

**BREAKING DOWN THE SILOS THAT HARM CHILDREN: A
CALL TO CHILD WELFARE, DOMESTIC VIOLENCE AND
FAMILY COURT PROFESSIONALS**

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INTRODUCTION

The fields of domestic violence and child welfare have historically functioned as completely separate. They emerged from different social sensibilities and at different times, operate within distinct parts of the legal system (child welfare in government agencies and juvenile courts; domestic violence in private organizations and civil and criminal courts), receive largely distinct and non-intersecting professional education and training, and are driven by substantially different philosophies and value systems.¹ The problems that stem from these disjunctions have been recognized, but only in part. For instance, as Part I below describes, researchers and reformers have worked with child welfare agencies to remedy their lack of understanding of domestic violence which too often triggers removal of children from loving, safe parents who are co-victims of the other parent.² But until quite recently, there has been little attention to the fact that family courts adjudicating private custody litigation also regularly decide child placements in cases involving domestic violence and child maltreatment. Moreover, the often-unfavorable reception given to mothers making such allegations, and surprisingly common awards of custody to parents accused of abuse — even child abuse — is not widely recognized.

This Article, authored by two law professors, one specializing in domestic violence and the other in child welfare, suggests that custody courts may actually be the *most significant* system responding to adult and child abuse. This is because custody courts regularly hear both types of allegations (often within the same families), and they are mandated to determine children's "best interests." But the siloing of domestic violence, child welfare, and custody courts has undermined such courts' willingness and capacity to engage with the risks to children from a parent.

Our collaboration has surfaced two interlocking problems in child welfare agencies and family courts, which compel correction: First, grave problems with the foster care system have led reformers to encourage agencies to encourage safe parents to seek child custody in civil court as a means of sidestepping foster care. The hope has been that this would protect children from the problems with foster care and keep them safe

¹ Marianne Hester, *The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence*, 41 BRIT. J. SOC. WORK 837 (2011).

² *Id.* at 844.

with one of their parents. However, as detailed below, qualitative and quantitative research indicate that family courts surprisingly often fail to assure a child's safety from an unsafe parent. In this regard, dedicated child welfare reformers' lack of knowledge about what is happening in family courts may be increasing — rather than decreasing — harms to children.

At the same time, the gulf between family court and child welfare systems contributes to the negative outcomes for mothers alleging child maltreatment in family courts. Family court judges may understandably but mistakenly believe that if there was true child abuse it would have been dealt with in the child welfare system. When child welfare agencies have not investigated or validated child abuse claims by one parent against the other, many family courts mistakenly conclude that the child abuse claims are false, and that the protective parent is the problem parent and should not have custody of the children.³

This Article first describes the historic and current siloing of domestic violence, child welfare, and family court practices in response to domestic violence and child maltreatment. It then summarizes the qualitative and quantitative critiques of family courts unfavorable responses to mothers' allegations of family violence, including frequent custody removals. It also explores some of the reasons family courts may be skeptical of child maltreatment allegations and resistant to assuming a child-protective role. Turning to child welfare agency practices, the authors note a parallel skepticism from even these agencies toward custody litigants' claims of child abuse. Moreover, recent advocacy by well-intended reformers to rely on civil custody litigation instead of foster care where there is one safe parent, has emerged without awareness of these realities of custody litigation, which often increase rather than decrease children's risks from a parent.

In response to these dynamics and problems, this Article proposes three specific reforms. By and large, it is not law that needs to change, but attitudes and practices. The remedies include cross-training and education aimed at opening up both systems' ideologies, assumptions and practices. A key proposal is the recruitment of child welfare agencies themselves to advocate for children's safety *within the parents' custody case*. This and other strategies could save many children from both the trauma of removal from a safe and loving parent and the danger and trauma of being forced to live either with an unsafe parent or in foster care, which can be traumatic even at its best.

³ Gina Kaysen Fernandes, *Custody Crisis: Why Moms are Punished in Court*, MOMLOGIC (Jan. 19, 2010), www.momlogic.com/2010/01/custody_crisis_why_mothers_are_punished_in_family_court.php.

I. SILOED YET INTERSECTING: CHILD WELFARE, DOMESTIC VIOLENCE, AND CUSTODY COURTS

The separation of social and legal interventions for child welfare and domestic violence has deep historical roots. Both fields emerged only after the erosion of the pre-existing patriarchal legal framework which treated the use of violence as a father's right and duty to discipline and control wives and children.⁴ Each field developed separately and with a differing sensibility — child maltreatment was ultimately addressed by state agencies, and domestic violence through criminal or civil legal action initiated by victims. Significant efforts were made at the turn of the 21st century to break down the silos between domestic violence and child welfare, in part to better address families in which both were occurring. These initiatives, however, did not include civil courts adjudicating child custody.⁵ And, while child custody law has incorporated domestic violence reforms, no parallel reforms have focused on child maltreatment. Thus civil family courts, which have a checkered record in responding even to adult domestic violence, have lacked any scrutiny of their responses to child maltreatment.

A. Evolution of System Responses

Although a Martian, or in fact many humans,⁶ might presume that one person's abuse of different victims within the family would be treated as a single problem, the reality on planet Earth is that domestic violence and child abuse have long been addressed entirely separately.⁷ This continues today, despite the now widespread understanding that a substantial number of families and cases involve both forms of victimization; and that at least a significant portion of child maltreatment cases involve similar power and control dynamics to domestic violence.⁸

⁴ ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (1987).

⁵ SUSAN SCHECHTER & JEFFREY EDLESON, *EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES FAMILY VIOLENCE DEPARTMENT* (1999).

⁶ Two college-aged students (the first author's daughter and her friend) were astonished and horrified to learn that family abuse of adults and children in the same family would not be dealt with by a single agency or process.

⁷ Cathy Humphreys & Deborah Absler, *History Repeating: Child Protection Responses to Domestic Violence*, 16 *CHILD. & FAM. SOC. WORK* 464 (2011).

⁸ LUNDY BANCROFT ET AL., *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2nd ed. 2012).

1. Child Protection

Child protection first became a matter of public concern in the late 1800s; over the next 40 years, 494 private charitable Societies for the Prevention of Cruelty to Children (SPCCs) arose across the country.⁹ By the 1930s, the federal government had created a governmental child protection program, and by the 1960s most states had converted their private charities into state-funded and -governed child welfare agencies.¹⁰ While child welfare professionals' mission targeted children's health and safety, "wife-beating" was often part of the early case narratives; as is true today, the same man often abused both mother and children.¹¹ However, domestic violence was, at best, a secondary concern for the "child-savers."¹² Rather, child protection agencies looked to mothers as the responsible and blameworthy parent, in part because they were more accessible and responsive — even when the father was victimizing the children.¹³ And, while views of child maltreatment and its causes have ebbed and flowed with the times, a coherent understanding or view of "family violence" involving the same perpetrator of abuse against both adult and child victims, has never really emerged.¹⁴ Instead, child maltreatment as a field has become synonymous with maternal failures, and within that field, fathers' abuse of children has been shadowy at best.¹⁵

Two entirely separate federal funding streams and programs have powerfully reinforced the legal separation of society's responses to adult partner violence and child maltreatment. The Child Abuse Prevention and Treatment Act (CAPTA), adopted in 1974, targeted child maltreatment, and the Family Violence Prevention and Services Act (FVPSA) in 1984, and later, in 1994, by the Violence Against Women Act (VAWA), targeted partner violence.¹⁶ It was not until 2013 that federal grants under VAWA

⁹ PLECK, *supra* note 4, at 69.

¹⁰ John E. B. Myers, *A Short History of Child Protection in America*, 42 FAM. L. Q. 449, 453–54 (2008).

¹¹ LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON, 1880–1960*, 252–53 (Penguin Books 1988).

¹² *Id.* at 32.

¹³ GORDON, *supra* note 11; PLECK, *supra* note 4; LIEN BRAGG, U.S. DEPT. OF HEALTH AND HUMAN SERVICES USER MANUAL, *CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE* 48 (3d ed. 2003).

¹⁴ Amy M. Smith Slep & Susan G. O'Leary, *Examining Partner and Child Abuse: Are We Ready for a More Integrated Approach to Family Violence?*, 4 CLINICAL CHILD & FAM. PSYCH. REV. 87 (2001).

¹⁵ David Mandel & Claire Wright, *Building on the Greenbook: A Perpetrator Pattern-Based Approach to Improve Child Welfare's Response to Domestic Violence*, 70 JUV. & FAM. CT. J. 125–26 (2019).

