

Creating Justice Through Balance: Integrating Domestic Violence Law into Family Court Practice

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A B S T R A C T

Freedom from domestic violence is a central right that should be enjoyed by all.¹ The proper operation of the law is integral to that freedom—as is the cultural transformation that must occur in order for women to live free from harm. Courts and attorneys have a privileged role to play in seeking improvement in the substance of the law, the administration of justice, and the quality of service rendered by the profession. Without this professional commitment, however, judges and lawyers run the risk of turning the law into an inaccessible institution that oppresses battered women seeking safety, autonomy, economic independence, and justice for themselves and their children.

The core values underpinning family law—particularly as it addresses child custody and visitation—too often are at odds with the safety needs of victims of domestic violence. Family law, which has developed as a mechanism for defining, recognizing, establishing, re-ordering, or supporting the familial and intimate relationships that people have with one another, is fre-

quently inadequate to address domestic violence. In contrast, the specialized domestic violence law provisions operating within family law function under rationales and theories distinct from those underlying family law. The inherent substantive tensions that arise when the two bodies of law are simultaneously implemented can result in conflicting court orders, unsafe interventions, and inappropriate remedies for survivors of domestic violence.

“Friendly parent” provisions, for example, which can be useful in opening lines of communication in non-abusive family situations, can end up silencing a battered woman who fears reporting abuse lest it make her appear “unfriendly.” Stay away provisions in protection orders may offer structure that leads to safety, but may conflict with later visitation provisions in custody court. The challenge facing judges and lawyers is how to integrate the normative assumptions of family law with the safety assumptions that undergird domestic violence law.

Freedom from domestic violence is a central right that will be realized through a transformation of culture. Law, embedded within the evolving cultural transformation, plays a necessary, though not sufficient, role in social change. This article reviews the development of family and domestic violence law. It compares and contrasts the core precepts of family and domestic violence jurisprudence with resulting practice and policy ramifications arising from the inherent substantive tensions. Finally, critical civil legal system actors, courts, and attorneys are challenged to apply and practice domestic violence law in the struggle to afford justice for all.

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Family Law Development and Core Values

Family law provides the framework for legally establishing and dissolving interpersonal relationships and personal status. The rules and principles are meant to answer the questions of who can become a spouse or parent and what rights and responsibilities arise from familial status.² At its heart, this jurisprudence outlines the contours of defining a “family” for purposes of regulating legal status inside, and to ensure rights of property and inheritance outside, the family.³

The Constitution recognizes and “protects” the “sanctity” of the family because “the institution is deeply rooted in this Nation’s history and tradition” and “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”⁴ The public law involving the family examines and pronounces the parameters of the rights of parents, the needs and rights of children, and the authority and obligation of the state. State regulation of the family is measured, as a matter of constitutional law, against fundamental liberty interests such as the freedom to marry, the interest of natural parents in the care, custody, and management of their children, and the sphere of private life free from state intrusion.⁵

Family law is, perhaps more than any other area of the law, a reflection of some of society’s most intimate and volatile beliefs. The history of marriage and divorce in the United States, for example, reads more as a history of moral and religious evolution than as an outline of legal development, despite the fact that the original principles defining marriage and divorce in this country were grounded in secular contract law.⁶ The many state anti-miscegenation laws that once limited marriage between races, for example, illustrate the impact of society’s sense of morality on marriage law.⁷

Divorce law reflects a similar dichotomy, balancing the practical need to legally recognize certain evolving relationships against our culture’s emotional response to change within the family structure. Divorce law has been useful for legally structuring property rights as relationships change, but it also has been, at many periods of U.S. history, alternatively described as an immoral force that destabilizes society⁸ and a “therapeutic” intervention that normalizes disruptions in family relationships.⁹

