

# Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law

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\* Professor of Law, George Washington University Law School. © 2022, Joan S. Meier. I am grateful to GW Law for the summer stipend in support of this Article and for 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 on this Article. I am grateful to the many research assistants who worked on this Article, including Ellen Albritton, Jeanel Sunga, and Victoria Yamarone. And I am deeply grateful to Sean Dickson, Chris O’Sullivan, and Leora Rosen, coauthors of the Study, who worked on the Family Court Outcomes Study and continue to engage with ongoing publications. 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.

– Amy Castillo<sup>1</sup>

The court-appointed evaluator and Maryland family court judge who heard her case 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-

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1. Letter from Amy Castillo to Chairman Vallario and Members of the House Judiciary Comm. (Feb. 25, 2010), [https://www.washingtonpost.com/wp-srv/metro/pdf/HB\\_700\\_Testimony\\_Amy\\_Castillo.pdf](https://www.washingtonpost.com/wp-srv/metro/pdf/HB_700_Testimony_Amy_Castillo.pdf) [<https://perma.cc/2YH9-AW3P>]. This Article contains several narratives illustrating real cases of family abuse and domestic violence.

ordered visitation with their father, she was held in contempt and jailed.<sup>2</sup> Months later, having learned her lesson, she let them go with their father and on March 29, 2008, he drowned Anthony (six), Austin (four), and Athena (two) in the bathtub, one at a time, in the hotel room he used for the visit.<sup>3</sup>

The court's dismissive response to Dr. Castillo's desperate warning was, sadly, quite typical. Over the past several decades a critical mass of scholarship, research, and social media has described the plight of mothers seeking to keep their children safe from an abusive father in family courts that respond with rejection and hostility, often reversing custody to the alleged abuser.<sup>4</sup> In particular, the literature has condemned courts' use of the controversial concept of parental alienation<sup>5</sup> to dismiss mothers' abuse allegations. This qualitative literature has been ignored or marginalized by leading mainstream family law scholars and family court professionals. While the reasons for this marginalization are complex and partially unintentional, this Article is a call to bring family violence in from the margins of judicial, policy, and academic attention. That call is grounded in new empirical data from the first-ever quantitative national analysis of family court practices—data that empirically validate the reports and grievances of thousands of parents (mostly mothers) and children in the United States.<sup>6</sup>

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 such allegations as often illegitimate despite longstanding empirical evidence suggesting abuse histories are common in custody cases.<sup>7</sup> This theoretical and practical marginalization of family violence in law fuels and reinforces custody courts' denials of abuse and disfavoring of mothers who report it. This critique has been amply

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2. See Nicole Fuller & Arin Gencer, *Court Records Document Separated Couple's Tumultuous Relationship*, BALT. SUN (Apr. 1, 2008, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-2008-04-01-0804010099-story.html>.

3. See *id.* For additional examples of child murders facilitated in part by court-ordered access, see Laurie Udesky, *U.S. Divorce Child Murder Data*, CTR. FOR JUD. EXCELLENCE, <https://centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/> [<https://perma.cc/VKV3-JMVX>] (last visited Feb. 14, 2022) (listing 111 “[p]reventable [h]omicides” in which courts were asked to restrict a parent’s access but refused).

4. See *infra* Part I.

5. Parental alienation lacks a singular definition but is understood as toxic behavior by a parent to undermine the children’s relationship with the other parent. It is often invoked when children resist contact with a (usually noncustodial) parent. See *infra* Part IV.

6. For documentation of the data, see SEAN DICKSON, FAMILY COURT OUTCOMES STUDY, STATISTICAL OUTPUT (2021), <https://mfr.osf.io/render?url=https://osf.io/sn3mf/?direct%26mode=render%26action=download%26mode=render> [<https://perma.cc/C575-27AH>].

7. Regarding rates of abuse allegations in custody cases and nonlitigating families, see *infra* Part I. Some might argue that because the Study’s data reflect only judicial decisions, the Study has limited significance because only approximately 5% of filed custody cases are ultimately decided by a judge. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 150 tbl.7.5 (1992). For an explanation of why this Article—and this dataset—is pertinent to most contested cases, including those that settle out of court, see *infra* note 197.

articulated in the domestic violence scholarship and literature but absent from 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 an abusive parent. The argument is supported by new empirical evidence validating the critiques of the domestic violence field and emphasizing the cognitive dissonance between the field’s critiques of family courts and mainstream family law and scholarship.

This Article then turns to the question the data raise: Why are mothers’ claims of abuse so widely denied in court? In addition to recognized explanations such as courts’ emphasis on shared parenting, gender bias, and misconceptions about abuse, it suggests another less recognized contributor—unconscious psychological denial, also referred to as unconscious denial or psychological denial. Only unconscious denial can adequately explain the illogical and counterfactual court decisions sometimes issued even by respected judges.

Finally, this 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 that fuel denial of credible abuse claims, in particular, 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, extensive scholarship, and social media reports to depict family courts’ common rejections of mothers’ evidence of family violence. It then presents the author’s data from the first-ever national, empirical study of family court cases involving abuse and parental alienation claims (the “Study,” “Family Court Outcomes Study,” or “FCO Study”).<sup>8</sup> The Study’s findings confirm that family courts reject mothers’ allegations of abuse by fathers at high rates and frequently remove mothers’ custody, thus 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. Both statutory frameworks and leading family law scholars idealize shared custody in ways that necessarily minimize and demote family violence concerns. Moreover, high-profile scholarship on child custody and family courts either neglect family violence altogether or

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8. The majority of the data included herein have not previously been published. However, a final summary overview containing all findings to date was prepared for the funder. See Joan S. Meier, Sean Dickson, Chris O’Sullivan, Leora Rosen & Jeffrey Hayes, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* (Geo. Wash. Univ. L. Sch., Working Paper No. 2019-56, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3448062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448062) [<https://perma.cc/D7C2-TQFL>]. A portion of the Study’s findings related to alienation have been published in Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?*, 42 J. SOC. WELFARE & FAM. L. 92 (2020).

reflect fundamental misconceptions about courts' responses to women and children's allegations of abuse.

Part III contrasts the widespread denial of family violence in family courts with the palpable shift toward greater societal recognition of men's abuse of women employees catalyzed 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 societal denial of many humanly inflicted traumas, including not only violence against women and children but also political and war traumas, have been explicated in significant social science research.<sup>9</sup> Western society at large has recently begun to shed the denial of men's sexual abuse in employment as a result of the #MeToo movement, although the implications of this new awareness remain highly contested even in the employment context.<sup>10</sup> In the family courts, where—unlike non-legal settings—both the facts and 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 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, at best, of mothers' pathology or excessive “gatekeeping” toward ex-partners they no longer love or trust and at worst, of mothers' malice and vengeance. Without directly ruling out or confirming abuse, PA thinking deflects courts' attention away from women's and children's abuse allegations and encourages courts 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 PA 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 PA is cabined so it cannot be used to short-circuit abuse investigations and brush aside children's reported experiences and feelings. While courts must remain free to reject the

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9. See JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 20–21, 28–32 (1997) (analogizing society's early refusal to recognize and compassionately treat “shell shock” to society's cyclical denial of the “war between the sexes”).

10. See, e.g., Jane Mayer, *The Case of Al Franken: A Close Look at the Accusation Against the Former Senator*, *NEW YORKER* (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken> (quoting lawyer Debra Katz as stating: “All offensive behavior should be addressed, but not all offensive behavior warrants the most severe sanction”).

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 cements preexisting predilections toward disbelief of women and children's claims of abuse. Second, the law needs to change courts' zero-sum approach to abuse allegations, that is, the presumption that "if it is not proven true, then it is false." Given that not all true abuse (particularly child sexual abuse) is easily proven, and given the human tendency toward avoidance of such painful realities, the law should recognize the need for—and require courts to employ—a nuanced response in situations of indeterminacy.<sup>11</sup>

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 both scholars and 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; the first two are described here: The parties met when Ms. G. was eighteen and in high school, and Mr. G. was thirty.<sup>12</sup> Nine years into the marriage they were divorcing and contesting custody of the parties' two sons and one daughter.<sup>13</sup> Mr. G.'s frequent verbal abuse of Ms. G. was admitted.<sup>14</sup> Both the children and Ms. G. lived in fear of Mr. G.<sup>15</sup> While Mr. G. had previously admitted to battering, hitting, and slapping her, and the neutral evaluator reported that he admitted to "hitting" her four or five times, at trial he asserted that she always hit him first.<sup>16</sup> He did admit to having grabbed and shaken his wife by the head while screaming "shut up, shut up, shut up[!]" in her face.<sup>17</sup> The previous couples' 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.<sup>18</sup> A police report describing Mr. G.'s recent hospitalization for a deliberate overdose was admitted.<sup>19</sup>

The court-appointed evaluator was not receptive to Ms. G.'s descriptions of Mr. G.'s family violence, and without reviewing any corroborative evidence,

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11. For explication of what a nuanced response would entail, see *infra* Part V. I am grateful to June Carbone for emphasizing this idea in our early discussions.

12. See Brief Amici Curiae on Behalf of the Domestic Violence Legal Empowerment & Appeals Project, Justice for Children, National Coalition Against Domestic Violence, & Leadership Council on Child Abuse & Interpersonal Violence in Support of Appellant at 6, *Ms. G. v. Mr. G.*, (Va. Ct. App. 2011) (on file with author) [hereinafter Brief Amici Curiae]. In the interest of litigants' privacy, I redacted the case names, specific dates, docket numbers, and database identifiers of several family court cases used in this Article. Redacted versions of these documents are on file with the author and can be provided upon request.

13. See E-mail from Ms. G. to author (Mar. 9, 2020, 2:30 PM) (on file with author).

14. See Brief Amici Curiae, *supra* note 12, at 15.

15. See *id.* at 21.

16. See *id.* at 6–10.

17. See *id.* at 8.

18. See *id.*

19. See Opening Brief of Appellant at 5, *Ms. G. v. Mr. G.*, (Va. Ct. App. 2011) (on file with author).

concluded that the children were not “current[ly]” afraid of their father.<sup>20</sup> The court-appointed guardian ad litem declined to focus on the allegations of abuse but did raise the unpaid fees Ms. G. owed from the first trial.<sup>21</sup> Both neutral appointees viewed Ms. G. as an inadequate parent with two hard-to-control boys, and recommended continued physical custody of all three children with Mr. G.<sup>22</sup> The court also characterized Ms. G. as having emotional problems.<sup>23</sup> Despite the corroboration described above, including testimony from past counselors, the uncontested fact that the family repeatedly sought treatment for family abuse,<sup>24</sup> and even the neutral evaluator’s statement that Ms. G. “was a victim” of domestic violence,<sup>25</sup> the court stated in 2010: “If all of this abuse happened as you testified to, ma’am, I’m shocked that there is not any corroborative evidence of it.”<sup>26</sup> The judge awarded physical custody to Mr. G., who moved the children to Tokyo, Japan.<sup>27</sup>

In 2015, during a summer visit with their mother, after four more years of living with their father in Tokyo, the children reported ongoing physical and emotional abuse.<sup>28</sup> One child told his mother about his plans to commit suicide if forced to go back to his father.<sup>29</sup> The Virginia Commonwealth University Child Protection Team interviewed the children, diagnosed one child with post-traumatic stress disorder, and recommended a full “child [welfare] investigation.”<sup>30</sup> In the emergency court hearing, the fourteen-year-old daughter testified in chambers about the physical abuse at home.<sup>31</sup> At the subsequent hearing, Mr. G. admitted that the Japanese school sent a note after seeing one child’s bruises “instructing [him] not to hit” the child.<sup>32</sup> The same custody evaluator now found the children were “very agitated,” acting out, and had uncontrollable tics, but felt this was not an emergency nor raised anything new.<sup>33</sup> The same judge again stated that the “[c]ourt finds that there is no abuse of the children nor a history of family abuse,” and ordered custody to remain with the father.<sup>34</sup>

A final custody round, triggered by the father’s secret and unlawful move with the children to the United Arab Emirates, produced the same result.<sup>35</sup>

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20. See Brief Amici Curiae, *supra* note 12, at 13.

21. See Redacted Brief of Appellant at 25, 30, Ms. G. v. Mr. G., (Va. Ct. App. 2015) (on file with author).

22. See Brief Amici Curiae, *supra* note 12, at 5, 23.

23. See Opening Brief of Appellant, *supra* note 19, at 21.

24. See Brief Amici Curiae, *supra* note 12, at 19.

25. See *id.* at 10.

26. See *id.* at 20 (emphasis omitted).

27. See Redacted Brief of Appellant, *supra* note 21, at 4.

28. See *id.* at 4–5.

29. *Id.* at 6.

30. *Id.*

31. See *id.* at 7–9.

32. *Id.* at 8.

33. *Id.* at 8–9.

34. *Id.* at 17.

35. See *id.* at 2.



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 United States, and enrolled in college in the United States.<sup>36</sup> A year later, one son remained with his mother after his 2019 summer visit due to suicidality, requiring a month in full-time mental health care.<sup>37</sup> The third child remained with his father in the United Arab Emirates.<sup>38</sup>

#### A. QUALITATIVE RESEARCH AND ANECDOTAL REPORTS

Narratives like the *Ms. G. v. Mr. G.* case are regularly echoed by professionals and parents throughout the country. Thousands of self-described “protective parents”<sup>39</sup> regularly share their struggles in court on social media, and a growing body of scholarship describes similar cases while critiquing family courts.<sup>40</sup> Domestic violence organizations such as the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)<sup>41</sup> are regularly flooded with pleas for help from battered women litigating custody and reporting that judges and court-appointed custody evaluators reject their claims of abuse while seeking to maximize fathers’ access to children instead.<sup>42</sup> Over the past fourteen years, an annual national conference has brought together protective mothers, their lawyers, experts, and advocates wrestling with the family courts.<sup>43</sup>

The importance of adult domestic violence for custody determinations was first addressed in legal scholarship decades ago,<sup>44</sup> and since the early 2000s, domestic violence professors, lawyers, and researchers have been reporting the failure of

36. See E-mail from Ms. G. to author, *supra* note 13.

37. See *id.*

38. See *id.*

39. CAL. PROTECTIVE PARENTS ASS’N, <https://www.caprojectiveparents.org> [<https://perma.cc/3JCS-VFHA>] (last visited Feb. 14, 2022); see, e.g., CTR. FOR JUD. EXCELLENCE, centerforjudicialexcellence.org [<https://perma.cc/SFW2-GMW4>] (last visited Feb. 14, 2022); ONE MOM’S BATTLE: BLOG, <https://www.onemomsbattle.com/blog/> [<https://perma.cc/2F3F-RX9G>] (last visited Feb. 14, 2022); #THECOURTSAID, <https://www.thecourtsaid.org> [<https://perma.cc/Y3NV-DSAX>] (last visited Feb. 14, 2022). Localized activist efforts have had piecemeal success. See *CA Commission on Judicial Performance Audit & Reform*, CTR. FOR JUD. EXCELLENCE, <https://perma.cc/PM37-HP9R> (documenting concerted effort by several California groups that resulted in legislative mandate for audit of state family courts’ performance).

40. See *infra* notes 45–49.

41. In 2003, the author founded—and until late 2019 served as Director or Legal Director of—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, see *Protecting Survivors Through Appellate Advocacy in All 50 States*, DV LEAP, [www.dvleap.org](http://www.dvleap.org) [<https://perma.cc/KCR8-ZB5Y>] (last visited Feb. 14, 2022).

42. Although I no longer work with DV LEAP, I continue to receive ten to twenty e-mails and calls per month from (mostly) mothers desperate for assistance to undo or prevent court decisions putting their children in harm’s way.

43. But for the coronavirus pandemic, 2020 would have been the Battered Mothers’ Custody Conference’s fifteenth annual conference. See BATTERED MOTHERS CUSTODY CONF., <https://perma.cc/3EP5-L8N8>.

44. See, e.g., Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1096–97 (1991) (“[T]here must be systemic recognition that [domestic] violence is bad for the family.”).



family courts to act on that link.<sup>45</sup> Experts and 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.<sup>46</sup> Others have pointed out that family courts often fail to understand the implications of domestic violence for children and parenting,<sup>47</sup> award unfettered access

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45. For just some examples of the critical literature, see generally Debra Pogrud 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, 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 LAW & INEQ. 5 (2011) (discussing eighteen Minnesota cases involving domestic violence and parental alienation); Mike Brigner, *Why Do Judges Do That?*, in CIVIC RSCH. INST., DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 13-1 (Mo Therese Hannah & Barry Goldstein eds., 2010) (detailing judges' mistaken beliefs that abuse ends after separation, that violent husbands can be good fathers, and that women reporting abuse are often lying); Sharon K. Araj & Rebecca L. Bosek, *Domestic Violence, Contested Child Custody, and the Courts: Findings from Five Studies*, in CIVIC RSCH. INST., *supra*, at 6-2 (describing five separate state-based studies of Child Custody Outcomes in cases involving domestic violence and 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 Courts*, 5 J. CHILD CUSTODY 228 (2008) (discussing sixteen 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, Daphne J. Monary-Ernsdorff, Jennifer K. Koepsell & Victoria L. Holt, *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1006, 1011 (2005) (finding that mothers with a violent partner were no more likely to obtain custody than mothers in nonabuse cases, and that fathers with a history of committing abuse were denied visitation in only 17% of cases); Leigh S. Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709 (2005) (arguing that battered mothers' narratives are as essential as data for making change but were dismissed by the courts due to gender bias); Mary Przekop, Student Scholarship, *One More Battleground: Domestic Violence, Child Custody, and the Batters' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053 (2011); and Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003).

46. See 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 & Joyanna L. Silberg, *Six Myths That Place Children at Risk During Custody Disputes*, 7 FAM. & INTIMATE PARTNER VIOLENCE Q. 65, 66, 81 (2014); Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES' J. 38, 40-41 (1997).

47. See Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 298, 312 (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, 27 (2003); Meier, *supra* note 45, at 663.

or custody to abusive fathers,<sup>48</sup> and even cut children off completely from their protective mothers.<sup>49</sup> These draconian responses are particularly apparent where mothers (and children) allege child sexual abuse.<sup>50</sup> 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.<sup>51</sup>

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48. See Gina Kaysen Fernandes, *A National Child Custody Crisis: Why Are Moms Punished in Court*, UAADV NEWS BLOG (Jan. 19, 2010), <http://uaadvnewsblog.blogspot.com/2010/01/national-child-custody-crisis-why-are.html> [https://perma.cc/LV99-B8SQ]; Sally F. Goldfarb, *The Legal Response to Violence Against Women in the United States of America: Recent Reforms and Continuing Challenges*, U.N. Doc. EGM/GPLVAW/2008/EP.06, at 8–9 (2008), [https://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/expertpapers/EGMGPLVAW%20Paper%20\(Sally%20Goldfarb\).pdf](https://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Sally%20Goldfarb).pdf) [https://perma.cc/CL7Q-93LZ]; Meier, *supra* note 45, at 662 n.19, app. at 726–31 (finding that of thirty-eight appealed custody and domestic violence cases, thirty-five involved award of joint or sole custody to an alleged or adjudicated batterer; two-thirds were reversed on appeal); see also LUNDY BANCROFT, JAY G. SILVERMAN & DANIEL RITCHIE, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 142–61 (2d ed. 2012) (detailing batterers' advantages in custody litigation).

49. See, e.g., Joan S. 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); NANCY STUEBNER, LINDA KRAJEWSKI & GERALDINE B. STAHLY, *FAMILY COURTS' FAILURE TO PROTECT ABUSED CHILDREN IN CUSTODY DISPUTES* (2014), <https://irp-cdn.multiscreensite.com/0dab915e/files/uploaded/IVAT%20Poster%202014.pdf> [https://perma.cc/6S3G-8DU6] (finding that 85% of mothers in survey lost custody to abusers); NEUSTEIN & LESHER, *supra* note 45; INTER-AM. COMM'N ON HUM. RTS., *PETITION IN ACCORDANCE WITH INTERNATIONAL COMMISSION ON HUMAN RIGHTS RULES OF PROCEDURE 23 AND 49* (2007), <http://claudinedombrowski.blogspot.com/2013/08/dombrowski-et-el-v-usa-2007-petition.html> [https://perma.cc/KDH3-K2J4] (detailing ten cases in which U.S. family courts both suppressed evidence of adult and child abuse and awarded custody to abusers).