¹⁶ Kiersten Stewart, *Evolving Federal Policies and Their Implications for Greenbook Interventions*, 70 JUV. & FAM. CT. J. 38–39, 42 (2019).

even permitted domestic violence legal representation to extend to child maltreatment cases. VAWA still only supports work on child sexual — but not child physical — abuse.¹⁷

One fundamental obstacle to better integration between child welfare and domestic violence systems has been women's rational fear of losing their children if reports of child abuse (or even domestic violence) are shared with the child welfare agency. Agencies have long used "failure to protect" charges against mothers whose children are victimized by an abusive father, often removing the children from their mother and home. This has fueled a deep resistance of domestic violence advocates and survivors toward collaboration with the child welfare system.¹⁸

In the 1990s, a pioneering effort by two leading domestic violence and child welfare experts challenged the bifurcation of adult domestic violence and child maltreatment.¹⁹ Susan Schechter and Jeffrey Edleson, along with others, pointed out the links between domestic violence and child maltreatment, the harm to children exposed to adult abuse, the risks batterers pose for children, and the importance of supporting rather than blaming the adult victim. Subsequently, the federally supported "Greenbook Initiative" brought together professionals from child welfare agencies, domestic violence non-profits, and dependency courts to develop a set of principles for best practices across the domestic violence and child welfare silos.²⁰ The Greenbook principles were put to work in six separate pilot projects around the country, with varying reports of success from the three collaborating groups regarding improved practices.²¹ For instance, many agencies adopted screening for domestic violence, and referrals of battered women for services increased. The Greenbook Evaluation Report does not, however, provide data or qualitative information on how these changes affected children.²² The Greenbook's spotlighting of the need for systems to collaborate to address the co-occurrence of adult and child

¹⁷ LISA N. SACCO, CONG. RSCH. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 17 (2019).

¹⁸ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 34–35 (1999); Lynn F. Beller, *When in Doubt, Take them Out: Removal of Children from Victims of Domestic Violence Ten Years After Nicholson v. Williams*, 22 DUKE J. GENDER L. & POL'Y 205–06 (2015).

¹⁹ SUSAN SCHECHTER & JEFFREY EDLESON, IN THE BEST INTEREST OF WOMEN AND CHILDREN: A CALL FOR COLLABORATION BETWEEN CHILD WELFARE AND DOMESTIC VIOLENCE CONSTITUENCIES 3–4 (1994).

²⁰ SCHECHTER & EDLESON, *supra* note 5, at 4.

²¹ THE GREENBOOK NATIONAL EVALUATION TEAM, NO: 233290, THE GREENBOOK INITIATIVE FINAL EVALUATION REPORT, GREENBOOK EVAL REPORT II–XI (2011).

²² *Id.* at ii.

abuse also spurred halting but incomplete efforts at the federal level to merge some of the funding and programs addressing each.²³

Building on the Greenbook's pioneering work, domestic violence expert David Mandel developed the Safe and Together Institute, whose "mission is to create, nurture and sustain a global network of domestic violence-informed child welfare professionals, communities and systems."²⁴ The Institute's trainings, concrete and teachable "perpetrator pattern-based approach," and valuable educational and follow-up resources for child welfare agencies have increased such professionals' awareness of the multi-faceted ways that a perpetrator of intimate partner violence impacts the whole family, including the children.²⁵ While the organization's mission has focused on child welfare agencies, it has also begun some work with civil family courts.²⁶

2. Domestic Violence

Unlike the child maltreatment field, which was primarily driven by a charitable impulse to protect presumptively innocent, helpless children,²⁷ activism against wife-beating or domestic violence evolved primarily out of advocacy for women's rights.²⁸ Not until the 1970s, when the first lasting movement against domestic violence emerged, did concrete legal remedies for intimate partner violence develop.²⁹ In 1970, the District of Columbia invented the civil protection order, which allowed abused women to seek an equitable injunction against abuse.³⁰ Over the following two decades, comparable equitable protection order remedies were adopted across the country.³¹

Since then, domestic violence awareness has spread to numerous fields, including criminal law, employment, health care, housing, insurance, and others. Of particular relevance for this Article, concerted advocacy by domestic violence experts and advocates in the 1980s and 1990s succeeded in creating statutory requirements that custody courts must consider domestic violence, either as a factor in determining children's best

²³ Stewart, *supra* note 16, at 41.

²⁴ Family Law Pathways Network, *David Mandel - FLPN Webinar*, YOUTUBE (June 9, 2020), <https://www.youtube.com/watch?v=xYjQOnJTB5U>.

²⁵ Mandel & Wright, *supra* note 15, at 132.

²⁶ Tiffany Martinez, *Keeping Michigan Families 'Safe and Together'*, THE PUNDIT (July 16, 2018), <https://michildsupportpundit.blogspot.com/2018/07/keeping-michigan-families-safe-and.html>.

²⁷ PLECK, *supra* note 4, at 88.

²⁸ *Id.* at 89.

²⁹ *Id.* at 88–89.

³⁰ District of Columbia Court Reform & Criminal Procedure Act of 1970, PUB. L. NO. 91-358, 84 Stat. 473, 547–48 (1970).

³¹ Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WISC. L. REV. 1657, 1666 (2004).

interests, or as the basis for a presumption against custody to a perpetrator.³² The effectiveness of these legislated reforms, however, has been questioned by myriad domestic violence lawyers, experts, and litigants, who have found family courts remarkably unreceptive to domestic violence evidence and concerns.³³

B. Custody Courts' Resistance to Addressing Child Maltreatment

While the Greenbook Initiative and the Safe and Together Institute have, with mixed results, sought to pioneer paradigm shifts within child welfare agencies regarding domestic violence, these efforts have not incorporated civil courts adjudicating child custody. The Greenbook focused on “co-occurring” domestic violence and child abuse, and asserted that “the three primary systems that serve these families [are] the child welfare system, the dependency courts, and domestic violence service providers.”³⁴ However, given that custody courts must determine children’s “best interests” and are legally mandated in all states to consider family violence, it is likely that it is family courts which are actually the *primary* system responding to both types of allegations. Unfortunately, civil family courts do not widely share this capacious view. Rather, as is described below, many judges deem themselves incompetent to hear child maltreatment allegations and seem to believe that such information should be siloed solely within child welfare agencies. As is described, in subsequent sections, this perspective does not lead to child protective court decisions.

One can see judges’ resistance to hearing about child maltreatment in one 2018 protection order case heard in a city’s dedicated domestic violence court. The judge, after listening to a mother (who had testified about her own victimization) described the abuser’s attacks on their children, burst out angrily, saying the equivalent of: “*Why is this here?! Why hasn’t DCFS addressed this?! We are not suited for this – we don’t have training in child abuse!*”³⁵ Similarly, in a custody case which the first author and a

³² Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 224 (2014).

³³ Debra Stark et al., *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1, 4–5 (2019); AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY MOTHERS ARE RUNNING FROM THE FAMILY COURTS – AND WHAT CAN BE DONE ABOUT IT 5–7 (2005); Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57, 58 (2003); Stephanie J. Dallam & Joyanna L. Silberg, *Six Myths that Place Children at Risk in Custody Disputes*, 7 FAM. & INTIMATE PARTNER VIOLENCE Q. 65, 69–71 (2014).

³⁴ THE GREENBOOK NATIONAL EVALUATION TEAM, *supra* note 21, at ii.

³⁵ The first author was representing the mother who was testifying and seeking a protection order for both herself and her children. She explained to the

law student handled many years ago, the highly-regarded and domestic-violence-trained judge exploded and started berating the client (the mother) and her representatives when the student started to detail the father's hurling of a child across a room. These volatile responses may have been triggered by a strong negative reaction to this disturbing material³⁶ — even though in both cases the judge was sitting on a domestic violence docket. One would hope that it would not surprise judges on a domestic violence docket if they are presented with information about child abuse — but the strength of this reaction is emblematic of many courts' reactivity and resistance to hearing about child abuse.

This resistance has likewise been reported by advocates in several states. Some assert that family court personnel sometimes refuse altogether to consider any information about child maltreatment or even child welfare investigations.³⁷ One advocate described a conversation in which a judge leading a commission on reform of the state's child custody statute, angrily refused to also include a child abuse expert on the expert body, despite including domestic violence experts, and despite the custody statute's inclusion of child abuse as a factor courts must consider.³⁸ While these stories undoubtedly do not represent all judges sitting on civil domestic violence or domestic relations dockets, the national data discussed in Section II.B below strengthen the indications that many family courts harbor negative attitudes toward child maltreatment allegations.³⁹

How is it that not only domestic relations — but even *domestic violence* civil courts — perceive child abuse as an inappropriate topic for their dockets? This Article submits that this is the most concrete manifestation of the historically distinct development of society's responses to domestic violence and child maltreatment. But the historical silos are also contemporaneously reinforced. For instance, the battered women's

judge that DCFS had interviewed the children, expressed empathy and concern, and done nothing. The judge was not very receptive. *Sessions v. Harris*, No. CPO 000424 (D.C. Super. Ct. Feb. 21, 2018) (civil protection order, on file with first author).