Similarly, the principles in family law that define

property division, support, and alimony are mixtures of moral assumptions and practical necessity. Early societal expectations about the role of women in marriage were reflected in the “merger rule” that established that “the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband....”¹⁰ Spousal roles in marriage dictated that the husband be responsible for support and the wife for domestic services.¹¹ Yet moral pressure by mid-19th century American feminists and the practical need to clarify creditors’ debt collection rights, led state legislatures to enact “Married Women’s Property Acts” that initialized a gradual trend toward allowing married women legal capacity over their property.¹² The development of the law of alimony followed a similar trajectory, having its origins in providing a practical mechanism for enforcing a husband’s support obligation during an era where parties were forced to live separately while still married because of barriers placed upon absolute divorce.¹³ At the same time, alimony law became infused with evolving moral principles regarding misconduct, maintenance of living standards, and need-based themes.¹⁴

The nature of family law, therefore, owes as much to societal assumptions as it does to the expression of substantive legal rights and protections. While these assumptions generally work well in resolving non-violent family law situations, they can undermine the safety protections that domestic violence laws were meant to provide.

Family Law Values in Child Custody Cases

Two practical questions underscore child custody law: 1) What qualifies a parent or person to have custody; and 2) How should a decision-maker determine the arrangement of care for a child?

Yet the history of custody determination also begins with gender-based inherent property rights of men and caretaking propensities of women. That early history was also premised on the principle that children were the exclusive property of their father.¹⁶ By the 1920s, this paternal hereditary right evolved into a judicial preference for the “tender years doctrine,” which theorized that mothers should care for younger

children.¹⁷ A call for gender-neutrality grounded in equal-rights philosophy, fathers' rights activism, and research on children of divorce all contributed to the 1970s' "best interests of the child" standard for custody decisions. The key aspect to "best interests" became the underlying assumption that the court be gender-blind in its choice between two "fit" parents so as to provide the "least detrimental alternative."¹⁸ "Children's best interests" were determined by considering a list of factors provided without hierarchal guidance. The very different issue of domestic violence was merely included within a list of other factors that had no relevance to addressing abuse of family members.

Custody law has now moved to an ostensibly gender-neutral place on the moral spectrum by focusing on offering solutions that engage both parents, such as joint custody and friendly parent provisions. These principles find their roots in influential popular research that suggests that divorce's detrimental aspects on children can be mitigated when courts offer liberal access to both parents and encourage children's contact with their non-custodial parent.¹⁹ The most recent manifestation of this assumption is states' adoption of "friendly parent" provisions in their custody laws that favor granting custody to the parent who seems better at facilitating a cooperative and frequent relationship with the other.²⁰ The 1990s saw an extension of the cooperative parenting theme and focus on parental access to children with detailed, on-going contact sanctioned through "parenting plans" often reached through private process.²¹ Even in states where courts are not required by law to insist that parties engage in cooperative parenting, many lawyers and domestic violence victim advocates observe anecdotally that judges in their jurisdictions believe that shared access is best for children and that the parent with the propensity to share is a better candidate for sole custody.²² Cooperative parenting has now become the moral imperative of the law, so that the parent who complains of abuse or violence appears to put the children at risk of psychological damage.

Another significant societal assumption that drives outcomes in child custody cases is the idea that parental rights are nearly absolute and should rarely be subjected to regulation.²³ This idea stems from concepts of family privacy and that it is the individual parents, rather than

the state, who know best how to raise their children. This value is also underscored with constitutional force. Under Supreme Court jurisprudence, natural parents have a "fundamental liberty interest...in the care, custody, and management of their child."²⁴

A third important family law assumption is the emphasis upon private process over court decision-making. The virtue of cooperation discussed *supra* militates toward a process that does not further conflict. This suggests that adversary proceedings and litigation are not the best outcome for the parents or the children. Additionally, society assumes that parents have better "standing" than judges or the state to decide what is best for their children. In part, this is because family law cases are viewed as extremely fact-sensitive and not "legal."²⁵ Therefore, processes that combine the elements of building cooperation and reducing state interference in decision-making are deemed in everyone's best interests. Ironically, while judicial discretion is the hallmark of custody law, courts, under the sway of this assumption, tend to abdicate their role to others, e.g., custody evaluators and guardians *ad litem*. Private process, such as mediation, becomes the preferred method. Courts become reluctant to decide "wrong-doing" or "fault" as a factor in parenting.

