviewers of abuse claims in custody litigation have typically viewed half to three-quarters of women's domestic violence and child abuse claims as valid. There should be little doubt, then, that contemporary courts' refusals to take seriously roughly 80% of child abuse claims are putting a significant number of children at serious risk. And as will be seen in Part III, alienation crossclaims roughly double courts' skepticism, especially of child abuse claims.

2. Mothers' Custody Losses

In theory, a court could reject an abuse claim without penalizing the alleging parent; that appears to have occurred in some Study cases. But custody reversals are common: Mothers alleging a father's abuse lost custody in 28% (384/1353) of all cases, ranging from a low of 23% (when alleging adult domestic violence) to a high of 56% (when alleging both physical and sexual child abuse).[56] When a mother alleged any type of child abuse she had almost twice the odds (1.7 times, $p<0.001$, CI 1.4-2.2) of losing custody as when she alleged domestic violence.[57]

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[54] *Id.,* also stating that judges in meetings disparaged women's claims of domestic violence as being "on their period."

[55] Bancroft, Silverman & Ritchie, *supra* note 22, at 119 ("[w]e have found CPS investigators to be highly skeptical of sexual abuse allegations with concurrent custody disputes"). *See infra* Section I.B.4 (describing research documenting evaluators' strong biases against believing mothers' abuse allegations in custody litigation).

[56] "Alleged" means the abuse claim may or may not have been credited. *See* Statistical Documentation.

[57] *Id.*

In striking contrast, when the genders were reversed, the outcomes were quite different: Fathers reporting abuse by a mother lost custody only 12% of the time, ranging from a low of 11% (when alleging child physical abuse) to a high of 33% (when alleging child sexual abuse).[58] Mothers thus have 3.0 greater odds of losing custody than fathers when accusing the other parent of any abuse ($p<0.001$, CI 1.7-5.1); and when they allege child abuse (physical or sexual) their odds of losing custody are 4.2 times greater than fathers' ($p<0.001$, CI 2.1-8.6).[59]

Finally, the finding most confirmatory of the abuse field's critiques is that even when courts **believed** fathers had abused the mother or child, they were still awarded custody 13% (64/505) of the time. In contrast, when courts believed *mothers* had committed any type of abuse, they received custody only 4% (2/51) of the time.[60]

3. Summary

Three things stand out from these data: First is the stark gender difference between fathers and mothers who convince the court that the other parent committed child physical abuse. Fathers who courts found had committed some form of child abuse took custody from the mother 12% (10/86) of the time – *none* of the 25 mothers proven to be child abusers received custody.[61] While it is surprising that any parent proven to have committed child maltreatment would receive custody, it is possible to conceive of facts that could justify this.[62] However, the fact that fathers –

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[58] There were only 6 cases where a father accused a mother of child sexual abuse; in two of those the father lost custody. *Id.* at 22. These numbers – as opposed to those in the text - are far too small to be statistically significant. *See* Statistical Analysis Appendix.
[59] *Id.*
[60] *Id.* at 23.
[61] *See* Statistical Analysis Appendix.
[62] In some of these cases the courts had concluded either that the physical abuse was relatively minor, *see e.g.*, *McMellon v. McMellon*, 161 So. 3d 769, 772–74 (La. Ct. App. 2014) ("spanking" with a belt and leaving bruises); *In re* C.G., No. 04–13–00749–CV, 2014 Tex. App. LEXIS 8826, at *11 (Aug. 13, 2014) (father had discontinued spanking); or that the mother's deficits were greater. *See, e.g.*, *Gibbs v. Hall*, No. 258538, 2005 Mich. App.

unlike mothers - never lost custody to a child-abusing mother provides interesting contrast.

Second is the somewhat heartening finding that only one court gave custody to a parent found to have committed child sexual abuse.[63] There is little mystery as to why most courts will not give custody to sexual child abusers.

Lastly, the data demonstrate that a fair number of courts are willing to take custody from a mother and give it to her abuser. Thirty-five batterers (12%) took custody from the mothers the courts found they had abused.[64] This is troubling, given the long-established research on the psychological and physical risks adult partner violence poses to children, both before and after the adults separate.[65] Extensive research indicates that the characteristics and behaviors of many batterers (including narcissism, domination and control, entitlement, etc.) are intrinsically destructive to children.[66] Again, while idiosyncratic facts could justify these custody awards, the gender bias hypothesis is supported by the research and narratives described above, consistently describing courts and professionals who often

LEXIS 956, at **8–13, n.1 (Apr. 14, 2005) (father admitted to striking daughter; mother had multiple arrests with possible pending incarceration for drunk driving, threatened father's current spouse, and made harassing phone calls to father's employer).

[63] In this case the father had sexually abused a third-party child and served time as a sex offender. Without substantiation of the allegation that he also abused the parties' child, the court awarded custody to the father based her visitation interference and his superior record of children's school attendance. Mother was also found to be struggling with a concussion, anxiety and depression. *Higgins v. Higgins*, No. A12-2127, 2014 Minn. App, Unpub. LEXIS 60 (Jan. 27, 2014) https://casetext.com/case/higgins-v-higgins-49.

[64] Statistical Analysis Appendix.

[65] Cahn, *supra* note 18; Bancroft, Silverman & Ritchie, *supra* note 22, at 37-53, 45 (children suffer from exposure to battering, batterers' modeling of misogyny, violence and disrespect, and batterers' direct physical and psychological abuse, including "extraordinary psychological cruelty"); Einat Peled, *Parenting by Men who Abuse Women: Issues and Dilemmas*, 30 BRIT. J. SOC. WORK 25, 28 (2000) ("[s]eparation of their parents seems to increase, rather than decrease, children's exposure to violence").

[66] *See* Bancroft, Silverman & Ritchie, *supra* note 22, at 7-26.

react to mothers' claims of paternal abuse – particularly child abuse – dismissively, or with hostility and disgust.[67]

The next section moves beyond judges to examine the role of neutral appointed evaluators and Guardians Ad Litem ("GAL")[68] upon whom family courts routinely rely. Since these professionals' opinions also have significant influence on parties' negotiated settlements,[69] data on their practices can also shed light on non-adjudicated cases.

4. The Role of Neutral Experts

For over three years, E.D. (between ages 6-10) described in detail multiple episodes of her father's prior sexual abuse to her therapist, Dr. G, two forensic evaluators, and a subsequent therapist, Dr. L. Dr. G, an expert in child sexual abuse, testified that E.D. told her that she "didn't feel safe" at her father's house, that "stuff happens . . . that involved touching" and "she was confused because sometimes it felt good."[70]

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[67] *See supra* notes 19-21, and sources cited therein; Silberg & Dallam, *supra* note 20; Bancroft, Silverman & Ritchie, *supra* n. 52 at 121; Winstock, *supra* n. 25, at 455 (describing one female judge's "antipathy" to a mother's abuse allegations). In one case, the trial court's opinion contained, as written in an appellate brief, "conspicuous indications of odium," including describing the mother as a "clawing" presence. Brief for DV LEAP et al. as Amici Curiae Supporting Plaintiff-Appellant-Respondent, *E.V. v. R.V.*, No. 10602/2007, 2017 N.Y. Ct. App. 2d Dept., p. 22 (March 22, 2017), https://drive.google.com/file/d/1Lrgioo7JRXG2bT_TiAx3yPbHmCnEBSIc/view.

[68] While the roles of GALs may be defined differently by different states, most treat their role as advocating for a child's "best interests" in the eyes of the professional. *See, e.g.,* D.C. Code Sec. 21-2033. The Study coded a GAL present if there was any lawyer appointed to represent the child or their best interests.

[69] *See, e.g.,* Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian ad Litem Practice,* 13 J.L. & Fam. Stud. 43, 47, 54-55 (2011) (GALs' roles and reports can increase the likelihood of settlement).

[70] E.D.'s undisputed disclosures included direct and specific verbal descriptions (e.g., when asked to draw something that disappointed her, drawing a time when her father was "not nice to her body"); expressing how she felt about her father (saying she would not be safe there alone); reporting physical symptoms from suppressing the abuse (keeping the secret made her stomach and head hurt); abnormal and unplanned behaviors such as bed-wetting and extremely sexual behavior with her school peers which triggered police calls; and dissociative states, such as screaming that her father was coming to kill her and her mother, even though he was not there. More details may be found in the Amicus Brief of Georgia

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During this time she did not see her father, who was under criminal investigation for her abuse. (The criminal charges were subsequently dropped.)

Each of these adults was recognized as an expert in child sexual abuse, with the two forensic evaluators also qualified (variously) as experts in psychosexual evaluations and child psychology, and forensic examinations of children for sexual abuse. It was undisputed that three of the four found that E.D. either "was" or "may have been" sexually abused. Two experts also diagnosed her with post-traumatic stress disorder ("PTSD"). And three recommended treatment for sexual abuse. They were all retained by E.D.'s mother.

The court appointed as neutrals a GAL and a custody evaluator. The GAL was an attorney with business law and mediation experience; the evaluator was a psychologist with no specialized training in assessing and treating cases of child sexual abuse. The GAL promptly recommended that contact and reunification therapy begin between the minor child and her father. During the reunification efforts, the minor child began exhibiting extreme dissociative, somatic and behavioral symptoms, including night terrors.

Subsequently, the GAL (with the evaluator's support) recommended that the father be awarded primary custody of the minor child on the basis that the mother was unintentionally and subconsciously "re-victimizing" the minor child because the mother was not allowing the minor child to "progress past" the issues of believed sexual abuse. The GAL contended that the mother's belief that the father had molested the minor child caused the minor child to singularly believe and focus upon the same. In response to the significant evidence that Appellee had sexually abused the minor child, the guardian ad litem testified that he "refuses to address this issue [of whether Appellee sexually abused the minor child]" in conducting his investigation because it is "not in [his] job description", "is a distraction from the real issue presented – i.e., the best interest of

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Network to End Sexual Assault et al, available on DV LEAP's website, https://drive.google.com/file/d/1pGgbECKRTK7eHSI21fyljNaSTQU5ehJ7/view.

the [minor child]moving forward", and he, instead, "leaves [the issue of whether Appellee sexually abused the minor child] with hope." He also testified that he did not find the minor child's statements to be credible because there were many inconsistencies and contradictions in her accounts of the abuse.
The Evaluator and GAL implied that all of E.D.'s reports, emotions, behaviors, and symptoms (described at note 72, supra) were somehow derived from the supposed fact that the mother's identity was "wrapped around E.D. being a victim of sexual abuse." The custody evaluator posited that the mother's influence did not allow her daughter to have her own independent thoughts because mother and child were "enmeshed." He admitted to having no child abuse, child sexual abuse or dissociation expertise. He further stated that even if there was a finding of sexual abuse, he would still recommend giving the father some custody.

The court accepted the neutrals' recommendations and, having temporarily reversed custody from the mother to the father, affirmed the temporary order and made it permanent.

a. Independent research on neutral appointees

The quality and validity of forensic evaluations in custody litigation has long been powerfully challenged even by mainstream family law scholars. For instance, former President of the Association of Family and Conciliation Courts (AFCC) Robert Emery, leading scholar Elizabeth Scott and pioneering researcher Robert Mnookin and colleagues have asserted that "[p]sychologists and mental-health professionals continue to make predictive claims that cannot be justified by social science research."[71] Scott and Emery have thus called for application of traditional admissibility standards to exclude much of what currently passes for forensic evaluation in custody

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[71] Robert Mnookin, *Child Custody Revisited*, 77 L. & CONTEMP. PROBS. 249, 251 (2014) (citing Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 L. & CONTEMP. PROBS. 69, 91–95 (2014)). *See also*, Scott & Emery at 94 ("many MHPs use clinical observations to make speculative predictions and substantiate favored diagnoses or constructs that are without scientific foundation").

cases today.[72]While differing from Scott's and Emery's critique,[73] abuse experts have researched and documented evaluators' problematic roles in abuse cases. Perhaps the best known study, a 2011 federally-funded survey by University of Michigan Professor Daniel Saunders and colleagues, found that many evaluators lack knowledge or expertise in domestic violence or child abuse, interpret abuse allegations as evidence of parental alienation, and ignore domestic violence as a risk factor for children.[74] Other studies have found that evaluators failed to recommend protective measures for children even when abuse allegations were substantiated.[75] Like judges, evaluators often make decisions in reaction to litigants' demeanor: In a study using hypotheticals, when a protective mother was portrayed as hostile, evaluators were five times more likely to recommend custody to the abuser.[76] Several

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[72] Scott & Emery, *supra* note 73 at 105 (arguing that application of *Daubert* standard would mean that "[e]xpert opinions about the optimal custody arrangement would be excluded, along with unscientific diagnoses such as PAS. Beyond this, MHPs would be discouraged from offering pure credibility assessments, unsubstantiated predictions, or qualitative assessments on the basis of unsupported inferences").

[73] Ironically, Scott and Emery are critical of evaluators for what they believe is evaluators' acceptance of flimsy domestic violence and child abuse claims. *Id.*

[74] DANIEL SAUNDERS, KATHLEEN FALLER & RICHARD TOLMAN, CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf (finding that evaluators often did not recognize or understand domestic violence or saw such claims as alienation); ELLEN PENCE, GABRIELLE DAVIS, CHERYL BEARDSLEE & DENISE GAMACHE, BATTERED WOMEN'S JUSTICE PROJECT, MIND THE GAP: ACCOUNTING FOR DOMESTIC ABUSE IN CHILD CUSTODY EVALUATIONS (2012), https://www.bwjp.org/assets/documents/pdfs/mind_the_gap_accounting_for_domestic_abuse_in_child_custody_evaluations.pdf (evaluators obscured, discounted or explained violence away); Silberg & Dallam, *supra* note 27, at 149-50 (85% of mental health appointees and 73% of GALs rejected abuse claims and 67% of courts cited these opinions); Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2002).

[75] Davis et al, *supra* n. 26, https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf (finding that most custody evaluators' recommendations were unsafe for children, even where abuse was substantiated).

[76] Jennifer L. Hardesty et al., *The influence of divorcing mothers' demeanor on custody evaluators' assessment of their domestic violence allegations*, 12 *J. CHILD CUSTODY* 47 (2015).

studies have found that custody evaluators fall into two philosophical groups: those who understand domestic violence and abuse and believe it is important in the custody context, and those who lack such understanding, are skeptical of abuse allegations, and believe they are evidence of alienation.[77] In other words, it appears that evaluators' pre-existing beliefs about men, women and abuse, and their personalities, drive their findings and recommendations more than the facts of the case.[78]

The harmful impact of court-appointed neutrals (both evaluators and Guardians-Ad-Litem ("GALs") in abuse cases was also documented in the Silberg and Dallam case series.[79] The researchers found that the evaluators and GALs were generally suspicious of all abuse claims; and even when domestic violence was known, it was ignored. Based in large part on these purportedly neutral professionals' recommendations, the children were sent into the care of abusive parents.[80]

These studies have indicated serious problems with custody evaluators in cases involving abuse allegations. But all of the studies involved non-random datasets. Until now, there has been no objective quantitative research that could establish that these problems are systemic. The following data from the Family Court Study fill this gap.