³⁶ Ann M. Ordway et al., *Understanding Vicarious Trauma, Burnout, and Compassion Fatigue in High-Conflict Divorce*, 28 THE FAM. J. 187, 189 (2020); Joan Meier, *Denial of Family Violence: An Empirical Analysis and Path Forward for Family Law*, 110 GEO. L. J. (forthcoming Apr. 2022).

³⁷ E-mail from Mikaela Deming, Staff Attorney, Ohio Domestic Violence Network to ABACDSV List-serv (July 20, 2020); E-mail from Danielle Pollock to Joan Meier (July 27, 2020).

³⁸ E-mail from Anonymous to first author (May 18, 2020) (on file with first author).

³⁹ See also *K.D. v. E.D.*, 2021 PA Super 224 (Nov. 16, 2021)(slip op.)(holding that a trial court's original findings that the father abused the children did not preclude a later court from finding no abuse, in part because no abuse finding had been made by the child welfare agency). The decision is being appealed.

movement's focus on women's rights has meant that advocacy for domestic violence reforms has centered on victimization of women, not children. Domestic violence custody law reforms thus far have focused solely on adult abuse. While child abuse is typically referenced in passing in protection order or custody statutes, such statutes typically import a definition from child welfare statutes or the criminal code⁴⁰, with little additional guidance to courts. And while reformers have developed domestic violence trainings for domestic violence and family court judges, it is rare — if ever — that such a training will also address how courts should understand and assess child abuse allegations (Epstein, 1999 n. 165; Jaffe, 2010).⁴¹

In short, while domestic violence law reformers have endeavored to awaken the civil and criminal legal systems to the reality and dynamics of adult domestic violence, no comparable systematic efforts have focused on child maltreatment, whether co-occurring with domestic violence or not.

Today, the fact that there is a separate state agency designed to address child maltreatment provides an easy structural argument for why judges hearing cases between parents, as opposed to involving the State, might believe their jurisdiction does not extend to child maltreatment, even though it is statutorily relevant to custody. Some child welfare system proponents have voiced a similar attitude. In a recent discussion of a proposal for custody courts to adjudicate child maltreatment and domestic violence in an up-front hearing, a self-described child welfare expert argued that child maltreatment was solely child welfare agencies' job, not custody courts'.⁴²

1. Lack of Intersectional Professional Education

These silos begin, to some degree, in the professional schools. While law schools may have domestic violence classes or clinics, those courses rarely address child abuse to a meaningful degree, although they may refer to child protection practices and laws, or to the impact of domestic violence on children. This is true even now in the first author's own clinical domestic violence course.⁴³ And while other law school courses may address the child protection system, they focus, understandably, on law and policy more than on child abuse itself, let alone the links between child

⁴⁰ District of Columbia IntraFamily Offenses Act, D.C. CODE § 16-1001 (2021).

⁴¹ Epstein, *supra* note 18, at 33 n.165; PETER JAFFE, ENHANCING JUDICIAL SKILLS IN DOMESTIC VIOLENCE CASES: A PROCESS AND OUTCOME EVALUATION OF A NATIONAL JUDICIAL EDUCATION PROGRAM (2010).

⁴² E-mail from Danielle Pollock to Joan Meier, *supra* note 37.

⁴³ E-mail from Joan S. Meier, Informal Survey of Domestic Violence Law Teachers (2020) (on file with first author).

abuse and domestic violence. Among mental health professions, as of 2002 and 2012 no family violence curriculum was required in social work and clinical psychology graduate programs, and most clinical psychologists rated their education in child maltreatment as poor.⁴⁴

The majority of legal and mental health professionals who find their way into family law and child custody litigation thus lack meaningful education or training in domestic violence, child maltreatment, and especially, both. Nor is continuing education likely to make up for that insufficiency.⁴⁵ Limited 1-3-hour trainings are not capable of engendering critical or deep thinking that could challenge an attendee's personal beliefs about families and child custody.⁴⁶

Finally, despite the ubiquity of family courts' reliance on court-appointed neutral evaluators, only six states (Alaska, Arizona, California, Louisiana, Oklahoma and Texas) require training on domestic violence.⁴⁷ Roughly 75% of contested custody cases in court involve allegations of some kind of family abuse,⁴⁸ often involving both child and adult

⁴⁴ INST. OF MED., *CONFRONTING CHRONIC NEGLECT: THE EDUCATION AND TRAINING OF HEALTH PROFESSIONALS ON FAMILY VIOLENCE* 4042 (2002); Pamela D. Connor et al., *Overcoming Barriers in Intimate Partner Violence Education and Training of Graduate Social Work Students*, 32 J. TEACHING IN SOC. WORK 29 (2012); Kelly M. Champion et al., *Child Maltreatment Training in Doctoral Programs in Clinical, Counseling, and School Psychology: Where Do We Go From Here?*, 8 CHILD MALTREATMENT 211 (2003). The Zero Abuse Project, noting that even child protection workers, police and social workers lack adequate training in child abuse, touts a program called "Child Advocacy Studies" ("CAST"), for universities and colleges, asserting that "85 universities in 28 states have implemented this reform." ZERO ABUSE PROJECT, *STRATEGIC PLAN 2021–23* 6–7 (2020), <https://www.zeroabuseproject.org/wp-content/uploads/2021/01/Strategic-Plan-2021-2023-Public.pdf>.

⁴⁵ K. N. Babeva & G. C. Davidson, *A Review and Critique of Continuing Education*, 40 BEHAV. THERAPIST 4 (2017).

⁴⁶ Jennifer J. Freyd & Alec M. Smidt, *So You Want to Address Sexual Harassment and Assault in Your Organization? Training is Not Enough; Education is Necessary*, 20 J. TRAUMA & DISSOCIATION 489 (2019).

⁴⁷ CAL. FAM. CODE §§ 1816, 3110.5 (West 2020); TEX. FAM. CODE ANN. § 107.104 (West 2015); ALASKA R. CIV. P. 90.6; ARIZ. REV. STAT. ANN. § 25-406 (Westlaw, through First Spec. Sess. of the Fifty-Fifth Leg. and the First Reg. Sess. of the Fifty Fifth Leg. (2021)); LA. STAT. ANN. §§ 9:331, 9:365 (Westlaw, through 2021 Reg. Sess. And Veto Sess. 2021); <https://law.justia.com/codes/oklahoma/2016/title-43/section-43-120.7/>. Colorado also adopted in 2021 requirements for court-approved custody evaluators to receive six hours of training each on domestic violence and child abuse. *See* 2021 Colo. Sess. Laws 1727. *See also* Materials for the Feerick Center 16th Domestic Violence Conference, *The Forensic Lens in Domestic Violence Custody Cases: Sharpening the Focus* (Appendix A), <https://sites.google.com/site/fordhamconference2012/forensic-lens>.

⁴⁸ Jaffe et al., *supra* note 33, at 58.

victims.⁴⁹ Therefore the lack of basic professional education for court-affiliated professionals on domestic violence, child maltreatment, and the links between them — and the absence of any *requirement* of such education for most court-affiliated professionals — surely contributes to courts' ignoring of the elephant in the living room.

2. Judicial Systemic Siloing

Like the professions themselves, courts are internally siloed. In most states and the District of Columbia, there is a separate “child abuse and neglect” (“CAN”) or “dependency” docket which hears cases brought by the child protection agency.⁵⁰ Child abuse is thus assumed to be handled “over there” in the agency cases. While it’s not entirely logical, this feeds the unstated belief that child abuse does not belong — or exist — in the other civil dockets., such as “domestic relations” or custody.

A parallel type of siloing is apparent among specialized domestic violence courts. For instance, in the District of Columbia, the new domestic violence court was forward-thinking in 1996 because it brought together criminal and civil dockets handling domestic violence cases, prioritized communication about the same families by judges across dockets, and to some extent assigned one family to one judge.⁵¹ But more than twenty years later, custody cases involving domestic violence continue to be heard only in the separate Domestic Relations Unit.⁵² In general, regardless of whether states possess a domestic violence court, separate court dockets for civil protection orders, child abuse and neglect, and custody, are the norm.⁵³

⁴⁹ Almost 20% of all alleged paternal abuse cases in the United States during a ten-year period contained allegations of mixed adult and child abuse. JOAN S. MEIER ET AL., CHILD CUSTODY OUTCOMES IN CASES INVOLVING PARENTAL ALIENATION AND ABUSE ALLEGATIONS 20, Final Summary Overview, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448062 (2019) (hereinafter “MEIER ET AL.”)