50. See Kathleen Coulborn Faller & Ellen DeVoe, *Allegations of Sexual Abuse in Divorce*, 4 J. CHILD SEXUAL ABUSE 1, 17–18 (1995) (describing how some courts sanctioned mothers for reporting child sexual abuse, especially those with more corroborative evidence); NEUSTEIN & LESHER, *supra* note 45; Sharon R. Lowenstein, *Child Sexual Abuse in Custody and Visitation Litigation: Representation for the Benefit of Victims*, 60 UMKC L. REV. 227, 239, 278 (1991) (finding that, of thirty-six cases alleged sexual abuse cases, two-thirds of the alleged perpetrators retained unsupervised visitation); BANCROFT ET AL., *supra* note 48, at 107–22; Madelyn Simring Milchman, *Misogyny in New York Custody Decisions with Parental Alienation and Child Sexual Abuse Allegations*, 14 J. CHILD CUSTODY 234, 236–37 (2017).

51. See The Court Said, FACEBOOK, <https://www.facebook.com/thecourtsaid/> [https://perma.cc/AL3X-9YWT] (last visited Feb. 15, 2022); Elizabeth Sheehy & Simon Lapierre, *Introduction to the Special Issue*, 42 J. SOC. WELFARE & FAM. L. 1, 2–3 (2020) (compiling papers from Italy, Spain, United Kingdom, Canada, United States, Australia, New Zealand, and Wales detailing consistent family court problems for abused women and the harmful impact of parental alienation crossclaims); JESS HILL, *SEE WHAT YOU MADE ME DO: POWER, CONTROL AND DOMESTIC ABUSE* (2019) (describing similar problems in Australia); Owen Bowcott, *Family Courts Not Safe for Domestic Violence Victims, Lawyers Say*, GUARDIAN (Feb. 19, 2020, 9:03 AM), <https://www.theguardian.com/law/2020/feb/19/family-courts-not-safe-for-domestic-violence-victims-lawyers-say> [https://perma.cc/Y5K6-UBM7] (discussing letter signed by 130 legal professionals describing pattern of not understanding or appropriately responding to family violence in the United Kingdom); Sigrún Sif Jóelsdóttir & Grant Wyeth, *Opinion, The Misogynist Violence of Iceland's Feminist Paradise*, FOREIGN POL'Y (July 15, 2020, 10:45 AM), <https://foreignpolicy.com/2020/07/15/the-misogynist-violence-of-icelands-feminist-paradise/>; MICHELLE LEFEVRE & JERI DAMMAN, *UNIV. OF SUSSEX, WHAT IS THE EXPERIENCE OF LAWYERS WORKING IN PRIVATE LAW CHILDREN CASES?* 19–20 (2020), <https://www.sussex.ac.uk/webteam/gateway/file.php?name=pd12-report-of-survey-final-11th-feb-2020.pdf&site=387> [https://perma.cc/VWW9-5PVZ] (detailing survey results in Sussex, United Kingdom, that found courts avoid and ignore family violence allegations and refuse to hold evidentiary hearings despite legal directive to do so); Lois

## 1. Harm to Children

The damage to children subjected to the care and custody of allegedly dangerous parents by family court orders<sup>52</sup> 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 who were sent to homes where abuse was alleged and even substantiated.<sup>53</sup> Another study provides troubling and concrete evidence of what happens to children in cases that go awry. Psychologist Joyanna Silberg and Registered Nurse Stephanie Dallam analyzed a series of "turned around" cases in which a first court disbelieved the abuse and failed to protect the child, but a second, later court found subsequent abuse and protected the child.<sup>54</sup> Silberg and Dallam found that in the majority of the turned around cases, children spent, on average, three years in the abusive parent's custody before another court reversed the decision.<sup>55</sup> Court records showed the children's deteriorating mental and physical conditions including anxiety, depression, dissociation, post-traumatic stress disorder, self-harm, and suicidality. One third

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Shereen Winstock, *Safe Havens or Dangerous Waters? A Phenomenological Study of Abused Women's Experiences in the Family Courts of Ontario* 39 (Oct. 17, 2014) (Ph.D. dissertation, Osgoode Hall Law School of York University), <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1044&context=phd> [<https://perma.cc/XYA4-5VS9>] (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").

52. While this Article focuses on cases with perpetrating fathers and victimized mothers, and while those cases constitute the majority of abuse-related cases in family courts, there is no doubt that abusive mothers, victimized fathers, and same-sex abusers and victims also exist. *See, e.g.*, Neil B. Guterman, Yookyong Lee, Shawna J. Lee, Jane Waldfogel & Paul J. Rathouz, *Fathers and Maternal Risk for Physical Child Abuse*, 14 CHILD MALTREATMENT 277 (2009); *Mothering Ourselves: Adult Survivors of Abusive Mothers*, RESILIENT RETREAT, <https://www.resilientretreat.org/mothering-ourselves-adult-survivors-of-abusive-mothers/> [<https://perma.cc/PJ6U-NQUP>] (last visited Feb. 15, 2022); Luca Rollè, Giulia Giardina, Angela M. Calderara, Eva Gerino & Piera Brustia, *When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence*, FRONTIERS PSYCH., Aug. 21, 2018, at 1. This author has handled two cases on behalf of protective fathers in which they were rejected and treated similarly to many protective mothers, raising a legitimate question as to whether courts' response is gender biased or rather biased against children and parents describing another parent as abusive. However, because the reality is that abusers are more often fathers and protective parents more often mothers, and both the shared parenting ideal, *see infra* Part II, and parental alienation theory, *see infra* Part IV, are deeply gendered, this Article speaks primarily of abusive fathers and protective mothers.

53. MICHAEL S. DAVIS, CHRIS S. O'SULLIVAN, KIM SUSSEY & MARJORY D. FIELDS, N.Y. LEGAL ASSISTANCE GRP., *CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS* 80 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf> [<https://perma.cc/23Y5-TXBM>].

54. *See* Joyanna Silberg & Stephanie Dallam, *Abusers Gaining Custody in Family Courts: A Case Series of Over Turned Decisions*, 16 J. CHILD CUSTODY 140, 153–54, 161–62 (2019).

55. *Id.* (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.* at 146–47. However, as a "case series," *id.* at 140, 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. *See* 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, 46–47 (2019).

of these children became suicidal; some ran away.<sup>56</sup> Some children survive the custody of an abusive parent only to commit suicide once they reach adulthood, due to the legacy of psychological torment they carry from their court-ordered suffering.<sup>57</sup> Even apart from ongoing abuse, the trauma and psychological harm to children who are precipitously removed from their loving, safe parent should be obvious.<sup>58</sup> The suffering caused by such court orders are regularly reported by now-adult children and protective parents on social media.<sup>59</sup>

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.<sup>60</sup>

56. See Silberg & Dallam, *supra* note 54, at 155.

57. See Rhonda Case, *Louis' Life Still Matters*, FREE AS THE SUN (Mar. 18, 2019), <http://web.archive.org/web/20190614130402/https://freeasthesun.com/2019/03/louis-life-still-matters/>.

58. See Press Release, Am. Psych. Ass'n, 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> [<https://perma.cc/7EAU-Z39P>] (describing immigrant child removals as traumatizing and causing "severe psychological distress"); Silberg & Dallam, *supra* note 54, at 160 (citing attachment research); Jennifer Collins, *Jennifer Collins Responds to Joan Meiers Article "When Abduction Is Liberation,"* AM. CHILD. UNDERGROUND: BLOG, <http://americancchildrenunderground.blogspot.com/2014/01/jennifer-collins-resopnds-to-joan.html> [<https://perma.cc/3G2B-ZZJM>] (last visited Feb. 15, 2022) (describing the experiences of a child who reported that after the court told a 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, and another was diagnosed with post-traumatic stress disorder. See *supra* note 34 and accompanying text.

59. See, e.g., Alex, *Alex's Story*, COURAGEOUS KIDS NETWORK: OUR STORIES (Feb. 2005), <https://web.archive.org/web/20150801090316/http://courageouskids.net/> ("DCFS had indicated 4 reports of abuse against him, yet the judge still made me go with him."); Stephanie Hope, *Stephanie's Story*, COURAGEOUS KIDS NETWORK: OUR STORIES (Dec. 4, 2008), <https://web.archive.org/web/20150801090316/http://courageouskids.net/> ("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 agains [sic] walls . . . . The judge gave him full legal and physical custody.").

60. CTR. FOR JUD. EXCELLENCE, *supra* note 39. Eighty percent of the killers were fathers; eleven percent were mothers; the remainder were other family members. E-mail from Brittany Elmore, Operations Manager, Ctr. for Jud. Excellence, to author (Sept. 23, 2021, 6:26 PM) (on file with author); see also 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., Lisa Finn, *Thomas Valva Remembered 1 Year After Death: 'They All Failed Him,'* PATCH (Jan. 17, 2021, 9:01 PM), <https://patch.com/new-york/center-moriches-eastport/thomas-valva-remembered-1-year-after-death-they-all-failed-him> [<https://perma.cc/JW6C-XWEL>] (describing family court and child protective services both rebuffing mother's repeated pleas); 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 being forced to sleep on concrete floor in freezing cold garage and then being bathed in cold water, and noting that the mother had reported the abuse for years).

## B. QUANTITATIVE EVIDENCE—FAMILY COURT OUTCOMES STUDY FINDINGS

The domestic violence and child abuse scholarship sounding 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,<sup>61</sup> or too trusting of women's allegations.<sup>62</sup> 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 abusers than to non-abusers, and treated "friendly parent" statutory provisions as outweighing domestic violence provisions.<sup>63</sup>

Recognizing the importance of national trend data as well as data on courts' responses to child maltreatment distinct from partner violence, in 2015 an expert team of colleagues<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> The Study's search for published opinions covered the ten-year period from January 1, 2005, through December 31, 2014. Two law graduates triaged over 15,000 cases that

61. See Richard A. Warshak, *When Evaluators Get It Wrong: False Positive IDs and Parental Alienation*, 26 PSYCH. PUB. POL'Y & L. 54, 54 (2020) (describing abuse experts' critiques of parental alienation, and advocacy to restrict its use in abuse cases, as an "extreme viewpoint"); NICK BALA, PARENTAL ALIENATION: SOCIAL CONTEXTS AND LEGAL RESPONSES 10 (2018) (on file with author) (depicting abuse critiques and aggressive PAS advocacy as two extremes with the purportedly 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*, 58 FAM. CT. REV. 270, 287 n.5 (2020) (citing several abuse experts' scholarship as subject to "scholar advocacy bias").

62. See NICK BALA, HIGH CONFLICT SEPARATIONS & CHILDREN RESISTING CONTACT WITH A PARENT 7 (2018) (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!").

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

64. 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 Jeffrey Hayes of the Institute for Women's Policy Research as quantitative analyst and preparer of the data for archiving.

65. *Child Custody Outcomes in Cases Involving Abuse Allegations and Parental Alienation*, NAT'L INST. OF JUST. (Sept. 16, 2014), <https://nij.ojp.gov/funding/awards/2014-mu-cx-0859> [<https://perma.cc/RY3E-23QK>].

66. The dataset of 4,388 electronically 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.



had been identified by our comprehensive search string and then coded, in detail, the 4,338 cases that fit the Study's criteria.<sup>67</sup>

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, the credibility of abuse or alienation claims, or children's best interests. By design, the Study simply maps out what courts report themselves to be thinking and deciding. 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 on those normative claims and is discussed below.<sup>68</sup>

### 1. Courts' Skepticism Toward Mothers' Abuse Claims<sup>69</sup>

The Study netted 2,189 cases<sup>70</sup> 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 42.6% of the time, they believed mothers' claims of child abuse only 20.8% (physical) and 19.4% (sexual) of the time.<sup>71</sup> This means that courts have 2.8 times lower odds of

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67. Far more information was coded than was capable of being analyzed during the Study's time frame; the complete dataset is available from the NIJ archives for secondary analyses. See *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations, United States, 2005-2014 (ICPSR 37331)*, NAT'L ARCHIVE OF CRIM. JUST. DATA (Mar. 30, 2021), <https://www.icpsr.umich.edu/web/NACJD/studies/37331> [<https://perma.cc/4LC9-8LU4>].

68. See *infra* Section I.B.2. Some additional limitations of the Study are described in Meier et al., *supra* note 8. There has been one published critique of the Family Court Outcomes study. See Jennifer J. Harman & Demosthenes Lorandos, *Allegations of Family Violence in Court: How Parental Alienation Affects Judicial Outcomes*, 27 PSYCH. PUB. POL'Y & L. 184, 184 (2020). Harman and Lorandos's critiques and original research are refuted as speculative, false, and invalid in Joan S. Meier, Sean Dickson, Chris S. O'Sullivan & Leora N. Rosen, *The Trouble with Harman and Lorandos's Attempted Refutation of Meier et al. Family Court Study*, TAYLOR & FRANCIS ONLINE: J. FAM. TRAUMA CHILD CUSTODY & CHILD DEV. (Feb. 28, 2022), <https://www.tandfonline.com/doi/full/10.1080/26904586.2022.2036286> [<https://perma.cc/8RM5-WN5F>] and Joan S. Meier, Sean Dickson, Chris S. O'Sullivan & Leora N. Rosen, *Harman and Lorandos's False Critique of Meier et al.'s Family Court, Abuse and Alienation Study*, J. FAM. TRAUMA CHILD CUSTODY & CHILD DEV. (forthcoming) (on file with author).

69. 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, in which fathers accuse mothers of abuse and mothers crossclaim alienation, are also discussed for purposes of a direct gender comparison.

70. These data have not previously been formally published. They were posted online in the final summary overview submitted to the National Institute of Justice. See Meier et al., *supra* note 8. The only journal publication of the Study to date focused solely on court responses to cases with and without alienation crossclaims. See Meier, *supra* note 8. By contrast, the data newly reported in this Section reflect all cases with abuse allegations, regardless of whether alienation was crossclaimed.

71. See DICKSON, *supra* note 6, at 1–2 tbls.8, 9 & 10. It should be noted that much of the Study data consists of simple frequencies, the percent of cases in which one thing or another occurred. Frequencies are purely descriptive and not subject to significance testing, especially in this dataset, which is a complete census and not a sample. Where we make gender or other comparisons, we report odds ratios. These meet statistical significance standards unless otherwise noted.

crediting child physical abuse<sup>72</sup> and 3.1 times lower odds of crediting child sexual abuse claims than domestic violence claims.<sup>73</sup> On average, courts credited mothers' abuse allegations approximately one-third (36.3%) of the time.<sup>74</sup> These data (and others)<sup>75</sup> pointedly contradict the all-too-frequently claimed conventional wisdom that women need merely to claim abuse in court to win custody of their children.<sup>76</sup>

Courts' even greater rejection of mothers' *child abuse* claims (crediting roughly only one-fifth) is particularly stunning. The lack of attention to this subject in even the domestic violence literature<sup>77</sup> is beyond the scope of this Article but is addressed elsewhere.<sup>78</sup> Given the substantial degree of overlap between these phenomena and courts' responses to them, this Article and the Study will hopefully spur future integrated research and analysis.<sup>79</sup>

#### 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 attempted to quantify courts'

72. *Id.* at 3 tbl.18. ( $P < 0.001$ , CI 2.1–3.8). The math behind these odds ratios can be performed as follows: in our Study, in cases where the father was accused of domestic violence, the court believed the mother's accusation in 42.6% of cases and did not believe the mother in 57.4% of cases. In cases of physical child abuse, courts believed the mothers 20.8% of the time and did not believe the mother 79.2% of the time. The odds ratio can be calculated by converting those four percentages to decimal and performing the following calculation:  $(.426/.574)/(.208/.792) = (.742/.263) = 2.82$ .

73. *Id.* ( $P < 0.001$ , CI 2.3–4.2).

74. *Id.* at 3 tbl.11.

75. See Teresa E. Meuer, Tony Gibart & Adrienne Roach, *Domestic Abuse: Little Impact on Child Custody and Placement*, ST. BAR WIS. (Dec. 13, 2018), <http://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=91&Issue=11&ArticleID=26737> [<https://perma.cc/Y4PS-7J5V>] (reporting that even criminal convictions for domestic violence did not affect 50% of cases, which resulted in shared legal custody, including negotiated settlements).

76. See, e.g., ALEC BALDWIN, A PROMISE TO OURSELVES: A JOURNEY THROUGH FATHERHOOD AND DIVORCE 198 (2008) (quoting Harvard Law Professor Jeannie Suk claiming that “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 “involve some allegation of violence”); ALEXA DANKOWSKI, SUZANNE GOODE, PHILIP GREENSPUN, CHACONNE MARTIN-BERKOWICZ & TINA TONNU, REAL WORLD DIVORCE: CUSTODY, CHILD SUPPORT, AND ALIMONY IN THE 50 STATES ch. 9 (2017) (ebook), <http://www.realworlddivorce.com/DomesticViolence> [<https://perma.cc/FD9M-DJA5>] (“All that [a woman] needs . . . is to say ‘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.”).

77. 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* note 54, at 157 (describing a majority of children in the sample as having been physically or sexually abused).

78. See Joan S. Meier & Vivek Sankaran, *Breaking Down the Silos that Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals*, 28 VA. J. SOC. POL’Y & L. 275 (2022).

79. See Claire Houston, *What Ever Happened to the “Child Maltreatment Revolution”?*, 19 GEO. J. GENDER & L. 1, 37 (2018) (advocating for more feminist activism to strengthen legal responses to child maltreatment); see also Meier & Sankaran, *supra* note 78 (manuscript at 2) (describing tensions and contradictions between the two fields).



own findings and rulings. Thus, some might argue that courts' low rates of crediting of mothers' abuse claims is legitimate because women do, in fact, often falsely allege abuse.<sup>80</sup> A brief review of what is known about the credibility of women's abuse claims is thus warranted.

Bringing objective research to bear on this question is, of course, quite difficult because 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 common, even relatively conservative institutional assessors found the majority of women's claims of partner abuse in court to be valid, ranging from 67% to 93%.<sup>81</sup> 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 outside evaluators' perceptions of mothers' and children's allegations of child abuse. A review of the extant research by leading University of Michigan expert Kathleen Faller found that multiple studies described 50% to 72% of child sexual abuse allegations in custody litigation as likely valid, that approximately one-third of allegations were "uncertain," and that credible research found malicious or pathological allegations in only 7.7% (13/169) and 4.6% of cases.<sup>82</sup> A large Canadian study across several jurisdictions found that only 12% of child sexual abuse allegations in cases involved with custody litigation were deemed by the child welfare agency to be intentionally

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80. 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., *Domestic Violence*, FATHERS FOR EQUAL RTS., <https://fathers4kids.com/issues/domestic-violence> [<https://perma.cc/Q72Y-WVT8>] (last visited Feb. 16, 2022) ("Fathers' 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 objective basis. See, e.g., sources cited *supra* notes 61–62.

81. Martha Shaffer & Nicholas Bala, *Wife Abuse, Child Custody and Access in Canada*, 3 J. EMOTIONAL ABUSE 253, 260 (2003) (judges believed thirty out of forty-two (71%) women's allegations of partner abuse in custody context); MATTHEW BILESKI & PHILLIP STEVENSON, ARIZ. CRIM. JUST. COMM'N, THE REPORTING OF SEXUAL ASSAULT IN ARIZONA, CY 2002-2011, at 2 (2013) (identifying only one reported case of false reporting of spousal sexual assault over ten-year period); Wendy Davis, *Gender Bias, Fathers' Rights, Domestic Violence and the Family Court*, 4 BUTTERWORTHS FAM. L.J. 299, 304–05 (2004) (quoting the New Zealand Law Commission which found "no empirical or qualitative evidence to substantiate . . . allegations' that 'women were making strategic use of protection orders to prejudice fathers' positions in custody disputes,'" and reflecting Davis' own experience that only two of the twenty-seven contested factual hearings in protective order cases she worked on between 1996 and 2004 resulted in courts finding against the woman's credibility, and even in those two cases the parties agreed that the incidents had occurred (alteration in original)). *But cf.* Janet R. Johnston, Soyoung Lee, Nancy W. Olesen & Marjorie G. Walters, *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 284–85, 289, tbl.3 (2005) (summarizing several other studies of false allegations, but finding that custody evaluators substantiated 41% of mothers' spousal abuse allegations).