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[77] Megan L. Haselschwerdt, Jennifer L. Hardesty, & Jason D. Hans, *Custody evaluators' beliefs about domestic violence allegations during divorce: Feminist and family violence perspectives*, 26 J. INTERPERS. VIOLENCE 1694 (2011) (evaluators' [pre-existing ideologies and] level of knowledge about domestic violence had more impact on recommendations than facts of cases); T.K. Logan, Robert Walker, Carol E. Jordan & Leah S. Horvath, *Child custody evaluations and domestic violence: Case comparisons*, 17 VIOLENCE & VICTIMS 719 (2002) (evaluators did not see domestic violence as relevant to child safety); Saunders, Faller & Tolman, *supra* note 76 (describing evaluators' "patriarchal" beliefs). *See generally*, Smith & Coukos, *supra* note 23, at 39, 41.

[78] Ruth Leah Perrin, *Overcoming Biased Views of Gender and Victimhood in Custody Evaluations when Domestic Violence is Alleged*, 25 AM. U. J. GENDER, SOC. POL'Y & L. 155 (2017) (describing the research).

[79] Silberg & Dallam, *supra* n. 27.

[80] *Id.* at 157-58. "Although the role of the GAL is to protect the interests of children, the involvement of GALs in the cases studied often [73%] contributed to children not being believed or protected from abuse." *Id.* at 151.

b. Study Findings: Neutral Appointees Increase Gender Bias in Outcomes

The Study found that both GALs and neutral evaluators significantly reduced the rates at which mothers' abuse allegations were credited. On average, the presence of a Guardian Ad Litem in a case reduced such credibility rulings from 38% to 33%.[81] This means that abuse claims are 1.3 greater odds of being credited *without* a GAL than *with* one (p=0.016, CI 1.0-1.5). Yet in the gender-reversed cases, the presence of a GAL had no material impact on the crediting of abuse when alleged by fathers against mothers (32% v 31%).

The Study's evaluator findings similarly indicate that the presence of an evaluator hurts abuse-alleging mothers' cases. Abuse has 1.4 greater odds of being credited by the court (p=0.001, CI 1.2-1.8) if there is no evaluator (38%) than if the court appointed an evaluator (30%). The difference is particularly strong when it comes to child sexual abuse, which has twice the odds of being credited without an evaluator in the case (OR 2.1, p=0.036, CI 1.0-4.1) (credited 23% without an evaluator and only 12% with).[82] As with GALs, the impact of evaluators on mothers' credibility stands in contrast to the virtually complete lack of impact of an evaluator's presence on the crediting of fathers' claims of abuse against mothers (33% v 32%).

Not surprisingly, custody losses mirror these findings.[83] Whereas without a GAL, abuse-alleging mothers' custody losses average 25%, with a GAL their custody losses average 36%. Mothers thus have 1.8 greater odds of losing custody when a GAL is present (p<0.001, CI 1.4-2.2); when alleging physical child abuse this difference increases to 3.4 (p<0.001, CI 1.8-6.4), and when alleging mixed physical and sexual child abuse, to 5.3 (p=0.033, CI 1.1-24.5).

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[81] Statistical Analysis Appendix.

[82] *Id*. As the *E.D.* case narrative demonstrates, this skepticism cannot be deemed the product of expertise.

[83] *Id.*

The same is true with evaluators: Whereas with no evaluator mothers' custody losses average 23%, with an evaluator those rates average 42%.[84] This means that mothers have 2.5 greater odds of losing custody when an evaluator is present than not ($p<0.001$, CI 1.9-3.2), increasing to 3.0 greater odds when alleging physical child abuse ($p=0.001$, CI 1.5-5.8), and 6.5 greater odds when alleging both physical and sexual child abuse ($p=0.017$, CI 1.4-30.4).

The net effect is that both GALs and Evaluators profoundly exacerbate the gender bias in case outcomes: Without a GAL/Evaluator, a mother alleging abuse loses custody 19% of the time compared to fathers' 11% of the time (difference not statistically significant); but with a GAL/Evaluator, that same mother loses custody 38% of the time compared to fathers' 12%, a 4.3 greater odds of losing custody ($p<0.001$, CI 1.9-9.6).[85] When alleging any type of child abuse, without a GAL/Evaluator, mothers lose custody 23% of the time compared to fathers' 11% (difference not statistically significant); with a GAL/Evaluator, mothers lose custody 43% of the time compared to fathers' 10%, a 6.7 greater odds ($p<0.001$, CI 2.3-19.1).

In contrast, the presence of a GAL or Evaluator has no statistically significant effect on protective fathers' custody losses. GALs have no negative impact on protective fathers' likelihood of losing custody when alleging maternal abuse (13% without a GAL, and 10% with a GAL). Fathers' custody losses do increase with an Evaluator (from 10% to 17%), but the increase is not statistically significant (likely due to the relatively few cases at issue). [86]

In summary, the Study's findings powerfully validate the growing scholarly and lay critiques of both courts' and neutral appointees' negative responses to mothers' allegations of abuse, and the gendered impact thereof.

[84] *Id.*
[85] *Id.*
[86] *Id.*

II. THE MARGINALIZATION OF ABUSE IN FAMILY LAW AND SCHOLARSHIP

The marginalization of abuse in family courts described above must be understood as partly the product of custody law and mainstream scholarship.

A. Custody Law Evolution

Family court norms track social changes: Over time, custody rights have shifted from patriarchal, to maternal, to the current gender-neutral "best interest of the child" standard.[87] While highly discretionary, this standard is also constrained by two often-opposing values: (i) for joint custody or shared parenting and (ii) against domestic violence. However, these priorities are both gendered and unequal in practice.

As Professor Deborah Dinner has written, "[f]athers' rights activism was instrumental in fueling a transformation in state laws from sole custody to joint custody."[88] Fathers' rights advocates' argument that they should be treated as equal parents after divorce was compelling, but the widespread adoption of the shared parenting norm was also driven by a belief that it was best for children. Shared parenting proponents often cite to social science research which has found that children parented by both of their separated parents after divorce retain greater resilience and achieve better academic and social outcomes.[89] However, an important qualification to this research, that

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[87]Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214 (2014).

[88] Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 U. VA. L. REV. 79, 121 (2016). *See also* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 137 (1988) ("[j]oint custody became a cause around which men's groups and fathers' groups rallied").

[89] *See, e.g.*, Clare Huntington, *Post-Marital Family Law: A Legal Structure for Non-marital Families,* 67 Stan. L. Rev. 167, 187 (2015) (summarizing three meta-analyses of over fifty studies, which found children did better academically, socially and emotionally when they had high-quality supportive and warm relationships with their non-residential fathers).

these benefits derive from *close, supportive* father-child relationships,[90] is often forgotten. It is rare indeed for courts to seriously consider the quality of the fathering relationship when ordering shared parenting, even where there is evidence of abuse. Rather, father-involvement is valued *per se*, regardless of its actual effects on a child.[91] Interviews with judges have

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Notably, earlier (pre-2000) research found quite the opposite—that non-residential father visitation was relatively unhelpful to children's well-being. *See, e.g.*, William Marsiglio et al., *Scholarship on Fatherhood in the 1990s and Beyond,* 62 J. MARRIAGE & FAM. 1173, 1184 (2000) (only 42% of studies reviewed showed that post-separation father contact predicted any aspect of child-well-being; there was no strong support linking father visitation with child well-being); Valerie King & Holly E. Heard, *Nonresident Father Visitation, Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being?*, 61 J. MARRIAGE & FAM. 385, 392 (1999) (frequent contact with fathers did not benefit children more than infrequent contact); Frank F. Furstenberg et al., *Paternal Participation and Children's Well-Being,* 52 AM. SOC. REV. 695 (1987) (children who had not seen their fathers in five years had significantly less delinquent behavior, academic difficulty, distress, and behavior problems than those who saw their fathers between one and thirteen days over the course of the previous year). It is possible that these studies did not distinguish between positive and negative father-child relationships; it is also possible that both these and the later father-favoring studies are influenced by changing cultural *mores.*

[90] *See* Huntington, *supra* n. 88*; See also* Joan B. Kelly, *Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research,* 46 FAM. PROCESS 35, 45 (2007) ("When children have *close relationships* with their fathers and the fathers are actively involved in their lives, frequent contact is significantly linked to more positive adjustment and better academic achievement in school-age children, compared with those with less involved fathers")(emphasis added); Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting,* 52 FAM. CT. REV. 152, 159 (2014) ("[r]esearch has led to widespread agreement among professionals that children generally have improved prospects after separation and divorce when they have *healthy, loving relationships* with two parents before and after separation and divorce")(emphasis added). *See also* Mary F. Whiteside & Betsy Jane Becker, *Parental Factors and the Young Child's Postdivorce Adjustment: A Meta-Analysis with Implications for Parenting Arrangements*, 14 J. FAM. PSYCH. 5, 16 (2000) (good father-child relationships benefit children).

[91] *See, e.g.*, *Musgrave v. Musgrave,* No. 2D18-2792, 2019 WL 6333800, at *5, (Fla. Dist. Ct. App. 2019) (reversing trial court's award of sole custody to mother due to father being "spiteful, vengeful and not credible," holding that joint custody is required unless there is proven harm to children). As is described in the next section, pro-shared-parenting scholarship similarly sidesteps the importance of the quality of the father-child

revealed the views of some that "ordinary decent . . . domestic violence" is simply not relevant to custody and access.[92] Rather, a recent Ontario study found that most of the judges interviewed believe that precedents and statutory law decree that shared parenting is virtually always best for children, and that "spousal misconduct" is essentially irrelevant, despite its inclusion in custody statutes because it is known to imply dangers to children.[93]

Knowing the harm that abusive fathers often cause children and their mothers, domestic violence advocates and experts often oppose joint custody provisions, rightly fearing that such presumptions will outweigh attention to domestic violence, even where statutes contained a presumption against custody to batterers.[94] While such resistance has occasionally prevailed,[95] the momentum toward shared parenting and maximizing fathering has been largely unstoppable. Today, while 12 state statutes contain an explicit presumption favoring joint custody, most other statutes elevate shared parenting in other ways, including through "friendly parent" preferences given to whichever parent is more willing to share custody.[96] Nor is shared

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relationship—perhaps because such a pre-requisite might cast doubt on the shared parenting project as a whole.

[92] Catherine M Naughton et al., '*Ordinary decent domestic violence': A discursive analysis of family law judges' interviews*, 26 DISCOURSE & SOC'Y 349 (2015) (describing interviews with six Irish judges, who idealized the nuclear family unit and normalized or trivialized abusive parents' behavior, treated it as irrelevant, and pathologized mothers alleging it). *See also* Winstock, *supra* n. 25 (interviews with family judges indicate that most feel spousal abuse must be ignored in order to fulfill what they see as mandates for shared parenting and settlement).

[93] *Id.* at 458-59.

[94] *See infra* notes 98-99 and accompanying text. Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1379 (2005) (family courts have turned a blind eye or minimized the significance of domestic violence).

[95] In the District of Columbia, national fathers' rights organizations led repeated efforts for adoption of a joint custody presumption—they were opposed each time by local domestic violence lawyers (including this author) but prevailed on the third round. *See* Meier, *supra* note 19 at 77–80 (describing fathers' rights' advocates' campaigns for joint custody and women's and battered women's advocates' resistance).

[96] DiFonzo, *supra* note at 85 at 216, 218. As of this writing, forty-two states have friendly parent provisions as a best interest factor. State Law Spreadsheet, *supra* note 7.

parenting's dominance dependent on explicit law; shared parenting as a *value* is universal.[97]

At the same time, in response to efforts by battered women's advocates, over half of state statutes exempt cases with proven domestic violence or child abuse from their shared parenting preference or presumption. Almost as many fail to exempt one, the other or both.[98] Many states have also adopted exceptions to the preference for joint custody where there was domestic violence.[99] But in the "battle of the presumptions" there is no contest: the shared parenting norm generally wins.[100] Numerous scholars have described how domestic violence provisions – whether embodied in best interest factors, exceptions to joint custody, or presumptions

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[97] Caselaw and unwritten preferences for shared parenting prevail in at least two states lacking explicit friendly parent legislation. E-mail from Paul Griffin, Legal Director, Child Justice, to author (Feb. 15, 2020) (describing Maryland practice); E-mail from Kim Susser, Attorney, Brooklyn, New York, to author (Feb. 15, 2020) (describing judicial bias toward shared parenting in New York where agreed or court deems the parents able to cooperate). *See also* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 752 (1988) (describing court-employed social workers "implementing the shared parenting ideal" "even without statutory authority"); Joan Zorza, *"Friendly Parent" Provisions in Custody Determinations,* 26 CLEARINGHOUSE REV. 921, 923 (1992) (many judges apply an unwritten friendly parent analysis regardless of whether it is in the statute).

[98] State Law Spreadsheet, https://drive.google.com/file/d/1eEMq_NtSBGrwR6Ofs5mlObsQuAUIfz3y/view?usp=sharing. I am deeply grateful to research assistant GW Law student Ellen Albritton for her conscientious and thorough research into the statutes and her compilation of and repeated revisions of the spreadsheet upon request.

[99] *Id.*

[100] Dennis P. Saccuzzo & Nancy E. Johnson, *Child Custody Mediation and Domestic Violence*, 251 NAT'L INST. JUST. J. 21, 21 (2004) (in study comparing 200 child custody mediations involving charges of domestic violence with 200 mediations that did not, joint legal custody was awarded about 90% of the time, regardless of whether domestic violence was an issue); Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1092, 1101 (2005) (in study of six states' applications of presumption against custody to batterers, when state also had a presumption for joint custody and a "friendly parent" provision the latter superseded); Meier, *supra* note 19, at 662 (out of thirty-eight appellate custody cases involving domestic violence, thirty-eight trial courts had given sole or joint custody to the alleged *or adjudicated* batterer; two-thirds were reversed on appeal).

against custody to a batterer - are routinely superseded by the shared parenting ideal.[101] In fact, a Wisconsin study found that even where one parent had been criminally convicted of domestic violence, neither settlement agreements nor court decisions gave much weight to the violence.[102]

Although awareness has grown about joint custody's down sides, including logistical challenges, disruption to children's lives, and triggering of increased conflict and litigation,[103] the joint custody *ideal* continues to powerfully shape courts' judgments. As Fineman articulated, "opposition to shared custody [is seen as] pathological. The assumption . . . is that the parent who rejects the shared parenting ideal and seeks sole custody of his or her child has an illegitimate motive." [104] Few would disagree that in most cases fathers gain - while mothers lose - from a shared parenting norm, rendering it intrinsically gendered. Courts nonetheless are hostile to mothers who

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[101] Regarding the ineffectiveness of domestic violence presumptions, *see* Nancy K.D. Lemon, *States Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?* 28 WM. MITCHELL L. REV. 601, 603 (2001); Maritza Karmely, *Presumption Law In Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption,* 30 NOTRE DAME J.L. ETHICS & PUB POL'Y 321, 355–58 (2016). Regarding the failure of domestic violence exceptions to joint custody presumptions, *see* Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 16 U. ILL. L. REV. 1535, 1568–70 (2016) (describing research finding that courts seem to apply joint custody to couples enduring significant conflict and even violence); Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL'Y 223, 227, 247–54 (2011).

[102] Meuer et al., *supra* n. 40 ("[r]esearchers expected at least 75 percent of final orders to result in sole custody. Instead, 50 percent of cases resulted in joint custody. . . When impasse-breaking authority is included, it increased to 53 percent . . . When the abusive parent was not in prison, the court orders for joint custody increased to 62 percent of cases"). However, primary physical placement went to the victim in 67% of cases. *Id.*

[103] Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 781–82 (2006). *See also* DiFonzo *supra* note 85 at 216 ("The applicability, appropriateness, and even the definition of joint custody are in a state of fluctuation."); Conner, *supra* not---, at 228 ("The vast majority of custody disputes resolved by trial judges are the least likely to be successful candidates for joint custody").