⁵⁰ See, e.g., <https://www.dccourts.gov/superior-court/family-court-operations>, itemizing the subdivisions and separate dockets within the family court; <https://www.dccourts.gov/superior-court> (domestic violence division is separate from family court and criminal court).

⁵¹ Epstein, *supra* note 18, at 34–35.

⁵² *Id.* at 31. At a meeting describing the then-new Domestic Violence court, when the first author asked the presenters where custody cases would be heard, a speaker expressed confusion at the notion that domestic violence cases could include custody cases, as opposed simply to protection order cases.

⁵³ *Id.* at 21–28 (describing the normally uncoordinated and confusing, complicated multiple different courts and proceedings for a single family; contrasting the District of Columbia’s then-new Domestic Violence Division which was intended to consolidate such proceedings).

Invariably, when courts assign child abuse and neglect or domestic violence cases to separate dockets, it sends the message to court personnel that those cases are to be handled *there*. The unstated corollary is that, if a case is not in the Child Abuse and Neglect (“CAN”) court or the domestic violence (“DV”) Unit, it’s assumed *not to be a case of child abuse or domestic violence*, respectively. Such bureaucratic siloing reinforces – and may even generate – family court professionals’ assumption that domestic violence, and especially child maltreatment, is not an intrinsic part of a custody adjudication.

II. CUSTODY COURT RESPONSES TO MOTHERS ALLEGING CHILD ABUSE

The siloing of child maltreatment and domestic violence, and the separation of child welfare agencies and family courts, would not necessarily be a problem if both agencies fulfilled their mandates effectively and adequately protected at-risk children. However, a vast literature and a growing body of empirical data describe domestic relations courts’ resistance and even punitive responses to mothers’ allegations of family violence, especially child abuse. Custody or unsafe visitation awards to allegedly abusive parents are not uncommon; and a growing body of child homicide cases documents the most severe outcomes of these errors.

A. Substantive Critiques

Legal and psychological scholars have extensively criticized family courts, both in the United States and internationally⁵⁴ for disbelief — and even hostility — toward women in custody battles alleging that a father is abusive. They have observed that custody courts commonly do not acknowledge domestic violence or child abuse, are driven by myths and misconceptions about perpetrators and victims,⁵⁵ and often fail to understand the implications of domestic violence for children and parenting,⁵⁶

⁵⁴ AUSTRALIAN LAW REFORM COMMISSION, FAMILY LAW FOR THE FUTURE — AN INQUIRY INTO THE FAMILY LAW SYSTEM (Mar. 2019), https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135_final_report_web-min_12_optimized_1-1.pdf; ROSEMARY HUNTER ET AL., MINISTRY OF JUSTICE, ASSESSING RISK OF HARM TO CHILDREN AND PARENTS IN PRIVATE LAW CHILDREN CASES: FINAL REPORT 51–52 (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report.pdf.

⁵⁵ HUNTER ET AL., *supra* note 54, at 51–52; Jaffe et al., *supra* note 33; Dallam & Silberg, *supra* note 33.

⁵⁶ Evan Stark, *Rethinking Custody Evaluations in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287 (2009); Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11 (2003).

resulting in awards of unfettered access or custody to abusive fathers.⁵⁷ They have described a growing number of cases in which courts deem the mothers' allegations to be signs of malevolence or a toxic psychology, and some which cut children completely off from their protective mothers.⁵⁸ These drastic responses to mothers' abuse allegations appear to be most pronounced in cases of alleged child sexual abuse.⁵⁹

B. Empirical Data

These substantive critiques have been supported by a small number of empirical studies of custody courts' handling of adult domestic violence or minimization of adult domestic violence.⁶⁰ A recent Wisconsin study found that half of all custody courts failed to mention domestic violence even when the perpetrator had been criminally convicted.⁶¹ Another

⁵⁷ BANCROFT ET AL., *supra* note 8; Fernandes, *supra* note 3; SALLY F. GOLDFARB, THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN IN THE UNITED STATES OF AMERICA: RECENT REFORMS AND CONTINUING CHALLENGE 9 (July 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); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. UNIV. J. GENDER, SOC. POL'Y. & L. 657 (2003).

⁵⁸ Nancy Stuebner et al., Poster Presentation at the International Violence and Trauma Conference (2014); Claudine Dombrowski, *Dombrowski et al V. U.S.A., 2007 -- PETITION # 664-07 International Commission Human Rights (IACHR)*, CLAUDINE DOMBROWSKI BLOG (Aug. 27, 2013), <http://claudinedombrowski.blogspot.com/2013/08/dombrowski-et-el-v-usa-2007-petition.html> (Petition to Inter-American Commission on Human Rights detailing 10 cases in which U.S. family courts both suppressed evidence of adult and child abuse and awarded custody to abusers).

⁵⁹ Kathleen Coulborn Faller & Ellen DeVoe, *Allegations of Sexual Abuse in Divorce*, 4 J. CHILD SEXUAL ABUSE 1 (1995); NEUSTEIN & LESHER, *supra* note 33; S. R. Lowenstein, *Child Sexual Abuse in Custody and Visitation Litigation: Representation for the Benefit of Victims*, 60 UMKC L. REV. 228 (1991); L. BANCROFT ET AL., *Chapter 4, The Batterer as Incest Perpetrator*, in THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 107, 119–21 (2nd ed. 2012); Madelyn Milchman, *Misogynistic Cultural Argument in Parental Alienation Versus Child Sexual Abuse Cases*, 14 J. CHILD CUSTODY 211 (2017).

⁶⁰ Joan Zorza & Leora Rosen, *Guest Editors' Introduction to Special Issue*, 11 VIOLENCE AGAINST WOMEN 993 (2005); Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 L. & INEQ. 5 (2011).

⁶¹ Teresa E. Meuer et al., *Domestic Abuse: Little Impact on Child Custody and Placement*, STATE BAR OF WIS.: INSIDE TRACK (Dec. 13, 2018), <http://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=91&Issue=11&ArticleID=26737>.

national study analyzed 27 “turned-around” cases, in which a first court rejected abuse claims and placed a child at risk with an abusive parent, but a second court validated abuse and (belatedly) protected the child.⁶² Consistent with extensive anecdotal reports in the literature and social media,⁶³ the researchers found courts and neutral professionals at the first proceeding were suspicious of mothers’ allegations of abuse, and tended to pathologize or label such mothers as “parental alienators.”⁶⁴

The above scholarship has shed light on family court trends, but none of these empirical studies examined a national picture, nor addressed courts’ responses to child abuse as distinct from or in conjunction with domestic violence. Recently a first-ever empirical study of family court outcomes nationwide, led by the first author, has produced objective data documenting family courts’ decisions in cases where one parent alleges either adult or child abuse by the other. The federally-funded *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* study (the “Study”) is described in more detail elsewhere.⁶⁵ The Study of all relevant custody opinions within a 10-year period powerfully confirms the qualitative critiques in the literature. In addition, to the authors’ knowledge, this study provides the only existing credible data on family courts’ responses to child abuse – as distinct from intimate partner violence - allegations.⁶⁶

In brief, courts rejected mothers’ allegations of any type of family abuse, on average, approximately 2/3 of the time.⁶⁷ Seventy-nine percent

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

⁶³ See, e.g., TheCourtSaid-USA, FACEBOOK, <https://www.facebook.com/search/top/?q=Thecourtsaid-USA>; One Moms Battle, FACEBOOK (Nov. 22, 2021), <https://www.facebook.com/onemomsbattle/posts/4765423403509892>.

⁶⁴ Silberg & Dallam, *supra* note 62, at 140.

⁶⁵ 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, 94–95 (2020) (hereinafter “Meier 2020”); MEIER ET AL., *supra* note 49.

⁶⁶ While one study purporting to refute the Meier et al study has been published, its flaws are so many and so profound that its data is not, in the authors’ view, reliable (Jennifer J. Harman & Demosthenes Lorandos, *Allegations of Family Violence in Court: How Parental Alienation Affects Judicial Outcomes*, 27 PSYCH., PUB. POL’Y & L. 187 (2021)). For the study team’s two rebuttal articles, see Meier et al., *Commentary, The Trouble with Harman and Lorandos’s Attempted Refutation of Meier et al*, J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. (forthcoming 2022); Meier et al., *Harman and Lorandos’s False Critique of Meier et al.’s Family Court, Abuse, and Alienation Study*, J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. (under review).