82. See Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What Is It and What Data Support It?*, 3 CHILD MALTREATMENT 100, 107–08 (1998); see also Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 161 (1990); BANCROFT ET AL., *supra* note 48, at 119–20 (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).

fabricated.<sup>83</sup> Most interestingly, custodial parents (mostly mothers) and children were found to be the *least* likely to fabricate (16%).<sup>84</sup> Most false claims were by noncustodial parents (mostly fathers) (43%).<sup>85</sup> Likewise, other research indicates that the primary fabricators of child abuse and neglect reports to child welfare agencies are noncustodial parents, primarily fathers.<sup>86</sup>

In spite of this objective evidence that most women alleging abuse are not fabricating, court professionals' broad skepticism of women's allegations persists. This attitude is in part an outgrowth of our culture's history of misogyny and denial of violence against women, as has been eloquently described by other scholars.<sup>87</sup> These beliefs are not just inherited consciously or unconsciously; they are sometimes explicitly taught: Two sources from opposite coasts have independently reported that experienced judges regularly warn new family court judges against believing women's abuse allegations.<sup>88</sup> Thus, former San Diego Judge DeAnn Salcido has described classes which warned new judges to be skeptical of the timing of child abuse allegations by women.<sup>89</sup> And, as is discussed in Part III, ubiquitous "parental alienation" trainings implicitly teach courts that women and children's abuse allegations may be signs of alienation, not actual abuse.<sup>90</sup>

83. See Nico Trocmé & Nicholas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, 29 CHILD ABUSE & NEGLECT 1333, 1342 (2005).

84. See *id.*

85. See *id.* 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 of being false, and 4% intentionally false. Nicholas MC Bala, Mindy Mitnick, Nico Trocmé & Claire Houston, *Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?*, 13 J. FAM. STUD. 26, 30 (2007). Again, few *mothers'* allegations were deemed intentionally false—noncustodial parents (usually fathers) were more likely fabricators. *Id.* 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.*

86. See, e.g., Heather Douglas & Emma Fell, *Malicious Reports of Child Maltreatment as Coercive Control: Mothers and Domestic and Family Violence*, 35 J. FAM. VIOLENCE 827, 830–33 (2020) (studying batterers' malicious use of false abuse reports to child welfare agencies).

87. See *id.* at 828; Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 402 (2019); Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>; see also BANCROFT ET AL., *supra* note 48.

88. Meeting Minutes from Workgroup to Study Child Custody Court Proceedings Involving Domestic Violence or Child Abuse Allegations 7 (Jan. 28, 2020), [http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnChdAbuseDomViol/January\\_28\\_2020\\_minutes.pdf](http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnChdAbuseDomViol/January_28_2020_minutes.pdf) [<https://perma.cc/HF4P-7R9J>] (reporting that judicial interviews indicated that "the older seasoned judges warn[ed] the incoming judges not to believe women"); Claudine Dombrowski, *Lost in System: Former Family Court Judge Whistleblower Speaks Out Salcido*, YOUTUBE (Oct. 6, 2012), <https://www.youtube.com/watch?v=MvA5hfTdsWI> (recording of Fox News 11 interviewing former San Diego Judge DeAnn Salcido who noted that she was trained to be suspicious of women's claims).

89. *Id.* at 4:00 (stating that judges in meetings disparaged women who claimed domestic violence as being "on [their] period.")

90. See *infra* Part III.

The studies of false abuse allegations described above relied on the opinions of evaluators and child welfare workers, inevitably reflecting the opinions and potential biases of these assessors, who are known to be conservative in their views of abuse allegations.<sup>91</sup> Yet, as noted above, even these skeptical reviewers of abuse claims arising in custody litigation have typically viewed one-half to three-quarters of women's domestic violence and child abuse claims in this context as valid.<sup>92</sup> Paired with the extensive anecdotal and survey reports of heart-breaking family court cases, it seems likely that contemporary courts' refusals to take seriously roughly 80% of child abuse claims mean they are putting a significant number of children at significant risk. And as will be seen in Part IV, alienation crossclaims roughly double courts' skepticism, especially of child abuse claims.<sup>93</sup>

## 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 removals of custody from alleging mothers are common: mothers alleging a father's abuse lost custody in 28.4% (384/1353) of all cases, ranging from a low of 22.6% (when alleging adult domestic violence) to a high of 55.6% (when alleging both physical and sexual child abuse).<sup>94</sup> When a mother alleged any type of child abuse, she had 1.7 times greater odds of losing custody than when she alleged domestic violence.<sup>95</sup>

In striking contrast, when the genders were reversed, the outcomes were quite different. Fathers reporting abuse by a mother lost custody only 11.8% of the time when alleging child physical abuse.<sup>96</sup> Mothers' odds of losing custody are three times greater than fathers' when either accuses the other of any kind of abuse;<sup>97</sup> when they allege child abuse (physical or sexual), mothers have 4.2 times greater odds of losing custody.<sup>98</sup>

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 still awarded the father custody 12.7% (64/505) of the time.<sup>99</sup> In contrast, when courts believed

91. See BANCROFT ET AL., *supra* note 48, at 119 ("We have found CPS investigators to be highly skeptical of sexual abuse allegations with concurrent custody disputes . . ."); *infra* Section I.B.4 (describing research documenting evaluators' strong biases against believing mothers' abuse allegations in custody litigation).

92. See *supra* note 82 and accompanying text.

93. See *infra* Part IV.

94. See DICKSON, *supra* note 6, at 4–5 tbls.21, 22 & 23. "Alleged" means the abuse claim may or may not have been credited.

95. *Id.* at 5 tbl.29. (P<0.001, CI 1.4–2.2).

96. *Id.* at 5–6 tbls.31, 32 & 33. There were only six cases where a father accused a mother of child sexual abuse; in two of those the father lost custody. *Id.* at 6 tbl.33. These numbers—as opposed to those in the text—are far too small to be statistically significant.

97. See *id.* at 7 tbl.41 (P<0.001, CI 1.7–5.1).

98. See *id.* at tbl.44 (P<0.001, CI 2.1–8.6).

99. *Id.* at 8 tbl.46.

mothers had committed any type of abuse, they received custody only 3.9% (2/51) of the time.<sup>100</sup>

### 3. The Role of Neutral Professionals

Judges in custody cases understandably often doubt their own expertise to determine children's "best interests" — hardly a question of law. Accordingly, many rely heavily on outside neutral professionals, either psychological experts in the role of custody evaluators or legal and psychological appointees in the role of guardians *ad litem* (GAL).<sup>101</sup> In fact, it is rare for court decisions to diverge substantively from evaluators' analyses of the facts or GALs' recommendations.<sup>102</sup> Any discussion of court responses to custody and abuse cases is therefore incomplete without discussion of these professionals, who have been the subject of significant scholarly and lay criticism and concern.

The quality and validity of forensic evaluations in custody litigation have long been powerfully challenged even by mainstream family law scholars.<sup>103</sup> The mainstream critique—of a lack of valid science underlying evaluators' opinions and predictions about children's best interests—has not been meaningfully rebutted. Leading family law scholars Elizabeth S. Scott and Robert E. Emery have thus proposed that a fairer and more reliable system would mean: "Expert opinions about the optimal custody arrangement would be excluded, along with unscientific diagnoses such as PAS. Beyond this, MHPs would be discouraged from

100. *Id.* at tbls.46 & 47.

101. See Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 193 (2005). While the roles of GALs are defined differently by different states, most states treat the GAL's role as advocating for a child's "best interests" as seen by the GAL. See, e.g., D.C. CODE § 21-2033(a) (2021) (court may appoint a GAL to "prosecute or defend the best interests of individuals in any legal proceeding if the court determines that representation of the interest otherwise would be inadequate"). The Study coded a GAL present if there was any lawyer appointed to represent the child or their best interests. Such "best interests" determinations are given substantial deference by courts even when GALs are not mental health professionals; most are in fact lawyers with no particular expertise. See Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 109 (2002).

102. See Tippins & Wittman, *supra* note 101, at 215; Nancy S. Erickson & Chris S. O'Sullivan, *Doing Our Best for New York's Children: Custody Evaluations When Domestic Violence Is Alleged*, 23 NYS PSYCH. 9, 9 (2011). Moreover, these professional opinions also have significant influence on parties' negotiated settlements. 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, 63, 66 (2011) (GALs' roles and reports can increase the likelihood of settlement).

103. For instance, former Social Science Editor of *Family Court Review* Robert Emery, leading scholar Elizabeth Scott, and pioneering researcher Robert Mnookin have asserted that "[p]sychologists and mental-health professionals continue to make predictive claims that cannot be justified by social-science research." Robert Mnookin, *Child Custody Revisited*, 77 LAW & CONTEMP. PROBS. 249, 251 (2014); see also Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 91–95 (2014); *id.* at 94 ("[M]any MHPs use clinical observations to make speculative predictions and substantiate favored diagnoses or constructs that are without scientific foundation.").

offering pure credibility assessments, unsubstantiated predictions, or qualitative assessments on the basis of unsupported inferences.”<sup>104</sup>

The critiques grow more pointed in the context of custody/abuse cases. Multiple experts in the domestic violence field have independently produced empirical research demonstrating evaluators’ lack of domestic violence or child abuse expertise and a general predilection for treating abuse allegations as evidence of parental alienation rather than an indication of risk to children.<sup>105</sup> The Silberg and Dallam case series found that evaluators and GALs were generally suspicious of all abuse claims; and when domestic violence was known, it was ignored.<sup>106</sup> These opinions significantly contributed to children’s being ordered into the care of abusive parents.<sup>107</sup> Other studies have found that evaluators failed to recommend protective measures for children even when abuse allegations were substantiated.<sup>108</sup>

Evaluators’ lack of appreciation of these issues may reflect their general lack of specialized knowledge or experience in the abuse field.<sup>109</sup> Research has demonstrated that the litigants’ personalities and evaluators’ pre-existing beliefs about men, women, and abuse drive evaluators’ findings and recommendations more than the facts of the case.<sup>110</sup> Only six states require evaluators to receive

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104. Scott & Emery, *supra* note 103, at 105.

105. See DANIEL G. SAUNDERS, KATHLEEN C. FALLER & RICHARD M. TOLMAN, CHILD CUSTODY EVALUATORS’ BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 119 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf> [<https://perma.cc/W9DT-F795>] (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 JUST. PROJECT, MIND THE GAP: ACCOUNTING FOR DOMESTIC ABUSE IN CHILD CUSTODY EVALUATIONS 15 (2012), [https://www.bwjp.org/assets/documents/pdfs/mind\\_the\\_gap\\_accounting\\_for\\_domestic\\_abuse\\_in\\_child\\_custody\\_evaluations.pdf](https://www.bwjp.org/assets/documents/pdfs/mind_the_gap_accounting_for_domestic_abuse_in_child_custody_evaluations.pdf) [<https://perma.cc/PSA8-9U6Z>] (stating that evaluators “obscured, discounted, or explained” violence away); Silberg & Dallam, *supra* note 54, at 150–51 (finding that 85% of mental health appointees and 73% of GALs rejected abuse claims, and 67% of courts cited these opinions); Jason D. Hans, Jennifer L. Hardesty, Megan L. Haselschwerdt & Laura M. Frey, *The Effects of Domestic Violence Allegations on Custody Evaluators’ Recommendations*, 28 J. FAM. PSYCH. 957, 963 (2014).

106. See Silberg & Dallam, *supra* note 54, at 157–58.

107. See *id.* at 151 (“Although the role of the GAL is to protect the interests of children, the involvement of GALs in the cases studied often contributed to children not being believed or protected from abuse. In 73% of cases for which we had data, the GAL sided with the perpetrator against the child.”).

108. See DAVIS ET AL., *supra* note 53 (finding that most custody evaluators’ recommendations were unsafe for children even where abuse was substantiated).

109. See SAUNDERS ET AL., *supra* note 105, at 116, 129, 131. Like judges, evaluators often make decisions in reaction to litigants’ demeanor rather than the facts. 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. See Jennifer L. Hardesty, Jason D. Hans, Megan L. Haselschwerdt, Lyndal Khaw & Kimberly A. Crossman, *The Influence of Divorcing Mothers’ Demeanor on Custody Evaluators’ Assessment of Their Domestic Violence Allegations*, 12 J. CHILD CUSTODY 47, 58, 64–65 (2015).

110. See Hardesty et al., *supra* note 109, at 64–65. Several studies have found that custody evaluators fall into two philosophical groups: (1) those who understand domestic violence and abuse and believe it is important in the custody context, and (2) those who lack such understanding, are skeptical of abuse allegations, and believe such allegations are evidence of alienation. See Megan L. Haselschwerdt,



specialized training in domestic violence or child abuse, although it is hard to know whether these requirements are enforced.<sup>111</sup> While less empirical research has been performed on GALs, they too have been subject to longstanding critiques of their roles in custody and abuse cases.<sup>112</sup>

The inclusion of these appointed professionals, particularly when courts inappropriately defer to their judgments as to the existence and importance of abuse, profoundly undermines family courts' ability to protect the children most at risk. The following narrative exemplifies the problem.

*a. Case Narrative*

For over three years between the ages of six and ten, E.D. described in detail multiple episodes of her father's sexual abuse to her therapist Dr. G., two forensic evaluators, and a subsequent therapist, Dr. L.<sup>113</sup> 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.'"<sup>114</sup> During this time, E.D. only once saw her father, who was under criminal investigation for her abuse.<sup>115</sup> The criminal charges were subsequently dropped.<sup>116</sup>

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Jennifer L. Hardesty & Jason D. Hans, *Custody Evaluators' Beliefs About Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. INTERPERSONAL VIOLENCE 1694, 1703–04 (2011) (finding that evaluators' ideologies and level of knowledge about domestic violence had more impact on recommendations than facts of cases); TK Logan, Robert Walker, Carol E. Jordan & Leah S. Horvath, *Child Custody Evaluations and Domestic Violence: Case Comparisons*, 17 VIOLENCE & VICTIMS 719, 735 (2002) (recognizing that evaluators did not see domestic violence as relevant to child safety); SAUNDERS ET AL., *supra* note 105, at 124–25 (describing evaluators' "patriarchal" beliefs); Smith & Coukos, *supra* note 46, at 39, 42. *See generally* 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).

111. Alaska, Arizona, California, Louisiana, and Oklahoma have statutorily required evaluators to receive domestic violence training. *See* FEERICK CTR. FOR SOC. JUST., FORDHAM L. SCH., APPENDIX A: STATE-BY-STATE SURVEY RELATED TO FORENSIC EVALUATORS 1, 4 (2012), <https://perma.cc/ZEL6-TUDF>; Alaska Dist. Ct. R. Civ. P. 90.6; ARIZ. REV. STAT. § 25-406 (2021); CAL. FAM. CODE § 3110.5 (2020); LA. STAT. ANN. §§ 9:331, 9:365 (2021); OKLA. STAT. tit. 43, § 120.7.D. (2021). The sixth state, Colorado, adopted a requirement for both domestic violence and child maltreatment training just as this article was being finalized, in 2021. *See* 2021 Colo. Sess. Laws 1727.

112. Powerful critiques of the concept and implementation of GALs in custody cases—particularly those involving family violence—date back over twenty years. *See generally* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998); Ducote, *supra* note 101; Nancy S. Erickson, *Confusion on the Role of Law Guardians*, 8 N.Y. FAM. L. MONTHLY 1 (2007); Julie R. Ancis & Laurel B. Watson, *Women's Experiences with and Perceptions of Guardians Ad Litem in Divorce and Custody Disputes*, in 2 DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 8-1 (Mo Therese Hannah & Barry Goldstein eds., 2016).

113. *See* Brief of Amici Curiae at 2, K.D. v. M.D., (Ga. Ct. App. 2015) (on file with author). The author worked on two amicus briefs in the mid- and top-level courts of appeals in this case. *See id.*; Amicus Curiae Brief of Georgia Network to End Sexual Assault, et al., In Support of Appellant's Petition for Writ of Certiorari, K.D. v. M.D., (Ga. 2015) (on file with author).

114. Brief of Amici Curiae, *supra* note 113, at 2 n.3 (alteration in original).

115. *Id.* at 11.

116. *See* Petition for Writ of Certiorari at 5, K.D. v. M.D., (Ga. 2015).

Each of these professionals was recognized as an expert in child sexual abuse, and the two forensic evaluators also qualified as experts in psychosexual evaluations, child psychology, and forensic examinations of children for sexual abuse.<sup>117</sup> Three of the four found that E.D. either was or may have been sexually abused.<sup>118</sup> Two experts also diagnosed her with post-traumatic stress disorder.<sup>119</sup> Three recommended treatment for sexual abuse.<sup>120</sup> They were all retained by E.D.'s mother.<sup>121</sup>

The fourth, Dr. L., after reporting one of E.D.'s disclosures to child protection services because she found it credible, expressed ambivalence about the accuracy of E.D. and her mother's potential role.<sup>122</sup> She described both "consistencies and . . . inconsistencies" in the child's reports but stated "I wouldn't say that I have the opinion that she is not telling the truth about sexual abuse."<sup>123</sup>

The court appointed a GAL and a custody evaluator as neutrals. 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.<sup>124</sup> The GAL promptly recommended that contact and reunification therapy begin between the minor child and her father.<sup>125</sup> During the reunification efforts, the minor child began exhibiting extreme dissociative, somatic, and behavioral symptoms, including night terrors.<sup>126</sup>

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."<sup>127</sup> 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.<sup>128</sup> In response to the significant evidence that the father had sexually abused the minor child, the GAL testified that he

"refuses to address this issue [of whether the father 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 the [minor child] moving forward," and he, instead, "leaves [the issue of whether the father sexually abused the minor child] with hope." He then testified that he did not find the minor child's statements to be credible because

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117. See Brief of Amici Curiae, *supra* note 113, at 2–4.

118. See *id.* at 2, 4.

119. See *id.* at 2.

120. See *id.* at 2–3.

121. See Petition for Writ of Certiorari, *supra* note 116, at 10–11.

122. See Brief of Amici Curiae, *supra* note 113, at 3, 6.

123. *Id.* at 4 & n.8.

124. See *id.* at 7.

125. See *id.* at 12.

126. See *id.*

127. Petition for Writ of Certiorari, *supra* note 116, at 7.

128. See Brief of Amici Curiae, *supra* note 113, at 7–8.



there were too many inconsistencies and contradictions in her accounts of the abuse . . . .<sup>129</sup>

The evaluator and GAL “implied that all of E.D.’s reports, emotions, behaviors, and symptoms” were derived from the supposed fact that the mother’s identity was “wrapped around E.D. being a victim of sexual abuse.”<sup>130</sup> The custody evaluator posited that the mother’s influence “did not allow E.D. to have her own independent thoughts because mother and child were ‘enmeshed.’”<sup>131</sup> He admitted to having no expertise in child abuse, child sexual abuse, or dissociation.<sup>132</sup> He further stated that “even if there was a finding of sexual abuse, he would still recommend giving the father some custody.”<sup>133</sup>

The court accepted the neutrals’ recommendations and, having temporarily reversed custody from the mother to the father, and with the child appearing to have adjusted to her father’s custody, affirmed the temporary order and made it permanent.<sup>134</sup>

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Notwithstanding the extensive evidence of sexual abuse in this case, the neutral professionals’ reliance on pathologizing children and the mothers who believe them, their dismissiveness toward abuse allegations as evidence of such pathology, and their prioritization of fathers’ parenting rights are far from unique. Moreover, scholarly research has found that when mothers present more evidence of sexual abuse (including medical evidence), courts respond more punitively.<sup>135</sup>

#### *b. Study Findings*

The data produced by the FCO Study, while lacking a qualitative discussion, reinforce both the earlier research and the complaints of litigants and allied professionals seeking to keep children safe in family court litigation. The Study’s descriptive statistics demonstrate that the presence of both evaluators and GALs is associated with significantly less acceptance of mothers’ abuse allegations and significantly more removals of custody.<sup>136</sup>

129. Petition for Writ of Certiorari, *supra* note 116, at 11–12 (citation omitted).

130. Brief of Amici Curiae, *supra* note 113, at 19.

131. *See id.* at 7–8.