[104] Fineman, *supra* note 95 at 765–66. While Fineman's words were penned in 1988 they could just as well have been written today; the changes she was objecting to then are now the norm.

oppose "sharing." In short, family court culture's emphasis on co-parenting creates a gendered dynamic in which mothers reporting abuse are *personae non grata.* [105]

B. Mainstream Family Law Scholarship

Like custody legislation and practice, the scholarly literature too has marginalized and minimized domestic abuse, in two respects: First, by extolling shared parenting, and second, by propounding misconceptions about family violence and family courts.

1. Shared Parenting Idealism

Shared parenting is a core, if not *the* core topic related to parenting rights in the family law literature. First, the subject is a staple of publications in the leading family law journal, Family Court Review, and an article of faith for many members of the AFCC, which publishes it.[106] Reporters on a 2014 Think Tank organized by the AFCC even concluded, among other things, that "violence is not as clear a presumptive factor against shared parenting as it might appear."[107]

In recent years academic scholars too have advanced shared parenting as the acme of enlightened custody policy. Most recently, in *Post-Marital Family Law: A Legal Structure for Non-marital Families,*[108] Clare Huntington argues persuasively that family law and practice must be adjusted to assure that co-parenting is prioritized for non-marital as well as marital families. Family law, she says, must be revised to adapt to the explosion of "non-marital" families in which the parents separate, by giving not only

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[105] *Id.;* Meier, *supra* note 19, at 678 (joint custody as an "absolute ideal" leads to criticism of mothers reporting abuse).
[106] *See, e.g.*, Pruett & DiFonzo *supra* n. 89 at 160, 162, 164, https://onlinelibrary.wiley.com/toc/17441617/52/2 (summarizing consensus among thirty-two family law experts that promotion of shared parenting is important for family wellbeing and health, is beneficial even in families with moderate or low levels of conflict). *See also* Emery et al., *supra.*
[107] Pruett & DiFonzo *supra* n. 89 at 164.
[108] Huntington, *supra* n. 88.

custody-litigating parents, but unmarried and non-litigating separated parents automatic co-parent status.[109] Huntington acknowledges that some mothers avoid shared parenting due to domestic violence or child abuse,[110] but without addressing how such cases could or should be screened out, nor the likelihood that, at least among cases filed in court, the majority involve a history of abuse.[111]

Similarly, in *A Parent-Partner Status for American Family Law,*[112] Merle Weiner develops a new model for how the law can and should impose various "duties" on any and all parents, in court or out, to create better "parent-partner" relationships for the benefit of children. Her appealing "parent-partner status" would attach certain *pre- and post-separation* obligations and duties on all parents of children in common.[113] To her credit, Weiner's vision starts from the practical realization that parents are often not up to the job of co-parenting well, and she seeks to develop a system that would optimize these relationships. Moreover, Weiner, herself a domestic violence lawyer, devotes eighteen pages of the book to discussing the importance of protection orders, the need to expand them to cover psychological abuse, and additional ways parent-partner status could improve relationship safety.[114] She also mentions the importance of protecting children.[115] However, the book incorporates no explicit exemptions for abusive relationships from the "core set of legal obligations on [all] parents who have a child in common that would obligate them *to each other* at least until their children are grown" (emphasis added). This is remarkable given that these obligations include a duty of "relationship work."[116] It may be a

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[109] *Id.*at 225.
[110] *Id.* at 15, 227.
[111] *See* notes 49-51 *supra* and accompanying text.
[112] MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW (2015).
[113] *Id.*
[114] *Id.* at 327–45.
[115] *Id.* at 186. She also criticizes Huntington for a lack of serious attention to domestic abuse. *Id.* at 122.
[116] *Id.* Merle Weiner, "*Parent Partnerships" Could Be the Future of Marriage*, WASH. MONTHLY (Dec. 7, 2015), https://washingtonmonthly.com/2015/12/07/parent-partnerships-could-be-the-future-of-marriage/ (emphasis added). Weiner does suggest that the counseling requirements used to enforce the duty of "relationship work" should be sensitive to domestic

measure of the seductiveness of the co-parenting ideal that even a domestic violence lawyer/scholar overlooked the inappropriateness of such a requirement for victims of abuse while writing a "parent-partner" book.[117]

In defense of both Huntington and Weiner, it should be said that their focus is as much or more on creating "default" rules for separating families who never go to court, as it is on establishing rules for contested court cases.[118] And while both scholars also suggest that their shared parenting rules could be enforced by courts,[119] their primary focus is on parents who have children together but either separate or never live together.[120] It might thus be argued that these proposals are not necessarily in tension with this article's critique of court practices, if in fact, their shared parenting policies aim at those who never set foot in court and who have no history of abuse.[121]

However, this seems unlikely. Data does not exist to enumerate how many separating families do or do not go to court. But there should be no doubt that the critique herein and in the larger domestic violence literature extends well beyond just those cases that are tried by a judge. Negotiated

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violence, WEINER, *supra* note 110, at 362–63. Weiner also suggests that "bad [and abusive] fathers" may improve once awarded "parent-partner" status. *Id.* at 222–23. The realities of abusive dynamics suggest otherwise. *See* Andrew R. Klein & Terri Tobin, *A Longitudinal Study of Arrested Batterers, 1995-2005*, 14 VIOLENCE AGAINST WOMEN 136, 151 (2008) ("Abusers' criminal and abuse behaviors are ingrained and intertwined . . . In terms of re-abuse, the majority of abusers re-abused, and the majority of re-abusers did so more than once.").

[117] Post publication, Weiner conceded that "a better solution might be to permit domestic violence survivors to opt out of relationship work." Merle Weiner, *Weiner's Response to Comments About the Parent-Partner Status*, CONCURRING OPINIONS, (Nov. 1, 2015), http://feedreader.com/observe/concurringopinions.com/archives%2F2015%2F11%2Fweiners-response-to-comments-about-the-parent-partner-status.html%3F+itemId=3293792030?from=51873585.

[118] Huntington, *supra* n. 88 at 227-229 (describing "default" rules); Weiner, supra n. 110 at 3, 31 (explaining that new legal status would automatically attach at birth of child).

[119] Huntington *supra* n. 88 at 229; Weiner supra n. 110 at 346, 392, 460-61 (speculating that few parents would "enforce" certain of the parent-partner obligations, but also articulating some financial obligations that could require court enforcement)

[120] Huntington *supra* n. 88 at 227-229; Weiner, *supra* n. 110 at 519 ("changes in child custody law would be premature . . . [first step is to] improve parents' *inter se* relationships overall").

[121] Thanks to Clare Huntington for raising this point.

settlements, especially those negotiated after a court filing, are far from independent; rather they are negotiated in "the shadow of the law."[122] Moreover, the opinions and recommendations of custody evaluators and other neutral professionals significantly drive settlements,[123] while embodying the biases described above. As noted above, approximately 75% of filed cases have a history of domestic violence, so courts' shared parenting pressure likely has significant influence on extrajudicial resolutions.[124]

Huntington's proposal is fueled in part by new research led by Kathryn Edin into the dynamics of unmarried parents' relationships, which describes many parents' initial high hopes for family dissipating as fathers' relationships with the mothers of their children become "fractious."[125] One wonders how many of these unmarried parents' "fractious" relationships include abuse. Indeed, another significant new study found that, in a population of young low-income couples:

> the majority of the pregnancies occurred in serious relationships
> of a relatively long duration (about 16 months), but
> those relationships were also unstable and violent. Further,

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[122] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. (1979). In one study, private family lawyers were among the professionals with the highest rates of skepticism toward mothers' abuse allegations in custody cases. Daniel Saunders, Kathleen Faller, & Richard Tolman, *Beliefs and Recommendations Regarding Child Custody and Visitation in Cases Involving Domestic Violence: A Comparison of Professionals in Different Roles,* 22(6) Violence Against Women 722, 732, 737 (2016).

[123] In what is still the largest, most definitive study of how custody litigation resolves, Eleanor Maccoby and Robert Mnookin studied over one thousand cases in California. They reported that 58% settled before getting to court, another 33% settled after mediation or evaluation, eleven cases (9%) went to trial, but only five cases (4%) went to adjudication. That is, 96% of cases settled. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 150 (1994). *See also* Boumil et al*, supra* n. 71.

[124] *See* notes 49-51, *supra.* DV LEAP regularly hears from mothers seeking appellate assistance after having agreed to an unsafe settlement under pressure from their lawyer who insisted (likely correctly) that joint custody was inevitable if they went to court.

[125] Huntington, *supra* n. 88 at 191 et seq, 196, *citing* KATHRYN EDIN AND MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 81 (2005).

> these relationships deteriorated after the pregnancy, becoming less serious, breaking up, and/or more violent.[126]

Even Kathryn Edin, whose research with unmarried fathers Huntington touts, found that *half* of all the couples' relationships ended due to domestic violence.[127]

In short, the idealization of shared parenting, whether in application to court processes or out-of-court relationships, remains problematic until we can develop meaningful and reliable means of distinguishing between safe and unsafe relationships, and can ensure that legal rules and expectations do not increase harm.

2. Other Scholarly Misconceptions About Abuse in Family Court

Shared parenting norms are not the only fuel marginalizing family violence in mainstream family law scholarship. For instance, a high-profile 2014 symposium publication on child custody law and practice which brought together leading scholars to honor esteemed pioneer of child custody research Robert Mnookin, contained *not one* discussion of the problems in courts' response to family violence. Only two of the articles even mentioned family violence. The first, by Elizabeth Scott and Robert Emery, discusses the "gender politics" of advocacy on abuse and parental alienation. While rejecting parental alienation syndrome ("PAS") (but not the more commonly

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[126] Jennifer Barber, Yasamin Kusunoki, Heather Gatny & Robert Melendez, *The Relationship Context of Young Pregnancies*, 35 Law & Ineq. 175 (2017), https://scholarship.law.umn.edu/lawineq/vol35/iss2/2. *See also* June Carbone and Naomi Cahn, *Introduction,* 35 Law & Ineq. 175 (2017) (Barber's research showed that "pregnant women experienced relationship violence at between two and three times the rate of those who did not become pregnant, and the violent men were more likely than non-violent men to have multiple children with multiple partners") (citations omitted).

[127] Edin & Kefalas, *supra* n. 122 at 81 (2005). The researchers found that, while crime, substance addiction, and infidelity also played significant roles, domestic violence was the most common reason for breakups. *Id.* Interestingly, they found that the only population for whom this was not true were African-Americans, possibly because they were less likely to cohabit. *Id.* at 98.

used "parental alienation") as unscientific, the authors also warn against courts' acceptance of "marginal" abuse claims.[128] They go on to state that "critics assert that domestic-violence evaluators are biased toward believing victims."[129]

The only other reference to family violence in this major symposium on child custody is in Mnookin's own essay, which refers in passing to family violence in private custody litigation. He suggests that these cases are the rare "easy" ones, because they involve one "clearly safe" parent and another known to be unsafe.[130] "[More] typically," he states, "the court must choose between two claimants who each offer advantages and disadvantages and neither of whom would endanger the child ."[131]

These articles by esteemed scholars of family law, combined, articulate three common assumptions: First, that true domestic violence is rare (and that "insignificant" allegations are common); second, that true family violence cases are clear and lead courts to protect children; and third, that biases, if any, run in favor of victims of abuse. In fact, each of these beliefs is contradicted by the Family Court Outcomes Study, as well as the scholarship and research discussed in Part I.

First, are abuse allegations rare in contested custody cases? All available research suggests the opposite – abuse in the family is *more common than not* among custody-litigating families. Multiple separate studies have all – surprisingly - converged on the statistic that 70-75% of parents in "high conflict" cases which do not settle involve "marital histories that included physical aggression."[132] Indeed, cases involving violence and

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[128] Scott & Emery, *supra* n. 73 at 86-87 (2014) (asserting that some parents bring marginal domestic violence claims for strategic purposes or due to distorted perceptions and feelings). *See also supra* n. 75.

[129] *Id.* at 97 ((citing Richard Gardner, ironically, the inventor of PAS). The authors acknowledge in a footnote that a contradictory critique also exists, but don't discuss it. *Id.* at n.150 (citation omitted).

[130] Robert Mnookin, *Child Custody Revisited*, 77 L. & CONTEMP. PROBS. 249, 252-53 (2014).

[131] *Id.*

[132] Jaffe, Crooks & Poisson, *supra* n. 20 at 58 (summarizing studies); BANCROFT, SILVERMAN & RITCHIE, *supra* note 22 at 120.

abuse may be harder to settle, although there is also evidence that such litigants do sometimes settle cases, for a variety of reasons.[133] The research makes clear, however, that, at least cases that go to adjudication are more likely to include family violence than not. As this article suggests, this is the not the conventional wisdom in family court. But it should be, given that, if Maccoby and Mnookin's groundbreaking research is representative, the majority of separating couples settle either before or during the litigation, with only 4-9% ultimately going to trial.[134]

Second, is it true that courts are responsive to serious abuse allegations? If the myriad nightmare narratives shared by litigants and professionals, described in the literature cited above and on numerous websites are any indication,[135] the answer is too often *no*. While we cannot be sure of the truth of every story or report of abuse, they surely cannot all be written off as the fantasies and lies of deranged or vengeful mothers and their lawyer dupes. A cursory review of these stories and reports, and their numbers, should lead fair-minded readers to acknowledge that there is a problem in family courts' treatment of abuse cases. Moreover, the fact that the same pattern is being reported in many other countries should reinforce

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[133] *See* n. 120, *supra* (anecdotal reports); Holly Joyce, *Comment, Mediation and Domestic Violence: Legislative Responses*, Journal of the American Academy of Matrimonial Lawyers Vol. 14 No. 2 (1997); NANCY E. JOHNSON ET AL., MANDATORY CUSTODY MEDIATION: EMPIRICAL EVIDENCE OF INCREASED RISK FOR DOMESTIC VIOLENCE VICTIMS AND THEIR CHILDREN, National Institute of Justice Award No. 1999-WT-VX-0015, 2, https://www.ncjrs.gov/pdffiles1/nij/grants/195422.pdf (Apr. 2003).

[134] In what is still the largest, most definitive study of how custody litigation resolves, Eleanor Maccoby and Robert Mnookin studied over one thousand cases in California. They reported that 58% settled before getting to court, another 33% settled after mediation or evaluation, eleven cases (9%) went to trial, but only five cases (4%) went to adjudication. That is, 96% of cases settled. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 150 (1994).

[135] In addition to the narratives throughout this article, *see* literature cited in notes 19-21, *supra;* Petition, *Stop Domestic Abuse Through Family Courts,* https://www.change.org/p/boris-johnson-mp-stop-domestic-abuse-through-the-family-courts?utm_content=cl_sharecopy_13201732_en-GB%3Av4&recruiter=63675036&recruited_by_id=c28d1d62-86f3-4f33-b758-66d2fd86198c&utm_source=share_petition&utm_medium=copylink&utm_campaign=psf_combo_share_initial

the conclusion.[136] Finally, the data shared in Part I, *infra,* provides objective evidence that mothers reporting abuse in custody litigation, particularly child abuse, are ordinarily not believed and often lose custody. Even if some of those allegations were untrue or were minor, there is no reason to believe that all were.