⁶⁷ MEIER ET AL., *supra* note 49, at 20.

of child physical abuse claims and 81% of child sexual abuse allegations were rejected.⁶⁸ When an allegedly abusive father cross-accused the mother of parental alienation, rejection rates were highest.⁶⁹ Only *one* child sexual abuse claim out of 51 (2%) was accepted by a court in that circumstance.⁷⁰

Courts' rejections of mothers' allegations had severe consequences: Approximately one-third of mothers alleging child abuse lost custody to the alleged abuser.⁷¹ When they alleged both types of physical and sexual child abuse, the penalties escalated: These mothers lost custody 56% of the time. Even when courts deemed the father abusive, 13% were able to remove custody from the mother with an even higher percentage of custody removals for mothers alleging child abuse.⁷² As is discussed in the Study, these patterns do not appear when genders are reversed.⁷³

While the Study did not and could not know whether trial courts' factual findings and rejections of abuse allegations were wrong or right,⁷⁴ when paired with the qualitative, anecdotal reports and surveys of allegedly protective mothers' outcomes in court, the data are sobering. And while some may argue that courts could be correct to disbelieve the vast majority of child sexual abuse claims in custody litigation, independent research consistently finds that 50-75% of child abuse allegations in context of custody litigation are considered credible.⁷⁵

Overall, the Study's new data powerfully reinforces the extensive critiques in the literature and social media of mothers who report having disclosed true abuse and losing custody to the abuser.⁷⁶ It should now be clear that family courts set an extremely high bar for proof of child physical — and particularly child sexual abuse allegations against fathers. The data and reports confirm that the pattern is deeply gendered. This should be troubling to all who care for children's safety and well-being.

C. Why?

The foregoing reports and data beg a two-part question: Why are family courts so resistant to mothers' allegations of fathers' abuse, and why especially to child abuse? While these questions deserve a study of their

⁶⁸ *Id.*

⁶⁹ *Id.* at 14; Meier 2020, *supra* note 65, at 98.

⁷⁰ MEIER ET AL., *supra* note 49, at 14; Meier 2020, *supra* note 65, at 98.

⁷¹ MEIER ET AL., *supra* note 49, at 23.

⁷² *Id.* at 24.

⁷³ *Id.* at 23.

⁷⁴ *Id.* at 11.

⁷⁵ MEIER ET AL., *supra* note 49, at 10–11.

⁷⁶ *E.g.*, Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. STATE L. J. 709 (2007).

own, the authors of this Article propose that the siloing discussed above plays a role in courts' rejection of child maltreatment allegations: To the extent that family courts relegate — implicitly or explicitly — child abuse to child welfare agencies, as noted above, they can be expected to believe that “those issues belong there, not here.” This leads to a skeptical and critical response when such allegations arise where they “do not belong.” But the reality is that legitimate child abuse allegations often arise in family court first. This is for many reasons, not least of which is that much child abuse only begins — or is disclosed by the child — after the parents separate, which is when custody proceedings are often initiated.⁷⁷ Unfortunately, courts have been known to reject child abuse allegations on the ground that they were raised for the first time in custody court.⁷⁸

More generally, some scholars have posited that courts' skepticism toward mothers' abuse allegations stems from a lack of knowledge about how domestic violence and trauma affect families, and implicit or explicit gender bias.⁷⁹ Another hypothesis turns on the natural human inclination to avoid psychological and emotionally traumatic material such as child sexual abuse. Professionals experiencing vicarious trauma — the psychological tendency to numb and avoid traumatic abuse material when one is overloaded, causing the brain to shut down in response to it — may appear uninterested in child abuse or inclined to “shoot the messenger” rather than accept such allegations and take action to protect a child.⁸⁰

While these phenomena likely play a role, the fact that courts' negative responses are aimed more at mothers than fathers necessitates, at least in part, a gender-specific explanation. Nor does that explanation need to stop at overt or implicit gender bias against women or favoring men. Rather, the over-riding and superficially gender-neutral value driving family courts — shared parenting — is itself implicitly but deeply gendered.⁸¹ Regardless of whether a court orders equal shared parenting,⁸² most courts

⁷⁷ LINDA C. NEILSON, RESPONDING TO DOMESTIC VIOLENCE IN FAMILY LAW, CIVIL PROTECTION & CHILD PROTECTION CASES SEC. 6.5.3.2 (Canadian Legal Info. Inst., 2d ed. 2020) (ebook); BANCROFT ET AL., *supra* note 8.

⁷⁸ NEILSON, *supra* note 77, at Sec. 6.5.3.2 n. 271 (citing *Cox v. Brady*, 2002 NFCA 27).

⁷⁹ Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399 (2019); Goodmark, *supra* note 76; Milchman, *supra* note 59.

⁸⁰ Ordway et al., *supra* note 36; Meier, *supra* note 57, at 708; Meier, *supra* note 36, at 43–47.

⁸¹ HUNTER ET AL., *supra* note 54; Meier, *supra* note 49.

⁸² While joint *legal* custody is common in family courts, there is no evidence that joint *physical* custody is common. Indeed, the Meier et al study found surprisingly few physical joint custody awards in cases involving either abuse or alienation claims. (Electronic communication from Sean Dickson to first author, 2020).

consider shared parenting the pre-eminent value in custody litigation, and the crucial value by which they judge parents.⁸³ Given that most primary caregivers are mothers, they naturally oppose shared parenting more often than fathers do; and are accordingly disadvantaged in court.⁸⁴ Another source of implicit bias in custody adjudications is the tendency for courts and systems to expect relatively little of men as parents before deeming them worthy of custody, in contrast to expectations of mothers.⁸⁵

These background disadvantages for mothers in custody court are compounded when they allege that a father is dangerous. As the 2020 United Kingdom Ministry of Justice-sponsored study of “harm” from family courts concluded, “respondents [litigants] felt that courts placed undue priority on ensuring contact with the non-resident parent, which resulted in systemic minimization of allegations of domestic abuse.”⁸⁶ Rather than inferring that women are reluctant to share parenting *because* of family violence, judges and other professionals committed to shared parenting often see mothers’ family violence allegations as merely a strategy for undermining the father’s parenting time.⁸⁷ This dynamic is accentuated by courts’ focus on “parental alienation,” a concept which treats children’s resistance to one parent as evidence that the other parent has undermined that relationship, either deliberately and malevolently, or because of pathology.⁸⁸ While the parental alienation concept theoretically also applies in non-abuse cases and to any gender, both the UK hearings and the first author’s Study found it to be more powerful when utilized against mothers accusing fathers of abuse.⁸⁹ In short, the #MeToo movement may have catalyzed a new social reckoning with the reality of men’s abuse of women in the larger world, but it has yet to do the same for legal attitudes toward abuse in the family.⁹⁰

⁸³ Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); HUNTER ET AL., *supra* note 54.

⁸⁴ *Id.* at 13–15; HUNTER ET AL., *supra* note 54.

⁸⁵ Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415–16 (1991); Mandel & Wright, *supra* note 15, at 127.

⁸⁶ HUNTER ET AL., *supra* note 54, at 4.

⁸⁷ Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to it*, 24 UCLA WOMEN’S L. J. 41, 43 (2017); HUNTER ET AL., *supra* note 54.

⁸⁸ Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: A Research Review*, VAWNET (Sept. 2013), <https://vawnet.org/material/parental-alienation-syndrome-and-parental-alienation-research-review>.

⁸⁹ HUNTER ET AL., *supra* note 54, at 18–19; MEIER et al., *supra* note 49.

⁹⁰ Milchman, *supra* note 59.

Thus, there are many reasons family courts might marginalize and reject mothers' abuse allegations, especially child abuse, which is intuitively more horrifying and harder to accept than partner violence. Structurally, courts are reinforced in believing that child abuse is handled elsewhere, by the child protection agency and/or dependency court. Judges and other neutral professionals, such as evaluators and Guardians Ad Litem, often lack meaningful expertise in domestic violence and especially child sexual abuse. While they may be trained to some extent on domestic violence, the same is not true for child maltreatment.⁹¹ And courts' resistance to mothers' claims of child abuse is also powerfully fueled by their priority to shared parenting and fathers' rights — which theories like parental alienation reinforce. In the eyes of many courts, child abuse poses more of an obstacle to shared custody than does partner violence.

Unfortunately, despite the fairly extensive literature describing the dynamics in family courts, awareness of the negative reception which awaits mothers alleging family violence in court has not penetrated the child welfare field. Simply put, the domestic violence and child welfare fields generally read different journals, use different listservs, and attend different conferences. One consequence of this lack of integration is that both child welfare agencies and their reformers have trusted family courts to protect children, not realizing that such courts often fail to see themselves — or to act — as child protectors.