132. *See id.* at 7.

133. *See id.* at 8 (emphasis omitted).

134. *See* Final Order on Custody, Visitation and Child Support at 4, 9, *M.D. v. K.D.*, (Ga. Sup. Ct. 2013). E.D.’s undisputed disclosures included direct and specific verbal descriptions (for example, 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. *See* Brief of Amici Curiae, *supra* note 113, at 16. *See generally id.*, for other details.

135. *See* Faller & DeVoe, *supra* note 50, at 18, 23.

136. It is important to remember that the Study does not and cannot judge the truth or falsity of mothers’ abuse allegations or the good faith of their attempts to limit an allegedly abusive father’s

On average, the presence of a guardian *ad litem* in a case reduced courts' findings that mothers' abuse allegations were credible from 38% to 32.7%, meaning that mothers' abuse claims have 1.3 times greater odds of being credited *without* a GAL than *with* one.<sup>137</sup> 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 (32.3% versus 30.8%).<sup>138</sup>

Likewise for evaluators: the data show that mothers' claims of abuse have 1.4 times greater odds of being credited by the court if there is no evaluator (38.4%) than if one was appointed (30.3%).<sup>139</sup> The difference is particularly strong when it comes to child sexual abuse, which was twice as likely to be credited without an evaluator in the case (22.7% without an evaluator and only 12.4% with an evaluator).<sup>140</sup> Moreover, 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 (32.6% versus 31.7%).<sup>141</sup> As the *E.D.* case narrative demonstrates, this selective skepticism toward mothers' abuse allegations cannot be presumed to be the product of discernment or expertise.

Not surprisingly, cases where mothers lost custody mirror these findings. Whereas without a GAL, abuse-alleging mothers' custody losses average 24.6%, with a GAL their custody losses average 36.4%.<sup>142</sup> Mothers thus have 1.8 times greater odds of losing custody when a GAL is present.<sup>143</sup> When alleging physical child abuse this difference increases to 3.4 times greater odds,<sup>144</sup> and when alleging mixed physical and sexual child abuse, to 5.3 times greater odds.<sup>145</sup>

Again, likewise with evaluators. Whereas with no evaluator, mothers lose custody 23% of the time, with an evaluator that rate is 42.4%.<sup>146</sup> This means that when an evaluator is present mothers have 2.5 times greater odds of losing custody.<sup>147</sup> When alleging physical child abuse, the presence of an evaluator means mothers' odds of losing custody are 3 times greater,<sup>148</sup> and when alleging both physical and sexual child abuse, those odds are 6.5 times greater.<sup>149</sup>

The net effect is that both GALs and evaluators profoundly exacerbate the gender bias in case outcomes. Without a GAL or evaluator, a mother alleging abuse

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access, although the other research described in *supra* Part I strongly suggests that many more mothers are truthful than courts believe.

137. DICKSON, *supra* note 6, at 10–11 tbls. 54 & 55 (P=0.016, CI 1.0–1.5).

138. *Id.* at 11 tbl.56.

139. *Id.* at 11–12 tbls.57 & 58 (P=0.001, CI 1.2–1.8).

140. *Id.* at 12–13 tbls.59 & 60 (OR 2.1, P=0.036, CI 1.0–4.1).

141. *Id.* at 13 tbl.61.

142. *Id.* at tbl.62.

143. *Id.* at 14 tbl.63 (P<0.001, CI 1.4–2.2).

144. *Id.* at tbl.64 (P<0.001, CI 1.8–6.4).

145. *Id.* at tbl.65 (P=0.033, CI 1.1–24.5).

146. *Id.* at 14–15 tbl.66.

147. *Id.* at 15 tbl.67 (P<0.001, CI 1.9–3.2).

148. *Id.* at tbl.68 (P=0.001, CI 1.5–5.8).

149. *Id.* at 15–16 tbl.69 (P=0.017, CI 1.4–30.4).

loses custody 19.4% of the time compared to fathers' 11.4% of the time, which is not a statistically significant difference.<sup>150</sup> With a GAL or evaluator, a mother alleging abuse has 4.3 greater odds of losing custody than a similarly situated father; 37.5% of the time compared to fathers' 12.3%.<sup>151</sup> When alleging any type of child abuse, without a GAL or evaluator mothers lose custody 22.9% of the time compared to fathers' 11.4% (again not a statistically significant difference).<sup>152</sup> But with a GAL or evaluator, mothers alleging child abuse have 6.7 times greater odds of losing custody than fathers.<sup>153</sup>

In contrast, the presence of a GAL or evaluator has no statistically significant effect on protective fathers' custody losses. When fathers allege maternal abuse 12.9% lose custody when there is no GAL; when a GAL is present, that frequency is 10.3%.<sup>154</sup> Fathers' custody losses do increase with an evaluator (from 9.5% to 16.7%), but the increase is not statistically significant, likely because of the relatively few cases at issue.<sup>155</sup>

These findings validate the growing scholarly and lay critiques of neutral appointees' negative responses to mothers' allegations of abuse, and indicate that this is a systemic pattern. That these professionals are systemically biased against women reporting abuse is critical information for family courts and professionals who interface with them.

#### 4. Summary of FCO Study Data

Four things stand out from the Study's findings. First, while this finding is not statistically significant due to the small number of reverse-gender cases, it is notable that fathers who courts found had committed some form of child abuse took custody from the mother 11.62% (10/86 cases) of the time, but *none* of the twenty-five mothers proven to be child abusers took custody from the protective father.<sup>156</sup> Although 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.<sup>157</sup> However, the fact that only fathers—but not mothers—found to have committed child abuse were awarded child custody certainly hints at gender bias.

150. *Id.* at 16 tbls.71 & 72.

151. *Id.* at 17–18 tbls.74, 75 & 76 (P<0.001, CI 1.9–9.6).

152. *Id.* at 18 tbls.78 & 79.

153. *Id.* at 19–20 tbls.81, 82 & 83 (P<0.001, CI 2.3–19.1). Because the gender differentials themselves are not sufficiently large, they are not statistically significant. However, the differential gender impact on outcomes with GALs/Evaluators are sufficiently large to be statistically significant.

154. *Id.* at 20–21 tbls.85 & 86.

155. *Id.*

156. *Id.* at 8–9 tbls.48 & 49.

157. In some of these cases the courts concluded that the physical abuse was relatively minor. *See, e.g.,* McMellon v. McMellon, 49,313 pp. 9–12 (La. App. 2 Cir. 7/23/14); 161 So. 3d 769, 774–76 (downplaying the father's "spank[ing]" a child with a belt and leaving bruises, and relying entirely on other factors to award the father domiciliary custody); *In re* C.G., No. 04-13-00749-CV, 2014 WL 3928612, at \*5, \*8 (Tex. App. Aug. 13, 2014) (downplaying past spankings by father and alleged current spankings by mother's boyfriend as a consideration in custody proceedings). In other cases the courts concluded that the mother's deficits were greater. *See, e.g.,* Gibbs v. Hall, No. 258538, 2005 WL 857366, at \*4–5, \*5 n.1 (Mich. Ct. App. Apr. 14, 2005) (awarding custody to father who admitted to

Second is the contrasting and somewhat heartening finding that only one court gave custody to a parent found to have committed child sexual abuse.<sup>158</sup> There is little mystery as to why most courts will not give custody to parents believed to have committed child sexual abuse.

Third, the data demonstrate that a fair number of courts are willing to take custody from a mother and give it to her—and sometimes the children’s—abuser. Thirty-five batterers (12.3%) took custody from the mothers the courts found they had abused.<sup>159</sup> 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.<sup>160</sup> Extensive research indicates that the characteristics and behaviors of many men who abuse their partners (including self-centeredness, domination and control, and entitlement) are intrinsically destructive to children; these behaviors are characterological and do not disappear after separation from their former partner.<sup>161</sup> Again, while idiosyncratic facts could justify such custody awards,<sup>162</sup> these custody awards to abusers are consistent with the widespread reports that family courts and professionals often react to mothers’ claims of paternal abuse—particularly child abuse—with dismissiveness, hostility, or disgust.<sup>163</sup>

And last, the data validate the widespread critiques of evaluators’ and GALs’ roles in custody cases involving family violence, indicating that these

striking daughter where mother had multiple arrests, faced possible incarceration on pending drunk driving charge, threatened father’s current spouse, and made harassing phone calls to father’s employer).

158. DICKSON, *supra* note 6, at 9 tbl.50. In this case the father had sexually abused a third-party child and served time as a sex offender. *See Higgins v. Higgins*, No. A12-2127, 2014 WL 273926, at \*1 (Minn. Ct. App. Jan. 27, 2014). Without substantiation of the allegation that he had also abused the parties’ child, *id.*, the court awarded custody to the father based on the mother’s visitation interference and the children’s poor school attendance, *id.* at \*5, \*7. The mother was also found to be struggling with a concussion, anxiety, and depression. *Id.* at \*1, \*6.

159. DICKSON, *supra* note 6, at 10 tbl.51.

160. *See Cahn, supra* note 44, at 1055–58 (explaining that children of abusive relationships are at risk of developing behavioral and psychological problems and are more likely to be abused and become abusers); BANCROFT ET AL., *supra* note 48, at 42, 58 (showing that 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) (“Separation of their parents seems to increase, rather than decrease, children’s exposure to violence.”).

161. *See BANCROFT ET AL., supra* note 48, at 6–26.

162. The research team has not yet undertaken a qualitative analysis of the cases where adjudicated abusers received custody, but plan to do so.

163. *See sources cited supra* notes 46–48; Silberg & Dallam, *supra* note 54, at 142 (noting that custody evaluators regularly dismiss allegations of abuse by mothers); BANCROFT ET AL., *supra* note 48, at 121 (explaining that the “current climate of hostility in the court system” discourages mothers from reporting sexual abuse disclosed by their children); Winstock, *supra* note 51, at 455–56 (describing survey results in which one female judge expressed “antipathy” toward mothers’ abuse allegations). In one case, the trial court’s opinion contained, as described by an appellate brief, “conspicuous indications of odium,” in part describing the mother as a “clawing’ presence.” Brief of Amici Curiae Domestic Violence Legal Empowerment and Appeals Project, Sanctuary for Families, New York Legal Assistance Group, & Her Justice in Support of Plaintiff-Appellant-Respondent at 22, 24–25, *E.V. v. R. V.*, (N.Y. App. Div. 2017) (on file with author).

professionals powerfully drive courts' skepticism of abuse allegations and contribute to custody reversals from mothers alleging abuse to the alleged abusers.

## II. THE MARGINALIZATION OF ABUSE IN FAMILY LAW AND SCHOLARSHIP

The minimization and rejection of mothers' abuse claims in family courts described above is underpinned by the marginalization of abuse in custody law and in mainstream family law scholarship.

### A. CUSTODY LAW EVOLUTION

Family court norms necessarily track social changes as well as constitutional developments. Over time, state laws governing custody rights have embodied preferences for fathers, then mothers, and lately for the current universal gender-neutral "best interest of the child" standard.<sup>164</sup> But this explicitly non-gendered standard is no guarantee against gender preferences and biases. These biases can be embedded in the judicial and professional discretion described above, but are also buried in nominally neutral rules of decision, such as the presumptions many states have adopted to guide courts' discretion. The primary statutory presumptions found in many state laws (1) favor joint custody or shared parenting and/or (2) disfavor perpetrators of domestic violence. The tension between these two policies is entirely gendered.

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."<sup>165</sup> 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 that found that children parented by both of their separated parents after divorce retain greater resilience and achieve better academic and social outcomes.<sup>166</sup> However, an

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164. J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214, 217 (2014).

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

166. See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 200 n.187 (2015) (summarizing two meta-analyses of over fifty studies each that found children did better academically, socially, and emotionally when they had high-quality, supportive, and warm relationships with their nonresidential fathers). Notably, earlier research found quite the opposite—that nonresidential father visitation was relatively unhelpful to children's well-being. See, e.g., William Marsiglio, Paul Amato, Randal D. Day & Michael E. Lamb, *Scholarship on Fatherhood in the 1990s and Beyond*, 62 J. MARRIAGE & FAM. 1173, 1184 (2000) (stating that only 42% of studies reviewed showed that contact with nonresidential fathers significantly predicted any aspect of 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) (finding frequent contact with fathers did not benefit children more than infrequent contact); Frank F. Furstenberg, Jr., S. Philip Morgan & Paul D. Allison, *Paternal Participation and Children's Well-Being*

important qualification to this research, that these benefits derive from *close, supportive* father-child relationships,<sup>167</sup> 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, a father's involvement is usually valued *per se*, regardless of its actual effects on a child.<sup>168</sup> Interviews with Irish judges have revealed the views of some that "ordinary decent domestic violence" is simply not relevant to custody and access.<sup>169</sup> Rather, a recent Ontario study found that most of the judges interviewed believe 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.<sup>170</sup>

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*After Marital Dissolution*, 52 AM. SOCIO. REV. 695, 697 (1987) (finding 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 were influenced by changing cultural mores.

167. See Huntington, *supra* note 166; 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) (citation omitted)); Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 159 (2014) ("Research 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)); 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) (finding that *high quality* father-child relationships were associated with good child outcomes).

168. See, e.g., *Musgrave v. Musgrave*, 290 So. 3d 536, 543 (Fla. Dist. Ct. App. 2019) (reversing trial court's award of sole custody to mother due to father being "spiteful, vengeful, and not credible," and holding that joint custody is required unless there is proven harm to children). As is described in *infra* Section II.B, pro-shared-parenting scholarship similarly sidesteps the importance of the quality of the father-child relationship—perhaps because such a prerequisite might cast doubt on the shared-parenting project as a whole.

169. Catherine M Naughton, Aisling T O'Donnell, Ronni M Greenwood & Orla T Muldoon, 'Ordinary Decent Domestic Violence': A Discursive Analysis of Family Law Judges' Interviews, 26 DISCOURSE & SOC'Y 349, 353, 361 (2015) (describing interviews with six Irish judges, who idealized the nuclear family, normalized, trivialized, or treated as irrelevant abusive parents' behavior, and pathologized mothers alleging abuse); see also Winstock, *supra* note 51, 460–61 (summarizing interviews with Canadian family judges who indicated that most feel spousal abuse must be ignored to fulfill what they saw as mandates for shared parenting and settlement).

170. See Winstock, *supra* note 51, at 458–59. While it could be argued that Irish, Canadian, and other studies have no bearing on American courts' attitudes, the dynamics of these cases are remarkably similar across the globe. See *supra* note 51 and accompanying text. Compare, e.g., Thea Brown, Margarita Frederico, Lesley Hewitt & Rosemary Sheehan, *The Child Abuse and Divorce Myth*, 10 CHILD ABUSE REV. 113, 114 (2001) (describing Australian study of the "myth" that child abuse allegations at divorce are mostly false and drawing on American, British, and other research), and Fallor & DeVoe, *supra* note 50, at 2 (quoting researchers from the University of Michigan who state that "[m] any people, including professionals who work with children, assume a sexual abuse charge made in the context of divorce is very likely false"), with Winstock, *supra* note 51, at 458–59. Though American in origin, PA has been marketed globally. See generally *The INTERNATIONAL HANDBOOK ON PARENTAL*



There is no reason to believe that U.S. custody judges' attitudes on shared parenting and domestic violence are significantly different from the views of the Canadian and Irish judges in the above studies.

Knowing the harm that abusive fathers often cause children and their mothers, domestic violence advocates and experts frequently oppose joint custody provisions, rightly fearing that such presumptions will outweigh attention to domestic violence even where statutes contain a presumption against custody to abusers.<sup>171</sup> While such resistance has occasionally prevailed,<sup>172</sup> the momentum toward shared parenting and maximizing fathering has been almost unstoppable. Today, while twelve state statutes contain an explicit presumption favoring joint custody, most statutes elevate shared parenting in other ways, including through "friendly parent" preferences given to whichever parent is more willing to share custody.<sup>173</sup> Nor is shared parenting's dominance dependent on explicit law; shared parenting as a *value* is virtually universal within family courts.<sup>174</sup>

At the same time, in response to efforts by domestic violence advocates, over half of the states exempt via statute 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.<sup>175</sup> Many states have also adopted exceptions to the preference for joint custody where there was domestic violence.<sup>176</sup> But in the "battle of the presumptions" against domestic violence and for shared parenting

ALIENATION SYNDROME: CONCEPTUAL, CLINICAL AND LEGAL CONSIDERATIONS (Richard A. Gardner et al. eds., 2006).

171. See *supra* notes 153–56 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 traditionally turned a blind eye to domestic violence or have minimized its significance." (citation omitted)).

172. 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 45, at 677–80 (describing fathers' rights advocates' campaigns for joint custody and women's and battered women's advocates' resistance).

173. DiFonzo, *supra* note 164, at 216–18. As of this writing, thirty-nine states and the District of Columbia have friendly parent provisions as a best interest factor. See *State Law Spread Sheet*, (Mar. 4, 2020), [https://drive.google.com/file/d/1eEMq\\_NtSBGrwR6Ofs5mlObsQuAUIfz3y/view?usp=sharing](https://drive.google.com/file/d/1eEMq_NtSBGrwR6Ofs5mlObsQuAUIfz3y/view?usp=sharing).

174. Even where friendly parent provisions are not contained in statutes, they are embodied in caselaw and unwritten preferences for shared parenting. See E-mail from Paul Griffin, Legal Dir., Child Just., to author (Feb. 15, 2020, 3:33 PM) (on file with author) (describing Maryland practice); E-mail from Kim Susser to author (Feb. 15, 2020, 4:09 PM) (on file with author) (describing judicial bias toward shared parenting in New York family courts); see also Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 752 n.104 (1988) (describing that "even without statutory authority," "court-[employed] social workers were . . . implementing the shared parenting ideal"); Joan Zorza, "Friendly Parent" Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921, 923 (1992) (stating that many judges apply an unwritten friendly parent analysis regardless of whether it is in the statute).

175. See *State Law Spread Sheet*, *supra* note 173. I am deeply grateful to research assistant and George Washington Law student Ellen Albritton for her conscientious and thorough research into the statutes and her compilation of and repeated revisions of the spreadsheet.

176. *Id.*



there is no contest: the shared parenting norm usually wins.<sup>177</sup> Numerous scholars have described how domestic violence provisions—whether embodied in best interest factors, exceptions to joint custody, or presumptions against custody to a batterer—are routinely superseded by the shared parenting ideal.<sup>178</sup> 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 that violence.<sup>179</sup>

Although awareness has grown about the downsides of joint custody, including logistical challenges, disruption to children’s daily lives, and triggering of increased conflict and litigation,<sup>180</sup> 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.”<sup>181</sup> Few would disagree that in most cases fathers gain—while

177. See Dennis P. Saccuzzo & Nancy E. Johnson, *Child Custody Mediation and Domestic Violence*, NAT’L INST. JUST. J., July 2004, at 21, 21 (comparing 200 child custody mediations involving charges of domestic violence with 200 mediations that did not, and finding joint legal custody was awarded about 90% of the time regardless of whether domestic violence was an issue); Allison C. Morrill, Jianyu Dai, Samantha Dunn, Iyue Sung & Kevin Smith, *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1092, 1101 (2005) (studying six states’ applications of presumption against custody to batterers, and finding that when state also had a presumption for joint custody and a “friendly parent provision” the latter superseded); Meier, *supra* note 45, at 662 n.19 (finding that out of thirty-eight appellate custody cases involving domestic violence, thirty-six trial courts had given sole or joint custody to the alleged or adjudicated batterer; two-thirds were reversed on appeal).