The third assumption, that court professionals' biases favor women reporting abuse, needs no further discussion here, as it is implicitly challenged throughout this article.

3. Scholarly Cognitive Dissonance

It should be clear from the above that there is a gulf between two schools of family law scholars: shared parenting (or "mainstream family law") [137] and abuse (or "domestic violence") [138] scholars. Family law scholars who prize co-parenting and domestic violence scholars who challenge this value as destructive for families experiencing abuse appear to have had little real dialogue, even in scholarship.[139] While much of the scholarship on and

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[136] See citations in n. 25, *supra; Petition,* n. 131, *supra.*

[137] Huntington, *supra* n. 88*;* WEINER, *supra* n. 110; Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent,* 153 U. PENN. L. REV. 921 (2005); Ariel Ayanna, *From Children's Interest to Parental Responsibility: Degendering Parenthood through Custodial Obligation*, 19 UCLA WOMEN'S L.J. 1, 7 (2012) (arguing for mandatory 50-50 shared physical custody to further gender equality and force fathers' involvement); Pruett & DiFonzo, *supra* note 90 at 160, 162, 164 (summarizing consensus among thirty-two family law experts in 2014 that promotion of shared parenting is important for family wellbeing and health, even with moderate or low levels of conflict, and that violence is not preclusive).

[138] *See* sources cited *supra* note 19. It should be noted that domestic violence has never been the only reason for scholarly opposition to shared parenting. *See, e.g.*, Jana Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 512, 515 (1988) (opposing joint custody because it is an easy out for judges and prioritizes "equalization" over what particular children need).

[139] Jaffe, Crooks & Poisson, *supra* note 20 at 59 ("Historically, the domestic violence literature has developed in isolation of the divorce literature (and vice versa), and findings from one area have not informed thinking and practice in the other."). One exception to this was the exchange between domestic violence scholar Leigh Goodmark and Professor Weiner in a symposium discussing Weiner's book. *See* Merle Weiner, *Weiner's Response to Comments About the Parent-Partner Status*, CONCURRING OPINIONS, (Nov. 1, 2015),

advocacy for co-parenting gives the obligatory nod to an exception for domestic violence,[140] as described above, such exceptions in law are notoriously inadequate. Rather, preservation of the shared parenting "fairy tale"[141] necessitates minimization and denial of abuse.

Fundamentally, the shared parenting literature has yet to wrestle with whether co-parenting should remain a priority if, as the evidence suggests, abuse in the family is more common than not among separating parents. Both current scholarship and law appear to be fueled more by idealism about shared parenting than from realism about the reasons parents part, and the commonality of family abuse and destructive parenting in failed relationships.[142]

III. **WHY?** THE PSYCHOLOGY OF DENIAL IN FAMILY LAW AND COURT

The above discussion of family courts' and scholars' idealization of shared parenting goes a long way to explaining courts' powerful motivation for not accepting mothers' allegations of abuse by fathers. But this agenda is not, by itself, a sufficient explanation, particularly given that state laws require judges to give weight to family violence and that the scholars are all

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http://feedreader.com/observe/concurringopinions.com/archives%2F2015%2F11%2Fweiners-response-to-comments-about-the-parent-partner-status.html%3F+itemId=3293792030?from=51873585. Sharing drafts of this article with several scholars has already triggered some thoughtful, useful exchanges.

[140] Huntington, *supra* note 88 at 227; Maldonado, *supra* note 134 at 987 (suggesting that domestic violence could be "highly relevant and possibly determinative" as an exception to a "strong presumption" of joint legal custody); Pruett & DiFonzo, *supra* note at 89 (domestic violence often—but not always—precludes shared parenting).

[141] Fineman, *supra* note 95 at 756, 760 (shared parenting is premised on "utopian" idea that "ideals of equality, sharing, and caring . . . [mean that] divorce can be painless . . . everybody wins").

[142] *See e.g.*, Weiner, *supra* note 116 at 224 (expressing desire not to be pessimistic; preferring to assume that most fathers are not the "bad" kind). Some state appeals courts are making it increasingly hard to justify *not* awarding joint custody. *Musgrave v. Musgrave, supra* n. 90. Even where there is no legally cognizable abuse, many forms of harsh, indifferent, and poor parenting can also harm children and make shared parenting enormously problematic.

deeply thoughtful. How is it that well-intentioned scholars and judges appear to systematically minimize domestic abuse?

Domestic violence scholars have offered many explanations for courts' rejections of likely true abuse, including lack of understanding of family violence and gender bias.[143] These explanations have much validity.[144] But simply inferring that too many judges are ignorant or biased is both questionable and unfair to the many conscientious judges doing their best to achieve what they believe is right for children. It is likely there is something else at work, particularly when judges or other neutrals treat substantial evidence of abuse as though it does not exist, as in the *G* and *E.D.* cases narrated above. Social media and professional reports abound in which clear evidence of almost certain abuse is ignored, minimized and sidestepped, or its existence denied.[145] Such obviously erroneous conclusions may be best understood as a form of psychological denial.

A. The Phenomena of Individual and Social Denial

Discussions of abuse are inherently resisted by many people in many settings. Many in the domestic violence field are careful to only share horrific stories when given permission, because they can be so disturbing. It turns out that human brains are hard-wired with defenses against awareness of horrific realities, especially those inflicted by humans against others. Social science

[143] Epstein & Goodman eloquently describe courts' "discounting" of survivors' credibility as a function of lack of understanding of domestic violence and trauma, and implicit gender stereotypes. Epstein & Goodman, *supra* note 53.

[144] Even decisionmakers who are not sexist but who are wedded to the shared parenting ideal may bend over backwards to excuse fathers' poor behaviors while condemning mothers.' Since mothers are thought to have an automatic advantage in custody litigation, and are often children's primary caretakers, both advocacy for and implementation of "shared parenting" manifests as a mandate for *paternal* involvement, leading to an implicit bias toward fathers. Fineman, *supra* note 95.

[145] See narratives at pp. 8-9 & 25-27; note 132, *supra*. See also Whitney Reynolds, *A Mother Fights for Her Daughter's Injustice*, Stop Abuse Campaign – Custody Court Crisis Blog, https://stopabusecampaign.org/2019/07/26/a-mother-fights-for-her-daughters-injustice/ (July 26, 2019)([a]fter three hospital reports and police reports "verifying my daughter's sexual abuse and trauma, the G.A.L. filed new motions to give the father unsupervised visits with my daughter including overnights. . . . For eight years, I was relegated to supervised visits of two hours a week").

has documented societal psychological denial in relation to war, terrorism, state violence and atrocities, as well as violence against women and children. Yet the psychology of unconscious denial has not heretofore been discussed in connection with society's and courts' resistance to "really knowing" about family abuse.[146]

In his foundational work of sociology, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING, Stanley Cohen draws on early psychoanalytic theory to explain why and how individuals and society avoid knowing about or acting in response to humanly inflicted horrors such as terrorism, war, and genocide. He describes "the foundation of human denial" as follows:

> Denial is understood as an unconscious defense mechanism for coping with guilt, anxiety, and other disturbing emotions aroused by reality. The psyche blocks off information that is literally unthinkable or unbearable. The unconscious sets up a barrier which prevents the thought from reaching conscious knowledge.[147]

This form of denial is not the intentional denial of facts consciously known to the denier, a phenomenon that is all too common in today's world. Rather, it reflects primarily a subtle, mostly unconscious psychological process. Whereas some of us may consciously choose not to listen to news about "starving children in Iraq [or] genocide in Rwanda,"[148] because the constant awareness of such excruciating human suffering is too hard to carry, in other settings unconscious denial "serves to numb, enables avoidance of the unthinkable or protects the psyche by blocking out awareness of cruelty

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[146] If you are finding reading this article unpleasant, or wanting to put it down, your own defenses may be at work.

[147] Mark S. Hamm, 11 CRITICAL CRIMINOLOGY 177, 178 (2002) (reviewing and quoting STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001)).

[148] *Id.*

and extreme horrors committed by some towards others . . ."[149] Of course, judges and evaluators are not entirely free to choose not to listen to horrific (e.g., child sexual) abuse reports; however, as seen in the cases described above, they may find other ways to minimize and deny such traumatic facts.

> Denial operates both on an individual and a social level. This
>
> refers to the maintenance of social worlds in which an undesirable situation . . . is unrecognized, ignored or made to seem normal . . . Domestic violence went through a familiar sequence from denial to acknowledgement. . . the phenomenon was hidden from public gaze; normalized, contained and covered up.[150]

Cohen also emphasizes another, more complex form of denial: "[T]here seem to be states of mind in which we know and don't know at the same time."[151] Countries which neighbored Nazi Germany knew but needed to "not know" about the horrors being perpetrated by their neighbor.[152] Neighbors of a woman with a black eye may "know" but "not know" what caused it. Or countries such as Canada may "forget" that their colonization of the indigenous inhabitants caused untold suffering, which is arguably ongoing.[153] Such denial is society-wide (although there is often a minority who fight the denial), and is perpetuated by social mechanisms which protect a dominant perpetrator from shame, via popular culture, language, and state actions.[154]

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[149] Genevieve Parent, *Genocide Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina*, 10 GENOCIDE STUD. AND PREVENTION: AN INT'L J. 38, 42 (2016).

[150] Cohen, *supra* at 51.

[151] Hamm, *supra* note 144, at 178.

[152] *Id.*

[153] Rebecca Bychutsky, *Social Denial: An Analysis of Missing and Murdered Indigenous Women and Girls in Canada* (2017) (M.A. thesis, University of Ottawa) (on file with University of Ottawa) ("denial is best conceptualized as a social practice . . . social denial refers to patterned behavior where actors both know and do not know about uncomfortable truths") (citing Cohen)

[154] Hamm, *supra* note 144 at 178; Bychutsky, *supra* note 149, at 116 (stating that even the Canadian government "inquiry" into Missing and Murdered Indigenous Women and Girls ("MMIWG") is an exercise in denial because it treats MMIWG as "a new phenomenon instead of one entrenched in a colonial history of violence").

Denial is more likely when the perpetrators are individuals or groups with whom we identify, or have reason to want to trust.[155] It seems likely that the *G* court and *E.D.* GAL were operating from such a partial awareness combined with a goal-oriented, assertive "not-knowing."[156]

B. Denial of Violence Against Women and Children

In her 1992 masterwork TRAUMA AND RECOVERY,[157] Harvard psychiatrist Judith Herman amplified on society's "episodic amnesia" about humanly inflicted trauma and its impact on survivors, particularly women.[158] Starting with the "hysteria" diagnosis given to troubled women in the late 1800s, she points out the similarities between that condition and the "shellshock" or "combat neurosis" which severely afflicted many ex-soldiers after the world wars. In both cases, society's initial response involved moral denigration of the sufferers, who were cast as malingerers. Unlike women's "hysteria," however, social views of war trauma haltingly gave way to a more objective, medical understanding of the ways war experiences could render *anyone* psychically troubled.[159]

Herman likens the impact of violence against women to war trauma, calling it the "combat neurosis of the sex war."[160] Noting that prior to the women's movement in the 1970s, speaking "about experiences in sexual or domestic life [invited] public humiliation, ridicule and disbelief," she describes how "consciousness-raising" groups helped women begin to

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[155] STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 163 (2001) ("the atrocities of official enemies arouse great anguish and indignation . . . the treatment is opposite in all respects when responsibility lies closer to home").

[156] Similarly, a Maryland judge found that a mother was full of "unfounded accusations" despite the fact that she had been awarded a protection order against her husband (who was represented by counsel) after proving her allegations by "clear and convincing" evidence. The judge focused instead on the fact that criminal charges for child abuse were dropped. *G v. C*, Bench Opinion (2010) (on file with author). The husband even admitted that he had surveilled the petitioner with three separate GPS trackers on her car, and that he controlled every move she made. *Id.*

[157] Herman, *supra* note 9 at 10-20.

[158] *Id.* at 7 et seq.

[159] *Id.* at 19, 24-25.

[160] *Id.* at 28, 32.

acknowledge the truth of their own painful lived experiences. Over time, recognition of rape trauma led to deeper investigations of previously hidden domestic abuse of all kinds, including child sexual abuse.[161]

However, these women's new awareness of the reality and commonality of abuse - particularly child abuse - was never fully integrated into broader social awareness. Indeed, abandoning social denial of atrocities is far harder than not:

> It is very tempting to take the side of the perpetrator. All the perpetrator asks is that the bystander do nothing. He appeals to the universal desire to see, hear, and speak no evil. The victim, on the contrary, asks the bystander to share the burden of pain. The victim demands action, engagement, and remembering.[162]

While many, especially in courts, may accept the fact that family abuse exists, the palpable description of traumatic events, especially child abuse, fundamentally threatens our unconscious need to not know, and to see family as a warm, safe haven in which to grow and love. For this reason, Herman argues that conscious acceptance of "traumatic reality . . . requires a social context that joins victim and witness in a common alliance." Such a social context can only emerge, she says, from "political movements that give voice to the disempowered and are strong enough to "counteract the ordinary social processes of silencing and denial."[163]

Such a movement began with the women's movement and its descendant, the "battered women's movement."[164] They ushered in powerful change in social awareness and remedies for the newly recognized, widespread phenomenon of domestic violence. Their "consciousness-

[161] *Id.* at 30-32.

[162] *Id.* at 7-8.

[163] *Id.* at 9.

[164] *Id.* at 28-31; Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 248-49 (2005).

raising" engendered substantial law reforms between the 1970s and 1990s, providing state-level civil and criminal remedies for domestic violence and ultimately federal recognition through the 1994 Violence Against Women Act.[165] As is clear from the extensive critical literature, however, these significant changes have never fully penetrated the family courts, where the dominant norm is support for fathering.[166]

Even more problematically, the increased social recognition of domestic violence has never extended to familial child abuse. No movement for children comparable to the women's movement has ever emerged.[167] Indeed, despite early feminist activists' explicit linkage of child sexual abuse to domestic violence and rape activism,[168] child sexual abuse today continues to be erroneously considered by many a crime committed by strangers who kidnap and molest strange children.[169] And much physical and emotional child abuse continues to be conflated with "discipline" and/or mere strictness,[170] or minimized with reference to children's "resilience." In short, familial child abuse continues to be subject to a variety of forms of social misconceptions, minimization and denial.

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[165] *See generally* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WISC. L. REV. 1657, 1658-75 (describing evolution of new legal responses).

[166] Meier, *supra* n. 19; see also citations in n. 19, *supra.*

[167] Claire Houston, *What Ever Happened To The "Child Maltreatment Revolution?"*, 19 GEO. J. GENDER & L. 1, 28 (2017).

[168] Herman *supra* note 9, at 30-31; Houston, *supra* note 163, at 28 (2017) (early feminists asserted that child sexual abuse was "an expression and tool of male domination. . . This power, like men's power over women, was rooted in the patriarchal family").

[169] *See* Bernard Gallagher, Michael Bradford & Ken Pease, *The Sexual Abuse of Children by Strangers: Its Extent, Nature and Victims' Characteristics*, 16 CHILDREN & SOCIETY 346, 347 (2002).