III. CHILD WELFARE AGENCIES' TREATMENT OF CUSTODY LITIGANTS

A. Turfing and Discounting

Ironically, while as noted above, custody courts look to child welfare agencies to handle child abuse, child welfare agencies also often defer their investigations to the civil courts — often assuming that they will “sort out” the truth.⁹² At the same time, agencies share courts' deep skepticism toward allegations of child abuse that arise in the context of custody litigation. Some agency personnel refer disdainfully to the influx of reports they receive on Sunday nights, after children return from visitation with their non-custodial parents, as “custody night.”⁹³ Others are advised — or believe — that the presence of custody litigation is grounds for

⁹¹ While trainings on domestic violence are supported by federal funding and significant non-profit expert organizations, cf. <https://njdv.org/>, https://www.ncjfcj.org/webinars/?search=domestic+violence+&start_date=&category=, there is no comparable support or organization delivering expert trainings to judges on child maltreatment. In the first author's experience, courts often assert that they are routinely trained on domestic violence; but when asked if that includes child maltreatment, the answer is no.

⁹² Silberg & Dallam, *supra* note 62.

⁹³ Family Law Pathways Network, *supra* note 24.

serious skepticism of a child abuse report.⁹⁴ And even where such views are not explicitly stated, in our experience from cases we have handled, they are implicitly held by many agency professionals. The many reasons such beliefs are incorrect cannot be addressed in this Article, but are discussed elsewhere.⁹⁵

Thus, like the scarecrow in *The Wizard of Oz*, whose arms were crossed and pointing in opposite directions, civil courts and child welfare agencies each seem to expect the other to handle child abuse allegations in shared cases, thereby leaving many children and protective parents altogether without systemic support. The net effect of both systems' excess skepticism and unwillingness to address child abuse where there is custody litigation, is that children are left unprotected — at best — by each part of the system which is responsible for their welfare. And where courts order children into unprotected parenting time with an allegedly abusive father, many children suffer.⁹⁶

B. Double-Edged Reforms

Compounding the legal system's failure to genuinely protect children is the harm inflicted on abused children by state agencies' reliance on foster care to keep some children safe. While foster care is not typically a first-line strategy, it is common in cases involving serious domestic violence.⁹⁷ The problems with foster care have caused reformers to encourage agencies to send non-offending, protective parents to obtain legal custody as a safe and better alternative. But, in the second author's experience, this reform focus developed without understanding that family courts often not

⁹⁴ BANCROFT ET AL., *supra* note 8.

⁹⁵ NEILSON, *supra* note 77; Brittany E. Hayes, *Indirect Abuse Involving Children During the Separation Process*, 32 J. INTERPERSONAL VIOLENCE 2975 (2015); BANCROFT ET AL., *supra* note 8.

⁹⁶ Reports of children murdered by a parent (mostly fathers) involved in custody litigation appear in the news with alarming frequency. *See, e.g.*, Tim Hahn, *PA Man Killed His Children, Set Fire to Home; Then Shot Himself: Police*, ERIE TIMES NEWS (June 30, 2021), <https://www.pennlive.com/crime/2021/06/pa-man-killed-his-children-set-fire-to-home-then-shot-himself-police.html>. Sadly, over one hundred such cases of child murder where a court was involved have been documented as part of a much larger database of children killed by a parent where a court's involvement has not been verified. Center for Judicial Excellence, *Child Murder Data*, <https://centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/>.

⁹⁷ Diana J. English et al., *Domestic Violence in One State's Child Protective Caseload: A Study of Differential Case Dispositions and Outcomes*, 27 CHILD. & YOUTH SERVS. REV. 1183, 1197 (2005)(four out of five children in homes with domestic violence, deemed moderate or high risk).

only fail to protect children from — but even force them into the care of — a dangerous or abusive parent.

1. Harms of Foster Care

While foster care is presumably used to protect children from an abusive or neglectful parent, frequently children are removed from both parents, even when one is non-offending and safe.⁹⁸ Unfortunately, research demonstrates that removing children from safe and loving parents is profoundly harmful. Separating children from their safe parents can cause both emotional and psychological trauma to a child that can last a lifetime.⁹⁹ The harm that can occur as a result of removal results in a “monsoon of stress hormones . . . flooding the brain and body.”¹⁰⁰ The evidence about the harm of involuntarily separating children from their safe parents is so overwhelming that a professor of Pediatrics at Harvard Medical School concluded: “There’s so much research on this that if people paid attention at all to the science, they would never unnecessarily separate children from parents.”¹⁰¹

⁹⁸ For example, in Michigan, for decades, juvenile courts had the authority to take children from both parents based solely on findings of abuse and neglect against one parent. In 2014, the Michigan Supreme Court struck down the practice, finding that the practice “impermissibly infringes the fundamental rights of unadjudicated parents without providing adequate process.” See *In re Sanders*, 852 N.W.2d 524, 495 (Mich. 2014). See also Angela Greene, *The Crab Fisherman and his Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 ALASKA L. REV. 173 (2007); Vivek Sankaran, *Parens Patriae Run Amuck: The Child Welfare System’s Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 84 (2009) (describing the practice of stripping non-offending parents of their rights to custody).

⁹⁹ Allison Eck, *Psychological Damage Inflicted By Parent-Child Separation Is Deep, Long-Lasting*, PBS: NOVA NEXT (June 20, 2018), <https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/>; William Wan, *What Separation From Parent Does To Children: The Effect Is Catastrophic*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c4b67019fcfe4_story.html?utm_term=.2731f2fd1d3; Sara Goudarzi, *Separating Families May Cause Lifelong Health Damage*, SCI. AM. (June 20, 2018), <https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage/>; Kimberly Howard et al., *Early Mother-Child Separation, Parenting and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 5 (2009).

¹⁰⁰ Eck, *supra* note 99.

¹⁰¹ Wan, *supra* note 99.

Such harms can be exacerbated when the removal is abrupt. Children are sometimes removed suddenly and without warning, intensifying the psychological trauma of a separation.¹⁰² Children in foster care often raise issues of ambiguity, loss, and trauma when talking about the experience of being removed — even describing the removal as kidnapping.¹⁰³

Once in foster care, children's experiences may be no better, and can, in some ways, be worse. Foster children experience high rates of maltreatment, routinely change placement, and sometimes receive inappropriate and inadequate medical, educational and mental health services.¹⁰⁴ Children in cases who had experienced maltreatment that were placed in foster care had higher rates of juvenile delinquency and criminal activity as adults than similarly situated children who remained at home.¹⁰⁵ Additionally, some research has found no significant outcome differences for maltreated children who were and were not placed in foster care, regarding cognitive and language outcomes, academic achievement, mental health outcomes or suicide risk.¹⁰⁶ Children who "age out" of foster care experience high rates of homelessness, incarceration, unemployment, and other negative outcomes.¹⁰⁷ Given these poor outcomes, it is unsurprising that *every state* has failed to meet federal standards to ensure the well-being of

¹⁰² Monique B. Mitchell & Leon Kuczynski, *Does Anyone Know What Is Going On? Examining Children's Lived Experience of The Transition into Foster Care*, 32 CHILD. & YOUTH SERVS. REV. 437 (2009).

¹⁰³ *Id.* at 439–40.

¹⁰⁴ Emily Wax-Thibodeaux, 'We Are Just Destroying These Kids': *The Foster Children Growing Up Inside Detention Centers*, WASH. POST (Dec. 30, 2019), https://www.washingtonpost.com/national/we-are-just-destroying-these-kids-the-foster-children-growing-up-inside-detention-centers/2019/12/30/97f65f3a-aaa2-11e9-9c6d-436a0df4f31d_story.html; Ramesh Raghavan et al., *Psychotropic Medication Use in a National Probability Sample of Children in the Child Welfare System*, 15 J. CHILD & ADOLESCENT PSYCHOPHARMACOLOGY 97–98, 102 (2005).

¹⁰⁵ Joseph Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007); Joseph Doyle, *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746 (2008); Joseph Doyle, *Causal Effects of Foster Care: An Instrumental Variables Approach*, 7 CHILD. & YOUTH SERVS. REV. 1143 (2013).

¹⁰⁶ Anouk Goemans et al., *Developmental Outcomes of Foster Care: A Meta-Analytic Comparison with Children from the General Population at Risk Who Remained at Home*, 21 CHILD MALTREATMENT 198 (2016).