Domestic Violence Law Development and Core Values

As cooperative parenting models in child custody cases evolved in the 1980s and 1990s, the parallel development of specialized statutes addressing domestic violence occurred. Domestic violence law, defined here as the civil body of law addressing intimate partner abuse in protection order, divorce, child custody and visitation, and child support cases, arose as part of, and in parallel to, more recent general family law development. Domestic violence law, like all other areas of family law, reflects changing societal assumptions about abuse in family settings.

The history of domestic violence law began with the assumption that men had the right to use violence against their wives on the grounds that they were, at best, dependents of their husbands, or were, at worst, mere property. Blackstone and the common law authorized the male right to beat women:

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children...²⁶

American law reiterated the English common law rule in the 1824 case of *Bradley v. Mississippi*, a case infamous for prescribing that husbands could beat their wives with a rod or stick as long as the instrument was less than the diameter of the base of the husband's thumb.²⁷ In 1836, a New Hampshire court would not allow a wife to obtain a divorce since she had not submitted to the legitimate authority of her husband and had acted in a manner "unbecoming a lady." The court opined that the disobedient woman deserved abuse inflicted by her husband where she provoked his anger and did not remain silent during its exhibition.²⁸ The assumption that women should submit to (and might even improve as a result of exposure to) domestic violence began to evolve in the latter half of the 19th century. However, husbands could no longer beat their wives with impunity, but were statutorily required to observe specific limitations placed on the extent of injury caused (cautioning against excessive or permanent injury). Subsequently, the law began to question the need for discipline "to teach the wife her duty and subjection to the husband."²⁹

By the late 19th century, courts operated under a mainstream "hands-off" approach by courts reluctant to intervene. Marital relationships became viewed in a framework that Elizabeth Schneider refers to as "affective privacy," unsuited to legal regulation, hence judicial involvement.³⁰ Considering abuse susceptible to mutual correction by the parties, and viewing preservation of the family as a core value, the family court system encouraged and coerced reconciliation by battered women who sought the protection of the legal system.³¹

The feminist movement of the 1960s and the battered women's movement of the 1970s brought wife beating back to public discourse and toward legal reform.³² Critical to the response to domestic violence is an understanding of the core features of violence

against women in intimate relationships:

Although the details of the assaults are shocking, their meaning lies beyond the deadening statistics documenting the severity and frequency of violence. *Violence signifies crossing a boundary in which violation and degradation, previously unacceptable in a loving relationship, are now used as tools of power and coercion. Battering is far more than a single event, even for the woman who is hit once, because it teaches a profound lesson about who controls a relationship and how that control will be exercised...Self-consciously exercised, violence temporarily brings a man what he wants—his wife acquiesces, placates him, or stops her demands.* As a form of terrifying intimidation, violence signifies that the man's way will prevail even when the woman struggles against this imposition. Leaving her in a constantly vigilant state, violence forces a woman to worry about the time, place, or reason for the next attack. As trust is destroyed, life is never quite the same again.³³ [emphasis added]

Domestic violence involves instrumental, strategic violence designed to enforce the privilege and rules of the batterer. Tactics are more than physical violence and include a penumbra of threats and actions to induce fear, humiliation, social isolation, and resource deprivation. Batterers "cast aspersions on the moral character, parenting and mental health of battered women to discredit them with those who might intervene." They shift responsibility for their behavior and violence to women, and they "develop a convincing repertoire of reasons to justify violent and coercive controls."³⁴

The complexity created by the combination of violence and coercive controls within the family context required the development of an entirely new set of assumptions: 1) that individual family members had the right to be free from abuse, and 2) that society, through the function of the legal system, had a responsibility to control and punish abusers' behavior. The question remained whether the most appropriate mechanism of law to achieve these goals would be criminal law or family law.