[170] ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 9 (1987) ("the right of discipline has served as a justification for virtually all forms of assault by parents and husbands short of those that cause permanent injury); Stephanie A. Whitus Walsh, The Relationship of Victims' Perceptions of Child Physical Abuse and Adult-Formed Attitudes Toward Physical Forms of Discipline and Perpetrators of Child Physical Abuse (2006) (Ph.D. thesis, Sam Houston State University) (on file with author) (behavior viewed by child victims and perpetrators as "as normal punishing techniques" may meet legal standards of abusive treatment).

This denial persists despite several established truths: First, it is no longer disputable that 90+% of sexually abused children know their abusers, and the majority of all child sexual abuse is committed by a parent or other family member.[171] Second, the longitudinal, massive, federally-supported Adverse Childhood Experiences ("ACEs") study has underlined the lifelong and societally costly psychic and physical harms from living in a home with abuse of oneself, one's parent or both.[172] And last, decades of research have established that intimate partner violence and child abuse often go hand in hand, frequently fueled by the same patriarchal values of male dominance and female subordination.[173] None of these fairly uncontroversial understandings within the abuse field appear to have penetrated court practices; in fact, professional training and much research literature continue to not only minimize abuse but also to treat child abuse and domestic violence as utterly distinct.[174]

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[171] *See, e.g.,* Lisa Cromer & Rachel Goldsmith*, Child Sexual Abuse Myths: Attitudes, Beliefs, and Individual Differences,* 19 J. Child Sex. Abuse 618, 631 (2010); Darkness to Light, http://www.d2l.org/wp-content/uploads/2017/01/Statistics_2_Perpetrators.pdf; RAINN, https://www.rainn.org/statistics/children-and-teens (last visited Mar. 21, 2020) (80% of child sexual abuse is committed by a parent) (citing UNITED STATES DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILD MALTREATMENT SURVEY, 2016 (2018)). Both policymakers and media often mislead the public by treating child sexual assault as purely a problem of stranger-danger.

[172] Vincent J Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACEs) Study*, 14 AM. J. PREV. MED. 245, 251 ([t]he findings suggest that the impact of these adverse childhood experiences on adult health status is strong and cumulative").

[173] Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134 (1999); Bancroft & Miller, *supra* note 25, at 108, 110 ("exposure to batterers is among the strongest indicators of risk of incest victimization . . . the sexually abusing batterer appears to stand out for his high entitlement, self-centered expectation that children should meet his needs (role reversal), high level of manipulativeness, and perception of his children as owned objects").

[174]*See* Desiree Kennedy, *From Collaboration To Consolidation: Developing A More Expansive Model For Responding to Family Violence*, 20 CARDOZO J. L. & GENDER 1, 8 (2013) (domestic violence and child maltreatment systems have had largely separate and distinct histories, philosophies, and approaches); Meier and Sankaran, *Breaking Down the Silos,* supra n. 47.

It appears that recognition of child abuse remains society's Rubicon – it remains to be crossed. Significant conscious psychological work is required in order to "bear witness" to such atrocities.[175] Society's and individuals' denial is perhaps not entirely surprising, despite the significant progress society has made on adult gender and violence issues. "Repression, dissociation and denial are phenomena of social as well as individual consciousness."[176] This is particularly evident in court.

While the persistence of denial and the limits of social progress regarding family abuse are significant, there is some reason for cautious optimism. Over the past four years, a new movement for gender justice has erupted: The #MeToo movement has triggered a plate tectonic shift in social and professional responses to women's claims of sexual abuse on the job. "Reporting of sexual abuse is starting to be welcomed rather than punished, on the view that accountability, not impunity, should prevail for individuals and institutions that engage in or enable such abuse."[177] Where once there was denial, suppression and ridicule, there is now concern, support, and credibility. Previously routine denials and dismissals of women's reports of sexual harassment are beginning to be replaced with concern and efforts toward accountability; and sexual abuse is finally beginning to be recognized and described "by the established media as pervasive and endemic rather than sensational and exceptional."[178] The #MeToo movement arguably meets Herman's pre-requisite of a "political movement" for the lifting of the veil of denial.

That is the good news. However, as has been pointed out by domestic violence experts Epstein and Goodman,[179] #MeToo has not yet filtered into courts responding to domestic violence. One reason is that a key ingredient for many of #MeToo's successes, the existence of multiple women's reports

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[175] Herman*, supra* note 9.
[176] *Id.*
[177]MacKinnon, *supra* n. 53 ("#MeToo, Time's Up, and similar mobilizations around the world—including #NiUnaMenos in Argentina, #BalanceTonPorc in France, #TheFirstTimeIGotHarassed in Egypt, #WithYou in Japan, and #PremeiroAssedio in Brazil among them—are shifting gender hierarchy's tectonic plates").
[178] *Id.*
[179] Epstein & Goodman, *supra* note 50.

of one perpetrator's abuses,[180] is not available in the court context, where a single victim (or mother-child duo) typically accuses a single perpetrator. And because all cases are adjudicated individually and involve unique facts, it is harder to establish systemic patterns across different courts and cases. The Child Custody Outcomes Study, however, provides the first such pattern analysis, which is essential to chipping away at social denial.[181]

In the meantime, until "#MeTooinFamilyCourt" gains traction, the pull of psychological denial and the push for shared parenting help explain why courts have been so receptive to the notion of "parental alienation," which offers a convenient scientific-sounding reason to reject mothers' and children's abuse allegations.

IV. **HOW?** THE MACHINERY OF DENIAL IN FAMILY COURT

Parental alienation theory was originally termed "parental alienation syndrome" or "PAS." Richard Gardner, PAS' inventor, framed mothers' allegations of child sexual abuse against fathers in custody battles as typically

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[180] MacKinnon observes that campus sexual assault cases are likely to be successful only when there are a minimum of four accusers, rendering a woman one-quarter of a person for purposes of credibility. MacKinnon, *supra* n. 53. *See, e.g.*, Carla Correa, *The #MeToo Moment: For U.S. Gymnasts, Why Did Justice Take So Long?*, N.Y. TIMES, Jan. 25, 2018, https://www.nytimes.com/2018/01/25/us/the-metoo-moment-for-us-gymnasts-olympics-nassar-justice.html (discussing how Olympic gymnastics doctor Larry Nassar was given a life sentence after over 100 women reported his abuses); Anna North, *Bill Cosby is in prison. But the first real #MeToo trial hasn't happened yet.*, VOX, Oct. 1, 2018, https://www.vox.com/2018/10/1/17902810/bill-cosby-sentencing-harvey-weinstein-larry-nassar (describing how Bill Cosby was convicted after numerous women had spoken out; Harvey Weinstein and Larry Nassar were also accused by numerous women).

[181] In an analysis of the parallels between the #MeToo movement and Transitional Justice movements in societies recovering from political terror, several scholars note that social denial of systemically perpetrated and socially condoned atrocities creates a need to "counter[] denial by directly uncovering and properly characterizing the wrongdoing which took place, as *not simply the ordinary misconduct of a few isolated actors in ways that were exceptional*, but rather as part of a *pattern of behavior that became unexceptional*, that targeted groups, and that was committed by groups" [emphasis added]. Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, TimesUp, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 101 (2019).

pathological, vindictive, and false.[182] And while contemporary proponents of parental alienation theory distinguish it theoretically from PAS, these nuances in the literature rarely appear in court practice. Thus, the Child Custody Outcomes study confirms quantitatively that "parental alienation" is a powerful weapon against mothers alleging abuse, and a virtual trump card against child sexual abuse allegations. This is so despite the absence of any scientific validation of alienation theory's assumptions and assertions, and the existence of some credible scientific research refuting them. Alienation theory's ubiquity in family courts is best understood as a function of its usefulness in furthering the goal of maximizing father involvement, by providing a pseudo-scientific basis for rejecting mothers' and children's claims of abuse.[183]

* * * *

> *"I don't want to be around my daddy when he's mad."*
> *"Frankly, this child is afraid of Mr. H." (custody evaluator).*
> *There was little doubt why the boys were afraid of their father. He had slapped and choked their mother in front of them, viciously sexually assaulted her while they were upstairs, hit his sons, and extensively humiliated his four-year-old autistic son in front of guests at a Christmas party because the boy had wet his pants. Yet the trial court concluded that the boys were afraid of him because of their mother's conduct, not his.*[184]
>
> *Based in part on a conversation the judge had had with an expert in parental alienation at a conference, the judge accused the mother of*

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[182] *See infra* note 193 and accompanying text.

[183] Alienation proponents often contend that PA is not only about mothers' abuse claims, is often alleged against fathers, and is an issue in many non-abuse cases, assertions which the Study has actually confirmed. *Child Custody Outcomes, supra* note 7 at 18 (noting that outcomes in alienation cases without abuse claims appear more gender-neutral). However, this does not negate the concept's original purpose and current effectiveness in denying mothers' and children's credible abuse claims.

[184] *In re Marriage of Crystal and Shawn H*., D061388, 2013 WL 2940952, (Cal. Ct. App. June 17, 2013). The appeal was filed with the assistance of an amicus brief from DV LEAP, co-authored by this author. *See* Amicus Curiae Brief on Behalf of Justice for Children et al., In re Marriage of Crystal and Shawn H., 2013 WL 2940952 (No. D061388).

> *creating a "revisionist history" about the father's conduct with the children, found that any harm suffered by the boys was merely "collateral damage" from the wife-abuse, and concluded that their fear of their father was the product of her "conscious" or "unconscious" statements to the children. Accordingly, the court ruled that as soon as the father was released from prison (where he was serving six years for his felony sexual assault of the mother), he should have access to his children, without regard to either their feelings or his attitude.*[185]

In this case, the mere extra-legal suggestion of "alienation" was enough to wipe away the extensive and undisputed abuse – including the father's felonious sexual assault of the mother with the children in the house, verbal and physical abusiveness toward the children and the children's understandable fear. Instead of triggering a protective response, the alienation label invited the judge to shift responsibility for the relationship breach from the father to the mother, and to order child access for the father as soon as possible.[186]

> *In another case from another state, the oldest child reported his father's hitting, pinching, being mean and being drunk; he had also witnessed his father strangling his mother, and he told evaluators that he feared his father would kill him. Rather than inferring the obvious, the evaluator characterized this child's feelings as "unnatural . . . abnormal" - and thereby evidence of alienation. The court adopted the parental alienation label and ordered custody to the father.* [187]

A. *History of Parental Alienation Theory*

[185] The order was reversed on appeal, in a forthrightly critical opinion. *See In re Marriage of Crystal and Shawn H*., 2013 WL 2940952.

[186] *See Amicus Curiae* Brief on Behalf of Justice for Children et al., *supra* note 147, at 25–27.

[187] Brief *Amicus Curiae* on Behalf of the Arkansas Coalition Against Domestic Violence *et al* at 15–16, *Oates v. Oates*, 2010 Ark. App. 346, at 6, 2010 WL 1609411 (No. CA09-498). https://drive.google.com/file/d/1kkENJxL78w0xDNj28eeipcNMhmTduryv/view.

There is a kernel of common sense at the core of the theory of parental alienation: Separating or divorcing parents do sometimes encourage their children to choose sides against their ex-partner. (This surely happens in intact families too.) Indeed, batterers are notorious for demeaning and undermining the other parent and her parenting authority or relationship with the children.[188] However, not until psychiatrist Richard Gardner invented the "Parental Alienation Syndrome" ("PAS") to combat mothers' efforts to protect children from dangerous fathers in custody litigation, did family court professionals start treating parents' denigration of each other in the custody context as a serious concern.[189]

Gardner asserted that vengeful ex-wives employ child abuse allegations as a ''powerful weapon'' to punish the ex and ensure custody to themselves, that they often ''brainwash'' or ''program'' the children into believing untrue things about the father, and that the children then fabricate their own added stories.[190] Without sources, he asserted that the majority of child sexual abuse claims in custody litigation are false,[191] although he explained some mothers' "vendettas" as the product of pathology rather than intentional malice.[192] Gardner strongly implied that when children reject their father and the mother alleges child abuse in custody litigation, these behaviors are likely part of the PAS rather than actual experiences of abuse.[193]

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[188] *See Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, https://www.theduluthmodel.org/wheels/understanding-power-control-wheel/#children (last visited Mar. 21, 2020) (includes "using children" as one of several non-violent battering tactics); LUNDY BANCROFT & JAY SILVERMAN, THE BATTERER AS PARENT (2002).

[189] *See* Joan Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation,* 6 J. CHILD CUSTODY 232, 235 (2009).

[190] RICHARD A. GARDNER, TRUE AND FALSE ACCUSATIONS OF CHILD SEXUAL ABUSE 160-161, 193, 199-200 (1992) (hereinafter GARDNER, TRUE AND FALSE); Richard A. Gardner, *Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child Custody Disputes*? 30 AM. J. FAM. THERAPY 93, 94 (2002) (hereinafter GARDNER, WHICH DIAGNOSIS).

[191] RICHARD A. GARDNER, SEX ABUSE HYSTERIA: SALEM WITCH TRIALS REVISITED 3-4 (1991) (hereinafter Gardner, SEX ABUSE HYSTERIA).

[192] *Id.* at 25-42.

[193] Gardner, *TRUE AND FALSE* at 159-161.

Gardner's PA "syndrome" presented an easy target for critics: He used conclusory analysis (e.g., he cited the "presence of PAS" as an indication that child abuse claims are false, while also stating that if child abuse is true it's not PAS), he invoked fabricated (and empirically contradicted) statistics, his "diagnostic" criteria were conclusory and flagrantly subjective, and he had published bizarre beliefs about human sexuality, including a defense of pedophilia.[194] Since there was no scientific proof of the purported "syndrome" and since Gardner's explanations - such as his suggestion that mothers falsely allege child sexual abuse because they are titillated by the thought of their husbands having sex with their children[195] - were outrageous, PAS has been widely discredited as lacking scientific credibility,[196] and ruled inadmissible by several courts.[197] Eventually it was definitively rejected (after extensive contention) in 2012 by the Fifth Diagnostic and Statistical Manual (DSM-V) of psychiatric disorders.[198]

However, "alienation" writ large has remained, thanks to the work of a number of family court professionals and researchers who developed a ‘‘reformulation" of PAS, termed ‘‘parental alienation'' or ‘‘the alienated

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[194] Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law and Policy*, 26 CHILD. LEGAL RTS. J. 1, 9–11, 13–15, 19–21 (2006); Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 Fam. L.Q. 527, 530–36 (2001).

[195] GARDNER, SEX ABUSE HYSTERIA 25-26, 31; RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS (1992) (hereinafter GARDNER, GUIDE).

[196] Meier, *supra* note 185, at 238–39.

[197] *See People v. Fortin*, 289 A.D.2d 590, 591 (N.Y. App. Div. 2001); *M.A. v. A.I.*, A-4021-11T1, 2014 WL 7010813, at *5 (N.J. Super. Ct. App. Div. Dec. 15, 2014), *certification denied,* 112 A.3d 592 (2015) (unpublished); *D.M.S. v. I.D.S.*, 2014-0364 (La. App. 4 Cir., 3/4/2015) (unpublished); *People v. Sullivan,* Nos. H023715, H025386, 2003 WL 1785921, at **13–14 (Cal. Ct. App. Apr. 3, 2003) (unpublished); *Mastrangelo v. Mastrangelo*, 55 Conn. L. Rptr. 245, 2012 WL 6901161, at *5 (Conn. Super. Ct. 2012) (unpublished); *Snyder v. Cedar,* No. NNHCV010454296, 2006 WL 539130, at *8 (Conn. Super. Ct. Feb. 16, 2006) (unpublished).