178. Regarding the ineffectiveness of domestic violence presumptions, see Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 603 (2001) and 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 outweigh joint custody presumptions, see Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535, 1569, 1570 n.226; Megan O’Matz, *He Beat Her Repeatedly. Family Court Tried to Give Him Joint Custody of Their Children.*, PROPUBLICA (Sept. 16, 2021, 5:00 AM), <https://www.propublica.org/article/he-beat-her-repeatedly-family-court-tried-to-give-him-joint-custody-of-their-children> [<https://perma.cc/KGS8-BYGE>]; and 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, 227–28, 247, 249–51 (2011).

179. See Meier et al., *supra* note 75 (“Researchers 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.*

180. See 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 164, at 216 (“The applicability, appropriateness, and even the definition of joint custody are in a state of fluctuation.”); Conner, *supra* note 178, at 228 (“The vast majority of custody disputes resolved by trial judges are the least likely to be successful candidates for joint custody.”).

181. Fineman, *supra* note 174, at 766 (footnote omitted). 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.

mothers lose—from a shared parenting norm, rendering it intrinsically gendered. Courts nonetheless are hostile to mothers who 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*.<sup>182</sup>

#### B. MAINSTREAM FAMILY LAW SCHOLARSHIP

Family law scholarship is both produced and consumed by family court professionals to a surprising degree.<sup>183</sup> But like custody legislation and practice, the scholarly literature too has marginalized and minimized domestic abuse in two respects: (1) by extolling shared parenting, and (2) 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 Association of Family and Conciliation Courts (AFCC), which publishes it.<sup>184</sup> 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.”<sup>185</sup>

In recent years, academic scholars too have advanced shared parenting as the acme of enlightened custody policy. Most recently, in *Postmarital Family Law: A Legal Structure for Nonmarital Families*, Clare Huntington argues persuasively that family law and practice must be adjusted to ensure that co-parenting is prioritized for nonmarital as well as marital families.<sup>186</sup> Family law, she says, must be

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182. *See id.*; *see also* Meier, *supra* note 45, at 678 (joint custody as an “absolute ideal” leads to criticism of mothers reporting abuse).

183. The “leading interdisciplinary family law journal,” *Family Court Review*, is published by the Association of Family and Conciliation Courts (AFCC), which includes as members family court judges, evaluators and GALs, lawyers, and others. *See About AFCC*, ASS’N FAM. & CONCILIATION CTS., <https://www.afccnet.org/About/About-AFCC> [<https://perma.cc/EEY8-RJ38>] (last visited Feb. 18, 2022). The AFCC describes itself as:

[T]he premier interdisciplinary and international association of professionals dedicated to the resolution of family conflict. AFCC members are the leading practitioners, researchers, teachers and policymakers in the family court arena.

....

... AFCC actively disseminates innovations and ideas to its members. The ripple effect can be seen in courts and communities throughout the world.

....

... AFCC places an ongoing emphasis on issues including ... the integration of research into practice and policy.

*Id.*

184. *See, e.g.*, Pruett & DiFonzo *supra* note 167, at 160, 162, 164 (summarizing consensus among thirty-two family law experts that promotion of shared parenting is important for family wellbeing and health, beneficial even in families with moderate or low levels of conflict); *see also* Scott & Emery, *supra* note 103, at 76 & n.36.

185. Pruett & DiFonzo *supra* note 167, at 164.

186. *See* Huntington, *supra* note 166, at 202.

revised to adapt to the explosion of nonmarital families by giving unmarried and non-litigating separated parents automatic co-parent status.<sup>187</sup> Huntington acknowledges that some mothers avoid shared parenting due to domestic violence or child abuse, but does not address how cases involving violence or abuse could be screened out by courts.<sup>188</sup> She also does not address the research indicating both that the majority of cases filed in court and a significant percentage of out-of-court separating parents involve a history of abuse.<sup>189</sup>

Similarly, in *A Parent-Partner Status for American Family Law*, 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 of court, to create better “parent-partner” relationships for the benefit of children.<sup>190</sup> Her appealing “parent-partner status” would attach certain pre- and post-separation obligations and duties on all parents of children in common.<sup>191</sup> 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 roles. 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.<sup>192</sup> She also mentions the importance of protecting children.<sup>193</sup> However, the book incorporates no explicit exemption 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.”<sup>194</sup> This is remarkable given that these obligations include a duty of “relationship work.”<sup>195</sup> Importantly, since publication, Weiner has conceded that “a better solution might be to permit domestic violence survivors to opt out of

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187. *See id.* at 225.

188. *See id.* at 205.

189. *See supra* notes 74–76 and accompanying text.

190. *See* MERLE H. WEINER, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW* 185, 187 (2015).

191. *See id.* at 187.

192. *See id.* at 327–45.

193. *Id.* at 186. She also criticizes Huntington for a lack of serious attention to domestic abuse. *See id.* at 122.

194. Merle H. Weiner, “*Parent Partnerships*” *Could Be the Future of Marriage*, WASH. MONTHLY (Dec. 7, 2015) (emphasis added), <https://washingtonmonthly.com/2015/12/07/parent-partnerships-could-be-the-future-of-marriage/> [<https://perma.cc/6DB9-F9XZ>]. Weiner does suggest that the counseling requirements used to enforce the duty of “relationship work” should be sensitive to domestic violence. WEINER, *supra* note 190, at 362–63. Weiner also suggests that “bad [and abusive] dads” 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: Career Criminals*, 14 VIOLENCE AGAINST WOMEN 136, 151 (2008) (“[A]busers’ criminal and abuse behaviors are ingrained and intertwined . . . . In terms of reabuse, the majority of abusers reabused, and the majority of reabusers did so more than once.”).

195. WEINER, *supra* note 190, at 362–63.

relationship work.”<sup>196</sup> Nonetheless, that even a domestic violence lawyer and scholar could have overlooked the inappropriateness of such a requirement for victims of abuse while writing about “parent-partners” may be indicative of the seductiveness of the co-parenting ideal.<sup>197</sup>

It is worth noting that Huntington’s proposal is fueled in part by new research led by sociologist Kathryn Edin into the dynamics of unmarried parents’ relationships; this research describes many parents’ initial high hopes for family dissipation as fathers’ relationships with the mothers of their children become “fractious.”<sup>198</sup> One wonders how many of these unmarried parents’ “fractious” relationships involve abuse. It is likely that many did. Another significant new study of young, low-income couples found that

pregnancy relationships included more than twice the amount disrespect [sic] as non-pregnancy relationships, more than triple the rate of threats, and four times the rate of physical assault. Interestingly, it is not that the women who got pregnant had violent relationships in general—their non-pregnancy relationships are much less violent than the relationships that led to pregnancy.<sup>199</sup>

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196. E-mail from Merle Weiner, Professor of L., Univ. of Or. Sch. of L., to author (Mar. 10, 2020, 12:41 AM) (on file with author); see Merle Weiner, *Weiner’s Response to Comments About the Parent-Partner Status*, CONCURRING OPS. (Nov. 1, 2015), <https://perma.cc/5PQ9-ZTHU> (click “Show more”).

197. In defense of both Huntington and Weiner, it should be said that their focus is more on creating default rules for separating families out of court than on establishing law for contested court cases. See Huntington, *supra* note 166, at 227–29 (describing “default rule[s]”); WEINER, *supra* note 190, at 519 (“[C]hanges to child custody law would be premature . . . [the first step is to] improve . . . parents’ *inter se* relationships overall.”). It might thus be argued—as Huntington has—that these proposals are not necessarily in tension with this Article’s critique, which is drawn from a dataset of court opinions. However, the drawing of a bright line between what happens in courts and what happens outside courts is unrealistic. Out-of-court settlements are negotiated in “the shadow of the law.” Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). Moreover, the opinions and recommendations of custody evaluators and other neutral professionals significantly drive settlements. 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; reporting that 96% of cases settled without court assistance—79.7% through direct negotiations before or after filing in court, and another 16.3% after court-sponsored mediation or evaluation. See MACCOBY & MNOOKIN, *supra* note 7, at 137 fig.7.2; see also Boumil et al., *supra* note 102. Private family lawyers have been found to be among the professionals with the highest rates of skepticism toward mothers’ abuse allegations in custody cases. Daniel G. Saunders, Kathleen C. Fallor & Richard M. Tolman, *Beliefs and Recommendations Regarding Child Custody and Visitation in Cases Involving Domestic Violence: A Comparison of Professionals in Different Roles*, 22 VIOLENCE AGAINST WOMEN 722, 732, 737 (2016). While working at DV LEAP, I encountered many clients seeking appeals after having settled for joint custody under pressure from private lawyers who insisted (likely correctly) that going to court would only result in shared custody.

198. Huntington, *supra* note 166, at 191–96; see KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 81 (2005).

199. Jennifer S. Barber, Yasamin Kusunoki, Heather Gatny & Robert Melendez, *The Relationship Context of Young Pregnancies*, 35 LAW & INEQ. 175, 192 (2017); see also June Carbone & Naomi Cahn, *Introduction*, 35 LAW & INEQ. 161, 168 (2017) (“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 nonviolent men to have multiple children with multiple partners.”).

Even Kathryn Edin, whose research about unmarried fathers Huntington touts, found that *half* of all the couples' relationships ended due to domestic violence.<sup>200</sup>

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 reason family violence is marginalized in mainstream family law scholarship; it is also ignored or barely acknowledged in much family law scholarship. For instance, a 2020 update on the law of child custody published by the *Georgetown Journal of Gender and the Law* included no discussion of domestic violence, despite the obvious relevance to the journal's mission and the explosion of disturbing research on family court practices in the preceding years.<sup>201</sup>

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, provides a paradigmatic example of mainstream family law scholars' lack of awareness of the intersection of domestic violence and custody. The symposium contained no 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.<sup>202</sup> While rejecting parental alienation syndrome (PAS) (but not the more commonly used "parental alienation") as unscientific, the authors also warn against courts' acceptance of "marginal" abuse claims.<sup>203</sup> Remarkably, they go on to state that "critics assert that domestic-violence evaluators are biased toward believing victims."<sup>204</sup>

The only other reference to family violence in this symposium on child custody is in Mnookin's own article, which refers in passing to family violence in private custody litigation.<sup>205</sup> He suggests that these cases are the rare "easy" ones, because they involve one safe parent and another parent known to be unsafe.<sup>206</sup>

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200. See EDIN & KEFALAS, *supra* note 198. 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.

201. See Anna Burke, Zachary Hughbanks, Therese Kilbane Myers, Caroline Neville & Harry Samuels, *Child Custody, Visitation & Termination of Parental Rights*, 21 *Geo. J. Gender & L.* 201 (2020).

202. See Scott & Emery, *supra* note 103.

203. See *id.* at 86–88 (asserting that some parents bring marginal domestic violence claims for strategic purposes or due to distorted perceptions and feelings); see also SAUNDERS ET AL., *supra* note 105, at 23.

204. Scott & Emery, *supra* note 103, at 97 (citing Richard Gardner, ironically the inventor of PAS). The authors acknowledge in a footnote that a contradictory critique also exists but do not discuss it. *Id.* at 97 n.150.

205. See Robert Mnookin, *Child Custody Revisited*, 77 *LAW & CONTEMP. PROBS.* 249, 252 (2014).

206. *Id.*

“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.”<sup>207</sup>

Together, these articles by leading scholars of family law articulate three common misconceptions. 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 any biases run in favor of abuse victims. In fact, the FCO Study and the scholarship discussed in Part I contradicts each of these beliefs.

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 in high-conflict cases which do not settle, 70% to 75% of parents described “marital histories that included physical aggression.”<sup>208</sup> It would be unsurprising if cases involving violence and abuse are harder to settle given the control and dominance agenda of many abusers,<sup>209</sup> although there is also evidence that such litigants do sometimes settle cases for a variety of reasons.<sup>210</sup> The research makes clear, however, that at least cases that go to adjudication are more likely than not to include family violence. As this Article suggests, this is not the conventional wisdom in family court. But it should be; if Maccoby and Mnookin’s groundbreaking research is representative, the majority of separating couples settle either before or during the litigation with only 4% to 9% ultimately going to trial.<sup>211</sup>

Second, is it true that courts are responsive to serious abuse allegations? The data shared in Part I show otherwise. Mothers (but not fathers) reporting abuse in custody litigation, particularly child abuse, are ordinarily not believed and often lose custody. The myriad narratives shared by litigants and professionals, described in the literature cited above and on numerous websites,<sup>212</sup> lend richness to the data and also contradict that belief. While one cannot confirm the truth of

207. *Id.* at 252–53.

208. Jaffe et al. *supra* note 46, at 58 (summarizing those studies); *see also* BANCROFT ET AL., *supra* note 48, at 120.

209. *See* BANCROFT ET AL., *supra* note 48, at 6–8.

210. *See* Holly Joyce, Comment, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIM. LAWS. 447, 451–52, 455–56, 458 (1997); DENNIS P. SACCUZZO, NANCY E. JOHNSON & WENDY J. KOEN, MANDATORY CUSTODY MEDIATION: EMPIRICAL EVIDENCE OF INCREASED RISK FOR DOMESTIC VIOLENCE VICTIMS AND THEIR CHILDREN 2 (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/195422.pdf> [<https://perma.cc/3ZKW-NPZA>]. *See generally* sources cited *supra* note 167.

211. *See* MACCOBY & MNOOKIN, *supra* note 7, at 137 fig.7.2 (finding that eleven (9%) cases went to trial, but only five (4%) cases received final adjudication).

212. In addition to the narratives throughout this Article, *see* sources cited *supra* notes 47–50 and Rachel Williams & Teresa Whittaker, *Stop Domestic Abuse Through the Family Courts*, CHANGE.ORG, [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\\_shareinitial](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_shareinitial) [<https://perma.cc/8GRH-ZCSR>] (last visited Feb. 18, 2022).



every mother's or advocate's report of abuse, they cannot all be written off as the fantasies and lies of deranged or vengeful mothers and their lawyer dupes. Moreover, that the same pattern is being identified in not only the United States but also Italy, Spain, the United Kingdom, Canada, Australia, and New Zealand reinforces the credibility of these reports.<sup>213</sup>

Third, are court professionals biased in favor of women reporting abuse? This claim is refuted by the data from the FCO Study and the narratives, reports, and qualitative research described in Part I.<sup>214</sup>

### 3. Cognitive Dissonance Within the Family Law Academy

It should be clear from the discussion above that there is a gulf between two schools of family law scholars: shared parenting (or “mainstream family law”)<sup>215</sup> scholars and abuse (or “domestic violence”)<sup>216</sup> scholars. Family law scholars who prize co-parenting and domestic violence scholars who challenge this value as destructive for families experiencing abuse have had little real dialogue, even in scholarship.<sup>217</sup> While much of the scholarship on and advocacy for co-parenting gives the obligatory nod to an exception for domestic violence,<sup>218</sup> as described above, such exceptions in law are notoriously ineffective.<sup>219</sup> Rather,

213. *See, e.g.*, sources cited *supra* note 52; Williams & Whittaker, *supra* note 212. Several years ago, I was recruited to lecture on PA and abuse throughout Japan because Japanese mothers were facing similar problems keeping their children safe during custody litigation. I have also heard the same stories in meetings with professionals from the Middle East, Eastern Europe, and elsewhere.

214. *See supra* Part I.

215. *See generally* Huntington, *supra* note 166; WEINER, *supra* note 190. For further examples of this literature, see Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. 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 fifty-fifty shared physical custody to further gender equality and force fathers' involvement); and Pruett & DiFonzo, *supra* note 167, 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 describing view that violence should not preclude shared parenting).

216. *See* sources cited *supra* note 46. It should be noted that domestic violence has never been the only reason for scholarly opposition to shared parenting. *See, e.g.*, Jana B. 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 the needs of particular children).

217. *See* Jaffe et al., *supra* note 46, 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* Weiner, *supra* note 196. Sharing drafts of this Article with several scholars has also triggered some thoughtful, useful exchanges.

218. *See* Huntington, *supra* note 166, at 227; Maldonado, *supra* note 215, 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 167, at 157 (arguing that domestic violence often—but not always—precludes shared parenting).

219. *See* sources cited *supra* note 177.



preservation of the shared parenting “*fairy tale*”<sup>220</sup> necessitates minimization and denial of abuse. While shared parenting can surely be beneficial for some children in some families, its idealization across-the-board unfortunately undermines the safety of children in other families.

Fundamentally, the shared parenting literature has yet to wrestle with whether co-parenting should remain the ideal and 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 the reality of why parents separate, and the frequency of family abuse and destructive parenting in failed relationships.<sup>221</sup>

### 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 rejecting mothers’ allegations of abuse by fathers. But the shared parenting 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 criticized herein are 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 credible abuse claims, including a lack of understanding of family violence and both conscious and unconscious gender bias.<sup>222</sup> These explanations have much validity, and are certainly backed up by centuries of social and legal minimization and dismissal of women’s credibility and complaints.<sup>223</sup> But even

220. Fineman, *supra* note 174, at 756, 760 (capitalization omitted) (arguing that shared parenting is premised on a “utopian” idea that “ideals of equality, sharing, and caring” mean that “divorce can be painless” where “everybody wins”).

221. *See, e.g.*, WEINER, *supra* note 190, 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. *See* *Musgrave v. Musgrave*, 290 So. 3d 536, 543 (Fla. Dist. Ct. App. 2019). 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.

222. Epstein and Goodman eloquently describe courts’ “discounting” of survivors’ credibility as a function of implicit gender stereotypes and a lack of understanding of domestic violence and trauma. Epstein & Goodman, *supra* note 87, at 442–46. Even decisionmakers who are not sexist but who are wedded to the shared parenting ideal may bend over backwards to excuse fathers’ poor behavior while condemning mothers’. Because 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 174.

223. For centuries, women reporting sexual abuse have been dismissed as hysterics. In 1938, the American Bar Association urged that any complainant alleging sexual assault be subjected to an expert mental examination because females were particularly subject to “delusion” and “distortion of the imagination in sex cases.” *Report of the Committee on Improvements in the Law of Evidence*, 63 ANN. REP. A.B.A. 570, 588 (1938) (“Today it is *unanimously* held . . . by experienced psychiatrists that the complainant woman in a sex offense should *always* be examined by competent experts to ascertain whether she suffers from some mental or moral delusion or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases.”)

implicit gender bias may not fully explain the many conscientious judges who somehow fail to recognize abuse or the harm to children from being parented by a parent they fear. Many court responses to such allegations are both unsubtle and incomprehensible: Often judges or other neutrals treat substantial evidence of abuse as though it does not exist, as shown in the *Ms. G. v. Mr. G.* and *E.D.* cases above and countless others.<sup>224</sup> Without dismissing the unquestionable history and remnants of misogyny in western culture, in today's world, where misogyny is both less acceptable and less common, something more is likely also at work: psychological denial.

#### A. THE PHENOMENA OF INDIVIDUAL AND SOCIAL DENIAL

Discussions of abuse are inherently resisted by many people in many settings. It is common practice in the domestic violence field to share horrific stories only when given permission because those regularly exposed to such material recognize the traumatic impact it can have, even on listeners.<sup>225</sup> But even without conscious awareness, human brains are hardwired to defend against horrific realities, especially when the horrors are inflicted by human beings against others. Social science has documented societal psychological denial in relation to war, terrorism, state violence and atrocities, and violence against women and children.<sup>226</sup> Yet the psychology of unconscious denial has not heretofore been discussed in connection with the refusal of society and courts to acknowledge and address family abuse. Indeed, if you find reading this Article unpleasant and are thinking of putting it aside, your own psychological defenses may be at work.

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.<sup>227</sup> 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.<sup>228</sup>

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224. See *supra* notes 34–36, 113–34 and accompanying text, 188; see also Whitney Reynolds, *A Mother Fights for Her Daughter's Injustice*, STOP ABUSE CAMPAIGN (July 26, 2019), <https://stopabusecampaign.org/2019/07/26/a-mother-fights-for-her-daughters-injustice/> [<https://perma.cc/SY46-BTBT>] (“After 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.”).