This is the core tension between domestic violence law and family law. Abusive behavior, which on its face appears to constitute criminal activity, occurs in a family context. The criminal law facet of domestic violence law recognizes that one intimate partner is a perpetrator and one is a victim in domestic violence cases and seeks to hold the perpetrator accountable. Family law, on the other hand, sees two intimate partners who need to modify, dissolve, or otherwise regulate their relationship with each other through cooperative acts that will resolve their conflicts.

Today, every state integrates the separate criminal and family law facets of domestic violence into the civil form of relief known generically as a “civil protection order” or CPO.³⁵ This “grandmother of domestic violence law”³⁶ is a revolutionary historical phenomena initially adopted in Pennsylvania in 1976.³⁷ The essential features of protection order codes now include the identification of a perpetrator and a victim through a fact-finding process and the provision of remedies available to the identified victims. These remedies include exclusive possession of the home, no-contact and cessation of abuse provisions, custody relief, spousal and child support, and restitution.

The advantages of embedding the CPO process within the family law context are numerous. The civil legal process gives battered women the capacity to initiate legal action against the abuser, rather than waiting for the state to act on her behalf. A victim-directed and expedited process, the civil law CPO gives courts the broad judicial discretion that characterizes family law, allowing for individually tailored and comprehensive awards of civil, economic, and anti-violence relief to support a battered woman’s independence. The CPO process in the family law context allows for flexible duration of orders, often covering intimate relationships that go beyond the marital relationship, and gives judges the discretion to craft additional relief and coverage based on the specific facts of each individual case. This freestanding and unprecedented legal remedy is a remarkable achievement of advocacy and community change that affords survivors of domestic violence a legal means to obtain enforceable and critical relief.

The theoretical triumph of the CPO cause of action, however, is too often undercut by the assumptions that dominate the family law context. Not surprisingly, the

identification of a parent as a “victim” in the CPO process will lead to the assumption in the custody proceeding that the parent so labeled suffers from weakness, ignorance or denial, indifference, or impaired caretaking ability. One reason for this is that lawyers and judges, like so many individuals in our society, are reluctant to acknowledge the possibility that domestic violence can ravage anyone’s life—thus, a person suffering from domestic violence must have some kind of vulnerability that makes her particularly susceptible to being victimized. Another reason is the misguided view that leaving the relationship should be the only goal for domestic violence survivors and that failure to do so “proves” that a woman’s parental fitness is compromised by “violence-induced mental trauma.”³⁸

Lawyers and judges subscribing to the “Why doesn’t she just leave?” theory too often ignore the battered woman’s experience-based determination that leaving may be more dangerous to her and the child than staying. As a result, battered women seeking justice in a family law context may well face two unnerving consequences: more abuse from the batterer and state coercive authority to remove her children against her will on the grounds that a “traumatized” parent is less fit to care for her children than the parent who is responsible for the abuse. This critical family law assumption clouds the legal system’s capacity to see that the victimized parent’s decision may have a secure foundation—that the victimized parent is indeed capable of complex thinking and acting, including performing subtle acts of compliance, resistance, and direct action to further her own and her children’s safety and autonomy in the world in which she lives.³⁹

Domestic Violence Law Core Values

In contrast with the family relationship, extreme parental autonomy, and cooperative conflict-solving assumptions that underpin family law jurisprudence, domestic violence law is based upon the four cornerstones of the vision to end violence against women: safety, agency, restoration, and justice. This is the legislative pedigree of statutes addressing domestic violence. The intent of the state legislatures that enacted these codes was not to encourage communication and face-to-face problem solving, as was their intent in developing modern divorce and custody laws. Rather, the legislative

intent of domestic violence laws is to afford freedom from abuse and provide a safe context in which survivors can make independent decisions about their own and their children's futures.