[198] *See* Holly Smith, *Parental Alienation Syndrome: Fact or Fiction—The Problem with Its Use in Child Custody Cases*, 11 U. MASS L. REV. 64, 76 (2016).

child.''[199] Janet Johnston, an early leader of this research, defined an alienated child as one

> who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent. Entrenched alienated children are marked by unambivalent, strident rejection of the parent with no apparent guilt or conflict.[200]

This definition, depending on the subjective conclusion that a child's feelings are "unreasonable," encourages the assumption that such negative feelings toward a parent may derive from an illegitimate source. The obvious fact that custody-contesting parents are adversarial fuels the conclusion that children's hostility is likely an extension and product of that adversarialism.

Parental alienation has by now become a ubiquitous label in cases where a post-separation parent or child is resistant to regular unsupervised contact between the other parent and the child. The scholarly literature on it has exploded.[201] And unlike PAS, "parental alienation" has yet to be ruled inadmissible or authoritatively rejected as junk science, perhaps in part because without use of the word "syndrome," it appears more factual than scientific, leading courts and professionals to treat it as more or less a matter of common sense.

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[199] Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 251 (2004).

[200] Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 762 (2005). This definition's emphasis on "stridency" and "no apparent guilt or conflict" echoes Gardner's descriptions of PAS. GARDNER, WHICH DIAGNOSIS, *supra* note 152, at 97 (listing "lack of ambivalence" and "absence of guilt" as two symptoms of PAS).

[201] The literature is far too vast to summarize here. But alienation's ubiquity is indicated by the fact that the Family Court Review has done not one but two special issues on the subject, ten years apart. (*Special Issue) Parent-Child Contact Problems: Concepts, Controversies and Conundrums,* 58:2 Family Court Review 259 (April 2020); *Special Issue on Alienated Children in Divorce and Separation: Emerging Approaches for Families and Courts* 48:1 Family Court Review 1 (2010

Over time, scholarship has added nuance to discussions of alienation. Some leading alienation scholars now acknowledge that (i) children may resist time with a parent for many understandable reasons, such as the child's own vulnerabilities, separation anxiety, reaction to the parents' separation, and other developmental circumstances; and that (ii) the avoided parent's behaviors are often part of the problem.[202] New terminology, such as "visitation refusal/resistance"[203] is sometimes used to indicate greater neutrality as to cause; though other new terms, such as "gatekeeping," continue to hold the custodial parent responsible for undermining the other parent's relationship with a child.[204] Nonetheless, while some scholarly alienation experts take pains to distance themselves from PAS and its singular focus on a toxic preferred parent,[205] other alienation proponents continue to assert that PAS and PA are essentially the same. [206]

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[202] *See, e.g.*, Janet R. Johnston & Joan B. Kelly, *Commentary on Walker, Brantley, and Rigsbee's (2004) "A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court,"* 1 J. CHILD CUSTODY 77, 79 (2004); Sheley Polak & Michael Saini, *Children Resisting Contact with a Parent Post-Separation: Assessing this Phenomenon Using an Ecological Systems Framework*, 56 J. DIVORCE & REMARRIAGE 220, 224–25 (2015).

[203] *See, e.g.*, Benjamin D. Garber, *Conceptualizing Visitation Resistance and Refusal in the Context of Parental Conflict, Separation, and Divorce,* 45 FAM. CT. REV. 588, 588 (2007).

[204] *See, e.g.*, William J. Austin et al., *Benchbook for Assessing Parental Gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate Closing and Opening for the Best Interests of Children,* 10 J. CHILD CUSTODY 1, 5 (2013).

[205] *See, e.g.*, Janet R. Johnston et al., *Is It Alienating Parenting, Role Reversal, or Child Abuse? A Study of Children's Rejection of a Parent in Child Custody Disputes*, 5 J. EMOTIONAL ABUSE 191, 206 (2005) (recognizing "a multi-factor explanation of children's rejection of a parent after divorce"); Leslie M. Drozd & Nancy Williams Olesen, *Is it Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1 J. CHILD CUSTODY 65, 67, 73–85 (2004) (describing multiple reasons a child may be estranged or less close with one parent, including poor parenting, absence, as well as abuse).

[206] William Bernet, *Parental Alienation: Misinformation Versus Fact*, JUDGES' J., Summer 2015, 23, 25 (describing the two concepts as "almost synonymous"); Sheila Pursglove, *Asked and Answered: Demosthenes Lorandos on Parental Alienation Syndrome*, OAKLAND COUNTY LEGAL NEWS (Jan. 6, 2015), http://www.legalnews.com/oakland/1399575/ (discussing PAS and parental alienation interchangeably); JOAN S. MEIER, PARENTAL ALIENATION SYNDROME AND PARENTAL ALIENATION: A RESEARCH REVIEW, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 7 (2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_PASUpdate.pdf (describing a case in which the evaluator seamlessly changed the label from PAS to PA without changing the analysis).

B. Alienation Theory in the Courts

Notwithstanding the nuances in the literature, the absence of the word "syndrome" has not changed alienation's use in court.[207] Like PAS, alienation is routinely used in court to per se discredit abuse claims.[208] PA labelling was responsible for 37% of the harmful outcomes in Silberg and Dallam's case series; and when alternative terms embodying similar forms of pathologizing of mothers' protective efforts were included, the percentage became 66%.[209] Like PAS, but unlike the nuanced literature's recognition that most "alienated" parents are partly responsible for their children's estrangement, the focus in court cases remains on the purportedlyh alienating parent. Finally, children's legitimate reasons for resisting contact with one parent – recognized in the new scholarship - are rarely given much weight in court once alienation has been raised. In fact, as was seen in the Study's data, even where abuse is known and acknowledged, alienation findings often

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[207] *See* Allison M. Nichols, *Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes*,112 MICH. L. REV. 663, 680 (2014) ("Expert witnesses may offer testimony strongly reminiscent of PAS without uttering the word 'syndrome.'"); Jodi Death, Claire Ferguson, & Kylie Burgess, *Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia,* CHILD ABUSE & NEGLECT, August 2019, at 3 (while endeavoring to distinguish PAS and parental alienation courts utilize similar analyses including blaming mothers and rejecting child sexual abuse claims); JESS HILL, SEE WHAT YOU MADE ME DO 279 (2019) (fathers' rights website advises fathers to avoid referencing PAS and speak instead of "brainwashing," "extreme alignment," or "alienation"); Smith, *supra* note 198, at 86 (citing alienation proponent Richard Warshak's references and support for both PAS and parental alienation); Meier, *supra* note 185 (explicating substantial overlap between PAS and PA).

[208] See Simon Lapierre & Isabel Côté, Abused Women and the Threat of Parental Alienation: Shelter Workers' Perspectives,65 Child. & Youth Servs. Rev. 120, 125 (2016) (parental alienation is a "strategy . . . to overshadow male's violence against women and children in society"); Smith, supra 202, at 84 (explaining that fathers assert PAS "much like an affirmative defense to disclaim a mother's allegation [of abuse]"); Meier, supra note 23 (discussing five cases in which alienation was used to deny credible abuse claims).

[209] JOYANNA SILBERG ET AL., CRISIS IN FAMILY COURT: LESSONS FROM TURNED AROUND CASES. FINAL REPORT TO THE OFFICE OF VIOLENCE AGAINST WOMEN, DEPARTMENT OF JUSTICE 37 (2013), http://www.protectiveparents.com/crisis-fam-court-lessons-turned-around-cases.pdf.

supersede. In one case exemplifying the logical extreme of alienation thinking, the court responded to a child's continued disclosures of his father's abuse during visits with his mother by terminating all visitation with his mother.[210]

[210] *Oates v. Oates, supra* n. 184.

1. Study Findings on Parental Alienation

The Study's data confirm that crossclaims of alienation are powerful weapons against mothers' abuse allegations. Whereas in non-alienation cases, courts credited 40% of mothers' abuse allegations overall, in alienation cases, they credited only 23%. Child abuse allegations were believed on average 27% of the time in non-alienation cases, but in only 18% of alienation cases.[211] Overall, when allegedly abusive fathers crossclaim alienation, courts (i) *dis*believe mothers' claims of abuse at 2.3 times the odds for cases without alienation ($p<0.001$, CI 1.6-3.1); and (ii) have almost 4 (3.8) times greater odds of disbelieving mothers' claims of child abuse ($p=0.002$, CI 1.6-8.8).[212]

Custody losses followed suit. Among cases where mothers alleged abuse and there was no alienation crossclaim,[213] 26% ended in a custody switch to the father accused of abuse. However, when fathers crossclaimed alienation, maternal custody losses roughly doubled, to 50%. Among mothers alleging child physical or sexual abuse, 29% lost custody in the non-alienation cases; in the alienation cases, that rate also doubled, to 58%.[214]

When a mother alleging abuse was found by the court to have committed alienation, 71% lost custody to the alleged abuser. (The same is true for fathers.) When a court believed both that a father was abusive and a mother was alienating, 43% (6/14) switched custody from alienating mothers to abusive fathers. In other words, alienation outweighed violence.[215]

These findings compel three important conclusions: First, mothers' child sexual abuse claims are nearly universally rejected when fathers crossclaim alienation. Indeed, both this Study and a Canadian study

[211] Statistical Documentation.
[212] *Id.*
[213] *Id.* Since the Study relies solely on courts' published opinions, it is possible that claims of alienation (or abuse) were made but not reported in the opinion. However, it is likely that allegations that are not mentioned in an opinion were not deemed significant.
[214] Statistical Documentation.
[215] Statistical Documentation.

produced virtually identical findings (whereas only one court believed child sexual abuse in the U.S. Study, in the Canadian study *no* sexual abuse claims were believed).[216]

Second, alienation roughly doubles women's disadvantage in cases where they allege a father has committed any type of abuse. Despite the truth of contemporary alienation proponents' assertion that alienation is not merely a mechanism for refuting abuse,[217] the fact remains that it is particularly powerful when deployed against a mother alleging abuse.

Third, while alienation proponents argue that alienation is not a gendered concept because women are also victims of parental alienation by fathers,[218] an observation the Study's findings support,[219] the findings do indicate that *in abuse cases*, alienation is likely gendered. Overall, across all alienation cases (both with and without abuse claims), mothers had twice the odds of losing custody when accused of alienation compared to fathers (OR 2.0, p=0.020, CI 1.1-3.5).[220] Half (81/163) of all mothers accused of alienation lost custody to the fathers they accused of abuse, while only 29% (5/17) of fathers who were accused of alienation by the mother they accused of abuse lost custody to that mother.[221]

In short, the Study's findings strongly confirm not only that courts are generally resistant to accepting mothers' claims of fathers' abuse, especially child abuse, but that parental alienation potently intensifies these outcomes. These national data support the many anecdotal reports of alienation's misuse

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[216] Elizabeth Sheehy & Susan Boyd, *Penalizing Women's Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases*, 42 J. SOC. WEL. & FAM. LAW 80, 8 (2020) (none of twenty-eight child sexual abuse claims by mothers accepted).
[217] *See* note 179, *supra.*
[218] *See, e.g.,* Johnston & Sullivan, *supra* n. 33 at 19–20.
[219] Statistical Documentation.
[220] *Id.*
[221] This difference was not statistically significant, likely because there were only seventeen cases where a father started with custody, accused the mother of abuse, and was accused of alienation. Statistical Documentation. A more comprehensive empirical analysis of gender bias will be revealed in a future paper.

to deny credible abuse allegations and to punish mothers who raise them, many of which are deeply harmful.[222]

C. Alienation's Lack of Scientific Basis

The troubling nature of alienation theory's use in abuse cases is underlined by its lack of scientific support. Despite some proponents' assertions to the contrary,[223] a rigorous and honest review of the extant research by several leading *alienation researchers* concluded with admirable frankness that:

> There is a virtual absence of empirical studies on the differential diagnosis of alienation in children from other conditions that share similar features with parental alienation, especially realistic estrangement or justified rejection in response to parental abuse/neglect, significantly compromised parenting or the child being a witness to intimate partner violence. [224]

Buried in this verbiage is a startling admission: Neither researchers nor practitioners have any objective, validated means of distinguishing between children resisting a parent for legitimate reason from those who have been

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[222] *See supra* notes 26-31 and accompanying text; *U.S. Divorce Child Murder Data, supra* n. 2. Many alienation scholars seem content to dismiss the abuse critique as "extreme" or ideological, *cf.* sources cited *supra* n. 33, without bothering to address the question of whether alienation is in fact being misused to deny credible abuse. Even the first-ever scholarly discussion of alienation "false positives" conspicuously fails to address its use to deny abuse. Warshak, *supra* n. 33.

[223] *See e.g.*, Brianna Pepiton et al., *Is Parental Alienation Disorder a Valid Concept? Not According to Scientific Evidence. A Review of "*Parental Alienation, DSM-5, and ICD-11*,* by William Bernet," 21 J. CHILD SEXUAL ABUSE 244, 248–52 (2012) (critiquing Bernet's claim that alienation is scientifically supported and noting that his book making the assertion contains only two studies—both dissertations, and neither proving Parental Alienation Disorder —but is filled with stories, movies, television shows, and non-peer-reviewed books and articles).

[224] Michael Saini et al., *Empirical Studies of Alienation*, *in* PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR FAMILY COURT 2E, 423 (Drozd, Saini & Olesen, eds., 2016). *See also* Rebecca M. Thomas & James T. Richardson, *Parental Alienation Syndrome: 30 Years on and Still Junk Science,* Judges' J., Summer 2015, at 22, 22.

illegitimately influenced by the other parent (i.e., "alienated").[225] The reviewers also found there was a dearth of generalizable, scientifically valid studies: Most merely describe "clinical opinions or personal impressions."[226]

The absence of genuine scientific support for the alienation theory is compounded by the emergence of credible research *refuting* it. University of Virginia scholar Robert Emery and colleague Jenna Rowen studied college students who reported having been subjected as children to their custodial parent's denigration of the other parent. Rather than finding that parental denigration encouraged the child to disrespect or dislike the other parent, this study found precisely the opposite: Denigrating behaviors by a parent had a "boomerang" effect - that is, the children turned *against the alienating parent* more than the denigrated parent.[227] They conclude:

> the hypotheses and predictions consistent with the alienation construct were unsupported. The overwhelming evidence suggests that when parents denigrate the other parent, parental alienation and rejection does not result.[228]

Nonetheless, the alienation concept retains wide allegiance from much of the family court world. In fact, the previously-cited scholarly reviewers of the research, while noting the lack of credible science, also emphasize the broad professional consensus among family court practitioners about the prevalence of parental alienation and professionals' ability to identify such behaviors in cases.[229] They do not discuss Emery and Rowen's research.

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[225] Saini, et al., *supra* note 496, at 417–18, 376 ("[n]o validated and reliable instruments exist to distinguish [realistic estrangement] from alienation cases.").

[226] *Id.* at 375.

[227] Jenna Rowen & Robert Emery, *Parental Denigration Reports Across Parent-Child Dyads: Divorced Parents Underreport Denigration Behaviors Compared to Children*, 16 J. CHILD CUSTODY 197, 207 (2019) ("The initial work we have completed on parental denigrations calls into question basic suppositions about parental alienation.").