225. See, e.g., Laurie Anne Pearlman & Paula S. Mac Ian, *Vicarious Traumatization: An Empirical Study of the Effects of Trauma Work on Trauma Therapists*, 26 *PRO. PSYCH.* 558, 558 (1995).

226. See sources cited *infra* notes 227–33.

227. See generally STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (2001).

228. Mark S. Hamm, 11 *CRITICAL CRIMINOLOGY* 177, 178 (2002) (reviewing and quoting COHEN, *supra* note 227).

This form of denial is not the intentional denial of facts consciously known to the denier, a common phenomenon in today's world. Rather, it reflects a subtle, mostly unconscious psychological process. Whereas some of us may consciously choose to ignore news about "starving children in Iraq [or] genocide in Rwanda"<sup>229</sup> because the constant awareness of such excruciating human suffering is hard to bear, in other settings unconscious denial "serves to numb, enables avoidance of the unthinkable or protects the psyche by blocking out awareness of cruelty and extreme horrors committed by some towards others."<sup>230</sup> Of course, judges and evaluators are not entirely free to ignore horrific abuse reports (for example, reports of child sexual abuse). However, unconscious denial can protect their psyches by helping them minimize and reject such traumatic facts.

Denial also operates on 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. . . . [T]he phenomenon was hidden from public gaze; normalized, contained and covered up.<sup>231</sup>

Cohen also emphasizes another, more complex form of denial: "There seem to be states of mind . . . in which we know and don't know at the same time."<sup>232</sup> Countries that neighbored Nazi Germany "knew" but needed to "not know" about the horrors being perpetrated by their neighbor.<sup>233</sup> Neighbors of a woman with a black eye may "know" but need to "not know" what caused it. Or countries such as Canada may "forget" that their colonization of the indigenous inhabitants caused untold and ongoing suffering.<sup>234</sup> Such denial is society-wide (although there is often a minority who fight the denial) and is perpetuated by social mechanisms that protect a dominant perpetrator from shame via popular culture, language, and state actions.<sup>235</sup> Denial is more likely when the perpetrators are

229. *Id.*

230. Genevieve Parent, *Genocide Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina (BiH)*, 10 GENOCIDE STUD. & PREVENTION 38, 42 (2016).

231. COHEN, *supra* note 227, at 51.

232. Hamm, *supra* note 228 (quoting COHEN, *supra* note 227).

233. *See id.*

234. *See* Rebecca Bychutsky, *Social Denial: An Analysis of Missing and Murdered Indigenous Women and Girls in Canada*, at iii (2017) (M.A. thesis, University of Ottawa), [https://ruor.uottawa.ca/bitstream/10393/36494/1/Bychutsky\\_Rebecca\\_2017\\_thesis.pdf](https://ruor.uottawa.ca/bitstream/10393/36494/1/Bychutsky_Rebecca_2017_thesis.pdf) [<https://perma.cc/9EH2-QMJK>] ("[D]enial is best conceptualized as a social practice. . . . [S]ocial denial refers to patterned behavior where actors both know and do not-know about uncomfortable truths." (citation omitted)).

235. *See* Hamm, *supra* note 228; Bychutsky, *supra* note 234, 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").

individuals or groups with whom we identify or have reason to want to trust.<sup>236</sup> It seems likely that the *Ms. G. v. Mr. G.* court and *E.D. GAL* were operating under this kind of a partial awareness combined with a goal-oriented, assertive “not-knowing.”<sup>237</sup>

#### B. DENIAL OF VIOLENCE AGAINST WOMEN AND CHILDREN

In her 1992 masterwork *Trauma and Recovery*, Harvard psychiatrist Judith Herman explored society’s “episodic amnesia” about humanly inflicted trauma and its impact on survivors, particularly women.<sup>238</sup> Starting with the “hysteria” diagnosis given to troubled women in the late 1800s, she pointed out the similarities between that condition and the “shell shock or combat neurosis” which afflicted many ex-soldiers after the world wars.<sup>239</sup> In both cases, society’s initial response involved moral denigration of the sufferers, who were cast as malingerers.<sup>240</sup> Unlike views about 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* psychologically troubled.<sup>241</sup>

Herman likens the impact of violence against women to war trauma, calling it the “combat neurosis of the sex war.”<sup>242</sup> Noting that prior to the women’s movement in the 1970s speaking “about experiences in sexual or domestic life . . . invit [ed] public humiliation, ridicule, and disbelief,” she describes how “consciousness-raising groups” helped women begin to acknowledge the truth of their own painful lived experiences.<sup>243</sup> Over time, recognition of rape trauma led to deeper investigations of previously hidden domestic abuse of all kinds, including child sexual abuse.<sup>244</sup>

However, women’s new awareness of the reality and commonality of abuse—particularly child abuse—was never fully integrated into broader social awareness. Abandoning social denial of atrocities is incredibly difficult:

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,

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236. COHEN, *supra* note 227, at 163 (“[T]he atrocities of official enemies arouse great anguish and indignation . . . the treatment is opposite in all respects when responsibility lies closer to home.”).

237. Similarly, a Maryland judge in another case found that a mother was full of “unfounded accusations” despite a court awarding her a protection order against her husband (who was represented by counsel) after proving her allegations by clear and convincing evidence. *See C.C. v. R.G.*, at \*10 (Md. Ct. Spec. App. 2016) (quoting lower court opinion) (on file with author). The judge focused instead on dropped criminal charges for child abuse. *Id.* at \*4–5. 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. *See id.* at \*6–7.

238. HERMAN, *supra* note 9, at 7.

239. *Id.* at 9.

240. *See id.* at 8.

241. *See id.* at 19, 24–25.

242. *Id.* at 32.

243. *Id.* at 28–29.

244. *Id.* at 30–32.

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.<sup>245</sup>

Although many people theoretically accept the existence of family abuse, 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. Herman thus argues that conscious acceptance of “traumatic reality . . . requires a social context that . . . joins victim and witness in a common alliance.”<sup>246</sup> 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.”<sup>247</sup>

This process began with the women’s movement and its descendant, the “battered women’s movement.”<sup>248</sup> These movements ushered in powerful changes in social awareness and remedies for the newly recognized, widespread phenomenon of domestic violence. Their consciousness-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.<sup>249</sup> The extensive critical literature makes clear, however, that these significant changes have never fully penetrated custody courts, where the dominant norm is support for fathering.<sup>250</sup>

Even this partial recognition of domestic violence has never extended to familial child abuse. No activist movement for children comparable to the women’s movement has ever emerged.<sup>251</sup> Indeed, despite early feminist activists’ explicit

245. *Id.* at 7–8. Foundational elements of our legal system, including the presumption of innocence and the reasonable doubt burden of proof in criminal law, facilitate maintenance—or slow abandonment—of social denial in the context of crimes such as violence against women and children (thanks to a student editor for this point). Certainly, the notorious difficulty of achieving criminal convictions for child sexual abuse feeds the lack of social recognition for such abuse. STEPHANIE D. BLOCK & LINDA M. WILLIAMS, *THE PROSECUTION OF CHILD SEXUAL ABUSE: A PARTNERSHIP TO IMPROVE OUTCOMES 2* (2019) (“We know that [child sexual abuse] cases are notoriously difficult to prosecute.” (citation omitted)).

246. HERMAN, *supra* note 9, at 9. Herman’s reference to a “witness” here is non-legal but applies to anyone who listens to a victim’s story, for our purposes including judges, evaluators, and attorneys.

247. *Id.*

248. *See id.* at 28–31; G. 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).

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

250. *See generally* Meier, *supra* note 45. While beyond the scope of this Article, it could be argued that until shared parenting and the pro-father aspects of child custody law are removed, child well-being will not be given the priority it deserves.

251. *See* Houston, *supra* note 79, at 28. While there are many organizations working to end child abuse, they lack an overarching political analysis to explain child abuse, and they do not organize political, activist change—there is no feminist or unified social movement challenging and combating intrafamilial child abuse.

linkage of child sexual abuse to domestic violence and rape,<sup>252</sup> many people today continue to erroneously assume that child sexual abuse is a crime committed by strangers who kidnap and molest children they do not know.<sup>253</sup> Much familial physical and emotional child abuse continues to be conflated with “discipline” and mere strictness, or minimized through reference to children’s “resilience.”<sup>254</sup> In short, familial child abuse continues to be subject to many forms of social misconception, minimization and denial.<sup>255</sup>

This denial persists despite several established truths. First, it is no longer disputable that 90% or more of sexually abused children know their abusers and one-third or more of child sexual abuse is committed by a parent or other family member.<sup>256</sup> Second, the longitudinal, massive, federally supported Adverse Childhood Experiences study has underlined the lifelong and societally costly psychic and physical harms caused by experiencing child abuse, domestic abuse against one’s parent, or both.<sup>257</sup> 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.<sup>258</sup> None of these fairly uncontroversial understandings within the abuse field

252. See HERMAN *supra* note 9, at 30–31; Houston, *supra* note 79, at 28 (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” (footnote omitted)).

253. See Bernard Gallagher, Michael Bradford & Ken Pease, *The Sexual Abuse of Children by Strangers: Its Extent, Nature and Victims’ Characteristics*, 16 CHILD. & SOC’Y 346, 347 (2002).

254. See ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 9 (1987) (“[T]he 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* 7 (Dec. 2006) (Ph.D. dissertation, Sam Houston State University) (ProQuest) (arguing that behaviors viewed by child victims and perpetrators “as normal punishing techniques” may meet legal standards of abusive treatment).

255. Sadly, the way intrafamilial child abuse is kept in the shadows helps enable exploitation of the issue by conspiracy theorists with extreme agendas. Moira Donegan, Opinion, *QAnon Conspiracists Believe in a Vast Pedophile Ring. The Truth Is Sadder*, GUARDIAN (Sept. 20, 2020, 6:40 PM), <https://www.theguardian.com/commentisfree/2020/sep/20/qanon-conspiracy-child-abuse-trump> [<https://perma.cc/W75T-Z296>] (“Acknowledging the real ways that children are sexually abused would mean confronting the ways that families and communities can keep dark secrets and enable harm to the most vulnerable.”).

256. See DARKNESS TO LIGHT, CHILD SEXUAL ABUSE STATISTICS: PERPETRATORS (2015), [http://www.d21.org/wp-content/uploads/2017/01/Statistics\\_2\\_Perpetrators.pdf](http://www.d21.org/wp-content/uploads/2017/01/Statistics_2_Perpetrators.pdf) [<https://perma.cc/SX4H-DCKE>]; *Children and Teens: Statistics*, RAINN, <https://www.rainn.org/statistics/children-and-teens> [<https://perma.cc/ZSE7-2NFF>] (last visited Feb. 18, 2022); see also Lisa DeMarni Cromer & Rachel E. Goldsmith, *Child Sexual Abuse Myths: Attitudes, Beliefs, and Individual Differences*, 19 J. CHILD SEXUAL ABUSE 618, 631, 636 (2010) (recognizing that both policymakers and the media often mislead the public by treating child sexual assault as a problem of stranger-danger).

257. See Vincent J. Felitti, Robert F. Anda, Dale Nordenberg, David F. Williamson, Alison M. Spitz, Valerie Edwards, Mary P. Koss & James S. Marks, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245, 251 (1998) (“The findings suggest that the impact of these adverse childhood experiences on adult health status is strong and cumulative.”).

258. See Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134, 137 tbl.1 (1999); BANCROFT ET AL. *supra* note 48, at 108, 110



appear to have penetrated court practices; in fact, professional training and much research literature continue to not only minimize abuse but also treat child abuse and domestic violence as utterly distinct.<sup>259</sup>

It appears that recognition of child abuse remains society's Rubicon—it has yet to be crossed. Significant conscious psychological work is required to “bear witness” to such atrocities.<sup>260</sup> The ongoing denial by society and individuals is thus perhaps not entirely surprising, despite the significant progress society has made on adult gender and violence issues, because “[r]epression, dissociation, and denial are phenomena of social as well as individual consciousness.”<sup>261</sup> 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. In recent years, a new movement for gender justice has erupted: The #MeToo movement has triggered a tectonic shift in social and professional responses to women's claims of sexual abuse on the job. As Catharine MacKinnon noted, “[r]eporting 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.”<sup>262</sup> 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 “in the established media as pervasive and endemic rather than sensational and exceptional.”<sup>263</sup> The #MeToo movement arguably meets Herman's pre-requisite of a “political movement” for lifting the veil of denial.<sup>264</sup>

That is the good news. However, as has been pointed out by domestic violence experts Epstein and Goodman, #MeToo has not yet filtered into courts responding to domestic violence.<sup>265</sup> One reason is that a key ingredient for many of #MeToo's successes—the existence of multiple women's reports of one

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(“[E]xposure to batterers is among the strongest indicators of risk of incest victimization. . . . [T]he 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 manipulateness, and perception of his children as owned objects . . .”).

259. See Deseriee Kennedy, *From Collaboration to Consolidation: Developing a More Expansive Model for Responding to Family Violence*, 20 *CARDOZO J.L. & GENDER* 1, 8 (2013) (arguing that domestic violence and child maltreatment systems have had separate and distinct histories, philosophies, and approaches); Meier & Sankaran, *supra* note 78.

260. HERMAN, *supra* note 9, at 7.

261. *Id.* at 9.

262. MacKinnon, *supra* note 87 (“#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.”).

263. *Id.*

264. See HERMAN, *supra* note 9, at 9.

265. See Epstein & Goodman, *supra* note 87.

perpetrator's abuses<sup>266</sup>—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. Our Study, however, provides the first such pattern analysis, which is essential to chipping away at social denial.<sup>267</sup>

Without a #MeToo type awakening in family courts, the pull of psychological denial and the push for shared parenting help explain why courts have been so receptive to the concept 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's inventor, framed mothers' allegations of child sexual abuse against fathers in custody battles as typically pathological, vindictive, and false.<sup>268</sup> 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 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

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266. MacKinnon observes that campus sexual assault cases are more likely to be successful when there are a minimum of three or four accusers, rendering “a woman, for credibility purposes, one quarter of a person.” MacKinnon, *supra* note 87; *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 160 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, 3:40 PM), <https://www.vox.com/2018/10/1/17902810/bill-cosby-sentencing-harvey-weinstein-larry-nassar> [<https://perma.cc/M9WG-9YXW>] (noting that Bill Cosby was convicted after numerous women had spoken out, and that Harvey Weinstein and Larry Nassar were also accused by numerous women).

267. In an analysis of the parallels between the #MeToo movement and transitional justice movements in societies recovering from political terror, several scholars have noted that social denial of systematically 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. Lesley Wexler, Jennifer K. Robbenolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 99–100 (emphasis added).

268. *See infra* note 270 and accompanying text.

providing a pseudo-scientific basis for rejecting mothers' and children's claims of poor parenting or abuse.<sup>269</sup>

#### A. HISTORY OF PARENTAL ALIENATION THEORY

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 some intact families too. Indeed, partner-abusers are notorious for demeaning and undermining the other parent and her parenting authority or relationship with the children.<sup>270</sup> However, not until psychiatrist Richard Gardner invented parental alienation syndrome to combat mothers' allegations in custody litigation that a father was a danger to his children did family court professionals start treating parents' denigration of each other in the custody context as a serious concern.<sup>271</sup>

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.<sup>272</sup> Without sources, he asserted that the majority of child sexual abuse claims in custody litigation are false,<sup>273</sup> although he explained some mothers' purported vendettas as the product of pathology rather than intentional malice.<sup>274</sup> Gardner strongly implied that when children reject their father and the mother alleges child abuse in custody litigation, these behaviors are likely due to PAS rather than a result of actual experiences of abuse.<sup>275</sup>

Gardner's PA "syndrome"<sup>276</sup> presented an easy target for critics. He used conclusory analysis (for example, citing the presence of PAS as an indication that child abuse claims are false, while also stating that if child abuse is true, it is not PAS), he invoked fabricated (and empirically contradicted) statistics, his

269. Alienation proponents often contend that parental alienation is not only about mothers' abuse claims, but is often alleged against fathers, and arises in non-abuse cases. *See, e.g.,* Barbara Jo Fidler & Nicholas Bala, *Concepts, Controversies and Conundrums of "Alienation: Lessons Learned in a Decade and Reflections on Challenges Ahead*, 58 FAM. CT. REV. 576, 578–79 (2020). These are assertions that the Study actually confirmed. *See* Meier et al., *supra* note 8, at 18–19 (noting that outcomes in alienation cases without abuse claims appear more gender neutral). However, none of these facts negates parental alienation's original purpose and continued use to deny mothers' and children's credible abuse claims.

270. *See* TheDuluthModel, *Using Children - Understanding the Power and Control Wheel*, YOUTUBE (May 2, 2016), <https://www.youtube.com/watch?v=PxAQduCP4c> (describing "using children" as one of several nonviolent battering tactics); BANCROFT ET AL., *supra* note 48.

271. *See* Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 235–36 (2009).

272. RICHARD A. GARDNER, TRUE AND FALSE ACCUSATIONS OF CHILD SEX ABUSE 160–61, 193, 199–200 (1992); 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).

273. *See* RICHARD A. GARDNER, SEX ABUSE HYSTERIA: SALEM WITCH TRIALS REVISITED 3–4 (1991).

274. *Id.* at 25–42.

275. *See* GARDNER, *supra* note 272, at 159–61.

276. *Id.*

“diagnostic” criteria were conclusory and flagrantly subjective, and he had published bizarre beliefs about human sexuality, including a defense of pedophilia.<sup>277</sup> Because there was no scientific proof of the purported “syndrome” and because 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<sup>278</sup>—were outrageous, PAS has been widely discredited as lacking scientific credibility.<sup>279</sup> It has also been ruled inadmissible by several courts.<sup>280</sup> In 2012, it was definitively rejected—after extensive contention—for inclusion in the *Diagnostic and Statistical Manual of Mental Disorders*.<sup>281</sup>

However, “alienation” writ large has remained, due to the work of a number of family court professionals and researchers who developed a reformulation of PAS, termed “parental alienation” or the “alienated child.”<sup>282</sup> 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.<sup>283</sup>

This definition, which depends on the subjective conclusion that a child’s feelings are unreasonable, encourages the assumption that such negative feelings toward a parent may well derive from an illegitimate source. This is likely due to the adversarial custody litigation context which naturally gives rise to assumptions that children’s hostility may be a product of that adversarial process.

277. See, e.g., Jennifer Houlst, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 CHILD’S 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).

278. See GARDNER, *supra* note 273, at 25–26, 31; RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* 126 (1992).

279. See Meier, *supra* note 271, at 238–39.

280. See *People v. Sullivan*, Nos. H023715, H025386, 2003 WL 1785921, at \*13–14 (Cal. Ct. App. Apr. 3, 2003); *Mastrangelo v. Mastrangelo*, No. NNHFA054012782S, 2012 WL 6901161, at \*5 (Conn. Super. Ct. Dec. 20, 2012); *Snyder v. Cedar*, No. NNHCV010454296, 2006 WL 539130, at \*8 (Conn. Super. Ct. Feb. 16, 2006); *D.M.S. v. I.D.S.*, 2014-0364, p. 18 (La. App. 4 Cir. 3/4/15); 225 So. 3d 1127, 1139; *M.A. v. A.I.*, No. A-4021-11T1, 2014 WL 7010813, at \*5 (N.J. Super. Ct. App. Div. Dec. 15, 2014); *People v. Fortin*, 735 N.Y.S.2d 819, 819 (N.Y. App. Div. 2001).

281. 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); AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5* (5th ed. 2013).

282. Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 251 (2001).

283. 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) (footnote omitted). This definition’s emphasis on “striden[cy]” and “no apparent guilt or conflict” echoes Gardner’s descriptions of PAS. See Gardner, *supra* note 272, at 97 (listing “[l]ack of ambivalence” and “[a]bsence of guilt” as two symptoms of PAS).

Parental alienation has 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.<sup>284</sup> The scholarly literature on it has exploded.<sup>285</sup> 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 a matter of common sense.