¹⁰⁷ PETER J. PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDING FROM NORTHWEST FOSTER CARE ALUMNI STUDY, 1–2 (Casey Family Programs, 2005).

children in foster care, which has contributed to many states' systems being put under federal oversight pursuant to consent decrees.¹⁰⁸

In short, research suggests that foster care can be a toxic intervention for children. Given that it is often used when moderate/severe domestic violence is present,¹⁰⁹ it is especially concerning that the domestic violence context renders it even more traumatic for children to be removed from their safe parent.¹¹⁰ In one prominent study of foster care alumni, 25% percent of foster care alumni still experienced post-traumatic stress disorder, a rate which is nearly twice as high as the rate for U.S. war veterans.¹¹¹

2. Reform Efforts — Keeping Children with Protective Parents

Given the harms to children from removal to foster care, many child welfare advocates have turned their focus to trying to divert cases with one safe parent out of the foster care system. Federal law requires child welfare agencies to make “reasonable efforts” to prevent children from being removed from their parents.¹¹² As part of this obligation, agencies must explore whether a child has a non-offending parent who can safely care for a child. For example, in cases involving domestic violence, the Michigan Department of Health and Human Services instructs its caseworkers “to assist the adult victim of DV in the planning for his/her safety and the safety of the child.”¹¹³ Its policy manual requires caseworkers to be “coordinating” with family court, though it does not define what that entails.¹¹⁴ Similarly, Pennsylvania and Maryland have actually prohibited child welfare agencies from involving juvenile courts when there is a non-offending parent who can and will safely care for the child.¹¹⁵ As the Maryland Court of Special Appeals explains, “[a] child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court.”¹¹⁶ Before dismissing juvenile court jurisdiction, courts must inquire whether

¹⁰⁸ U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD AND FAMILY SERVICES REVIEWS AGGREGATE SCREENING REPORT, ROUND 3, 2015-2018, i-ii (2020).

¹⁰⁹ English et al., *supra* note 97, at 1197.

¹¹⁰ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 251; 253 (E.D.N.Y. 2002).

¹¹¹ *PECORA ET AL.*, *supra* note 107, at 1.

¹¹² State Plan for Foster Care and Adoption Assistance, 42 U.S.C. § 671 (2010).

¹¹³ MICH. DEP’T OF HEALTH & HUM. SERVS., CHILDREN’S PROTECTIVE SERVICES MANUAL (2020).

¹¹⁴ *Id.*

¹¹⁵ *In re M.L.*, 757 A.2d 849, 850–51 (Pa. 2000); *In re Russell G.*, 672 A.2d 109, 114 (Md. Ct. Spec. App. 1996).

¹¹⁶ *In re Russell G.*, 672 A.2d 109, 114 (Md. Ct. Spec. App. 1996).

the non-offending parent is keeping the child safe, which may require obtaining a custody (or protective) order in court.¹¹⁷

In recognition of the critical importance of allowing children to stay with their safe parent, several innovative legal centers have been formed to support the efforts of non-offending parents to retain custody of their children and prevent them from entering the foster care system. The first of these — the Detroit Center for Family Advocacy, which the second author co-founded — provided parents with the assistance of a lawyer, social worker and parent mentor, to resolve any safety concerns that the child welfare agency identifies.¹¹⁸ The Center received case referrals directly from the child welfare agency and worked collaboratively with agency investigators to address the factors creating a risk to the child. A quarter of cases that the Center handled involved child custody issues. In these cases, Center advocates focused on seeking custody orders that would prevent the offending parent from having unfettered access to the child. The multidisciplinary team would work with the non-offending parents, file for custody (or seek modification of an existing custody order), and help the parent navigate the court process. The Center ended its work in 2016 due to a lack of funding, but the model has been replicated in New Jersey, Washington, Iowa, and Oklahoma, among other jurisdictions.¹¹⁹

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While these creative interventions hold promise, in the vast majority of cases, non-offending parents must navigate this process on their own or with a family lawyer who may lack familiarity with child welfare processes. Most child custody litigants are purely *pro se*.¹²⁰ And while many child welfare investigators instruct the non-offending parent that she they must get a custody order to avoid removal of her child, agencies typically provide little or no assistance to help the parent in doing so. It is also rare

¹¹⁷ *In re M.L.*, *supra* note 115, at 851.

¹¹⁸ UNIV. MICH. L. SCH., DETROIT CENTER FOR FAMILY ADVOCACY PILOT EVALUATION REPORT 5 (2013).

¹¹⁹ See Casey Family Programs, *How can pre-petition legal representation help strengthen families and keep them together?*, <https://www.casey.org/preventive-legal-support/> for more information about the spread of pre-petition legal representation models across the country.

¹²⁰ See Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L.J. 1389 (2016).

for child welfare investigators to appear in a custody proceeding to support the non-offending parent.¹²¹ Additionally, to complicate matters, when child welfare personnel choose not to substantiate a finding of abuse or neglect in part because they know a case is in custody litigation matters (as described in Section III.A. *supra*), this inaction can be seen by the custody judge as a signal that the abuse claims are false. Such courts appear unaware that “un-substantiation” usually means only that an allegation’s validity is unknown.¹²²

Given the anecdotal and empirical reports described above, these processes create a perfect storm for parents and children seeking safety from an abusive other parent. Not only might the protective parent have to navigate the court process on her own — once in court, there is a significant risk that her claims of abuse and domestic violence will be rejected by the judge, engendering a cascade of further harms. And such courts may not only fail to protect the children from a potentially abusive parent, they may even “shoot the messenger” by reversing custody.¹²³ Moreover, due to agencies’ lack of understanding of family court processes, child welfare investigators might treat that court’s decision as a failure of the *non-offending parent* to protect the child. Such blame can flow in part from the child protective system’s history of treating mothers as “failing to protect” children from a father’s abuse,¹²⁴ as well as a mistaken faith in family courts’ commitment to thoroughly and objectively vetting family violence allegations and protecting children. In short, both systems’ misperceptions of the other can contribute to parallel refusals to protect children.

The authors of this Article believe that serious work is needed to eliminate the cross-cutting misconceptions between civil family courts and child welfare agencies. These misconceptions involve (i) who should and can adjudicate child maltreatment; (ii) what an un-substantiated finding means and when it is or is not appropriate; (iii) why *valid* child abuse concerns frequently arise in custody cases; and (iv) trends and structural biases within each system. The next section turns to the Authors’ proposed systemic reforms to address these important concerns. They propose that each of these reforms is firmly within reach, with the right investment of expert support, training, and policy advocacy.

¹²¹ Meier, *supra* note 57, at 717–19.

¹²² CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS. CHILDS. BUREAU, MAKING AND SCREENING REPORTS OF CHILD ABUSE AND NEGLECT 5 (2017).

¹²³ MEIER ET AL., *supra* note 49 at 15–17. *See generally* The Court Said USA (@thecourtsaidusa), FACEBOOK, <https://www.facebook.com/thecourtsaidusa/> (last visited July 12, 2021).

¹²⁴ Hester, *supra* note 1, at 846.

IV. THREE PRACTICABLE SYSTEM REFORMS

There are three over-arching mechanisms that could help to correct the systemic failures leading to the troubling outcomes for children described above: (i) participation of child welfare professionals in support of protective parents' private custody litigation; (ii) use of agencies' foster care funds to support attorneys to represent non-offending (safe) domestic violence victims; and (iii) several simple policy changes and accompanying trainings for both agencies and courts addressing how each should approach cases of mutual concern.

A. Child Welfare Agency Participation in Private Custody Litigation

Arguably the single most significant obstacle to protection of at-risk children in custody litigation is family courts' reluctance to engage seriously with such allegations, as is described in Section II, *supra*.¹²⁵ A simple yet potentially powerful mechanism for countering this reluctance would be for child welfare agencies to support a non-offending protective parent's position in custody litigation, by participating in the litigation and potentially testifying about their findings.¹²⁶ While such intervention is unlikely where the agency firmly believes the allegations are false, in the majority of cases (where they either substantiate or un-substantiate the allegations due to lack of information or systemic triage) the allegations are often still credible enough to signal potential risk to a child. In these cases, agency practice should be to offer ongoing assistance to a protective parent — especially in court — to further their shared goal of ensuring children's safety and welfare. In some cases, testimony from the caseworker or supervisor could usefully explain that allegations were not substantiated merely because they lacked sufficient evidence, because their rules are restrictive in ways that do not constrain the court, or even because it was believed that the custody judge would appropriately determine their validity.¹²⁷

The idea of child welfare agencies supporting protective mothers in custody litigation was first proposed as a "thought experiment" by the first author in 2003.¹²⁸ While agencies working with Safe and Together have

¹²⁵ While some courts also possess substantive misconceptions about credibility and family violence, re-framing courts' mission to encompass child maltreatment is also necessary to address these.