[228] Jenna Rowen & Robert Emery, *Examining Parental Denigration Behaviors of Co-Parents as Reported by Young Adults and Their Association with Parent–Child Closeness*, 3 COUPLE & FAM. PSYCHOL. 165, 175 (2014).

[229] Saini et al., *supra* note 224, at 418.

Alienation has also been exceedingly difficult to challenge in court. While PAS was ruled inadmissible by a handful of courts,[230] no family court has created precedent addressing the admissibility of mere "alienation," despite multiple attempts by capable lawyers. Even appellate courts have avoided such challenges when they have been brought.[231]

The staying power of alienation– and its many synonyms and variants[232] - can be seen as a reflection of family courts' eagerness to doubt or reject mothers' and children's abuse claims in custody battles. Alienation, especially when propounded by neutral court-appointees, provides a plausible, quasi-scientific rationale for discrediting claims that fathers are abusive or dangerous, while providing a reason to criticize mothers who bring such claims. To be clear, this article is not suggesting that one parent's efforts to undermine the other parent's relationship with the children should be of no concern to family courts. Rather, as is explained further below, it urges that courts' use of the "alienation" concept be cabined to avoid its *misuse* to deny credible abuse claims that have real implications for children's safety.

V. WHAT IS TO BE DONE?

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[230] *See* cases cited *supra* note 193.

[231] DV LEAP has handled several appeals challenging the admissibility and misuse of alienation to deny abuse claims by a mother and/or child. Every appellate court declined to address the issue. *See Licata v. Licata,* 859 A.2d 691 (N.J. 2004), https://drive.google.com/file/d/17FLNEf3IeEBHvKQjad-KA-ERw7RU6CxT/view; *McRoberts v. Superior Court of L.A. Cty*, 2012 WL 2317714, at **10–12 (Cal. Ct. App. June 19, 2012) https://drive.google.com/file/d/1zIUr686NWFChEVKA2TZJHtLMgd4eHYxQ/view (unpublished); *Oates v. Oates*, 2010 Ark. App. 346, at 6, 2010 WL 1609411, at *6; In 2019, New York's highest court declined without explanation to review a carefully developed challenge to the misuse of parental alienation, supported by a broad spectrum of organizations. See Order, *E.V. v. R.V.,* (N.Y. Court of Appeals, May 2, 2019) (on file with author).

[232] *See, e.g.*, Marsha Kline Pruett & Leslie M. Drozd, *Not Just Alienation: Resistance, Rejection, Reintegration, and the Realities of Troubled Parent-Child Relationships*, ASS'N FAM. & CONCILIATION CTS. ANN. CONF., slide 5 (2019) (listing different terms/concepts) (on file with author).

The foregoing discussion indicates that protective parents' and their advocates' increasingly urgent calls for reform should be heeded. The new data verify that not only are women's reports of domestic violence being ignored, even – and especially - *child abuse* claims are being rejected and punished with loss of custody. Children's subjection to ongoing abuse, and in extreme cases, horrific deaths[233] at the hands of a father who was reported to be dangerous but to whom the court awarded unsupervised access, is both unacceptable and completely unnecessary. While it is possible that some of the mothers who lost custody in the Study had not accurately reported abuse, heeding the warnings of the majority of protective parents who do can keep children alive and safe. What does this mean for both the practice and theory of family law?

First, academic understanding of family law – and the education of future family lawyers and judges – has been missing a significant piece of the picture. Family law scholarship and teaching should better integrate the reality of family abuse – both its commonality and its common denial by authorities. In particular, the myth that family courts respond protectively to family abuse allegations must be punctured so that family lawyers with protective-parent clients can know what to expect and become prepared to handle such cases.[234] Scholarly co-parenting proposals should be expected to explain how greater co-parenting emphasis in courts can be achieved without increasing problems for families experiencing abuse. Weiner's Parent-Partners book includes a positive example of this when she argues that protection orders should be broadened to cover psychological abuse between

[233] *See supra* note 32; Nikita Stewart, *She Went to Court to Save Her Three-Year-Old Daughter. Days Later, the Child Was Dead*, N.Y. TIMES (July 22, 2019) https://www.nytimes.com/2019/07/22/nyregion/queens-car-fire-toddler-death.html.

[234] It is an open secret among domestic violence lawyers that most fee-paid family lawyers do not adequately understand either domestic violence or child abuse and are ill-equipped to litigate these issues affirmatively, especially preparing to combat the culture of denial and alienation. After all, opposing abuse allegations is far easier. Some are aware enough to withdraw from a case once child sexual abuse becomes an issue—others stumble through, often in ways that prejudice future attempts to secure safety. Education, training and support on family abuse for private domestic relations lawyers is a compelling need.

co-parents – to fulfill co-parents' "duty not to abuse," and to support decent co-parental relationships.[235]

With regard to the courts and the law, the remainder of this article proposes two changes.[236] First, the law must outlaw the use of alienation theory (or its synonyms) *as a reason to discount abuse allegations*.[237] While judges will always need to determine the truth or falsity of litigants' and children's allegations about a parent, parental alienation's quasi-scientific veneer encourages evaluators and courts to ignore and reject abuse claims without proper assessment, and fuels negative judgments of the alleging parent. Alienation acts as a thumb on the scale against attending to abuse allegations – it must be removed.

Second, state law should explicitly recognize that there will always be indeterminate cases,[238] and offer a path forward which does not ignore risk to children. Perhaps understandably, custody judges often react to abuse claims as though they are adjudicating a crime, where non-conviction means acquittal. But where indeterminacy should lead to acquittal in the criminal realm, the same is not true in the determination of children's best interests in custody litigation: Here, the perpetrator does not face a loss of liberty, and the potential child victim faces a risk of ongoing abuse (or worse), despite the presence of a safe parent. Protecting children's welfare should take precedence in this context. States should thus amend their custody laws to require courts to respond to indeterminacy about abuse by following a

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[235] WEINER, *supra* n. 110 at 333.

[236] I do not discuss amending statutes to reduce emphasis on shared parenting. While such amendments could support needed changes, the cultural, normative emphasis on shared parenting is likely to be more significant than statutory language.

[237] As noted above and below, this paper and this author make no recommendations regarding the use of the parental alienation theory in non-abuse cases.

[238] I thank University of Minnesota Law Professor June Carbone for the seeds of this idea. Alienation scholars Johnston and Sullivan also emphasize indeterminate cases in their newest article, but their approach is vulnerable to the conflation of abuse and alienation, and, contrary to the proposal herein, explicitly rejects emphasizing children's voices. Johnston & Sullivan, *supra* n. 33.

"middle path"[239] which respects the possible risk while also seeking to heal any unnecessary rift between parent and child to the extent possible.

As a result of an increasing number of child murders by parents given access by family courts over the objections of a protective parent, a unanimous Congressional resolution on *Child Safety in Family Courts,*[240] the new data described herein, and long-term advocacy by anti-abuse advocates, several state lawmakers and advocates for children's safety are currently revisiting state custody laws.[241] Now is an auspicious time for developing new policies and practices for family courts.

A. Constraining Reliance on Alienation and Like Theories

Concern about parental alienation being used to deny mothers' and children's abuse allegations has reached international critical mass with the 2020 publication of a European journal's Special Issue covering 8 different countries; it is also reflected in a recent United Nations-affiliated call for governments to

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[239] The "middle way" is a Buddhist principle which encourages people to avoid all-or-nothing thinking and advocacy. *See* https://en.wikipedia.org/wiki/Middle_Way

[240] *See Expressing the Sense of Congress That Child Safety Is the First Priority of Custody and Visitation Adjudications, and That State Courts Should Improve Adjudications of Custody Where Family Violence Is Alleged*, H.R. Con. Res. 72, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-concurrent-resolution/72/titles. The Resolution's unanimous adoption by the House of Representatives in 2018 was the culmination of years of education and advocacy by a small group of "protective parent advocates" and parents whose children had been killed after a family court failure.

[241] For instance, Connecticut, reeling from the presumed murder of a protective mother (and more recently, the suspect-father's suicide), has held a series of hearings on family court has and is currently considering An Act Concerning Court Proceedings Involving Allegations of Family Violence and Domestic Abuse, S.B. 442, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020), https://www.cga.ct.gov/2020/TOB/s/pdf/2020SB-00442-R00-SB.PDF. In Pennsylvania, Kayden's Law was named after a seven-year-old murdered by her father during a court-ordered visit. *Kayden's Law: Bucks County Lawmakers Introduce Bills to Ensure Children in Custody Disputes are Protected*, BUCKS LOCAL NEWS (Oct. 7, 2019), https://www.buckslocalnews.com/news/kayden-s-law-bucks-county-lawmakers-introduce-bills-to-ensure/article_981e4d38-e903-11e9-a3b9-8f24a06c0ab5.html. New York is reeling from multiple horrific child murders after courts rejected mothers' pleas for safety, and legislative reforms are under discussion. *See supra* note 32.

remedy the problem.[242] The following discussion spells out a balanced and thoughtful approach to constraining the misuse of alienation theory. [243] It should be noted that this proposal does not seek to eliminate the concept of alienation completely – affirmative evidence of parental alienation behaviors can be considered when *not used to deny abuse*.

Statutes should require that courts:

i. ***Determine abuse allegations first***, before reaching other best-interest factors or considerations. This ensures that "friendly parent" or alienation-type considerations do not distort an objective, fact-based judgment on abuse claims.

ii. ***In determining the validity of abuse allegations, only experts in the alleged form(s) of abuse should be heard from.*** As several of the case narratives contained in this article indicate, courts often allow non-expert evaluators or GALs to opine negatively on abuse allegations. Opinions about abuse should require expertise in the type of abuse alleged.

iii. ***Once family abuse by one parent is found, alienation claims against the other protective parent should be excluded***.[244] Alienation is too regularly used to deny abuse or its effects. If abuse is recognized to have occurred in a family, alienation by a non-offending parent should not be considered.

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[242] *See* Sheehy & Lapierre, *supra* note 25; Dubrovka Simonovic, et al., *Intimate Partner Violence is an Essential Factor in the Determination of Child Custody, Say Women's Rights Experts*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS 3 (2019), https://www.ohchr.org/Documents/Issues/Women/SR/StatementVAW_Custody.pdf (international consortium of leading experts on violence against women working with the United Nations recommend that nation-states should "explicitly prohibit, during the investigations to determine the existence of violence, evidence based on the discrediting testimony on the basis of alleged Parental Alienation Syndrome. . . . Accusations of parental alienation by abusive fathers against mothers must be considered as a continuation of power and control by state agencies and actors, including those deciding on child custody.").

[243] *See* Meier, *supra* n. 23 (containing a more detailed discussion of the proposal).

[244] This restriction distinguishes this proposal from that of Johnston and Sullivan, *supra* n. 33, who advocate assessment of both alienation and abuse and other parenting concerns all at the same time. As I have explained elsewhere, *cf.* Meier, *supra* n.23, employing this type of "multi-variate" assessment cannot and will not rein in the misuses of alienation to deny abuse and its effects on a family.

iv. ***Where abuse allegations are not confirmed, the allegations themselves should not be treated as evidence of alienation.*** Alienation should not be inferred from abuse allegations. It should stand or fall on its own.

v. **Alienation claims should be considered only if all other "natural" reasons for *the child's hostility to the parent (such as affinity, development, or the disfavored parent's own conduct) have been ruled out.*** Courts and evaluators need to be guided to avoid leaping to alienation and blaming a preferred parent without ruling out myriad other reasons children may have difficulties with a parent after separation.[245]

vi. ***Only conscious intent and specific behaviors should be deemed alienating conduct.*** Speculation about unconscious transmission of "alienating" thoughts should not be considered. As some of the narratives herein demonstrate, courts have been remarkably accepting of speculations that a mother has *not deliberately, but unconsciously* alienated her child from the father.[246] There is no scientific basis for this – and it derives from Gardner's PAS.[247]

vii. ***Remedies for confirmed alienation should be limited to healing the child's relationship with the alienated parent. No treatment requiring separation from a non-abusive parent to whom the child is bonded or forced change of custody should be ordered.*** Particularly given the ever-present risk of

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[245] *See* Johnston & Sullivan, *supra* n. 33 at 26 (describing many different factors and dynamics that come into play in fueling a parent-child relationship breach).

[246] In addition to the narratives in this article, I am familiar with other cases that have turned on imputations of unconscious alienation. In one case, the court explicitly found that the mother was not coaching the child but suggested that the child might be inventing sexual abuse because she "senses her mother's dislike for her father." Order, p. 15, *CW v. EF*, Case No. DR 757-01, IF 2261-02 (2007) (on file with author). Such a theory could negate all child abuse allegations in all cases, since inter-parental hostility can be inferred in most custody litigation. *See also* Brief of Appellant Rosalind Blount, in Blount v. Grier at 31, 18-FM-624 (on file with author) (court suspects mother's anxiety unconsciously alienated son). Some alienation specialists have wisely warned evaluators against "attempt[ing] to guess at someone's motivation or . . .[posit] some unconscious underlying family dynamic." Drozd & Olesen, *supra* note 202, at 80.

[247] GARDNER, A GUIDE, *supra* note 157, at126, 128 ("In other cases, however, subconscious and unconscious factors are operative, especially projection," and treating father as incompetent can "serve as a mechanism for dealing with one's own unconscious desires to inflict harm on the baby").

> error when courts seek to untangle family relationships and force changes, remedies such as a forced custody switch, which intrinsically inflict psychological trauma on children, should not be entertained. Currently, most intensive court-ordered "reunification" treatment programs require this,[248] based on the brainwashing theory underlying the alienation label. While meaningful data is not yet available, anecdotal reports of such programs' torment of and harshness toward children, as well as indefinite removals from their caring parent, are extremely troubling.[249]

Provisions such as the foregoing could easily be incorporated into a state's statute; they could also be embodied in court rules, or at minimum, in judicial guidelines or a Bench Book. (The latter, of course, would be harder to enforce.) Pieces of the above guidelines are already embodied in legislation pending in Pennsylvania.[250] With sufficient education about the Study, citation to House Concurrent Resolution 72,[251] and detailed reports on children murdered by a parent as the result of a family court access order, lawmakers, advocates, experts, and lawyers should be well-positioned to advance this proposal.

B. Legislating for Indeterminacy

The discussion in Part III of courts' denial of the reality of family abuse and its implications for custody suggests that fundamental change in court professionals' attitudes will not be rapid. Indeed, this problem – and

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[248] Jean Mercer, *Are intensive parental alienation treatments effective and safe for children and adolescents?* 16:1 Journal of Child Custody 67 (2019).

[249] One child described her experience at a treatment program thus: "[C]aptive is a good way to describe it. I felt watched all the time. I felt trapped." *Bitter Custody*, REVEAL (Mar. 9, 2019), https://www.revealnews.org/episodes/bitter-custody/. She and her brother "couldn't leave the program until they said that their dad had brainwashed them [against the mother they said was emotionally abusive]." *Id.* Another had written the judge stating "[m]y mom screamed at me so much I started getting panic attacks. I wanted to kill myself just to make the pain go away." *Id.* She was ordered to attend another treatment program, supposedly for five days. *Id.* Her stay lasted for 10 months, costing over $200,000. *Id.* She was not allowed to have any contact with the father and brothers she loved until she aged out of the court's jurisdiction. *Id.* *See* Dallam and Silberg, *supra* n. 109.

[250] *See Kayden's Law*, *supra* note 241.