Over time, specialists have added nuance to discussions of alienation. Some leading alienation scholars now acknowledge that (1) 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 (2) the avoided parent’s own behaviors are often—if not always—part of the problem.<sup>286</sup> New terminology, such as contact “refusal” or “resistance”<sup>287</sup> is sometimes used to indicate greater neutrality as to cause; other new terms, such as “gatekeeping,” continue to hold the custodial parent responsible for restricting the other parent’s relationship with the child.<sup>288</sup> Nonetheless, while some scholarly alienation experts take pains to distance themselves from PAS and its singular focus on a toxic preferred parent,<sup>289</sup> other alienation theory proponents continue to assert that PAS and PA are essentially the same.<sup>290</sup>

284. The automatic assumption of alienation can be seen in a treatise written by a leading family law scholar that devotes an entire section to “The Alienated Child,” and opens thus: “When a child refuses to visit or have contact with a parent, generally something is wrong. Parental alienation can be a serious problem.” 2 LINDA D. ELROD, *KANSAS LAW & PRACTICE: FAMILY LAW* § 13:17, Westlaw (database updated Jan. 2021).

285. The literature is far too vast to summarize here. But alienation’s ubiquity is indicated by the *Family Court Review*’s publication of not one but two special issues on the subject, ten years apart. See generally Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 58 *FAM. CT. REV. (SPECIAL ISSUE)* 270 (2020); Andrew I. Schepard, *Alienated Children in Divorce and Separation*, 48 *FAM. CT. REV. (SPECIAL ISSUE)* 1 (2010).

286. See, e.g., Janet R. Johnston & Joan B. Kelly, Commentary, *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); Shely Polak & Michael Saini, *Children Resisting Contact with a Parent Postseparation: Assessing This Phenomenon Using an Ecological Systems Framework*, 56 *J. DIVORCE & REMARRIAGE* 220, 224–25 (2015).

287. 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).

288. E.g., William G. Austin, Linda Fieldstone & Marsha Kline Pruett, *Bench Book 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).

289. See, e.g., Janet R. Johnston, Marjorie Gans Walters & Nancy W. Olesen, *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, and abuse).

290. See, e.g., William Bernet, *Parental Alienation: Misinformation Versus Facts*, 54 *JUDGES’ J.* 23, 25 (2015) (describing the two concepts as “almost synonymous”); Sheila Pursglove, *Asked & Answered: Demosthenes Lorandos on Parental Alienation Syndrome (PAS)*, OAKLAND CNTY. LEGAL NEWS (Jan. 6,

## B. ALIENATION'S LACK OF SCIENTIFIC BASIS

Despite continued assertions to the contrary,<sup>291</sup> 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.<sup>292</sup>

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 reasons and those who have been illegitimately influenced by the other parent (that is, “alienated”).<sup>293</sup> The reviewers also found a dearth of generalizable, scientifically valid studies empirically proving the alienation concept; most such studies merely describe “clinical opinions or personal impressions.”<sup>294</sup> Nonetheless, alienation has become a core, widely accepted concept in family law.

The absence of genuine scientific support for the alienation theory is compounded by the emergence of credible research *undermining* it. University of Virginia scholar Robert Emery and colleague Jenna Rowen studied college students who reported witnessing their custodial parent’s denigration of the other parent as children.<sup>295</sup> Rather than finding that parental denigration encouraged the child to disrespect or dislike the other parent, this study found precisely the

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2015), <http://www.legalnews.com/oakland/1399575/> [<https://perma.cc/9VXM-JLHD>] (discussing PAS and parental alienation interchangeably); JOAN S. MEIER, NAT’L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, PARENTAL ALIENATION SYNDROME AND PARENTAL ALIENATION: A RESEARCH REVIEW 7 (2013), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_PASUpdate.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_PASUpdate.pdf) [<https://perma.cc/892C-8XQV>] (describing a case in which the evaluator seamlessly changed the label from PAS to PA without changing the analysis).

291. See, e.g., M. Brianna Pepiton, Lindsey J. Alvis, Kenneth Allen & Gregory Logid, *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) (book review) (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).

292. Michael Saini, Janet R. Johnston, Barbara Jo Fidler & Nicholas Bala, *Empirical Studies of Alienation*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 374, 423 (Leslie Drozd et al. eds., 2d ed. 2016); see also Rebecca M. Thomas & James T. Richardson, *Parental Alienation Syndrome: 30 Years On and Still Junk Science*, 54 JUDGES’ J. 22, 22 (2015) (discussing the lack of empirical studies on PAS and PA).

293. See Saini et al., *supra* note 292, at 376, 417–18 (“[T]here are no validated and reliable instruments to distinguish [justified estrangement] from alienation cases.”).

294. *Id.* at 375.

295. See Jenna Rowen & Robert E. Emery, *Parental Denigration Reports Across Parent-Child Dyads: Divorced Parents Underreport Denigration Behaviors Compared to Children*, 16 J. CHILD CUSTODY 197, 201–02 (2019).



opposite: denigrating behaviors by a parent had a “boomerang effect”—that is, the children turned *against the alienating parent* more than the denigrated parent.<sup>296</sup> 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.”<sup>297</sup>

No research challenging Rowen and Emery’s findings has emerged, and to date only fleeting disagreement has appeared in the literature.<sup>298</sup> 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 emphasized the broad professional consensus among family court practitioners about the prevalence of parental alienation and professionals’ ability to identify such behaviors in cases.<sup>299</sup> They do not discuss Emery and Rowen’s research.

The staying power of alienation—and its many synonyms and variants<sup>300</sup>—can be seen as a reflection of family courts’ eagerness to doubt or reject mothers’ and children’s abuse claims in custody battles.<sup>301</sup> Alienation, especially when propped up by neutral court-appointeds, 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. Alienation theory, in its breadth and vagueness, invites application to virtually any case where a father’s access is contested, operating like a well-oiled machine in furtherance of both courts’ explicit goal of maximizing fathering and the implicit or unconscious psychological denial of disturbing depictions of family abuse. This Article is not

296. *See id.* at 198, 207 (“The initial work we have completed on parental denigrations calls into question basic suppositions about parental alienation . . .”).

297. 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. PSYCH.* 165, 175 (2014).

298. Some defenders of alienation theory have argued that Rowen and Emery’s challenge to PA was based on “an erroneous premise,” because “denigration is *only one* [parental alienating behavior], and parental behavior is only one factor in determining whether alienation is present.” Fidler & Bala, *supra* note 269, at 582 (citation omitted). While it is true that other behaviors are also sometimes considered evidence of parental alienation, denigration and intentional undermining have long been core to alienation theory’s premise that a preferred parent should be blamed for a child’s estrangement from the other parent. Moreover, if it is true that denigration “boomerangs,” then the many cases and articles treating denigrating parents as per se alienating must be rejected. I am not aware of any alienation scholars having accounted for this research by, for instance, acknowledging that denigration should no longer be seen as a cause of parental alienation.

299. *See Saini et al.*, *supra* note 292, at 418.

300. *See, e.g.*, MARSHA KLINE PRUETT & LESLIE M. DROZD, NOT JUST ALIENATION: RESISTANCE, REJECTION, REINTEGRATION, AND THE REALITIES OF TROUBLED PARENT-CHILD RELATIONSHIPS 5 (2019) (on file with author) (listing different terms and concepts similar to alienation).

301. Pathologizing women reporting abuse as “alienators” is also consistent with our social history of pathologizing individuals and groups who are seen as troublesome, different, or “less than.” *See, e.g.*, Britt Peterson, *A Virginia Mental Institution for Black Patients, Opened After the Civil War, Yields a Trove of Disturbing Records*, WASH. POST (Mar. 29, 2021, 7:00 AM), [https://www.washingtonpost.com/lifestyle/magazine/black-asylum-files-reveal-racism/2021/03/26/ebfb2eda-6d78-11eb-9ead-673168d5b874\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/black-asylum-files-reveal-racism/2021/03/26/ebfb2eda-6d78-11eb-9ead-673168d5b874_story.html).

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 constrained to avoid its *misuse* to deny credible abuse claims that have real implications for children's safety.

### C. ALIENATION THEORY IN THE COURTS

#### 1. Qualitative Information

I don't want to be around my daddy when he's mad.

Frankly, this child is afraid of Mr. H[.]<sup>302</sup>

There was little doubt why the boys were afraid of their father. He had slapped and choked the mother in front of the boys, viciously sexually assaulted her while the boys were upstairs, hit them, and extensively humiliated his four-year-old autistic son in front of guests at a Christmas party because the boy had wet his pants.<sup>303</sup> Yet the trial court concluded that the boys were afraid of him because of their mother's conduct, not his.<sup>304</sup>

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 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.<sup>305</sup> 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.<sup>306</sup>

\* \* \*

In this case, the mere extra-legal suggestion of "alienation" was enough to wipe away the extensive and undisputed family abuse—including the father's felony conviction for sexual assault of the mother with the children in the house, his verbal and physical abusiveness toward the children, and the children's understandable fear.<sup>307</sup> 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

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302. Amicus Curiae Brief on Behalf of Justice for Children, Domestic Violence Legal Empowerment & Appeals Project, & the Leadership Council on Child Abuse & Interpersonal Violence at 1, C.H. v. S. H., (Cal. Ct. App. 2013) (on file with author) (footnote omitted). The Amicus brief was coauthored by this author.

303. *Id.*

304. *Id.* at 1–2.

305. *See id.* at 2.

306. *See id.*

307. *See id.* at 1, 22, 26. The order was reversed on appeal, in a forthrightly critical opinion. *See* C.H. v. S.H., at \*8, \*17 (Cal. Ct. App. 2013) (on file with author).

possible.<sup>308</sup> In another case from another state, one child reported his father's "hitting, pinching, being mean, and being drunk";<sup>309</sup> he had also witnessed his father strangling his mother, and he told evaluators that he feared his father would kill him.<sup>310</sup> Rather than inferring the obvious, the evaluator characterized this child's feelings as "abnormal" or "unnatural"—and thereby evidence of alienation.<sup>311</sup> The court adopted the parental alienation label and ordered custody to the father.<sup>312</sup>

As these narratives demonstrate, notwithstanding the nuances in the literature, the absence of the word "syndrome" has not changed alienation theory's use in court.<sup>313</sup> Like PAS, alienation theory is routinely used in court to per se discredit abuse claims.<sup>314</sup> PA labelling was responsible for 37% of the harmful outcomes in Silberg and Dallam's case series (including children's depression, suicidality, dissociative symptoms, regressive behaviors, sexual acting out, school problems, and nightmares),<sup>315</sup> and when alternative terms also pathologizing mothers were included, the percentage became 67%.<sup>316</sup> Like PAS, but unlike the literature's recognition that most "alienated" parents are partly responsible for their children's estrangement, the focus in court cases remains on the purportedly 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 is seen in the Study's data, even where

308. See *C.H. v. S.H.*, at \*8–9.

309. Brief Amicus Curiae on Behalf of the Arkansas Coalition Against Domestic Violence, Domestic Violence Legal Empowerment & Appeals Project (DV LEAP), Leadership Council on Child Abuse & Interpersonal Violence, Justice for Children, National Coalition Against Domestic Violence, & National Ass'n of Women Lawyers in Support of Appellant at 15, *Oates v. Oates*, 2010 Ark. App. 346, 2010 WL 1609411.

310. See *id.* at 16.

311. *Id.*

312. See *Oates*, 2010 Ark. App. 346, at 4–5, 2010 WL 1609411, at \*3–4.

313. See Allison M. Nichols, Note, *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, June 15, 2019, at 1, 3 (arguing that while courts endeavor to distinguish PAS and parental alienation, they utilize similar analyses including blaming mothers and rejecting child sexual abuse claims); HILL, *supra* note 51, at 279 n.\* (describing one fathers' rights website that advised fathers to avoid referencing PAS and speak instead of "brainwashing", [sic] 'extreme alignment' or just 'parental alienation'); Smith, *supra* note 281, at 86 (citing alienation proponent Richard Warshak's references and support for both PAS and parental alienation); Meier, *supra* note 271 (explicating the substantial overlap between PAS and PA).

314. See Simon Lapierre & Isabelle Côté, *Abused Women and the Threat of Parental Alienation: Shelter Workers' Perspectives*, 65 CHILD. & YOUTH SERVS. REV. 120, 125 (2016) (describing parental alienation as "a strategy . . . to overshadow male's violence against women and children in society"); Smith, *supra* note 281, at 84 (explaining that fathers assert PAS "much like an affirmative defense to disclaim a mother's allegation [of abuse]"); Meier, *supra* note 45 (discussing five cases in which alienation was used to deny credible abuse claims).

315. See Silberg & Dallam, *supra* note 54, at 162.

316. See Silberg & Dallam, *supra* note 54, at 151. Additional terms used to pathologize mothers included "narcissistic," "obsess[ed]," "histrionic," "enmeshed," and "lacking in insight." *Id.* at 151, 158.

abuse is known and acknowledged, alienation findings often supersede.<sup>317</sup> 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.<sup>318</sup>

## 2. Study Findings<sup>319</sup>

In brief, as previously reported, the Study confirmed that crossclaims of alienation are powerful weapons against mothers' abuse allegations.<sup>320</sup> Whereas in non-alienation cases courts credit 40.4% of mothers' abuse allegations overall, in alienation cases, they credit only 23%.<sup>321</sup> Child abuse allegations are believed on average 27.2% of the time in nonalienation cases, but in only 18.2% of alienation cases.<sup>322</sup> Overall, when allegedly abusive fathers crossclaim alienation: (1) the odds of courts' disbelieving mothers' claims of any kind of abuse are 2.3 times greater than in cases without alienation,<sup>323</sup> and (2) the odds of courts' disbelieving mothers' claims of child abuse are 3.8 times greater.<sup>324</sup>

Custody losses match this pattern. When fathers crossclaim alienation, maternal custody losses roughly double to an average of 49.7%.<sup>325</sup> Among mothers alleging child physical or sexual abuse, 28.7% lose custody in the nonalienation cases; in the alienation cases, that rate also doubles to 57.6%.<sup>326</sup>

Notably, when parents are found by the court to have committed alienation, 71% lose custody, a finding that applies across genders.<sup>327</sup> When courts believe both that a father is abusive and a mother is alienating, 42.9% (6/14) switch custody from the alienating mothers to the abusive fathers.<sup>328</sup> In other words, in these cases alienation outweighs violence.

These findings compel three important conclusions. First, mothers' child sexual abuse claims are nearly always rejected when fathers crossclaim alienation. This rejection of mothers' allegations of fathers' incest has recently been documented in several countries. For instance, a Canadian study produced virtually

317. See Meier, *supra* note 8, at 99 tbl.7 (finding that 43% of courts awarded custody to adjudicated abuser where mother found to be an alienator).

318. See *Oates v. Oates*, 2010 Ark. App. 346, at 4–5, 2010 WL 1609411, at \*3–4. As this case suggests, significant harm can flow from so-called remedies for alienation such as abrupt removal of a child from a parent they trust to be forced into the custody of a parent they fear or dislike.

319. The Study's data related to alienation have been previously published in Meier, *supra* note 8. They are summarily referenced here to further the discussion of alienation.

320. Categorization of cases as containing or not containing alienation or abuse allegations are based on courts' published opinions. It is possible that some of these opinions do not reflect allegations of alienation or abuse that were made at some point in the litigation. However, it is likely that allegations that are not mentioned in an opinion were not deemed significant.

321. See Meier, *supra* note 8, at 96–97 tbls.1 & 4.

322. DICKSON, *supra* note 6, at 21–22 tbls.96 & 97; see also Meier, *supra* note 8, at 96–97 tbls. 1 & 4.

323. DICKSON, *supra* note 6, at 22 tbl.102 (P<0.001, CI 1.6–3.1); see also Meier, *supra* note 8, at 98.

324. DICKSON, *supra* note 6, at 22 tbl.103 (P=0.002, CI 1.6–8.8); see also Meier, *supra* note 8, at 98.

325. DICKSON, *supra* note 6, at 23 tbl.106.

326. *Id.* at tbls.108 & 109; see also Meier, *supra* note 8, at 99 fig.2.

327. DICKSON, *supra* note 6, at 23–24 tbls.110 & 111; see also Meier, *supra* note 8, at 100.

328. DICKSON, *supra* note 6, at 24 tbl.112; see also Meier, *supra* note 8, at 99 tbl.7.

identical findings: Whereas only one court believed child sexual abuse in the American study, in the Canadian study *no* sexual abuse claims were believed.<sup>329</sup> In mid-2021 an Australian study found that only 14% of child sexual abuse allegations were believed; moreover, two-thirds of accused fathers received increased access time, and in 17% of cases, gained physical custody.<sup>330</sup> And in October 2021, a French “incest commission” concluded that accusations of sexual abuse by a parent are “too often brushed aside.”<sup>331</sup>

Second, alienation claims roughly double 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 claiming alienation is not merely a mechanism for refuting abuse,<sup>332</sup> 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,<sup>333</sup> an observation the Study’s findings support,<sup>334</sup> the findings are indicative of some degree of gender disparity in alienation claims’ impact. Overall, across all alienation cases (both with and without abuse claims), mothers had twice the odds of losing custody compared to fathers when accused of alienation.<sup>335</sup> Among cases with abuse claims, 49.7% (81/163) of all mothers accused of alienation lost custody to the fathers they accused of abuse, while only 29.4% (5/17) of fathers who were accused of alienation by the mother they accused of abuse lost custody to that mother. This difference, however, was not statistically significant.<sup>336</sup>

In short, the Study’s findings strongly confirm not only that courts are resistant to accepting mothers’ claims of fathers’ abuse, especially child abuse, but that parental alienation potently intensifies these responses. These national data support the many anecdotal reports of alienation’s misuse to deny credible abuse allegations and to punish mothers who raise them, leading to potentially serious harm.<sup>337</sup>

329. See Elizabeth Sheehy & Susan B. Boyd, *Penalizing Women’s Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases*, 42 J. SOC. WELFARE & FAM. L. 80, 83 (2020) (finding that of twenty-eight child sexual abuse claims, twenty-four of them made by mothers, none were accepted).

330. Nola Webb, Lawrence J. Moloney, Bruce M. Smyth & Robyn L. Murphy, *Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019*, 56 AUSTRALIAN J. SOC. ISSUES 322, 322–23 (2021).

331. Amanda Morrow, *French Incest Commission Says Accusations Against Fathers ‘Not Taken Seriously’*, RFI (Oct. 27, 2021, 4:20 PM) (emphasis omitted), <https://www.rfi.fr/en/france/20211027-french-incest-commission-says-accusations-against-fathers-not-taken-seriously-ciivise> [<https://perma.cc/MLY6-QL48>].

332. See Fidler & Bala, *supra* note 269.

333. See *id.*; Johnston & Sullivan, *supra* note 61, at 276.

334. See DICKSON, *supra* note 6, at 25 tbl.121 (OR 2.0, P=0.020, CI 1.1–3.5); Meier, *supra* note 8, at 100.

335. Meier, *supra* note 8, at 100.

336. DICKSON, *supra* note 6, at 24 tpls.113 & 114. The lack of statistical significance likely reflects the small pool (seventeen) of cases where a father started with custody, accused the mother of abuse, and was accused of alienation. See *id.*

337. See *supra* notes 56–61 and accompanying text; CTR. FOR JUD. EXCELLENCE, *supra* note 39. Many alienation scholars seem content to dismiss the abuse critique as “extreme” or ideological without

## V. WHAT IS TO BE DONE?

Despite repeated attempts, alienation has been exceedingly difficult to challenge in court. While PAS was ruled inadmissible by a handful of courts,<sup>338</sup> 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 raised.<sup>339</sup> This suggests that policy must be changed at the legislative and potentially individual judicial level.