¹²⁶ Meier, *supra* note 57, at 717–19.

¹²⁷ Both co-authors have seen child welfare agencies abdicate for these reasons and have seen family courts erroneously treat a non-substantiation as reason to dismiss the abuse allegations and sometimes to punish the alleging parent by switching custody to the alleged perpetrator.

¹²⁸ Meier, *supra* note 57, at 716–21.

occasionally engaged in this way,¹²⁹ society must move further to systematize such supportive interventions by child welfare agencies. The authors of this Article believe this could be accomplished through either legislative or rulemaking changes in federal and state-level policies governing child protection agency procedures.

B. Using Foster Care Funds to Support Safety with a Non-Offending Parent

In addition to requiring caseworkers to stay involved in the custody litigation to support the safe parent in keeping the child safe, child welfare agencies should use their federal foster care funds to support the provision of legal services to non-offending parents. As noted above, most domestic violence victims appear *pro se* in child custody cases, which makes them especially vulnerable to family courts' disbelief of their allegations of child abuse. They may not know what evidence to present to support the allegations, how to gather it, how to testify about the allegations, or how to question opposing witnesses. It is in these situations that lawyers can make a real difference.¹³⁰

Thanks to action by the federal Children's Bureau in 2018, foster care expenditures under Title IV-E of the Social Security Act¹³¹ may now be used to support lawyers in representing parents involved with child welfare. This includes lawyers seeking to help prevent "candidates for foster care" from entering care.¹³² Federal foster care funds can thus now be used to support programs like the Detroit Center for Family Advocacy (and others) that provide legal assistance to keep kids safely out of foster care. Child welfare agencies can also request matching federal funds to support legal representation for child-welfare-involved families.¹³³ Given the critical need for lawyers to represent protective parents in custody litigation, agencies should use these funds to support these legal services. Such funds could support local legal aid organizations, public defenders, or low-fee private practitioners. Formal state policies, in addition to advocates and reformers, should encourage this practice. Such a shift might also help child welfare agencies move away from thinking in terms of parents' pathologies and realign around recognizing and supporting safe parents —

¹²⁹ Conversation with David Mandel, Executive Director, mentioning the organization's work with agencies to intervene in family court and obtain safe parenting orders.

¹³⁰ See generally Mansfield, *supra* note 120.

¹³¹ 42 U.S.C. 671 et seq.

¹³² Family Justice Initiative, *Federal Funding*, FAM. JUST. INITIATIVE (2020), <https://familyjusticeinitiative.org/iv-e-funding/>.

¹³³ *Id.*

consistent with the philosophy of the Greenbook and Safe and Together Institute's reform efforts.¹³⁴

C. Policy Reforms and Substantive Trainings

There are three areas in which policy development and education/training can help to reverse the misconceptions which are leading to courts' and agencies' failures to keep children safe even when there is a non-offending, safe, caring parent.

First, both agencies and courts should be prohibited from using the mere fact that the parents are battling over custody as a reason to downgrade the credibility of abuse allegations.¹³⁵ On the contrary, there are multiple reasons why custody litigation should be expected when one parent abuses others in the family.¹³⁶ Such a prohibition could draw on precedent from early domestic violence reforms involving arrest policies: For instance, the original D.C. Police pro-arrest policy stated explicitly that the fact that a 911 call relates to violence within the family may not be counted against probable cause.¹³⁷ Similarly here, policies and statutes should make clear the fact that parent's involvement in custody litigation may not be counted against the credibility of child maltreatment allegations. Such a policy could be embodied in states' custody statutes, court rules and/or agency policy manuals. While this could make it slightly harder for agencies to reject some genuinely false allegations, it would, on balance, allow proportionally more children to benefit from such a policy.¹³⁸

Second, both agencies and courts should be encouraged to adopt new policies and practices for indeterminate cases. Both systems should recognize the reality that many "unsubstantiated" cases may in fact entail risk to a child, despite a lack of clear proof. Child welfare agencies should make clear in their investigations why an allegation was not substantiated, and should clearly document situations in which the lack of substantiation does not reflect a finding of no abuse. Additionally, agencies should adopt a new category of findings for cases where allegations are not yet substantiated but a risk to the child may still exist. In these cases, where possible,

¹³⁴ Mandel & Wright, *supra* note 15, at 134.

¹³⁵ While some abusive parents make specious child abuse reports to gain an advantage in custody litigation, we believe that removing this prejudice against custody litigants will, on balance, benefit children and protective parents, who are too often disbelieved merely because there is a custody case.

¹³⁶ BANCROFT ET AL., *supra* note 8, at 154; NEILSON, *supra* note 77.

¹³⁷ Nicole M. Montalto, *Mandatory Arrest: The District of Columbia's Prevention of Domestic Violence Amendment Act of 1990*, 8 J. CONTEMP. HEALTH L. & POL'Y 337, 351 (1992).

¹³⁸ See note 135, *supra*.

agencies should work with the non-offending parent to keep the child safe through custody litigation, as discussed above.

Unlike agencies, courts *must* issue parenting orders. In indeterminate cases, therefore, courts would be well-considered to take measured action and to avoid defaulting to the view that the allegations are false. Indeterminate findings would ideally be followed by recruitment of a skilled child therapist to work with the child, and a therapist with expertise in the relevant type of family violence to work with the accused adult. Such therapeutic work is likely to produce greater clarity about the truth over time. In turn, this would lead to both better protection for children *and* greater potential for healing negative parent-child relationships.¹³⁹

Finally, substantial, systematic expert trainings on child maltreatment and system practices should be mandated for both family courts and child welfare agencies.¹⁴⁰ Trainings should address both systems' complementary misconceptions about each other, and shared misconceptions about child maltreatment allegations by parents in custody litigation. Such trainings should, of course, address the two policy changes above. They should also explain why custody litigation is not *per se* evidence of false allegations, why child abuse often does not come to light until after parties separate, why mothers often avoid reporting to child welfare agencies, and how and why agencies and courts, respectively, see their own and the other's roles. Some of these trainings should be joint, for both family court and agency personnel, and include high-level staff so they may discuss their perceptions regarding who should do what, why, and how. For instance, courts may benefit from hearing that agencies often choose not to bring cases to juvenile court for reasons that do not mean there is no danger to a child. And agencies may benefit from understanding that simply filing an action in family court does not always ensure adequate review of abuse evidence and protection of children. Skillfully handled, such meetings could generate new understandings and improved procedures and collaborations, in the interests of at-risk children.

Such trainings must also challenge the widespread social and legal skepticism toward mothers' reports of abuse by fathers, educating participants on the research showing that intentional false child abuse allegations are exceedingly rare and most often brought by *noncustodial* parents,¹⁴¹ and on implicit gender biases which may fuel undue and inappropriate

¹³⁹ Meier, *supra* note 36.

¹⁴⁰ The pending Violence against Women Act ("VAWA") includes a provision providing funding for states to provide training to judges and other court personnel on domestic violence, child abuse, coercive control, etc. *See* <https://www.congress.gov/bill/117th-congress/house-bill/1620/text>, Section 1605 (4). If and when the Senate adopts the VAWA with this provision in it, states will have an opportunity to seek this funding.

¹⁴¹ Meier, *supra* note 36.

skepticism and hostility toward mothers alleging abuse.¹⁴² Incorporation of the Safe and Together Institute’s “perpetrator pattern-based approach” may be foundational to shifting both systems’ responses to mothers who accuse fathers of abuse, reducing both the gender-bias and underestimating of risk to children which currently permeates both systems in cross-system cases.

CONCLUSION

In the course of the Authors’ collaboration on this Article, both learned a great deal from each other about family court and child welfare system practices and potential reforms. Each believe that the same will be true for child welfare, child custody, and domestic violence professionals who come together to address the lacunae in the legal system’s responses to child maltreatment which intersects with custody litigation. The authors do not claim to be the first to point out the gulfs between civil courts, child welfare, and domestic violence systems.¹⁴³ We believe, however, that this Article’s proposed reforms are new — building on all that has gone before. Nor are they any more unrealistic than many previous reforms regarding domestic violence in the child welfare caseload or child custody laws’ inclusion of domestic violence. Clarity and quality of trainings – and mandates to participate – will be critical for such reforms to succeed. But the existence of resources such as the Safe and Together Institute, and the many experts in child welfare and family violence we have cited throughout, as well as increasingly concerned lawmakers, provide reason for optimism that real change can and will be accomplished. It must.

¹⁴² Epstein & Goodman, *supra* note 79, at 451–53.

¹⁴³ Hester, *supra* note 1.