[251] An Act Concerning Court Proceedings Involving Allegations of Family Violence and Domestic Abuse, S.B. 442, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020), https://www.cga.ct.gov/2020/TOB/s/pdf/2020SB-00442-R00-SB.PDF.

tragic stories – have been in the public eye to some extent for decades,[252] but, like other "inconvenient truths," they have also been suppressed.[253]

While the long-term battle to challenge family courts' denial has yet to succeed, the #MeToo movement creates new momentum for change. While as previously noted, the movement has not yet penetrated the courts – especially the family courts – it is ushering in a new social consciousness that may eventually be felt there as well. Society – and the courts – are in transition, and there is a need for a transitional approach that invites more meaningful attention to abuse, without requiring a "feminist transformation." Moreover, there will always need to be an approach for cases involving abuse allegations that are not resolved with certainty.

One reason for family courts' resistance to abuse allegations is courts' understandable instinct to treat abuse allegations as criminal, which generates an automatic protectiveness toward the rights of the "accused," and an intuitive (if not explicit) demand for greater proof than the regular civil preponderance standard.[254] Another dynamic likely imported from the

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[252] *See, e.g.*, PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY (2d ed. 2011).

[253] *Women on Trial*, WIKIPEDIA, https://en.wikipedia.org/wiki/Women_on_Trial_(film) (last visited Mar. 18, 2020) (describing 1992 HBO documentary that followed a group of women who lost custody in family court to abusive fathers and that was pulled after one night due to lawsuit by judge); *see also Psychologist Loses Libel Suit Over HBO Documentary*, REPS. COMMITTEE FOR FREEDOM PRESS (Oct. 19, 1998), https://www.rcfp.org/psychologist-loses-libel-suit-over-hbo-documentary/. *See also* Michael Getler, *A Little About Me, A Lot About "Breaking the Silence,"* PBS: OMBUDSMAN COLUMN (DEC. 2, 2005, 4:11PM), http://www.pbs.org/ombudsman/2005/12/introduction_and_breaking_the_silence.html (quoting review describing the film as depicting "the impact of domestic violence on children and the recurring failings of family courts across the country to protect them from their abusers"). Attacks on the film by fathers' rights advocates were so vociferous that PBS produced another documentary to appease them. Press Release, PBS, PBS Statement on Breaking the Silence: Children's Stories (Dec. 21, 2005), https://www.pbs.org/about/blogs/news/pbs-statement-on-breaking-the-silence-childrens-stories-december-21-2005/.

[254] *See* Brief of Amicus Curiae Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) in Support of Petitioner at 16–18, Ohio v. Clark, 135 S. Ct. 2173 (2015) (No. 13-1352), https://drive.google.com/file/d/0B0lqDMVtMxXDMHhOZGlmWHFPZEU/view

criminal context is courts' apparent assumption that if abuse allegations are not sufficiently proven, they must then be considered untrue. While this may be technically correct in a criminal case, in a custody case, the issue is not guilt or innocence, but future child well-being. Where child safety is at issue, treating *uncertain* abuse claims as *false* puts the risk of error squarely on the child. In a custody adjudication, where children's well-being is legally and morally the priority, defaulting to "false" in cases of uncertainty inappropriately subjects children to unnecessary risk. Moreover, treating these cases as a zero-sum game between the child and the accused parent is a recipe for further harm to one or both parties. Crafting a "middle way" response for cases of uncertainty is thus essential, albeit challenging.

What should courts do in cases that are indeterminate – whether due to a court's resistance to believing abuse, or due to actual lack of sufficient evidence? If, as courts and court professionals regularly assert, one priority is relationship repair, a child-centric approach[255] would build on the guidelines described in Part A above, thus:

i. ***Children's negative feelings about one parent would be given the benefit of the doubt and not be presumed to have been caused by the other parent they love and trust.*** Indeterminacy means that abuse claims may be true, which means that exposure to the abuser could re-traumatize the child. Without proper trauma-sensitive and child-centric therapy, a premature push for reunification can magnify the trauma of being helpless and overpowered by an abusive parent.[256]

ii. ***The resistant or frightened child would be given a therapist with expertise in trauma and the relevant type of alleged abuse.*** The therapy would not necessarily aim to prove or disprove the alleged abuse but would prioritize working with the child and their feelings and ascertaining whether there are any conditions that might make parent-child contact non-traumatic and emotionally as well as physically safe for the child. A potentially rich modality for this type of therapy is play therapy, which does not require a child to verbalize what has

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(describing family courts treating cases involving child abuse allegations as though they are criminal cases).

[255] Thanks to June Carbone for elevating this approach in my thinking.

[256] Madelyn Milchman, *Scientific Issues Related to Reunification Therapy vs. Reunification Treatment* (Mar. 4, 2020) (unpublished report, on file with author).

happened to them or even how they feel, but often allows them to use the animals or other figures, drawings, sand trays, etc, to discuss what is happening with the play figures without requiring them to say in words what happened to themselves.[257] "The decision to expose a child to an alleged abuser should be made [only] on the basis of clear and scientifically validated criteria for differentiating abused from alienated children." As child sexual abuse expert Madelyn Milchman has stated, no such valid criteria exist, and existing criteria for "diagnosing" alienation are too similar to behaviors of children *who have been abused,* making indeterminate cases unsafe cases for forced reunification.[258]

iii. ***The disfavored parent would be given a therapist with expertise in parenting therapy, and enough expertise in family abuse to understand the counter-intuitive dynamics, and the ways children, adult survivors, and perpetrators may present.*** The purpose of this therapy would be to work with this parent on any aspects of their parenting behavior which they are able to acknowledge may have impaired their relationship with his child, and to work toward repairing those injuries to the parent-child relationship for which s/he can accept responsibility. An aspect of this process might include helping the accused parent understand and accept how the child feels, even if the allegations are not, in his/her view, accurate. Another aspect might require challenging such a parent's desire to blame the problems in their relationship with the child on the preferred parent. The core premise of such work would be that, regardless of what is true about the past, repairing the relationship will require some maturity and selflessness on the part of the accused parent, and a willingness to sacrifice their ego-defensiveness in the interests of rebuilding a positive relationship with the child without damage.[259]

iv. ***If these therapeutic processes clarify that abuse (or other destructive parenting) did in fact occur, the court's orders should respond to that reality***

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[257] *See* Sue C. Bratton, Dee Ray, Tammy Rhine, & Leslie Jones, *The Efficacy of Play Therapy with Children: A Meta-Analytic Review of Treatment Outcomes*, 36 PSYCHOL. RES. & PRAC. 376, 376 (2005) (Play therapy is "equally effective across age, gender, and presenting issue," as children "use play materials to directly or symbolically act out feelings, thoughts, and experiences that they are not able to meaningfully express through words").

[258] Madelyn Milchman, *Scientific Issues Related to Reunification Therapy in Cases with Parental Alienation vs. Child Sexual Abuse Allegations* 8–9 (Sept. 19, 2019) (on file with author).

[259] *Id.*

and ensure that the child's physical and psychological safety are protected. However, this does not mean that there should never be contact between the abusive parent and the child. Contact should be a function of the child's wishes and their therapist's determination of what the child is ready for. Some children want contact with fathers who have abused them or their mother.[260] Allowing some kind of relationship - even if limited - to exist can help a child survivor come to terms with their experience and learn to see their abusive parent in a more complex and full light. If their abusive parent works on themself, allowing contact could provide them with the apology and acknowledgment of their hurt for which most abuse survivors long.[261] On the other hand, if the child does not want to see that parent under any circumstances, their feelings, as a matter of justice and mental health, should be respected.[262]

v. ***If the therapeutic processes do not clarify whether abuse did in fact occur, the court should still be guided by the child therapist's recommendations as to what would be best for the child.*** The child's well-being must be the priority of a custody/visitation proceeding where a child's "best interests" must be determined. Fairness to even a falsely accused parent should not supersede a child's needs. In fact, a falsely accused parent is more likely to eventually regain a relationship with their child if the child's needs are respected, rather than rejected as "wrong," with the child subjected to coercion - the usual *modus operandi* in alienation-driven proceedings.[263] It is likely, albeit not guaranteed, that a productive therapeutic relationship with the child will help the child move toward a healthier and more reality-based perspective on the avoided parent and

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260 Peled, *supra* note 65 ("Many children of abusive men seem to care deeply for their fathers and wish they could have a gratifying relationship with them.").

261 *See* Arifa Akbar, *Review, The Apology by Eve Ensler–My Father Who Abused Me*, GUARDIAN (June 12, 2019, 2:30 AM), https://www.theguardian.com/books/2019/jun/12/the-apology-eve-ensler-review (Ensler imagines and details her father's apology).

262 Janet R. Johnston & Judith Roth Goldman, *Outcomes of Family Counseling Interventions with Children Who Resist Visitation: An Addendum to Friedlander and Walters* (2010), 48 FAM. CT. REV. 112, 113 (Nineteen percent of post-custody-litigation counseling population continued to refuse all contact with parents who were alcoholic, abusive or subtly emotionally manipulative and lacking in "empathy or respect for them as a person.").

263 *Id.* (children forced into extended reunification treatment, "were, as young adults, contemptuous and blamed the court or rejected parent for putting them through this ordeal").

may, as described in iii above, lead to the child's greater willingness to have contact with that parent.[264]

vi. ***The preferred parent should be worked with by the child's therapist and/or an independent therapist to understand the child's feelings and process***, and to aid the parent to support the child's growth and healing. A part of this work may include helping the parent come to terms with their own feelings toward the accused parent, and to separate them from the child's possible need for a relationship with that parent. The preferred parent should not be told they are a liar, pathological, or not in reality, merely because their abuse allegations have not been validated to the satisfaction of the court. However, they, like a parent who feels falsely accused, should be expected to prioritize their children's needs and interests, where they diverge from their own.

While the process outlined here requires substantial trust in and deference to mental health professionals, family courts already rely extensively on mental health professionals – but on the wrong ones, who lack abuse expertise and are biased toward alienation labels.[265] This proposal urges that – if our goal is to repair a damaged parent-child relationship in a case with abuse allegations - we replace forensic custody evaluators' opinions with the opinions of abuse and parenting experts.[266] This strategy alone would help prioritize children's needs and safety over fathers' or mothers' rights and shared parenting ideals. Given the high costs in dollars, time, and traumatic stress already embedded in our current alienation-driven court processes, there is little to lose and much to gain from shifting the paradigm in responding to abuse allegations. As amplified above, this does not mean accepting all such allegations as true, but it does mean taking them seriously enough to not dismiss them out of hand, and to shift the current emphasis on

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[264] *Id.* (among young adults who had been estranged from a separated parent when younger, "[a]ttitudes towards both parents then improved steadily through high school and afterwards to their current status where the majority reported feeling 'positive' or 'very positive,' albeit with more moderate views of their parents' strengths and limitations").
[265] Saunders, *supra* n. 76.
[266] Such experts should be qualified based on their training and experience acquired in non-forensic settings, as the forensic context tends to simply feed pre-existing biases; it does not provide meaningful work with and understanding of abusers and their victims.

"reunification" therapy which dismisses abuse claims to therapy that operates more open-mindedly with regard to the potential truth of abuse allegations, so long as they have not been ruled out.

C. Anticipated Objections

The primary objection to the above guidelines will likely be from alienation proponents or those who bring a bias toward distrusting women's and children's allegations of a father's abusive or destructive conduct. While the guidelines' emphases on taking children's feelings and reports seriously are unlikely to satisfy such skeptics, I offer two responses. First, children's feelings and experiences must be key to any resolution that aims to protect children's well-being and to heal parent-child relationships.[267] Whether or not a child is "rational" or correct in a court's view, relationship repair cannot be accomplished by coercion. While forced "reunification" gives rejected parents physical possession of their children, it does so at huge cost: First, many supposedly alienated children are cut off indefinitely from the parent they love and they believe is protecting them. This ironically cures "alienation" by imposing an equivalent or greater destruction of a parent-child relationship, causing presumably even more psychological damage to the child.[268] Second, parents who are "reunified" with their children by force rarely benefit long-term, because the failure to respect children's feelings and needs turns many such children against that parent.[269] It should not take a specialist to recognize that healthy, positive parent-child relationships cannot

[267] *See, e.g.,* BEVERLY JAMES, TREATING TRAUMATIZED CHILDREN: NEW INSIGHTS AND CREATIVE INTERVENTIONS 127 (1989) ("The child's feelings and concerns about contact and reunification need to be explored and worked through"). While it has not been ratified by the United States, the Convention on the Rights of the Child, Article 12, reflects an international consensus that children have the right to input on matters concerning their own welfare.
https://www.ohchr.org/en/professionalinterest/pages/crc.aspx?fbclid=IwAR35cVUouzhmgWieqVBgZYcB2B0AxOmow0WCMu4zy7eIWfQD-VMAwGkORks

[268] Johnston and Sullivan write that for some children, "a custody reversal is . . . analogous to surgical removal of a body part without anesthesia . . . [and may] threaten psychic integrity of both parent and child, inducing panic and despair." Johnston & Sullivan, *supra* note 33 at 30 note11.

[269] Johnston & Goldman*, supra* note 268.

be built on force and coercion, and must make room for children's genuine feelings. The alienation model, which employs coercion and denial of children's felt experiences and feelings, at minimum inflicts psychological harm on children by taking them away from a loving parent and forcing them to live with one they hate or fear, prioritizing an accused parent's "rights" or desires over the child's felt needs.[270]

A second objection may be that the proposal calls for too much court reliance on still more mental health professionals.[271] I sympathize with this concern. My answer is simply this: If, as now, courts insist on repairing relationship breaches between a child and a parent after separation or divorce, then they should rely on the *appropriate* mental health professionals to accomplish this goal in a healthy and respectful manner. However, in my view it would not be unreasonable for courts and lawmakers to conclude that they are not institutionally suited to such a goal, and that courts should instead strive to "do no harm." In that case, a more modest goal might mean offering referrals, but resisting the urge to mandate therapeutic interventions, and leaving children in the care of the parent they love and trust. This stance would mean leaving the future of a parent-child relationship to the parent and child, after the child becomes independent. Research suggests that most estranged children do return and seek reconciliation with a formerly rejected parent.[272] Whether that effort is rewarded depends on the strengths and weaknesses of the formerly rejected parent, as well as the adult child.

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[270] Dallam & Silberg, *supra* note 208, at 140 (describing others' research as finding that "adults who were forced into reunification with a rejected parent when they were a child had strong negative views and feelings about the experience").

[271] *See, e.g.*, Scott & Emery, *supra* note 73 at 71, 92–100 (criticizing courts' reliance on mental health professionals for custody/visitation decisions).

[272] Johnston and Goldman, *supra* note 268 at 113 ("Virtually all of the youth who had actively resisted or refused visitation subsequently, on their own accord, initiated reconciliation with the rejected parent some time during their late teens and early twenties, often after they reached 18 years").

CONCLUSION

This article presents what may be an unwelcome description of how our nation's family courts are handling cases involving abuse claims by women and children. But the many different sources confirming this picture should compel both scholars and practitioners to grapple with the common realities faced by abuse survivors in our court system. Reckoning with courts' denial of family abuse and reification of shared parenting is necessary if we are to devise methods to better protect children and ensure that shared parenting remains in its place – in non-abusive families. Hopefully, this article will inspire that reckoning in all three realms: judicial, policy, and academic. The risks and the harms to children and their loving parents in these cases have been borne by too many for too long. We can and must do better.