Although the Family Court Outcomes Study’s data alone prove nothing about the risks or benefits of courts’ decisions, the data in combination with the literature and widespread reports indicate reforms are needed. The new data verify that not only are most women’s reports of domestic violence rejected, even—and especially—the vast majority of *child abuse* claims are rejected, and many alleging mothers are punished with loss of custody. Where courts are mistaken, children’s subjection to ongoing abuse, and in some cases, horrific deaths<sup>340</sup> as a result of a court’s award of 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, if courts heeded the warnings of the majority of protective parents who do accurately report abuse, they could keep many at-risk 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 be better prepared to handle such cases.<sup>341</sup> Scholarly co-parenting proposals should be expected to explain how greater co-parenting

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addressing the question of whether alienation is in fact being misused to deny credible abuse. *See* sources cited *supra* note 61. Even the first scholarly discussion of alienation “false positive[s]” conspicuously fails to address its use to deny abuse. *See* Warshak, *supra* note 61.

338. *See* cases cited *supra* note 280.

339. 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) (mem.); *McRoberts v. Super. Ct.*, No. B234877, 2012 WL 2317714, at \*10–12 (Cal. Ct. App. June 19, 2012); *Oates v. Oates*, 2010 Ark. App. 346, at 5–6, 2010 WL 1609411, at \*3. 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* E.V. v. R.V., (N.Y. Ct. App. 2019) (on file with author).

340. *See* Case *supra* note 57; Nikita Stewart, *She Went to Court to Save Her 3-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>.

341. 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 of their limitations to withdraw from a case once child sexual abuse becomes an issue—others stumble through, often in ways that prejudice



emphasis in law or 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 co-parents—to fulfill co-parents' duty "not to abuse," and to support decent co-parental relationships.<sup>342</sup>

With regard to the courts and the law, the remainder of this Article proposes two changes.<sup>343</sup> First, the law must outlaw the use of alienation theory (or its synonyms) *as a reason to discount abuse allegations*.<sup>344</sup> 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 and offer a path forward which does not ignore risk to children.<sup>345</sup> Perhaps understandably, custody judges often react to abuse claims as though they are adjudicating a crime, where non-conviction means acquittal. But although indeterminacy properly leads to acquittal in the criminal realm, the same is not true for a determination of children's best interests in regard to parenting time. In these cases, the perpetrator does not face a loss of liberty, but the child faces a risk of ongoing abuse (or worse), which is entirely unnecessary when there is another 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 middle path that respects the possible risk while also seeking to heal any unnecessary rift between parent and child to the greatest extent possible.

Wherever a court is not prepared to rule affirmatively on abuse, but it has not been ruled out and the court believes the parent-child relationship should be pursued, 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

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future attempts to secure safety. Education, training, and support on family abuse for private domestic relations lawyers is a compelling need.

342. WEINER, *supra* note 190, at 329, 333.

343. This Article does 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 more determinative of judicial outcomes than statutory language.

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

345. 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. *See generally* Johnston & Sullivan, *supra* note 61.

forcing or eliminating parent-child contact based simply on whether abuse is fully proven.

As a result of increasing child murders by parents given access by family courts over the objections of a protective parent, a congressional concurrent resolution on child safety in family courts,<sup>346</sup> the new data described herein, and long-term advocacy by anti-abuse advocates, many state and federal lawmakers and advocates for children's safety are currently revisiting state custody laws.<sup>347</sup> Now is an auspicious time for developing new and more protective policies and practices for family courts.

#### A. CONSTRAINING RELIANCE ON ALIENATION AND LIKE THEORIES

Concern about parental alienation labels being used to deny mothers' and children's abuse allegations reached international critical mass with the 2020 publication of a European journal's special issue empirically documenting this problem in eight different countries. A growing number of international bodies are issuing statements of concern and calling on governments to remedy the problem, including most recently a European Parliament resolution warning countries of the need to better address family abuse in custody litigation and against the use of parental alienation labels in such cases.<sup>348</sup> The following discussion spells out

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346. 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). 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. See *House Concurrent Resolution 72 Passes in United States House of Representatives*, CAL. PROTECTIVE PARENTS ASS'N, <https://perma.cc/4SK3-RZEA> (last visited Mar. 7, 2022); *Our Work*, DV LEAP, <https://www.dvleap.org/our-work> [<https://perma.cc/J7SU-LQ5T>] (last visited Mar. 7, 2022).

347. For instance, Connecticut, reeling from murders of two protective mothers, adopted Jennifer's Law, which mandates protective order and custody courts to consider coercive control as well as domestic violence. S. Res. 1091, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021). In Pennsylvania, Kayden's Law, which passed the state House and is currently pending before the state Senate, 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 LOC. NEWS (Oct. 7, 2019), <https://perma.cc/2KF7-94NG>. New York is reeling from multiple horrific child murders after courts rejected mothers' pleas for safety, and legislative reforms are under discussion. See sources cited *supra* note 57. Finally, the recently reauthorized Violence Against Women Act contains a federal version of Kayden's Law, providing financial incentives to states to strengthen courts' protections of at-risk children through statutory and training reforms. See Press Release, Brian Fitzpatrick, Rep., House Passes Fitzpatrick's Bipartisan VAWA Reauthorization (Mar. 17, 2021), <https://fitzpatrick.house.gov/2021/3/house-passes-fitzpatrick-s-bipartisan-va-wa-reauthorizatio> [<https://perma.cc/9FTA-MV8V>]; Press Release, White House, Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA) (Mar. 18, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-va-wa/> [<https://perma.cc/6U9U-6Z7F>].

348. See Sheehy & Lapierre, *supra* note 51; DUBRAVKA ŠIMONOVIC, HILARY GBEDEMAH, IVANA RADAČIĆ, FERIDE ACAR, MARGARETTE MAY MACAULAY, LUCY ASUAGBOR & SYLVIA MESA, INTIMATE PARTNER VIOLENCE IS AN ESSENTIAL FACTOR IN THE DETERMINATION OF CHILD CUSTODY, SAY WOMEN'S RIGHTS EXPERTS 3 (2019), [https://www.ohchr.org/Documents/Issues/Women/SR/Statement\\_VAW\\_Custody.pdf](https://www.ohchr.org/Documents/Issues/Women/SR/Statement_VAW_Custody.pdf) [<https://perma.cc/QN9A-FNAC>] (recommending that nation-states should

a balanced approach to constraining the misuse of alienation theory.<sup>349</sup> It should be noted that this proposal does not seek to altogether eliminate the concept of one parent undermining the other—affirmative evidence of such behaviors can be considered when *not used to deny abuse*, that is, in cases where abuse is not alleged or in cases where it is an abuser who is alienating the children from their other parent as part of their pattern of abuse.<sup>350</sup>

To adequately constrain the misuse of alienation labels, statutes should require that courts do the following. First, 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. Next, in determining the validity of abuse allegations, experts, if any, must have expertise in the alleged form(s) of abuse. As several of the case narratives contained in this Article indicate, courts often allow nonexpert evaluators or GALs to opine negatively on abuse allegations. The requirement that any expert testimony must be by experts in the relevant sort of abuse is contained in both House Concurrent Resolution 72 and the reauthorized Violence Against Women Act (VAWA).<sup>351</sup>

Once family abuse by one parent is found, alienation claims against the other protective parent should be excluded.<sup>352</sup> Alienation is too regularly used to deny abuse or its effects. If abuse is recognized to have occurred in a family, alienation by a nonoffending parent should not be considered.

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.

Alienation claims should be considered only if all other justifiable 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, when there

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“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”); *European Parliament Resolution of 6 October 2021 on the Impact of Intimate Partner Violence and Custody Rights on Women and Children*, EUR. PARLIAMENT (Oct. 6, 2021), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-10-06\\_EN.html#sdocta3](https://www.europarl.europa.eu/doceo/document/TA-9-2021-10-06_EN.html#sdocta3) [<https://perma.cc/962L-QJDQ>] (“[C]alls on the Member States not to recognise parental alienation syndrome in their judicial practice and law and to discourage or even to prohibit its use in court proceedings, particularly during investigations to determine the existence of violence . . .”).

349. See Meier, *supra* note 45 (containing a more detailed discussion of the proposal).

350. See BANCROFT ET AL., *supra* note 48, at 74–84 (describing myriad ways batterers undermine mothers’ parenting and children’s respect for and trust in their abused mothers).

351. See Press Release, Brian Fitzpatrick, *supra* note 347; H.R. Con. Res. 72.

352. This restriction distinguishes this proposal from that of Johnston & Sullivan, *supra* note 61, who advocate assessment of alienation, abuse, and other parenting concerns all at the same time. As I have explained elsewhere, see Meier, *supra* note 45, 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.

are myriad other reasons children may have difficulties with a parent after separation.<sup>353</sup>

Next, 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.<sup>354</sup> There is no scientific basis for this—and it derives from Gardner’s PAS.<sup>355</sup>

Finally, 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 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 complete removal from the parent to whom a child is bonded, and forced contact with the so-called alienated parent,<sup>356</sup> based on the brainwashing theory underlying the alienation label. While meaningful data are 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.<sup>357</sup>

Provisions such as the foregoing could easily be incorporated into state statute; they could also be embodied in court rules, or at minimum, in judicial guidelines

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353. See Johnston & Sullivan, *supra* note 61, at 277–82 (describing many different factors and dynamics that come into play in fueling a parent-child relationship breach).

354. 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.” *Ferguson v. Wilkins*, No. 2001DRB000757, 2005 WL 8173309, at \*8 (D.C. Super. Ct. Dec. 15, 2005). Such a theory could negate all child abuse allegations in all cases, because inter-parental hostility can be inferred in most custody litigation. See Brief of Appellant Rosalind Blount at 31, *Blount v. Grier*, 221 A.3d 923 (D.C. 2019) (mem.) (No. 18-FM-624) (finding that 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 289, at 80.

355. See GARDNER, *supra* note 278, at 126, 128 (“In other cases, however, subconscious and unconscious factors are operative, especially projection. . . . [Treating the father as incompetent] can also serve as a mechanism for dealing with one’s own unconscious desires to inflict harm on the baby.”).

356. See Jean Mercer, *Are Intensive Parental Alienation Treatments Effective and Safe for Children and Adolescents?*, 16 J. CHILD CUSTODY 67, 69 (2019).

357. One child described her experience at a treatment program thus: “Captive 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/> [<https://perma.cc/6XS9-7X6C>]. She and her brother “couldn’t leave the program until they admitted 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 ten months, costing over \$200,000. *Id.* She was not allowed to have any contact with the father and brother she loved until she aged out of the court’s jurisdiction. *Id.*; see Silberg & Dallam, *supra* note 54.

or a bench book—the latter, of course, would be harder to enforce. Pieces of the above guidelines are already embodied in both the federal and Pennsylvania versions of Kayden’s Law.<sup>358</sup> With sufficient education about the Study, citation to both the reauthorized VAWA and House Concurrent Resolution 72,<sup>359</sup> 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 occur rapidly. Indeed, this problem—and these tragic stories—have been in the public eye to some extent for decades<sup>360</sup> but, like other inconvenient truths, they have been suppressed.<sup>361</sup>

Nonetheless, new momentum for change has recently emerged thanks to the #MeToo movement. While, as previously noted, this movement has not yet penetrated the legal system’s view of family violence, #MeToo is ushering in a new social consciousness that may eventually be felt in custody courtrooms. 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 “complete transformation.” Moreover, there will always need to be an approach for cases involving abuse allegations that are not—and may never be—resolved with certainty.

One institutional reason for family courts’ resistance to abuse allegations is courts’ somewhat understandable treatment of abuse allegations as raising

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358. See *supra* note 347.

See Press Release, Brian Fitzpatrick, *supra* note 347; *Kayden’s Law: Bucks County Lawmakers Introduce Bills to Ensure Children in Custody Disputes Are Protected*, *supra* note 347.

359. See Press Release, Brian Fitzpatrick, *supra* note 347; 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).

360. See, e.g., PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* (1986) (family courts’ rejection of mothers and elevation of fathers, including cases involving violence and incest).

361. See *Women on Trial (Film)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Women\\_on\\_Trial\\_\(film\)](https://en.wikipedia.org/wiki/Women_on_Trial_(film)) [<https://perma.cc/Z5J4-X66W>] (last visited Feb. 19, 2022) (describing a 1992 HBO documentary that followed a group of women who lost custody in family court to abusive fathers and that was taken off the air after one night due to a lawsuit by a family court judge); *Psychologist Loses Libel Suit Over HBO Documentary*, REPS. COMM. FOR FREEDOM PRESS (Oct. 19, 1998), <https://www.rcfp.org/psychologist-loses-libel-suit-over-hbo-documentary/> [<https://perma.cc/7HNN-VGXQ>]; see also Michael Getler, *A Little About Me, a Lot About “Breaking the Silence,”* PBS: OMBUDSMAN (Dec. 2, 2005, 4:11 PM), <https://perma.cc/KER4-SJBY> (describing *Breaking the Silence: Children’s Stories* 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* (Aug. 17, 2020), <https://www.pbs.org/about/blogs/news/pbs-statement-on-breaking-the-silence-childrens-stories-december-21-2005/> [<https://perma.cc/D3HQ-Q453>].

criminal claims. Faced with the equivalent of criminal allegations, courts instinctively lean toward protecting the rights of the “accused” and, in this author’s experience, may require (unconsciously if not explicitly) greater proof than the regular civil preponderance standard.<sup>362</sup> Another dynamic likely imported from the criminal context is courts’ apparent assumption that if abuse allegations are not sufficiently proven, they must then be considered untrue. Although a failure to be found guilty in a criminal case may be equated with innocence (at least as a legal matter), in a custody case, the issue is not guilt or innocence but future child well-being. In civil cases where child safety is at issue, treating *uncertain* abuse claims as *false* inappropriately places the risk of error squarely on the child. 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 an actual lack of sufficient evidence? If, as courts and court professionals regularly assert, one priority is relationship repair, a child-centric approach<sup>363</sup> would build on the guidelines described in Section V.A above.

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 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.<sup>364</sup>

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 nontraumatic and emotionally and physically safe for the child. A potentially rich modality for this type of therapy is play therapy. Play therapy allows children to use animals or other figures, drawings, sand trays, and other play materials to “directly or symbolically act out feelings, thoughts, and experiences that they are not able to meaningfully express through words.”<sup>365</sup> Moreover, “[t]he decision to expose a child to an alleged abuser should

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362. See Brief of Amicus Curiae Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) in Support of Petitioner at 16–18, *Ohio v. Clark*, 576 U.S. 237 (2015) (No. 13-1352) (describing family courts treating cases involving child abuse allegations as though they have criminal consequences).

363. Thanks to June Carbone for elevating this approach in my thinking.

364. See Madelyn Simring Milchman, Re: Scientific Issues Related to Reunification Therapy in Cases with Parental Alienation vs. Child Sexual Abuse Allegations 8 (Aug. 9, 2020) (unpublished manuscript) (on file with author).

365. Sue C. Bratton, Dee Ray, Tammy Rhine & Leslie Jones, *The Efficacy of Play Therapy with Children: A Meta-Analytic Review of Treatment Outcomes*, 36 *PRO. PSYCH.* 376, 376, 385 (2005) (describing play therapy as “equally effective across gender, age, and presenting issue,” because



be made [only] on the basis of clear and scientifically validated criteria for differentiating abused from alienated children.”<sup>366</sup> As child sexual abuse expert Madelyn Milchman has stated, no such valid criteria exist, and existing criteria for diagnosing alienation are too similar to criteria identifying behaviors of children who have been abused, making indeterminate cases unsafe for forced reunification.<sup>367</sup>

The disfavored parent would be given a therapist with expertise in parenting therapy and enough expertise in family abuse to understand the dynamics and the ways children, adult survivors, and perpetrators may present. The purpose of this therapy would be to work with the disfavored parent on any aspects of their parenting behavior that they are able to acknowledge may have impaired their relationship with their child, and to work toward repairing those injuries to the parent-child relationship for which they 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 the parent’s 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 healthy and positive relationship with the child.<sup>368</sup>

If these therapeutic processes clarify that abuse or other destructive parenting did in fact occur, the court’s orders should respond to that reality 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.<sup>369</sup> Allowing some—even limited—relationship 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 to improve themselves, allowing contact could provide the child with the apology and acknowledgment of their hurt for which most abuse survivors long.<sup>370</sup> On the other hand, if the child does not want to see that parent

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children “use play materials to directly or symbolically act out feelings, thoughts, and experiences that they are not able to meaningfully express through words”).

366. See Milchman, *supra* note 364, at 8–9.

367. See *id.* at 9–10.

368. See *id.*

369. Peled, *supra* note 160, at 29 (“[M]any children of abusive men seem to care deeply for their fathers and wish they could have a gratifying relationship with them.”).

370. See Arifa Akbar, *The Apology by Eve Ensler Review – 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> [<https://perma.cc/TKC2-F3A9>] (describing a memoir in which Ensler, writer of *The Vagina Monologues*, imagines and details an apology her father never actually made).

under any circumstances, their feelings, as a matter of justice and mental health, should be respected.<sup>371</sup>

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." This is less likely when the child is subjected to coercion—the usual *modus operandi* in alienation-driven proceedings.<sup>372</sup> 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. It may also, as described above, lead to the child's greater willingness to have contact with that parent.<sup>373</sup>

The preferred parent should work with the child's therapist or an independent therapist to understand the child's feelings and process and to help the parent support the child's growth and healing. This work may include helping the preferred 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 or pathological (as they often are now) 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 those needs and interests 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—the wrong ones, who lack abuse expertise and are biased toward alienation theory.<sup>374</sup> If our goal is to repair a damaged parent-child relationship in a case with abuse allegations, this Article urges that we replace forensic custody evaluators' opinions with the opinions of abuse and parenting

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371. See 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 (2010) (finding that 19% 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 and respect for them as a person").

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

373. See *id.* (finding that 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").

374. See SAUNDERS ET AL., *supra* note 105, at 723–24.

experts.<sup>375</sup> 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-theory-driven court processes, there is little to lose and much to gain from shifting the paradigm in responding to abuse allegations. As discussed 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. It also means shifting the current emphasis on "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 predisposition to distrust women's and children's allegations of a father's abusive or destructive conduct. Although the guidelines' emphasis on taking children's feelings and reports seriously is 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.<sup>376</sup> Regardless of whether a child is "rational" or correct in the view of a court, relationship repair cannot be accomplished by coercion. Forced "reunification" gives rejected parents physical possession of their children, but it does so at huge cost. First, many supposedly alienated children are cut off indefinitely from the parent they love and believe is protecting them. This ironically cures "alienation" by imposing an equivalent or greater destruction of a foundational parent-child relationship, causing presumably even more psychological damage to the child.<sup>377</sup> 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.<sup>378</sup> It should not take a specialist to recognize that healthy, positive parent-child relationships cannot 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 parent they love and trust and

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375. Such experts should be qualified based on their training and experience acquired in nonforensic settings, as the forensic context tends to feed preexisting biases. Forensic analysis does not provide meaningful work with and understanding of abusers and their victims.

376. 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."). Although not 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. See Convention on the Rights of the Child art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3.

377. 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 61, at 287 n.11.

378. See Johnston & Goldman, *supra* note 371.

forcing them to live with one they hate or fear, prioritizing an accused parent's "rights" or desires over the child's felt needs.<sup>379</sup>

A second objection may be that the proposal calls for too much court reliance on still more mental health professionals.<sup>380</sup> 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 manner that appropriately puts children's needs and interests first. However, in my view, it would be reasonable for courts and lawmakers to conclude that they are not institutionally suited to fixing family relationships, and that courts should instead strive to follow a medical model and "do no harm." This more modest and realistic 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. Such a 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.<sup>381</sup> Whether that effort is rewarded depends on the strengths and weaknesses of the formerly rejected parent and the adult child.

#### 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 family court system. Reckoning with courts' denial of family abuse and idolization 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.

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379. Stephanie Dallam & Joyanna L. Silberg, *Recommended Treatments for "Parental Alienation Syndrome" (PAS) May Cause Children Foreseeable and Lasting Psychological Harm*, 13 J. CHILD CUSTODY 134, 140 (2016) ("[A]dults who were forced into reunification with a rejected parent when they were a child had strong negative views and feelings about the experience.").

380. See, e.g., Scott & Emery, *supra* note 103, at 71, 92–100 (criticizing courts' reliance on mental health professionals for custody and visitation decisions).

381. Johnston & Goldman, *supra* note 371 ("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 . . .").