Safety is the transcendent goal of domestic violence law and is every woman's right.⁴⁰ It involves freedom from physical violence and the attendant vestiges of threat and fear, circumscribed movement, anxiety for one's well-being as well as one's children, diminution of choice, imposed role, eclipsed resources, and collusive community aligned with the batterer. A person's safety is idiosyncratic and dependent upon the person's circumstance in the world.⁴¹

Agency is the ability to organize one's life, and for subordinated persons, such autonomy is "always partial, contingent and emerging."⁴² The domestic violence law theory of agency is the ability to organize one's life in defiance of the abuser's attempts at subordination. It involves the ability to make and implement informed decisions; to employ legal options; to avail one's self of community resources; and to access economic remedies, housing opportunities, and educational programs. Material resources are critical to this reclamation agenda. When battered women have inadequate material resources, their choices necessarily become "more coerced than would otherwise be the case."⁴³ As Susan Schechter noted in 1982, "[E]mpowerment means gaining control over the decisions affecting one's life and finding access to the resources needed to live decently. . . . [W]ithout material resources—housing, jobs and sufficient income—empowerment as a universal goal is unreachable."⁴⁴

Domestic violence law is also premised on the value of restoration, which calls for restitution and conditions and awards that allow survivors to return to the position they enjoyed but for the abuse. Monetary compensation assists in this renewal of prior life material conditions, but restoration also encompasses the invaluable aspects of maintaining or re-establishing social, familial, and sacred relationships. One must be restored to health, spiritual support, and a life without fear. The restorative venue is the community of one's choice.⁴⁵

The fourth core value in the domestic violence law framework is justice. Justice can only prevail in a society free of domination and violence against women. This concept includes holding the abuser accountable,

affording all parties due process, ensuring that the survivor's claims are heard, treating people fairly and respectfully, and guaranteeing equal access to legal remedies and redress afforded under the promise of the law. The law must be more than a "paper construct" and must be made available and meaningful through the actions and practices of lawyers and judges. The real test of justice is what is afforded under the practice of the law for those who may be subordinated the most.⁴⁶

Comparing Domestic Violence and Family Law Assumptions

There are inherent tensions in the family law assumptions and domestic violence law assumptions. If we understand these differences and the resultant difficulty of applying them simultaneously, we can begin to shape appropriate practice solutions that will further the ultimate goal of ending domestic violence. To illustrate the conflicts and tensions that simultaneous—rather than alternating—applications of family law assumptions and domestic violence assumptions create, we offer the following examples of domestic violence/family law tensions in custody proceedings:

EXAMPLE #1: An abuser repeatedly calls his ex-wife at work and engages in strategic threats and demands about the children's health and education. The custody court judge does not believe that these actions are part of domestic violence and that anything should be done.

Domestic Violence Law Assumption: Take any physical threat or harm seriously, including emotional and financial abuse.

Family Law Assumption: The abuser's actions must constitute serious bodily harm or an imminent threat of such in order to make domestic violence a primary factor in any court decision.

The first domestic violence assumption is derived from the power and control essence of domestic violence and the core value of safety. As noted *supra*, the fundamental nature of domestic violence is the *instrumental schemata utilized by the batterer to maintain domination over an intimate partner*. Abuse is more than physical harm—it is the constellation of tactics

meant to induce fear and compliance.⁴⁷ Threats of homicide and suicide are real tactics utilized by batterers. With or without prior threat, batterers do kill.⁴⁸ Separation is no guarantor of safety, and if anything, may increase a woman's vulnerability in many respects.⁴⁹

The family law assumption, on the other hand, arises from the assumptions about constitutional rights to autonomous parenting and reluctance for the state, here the court, to choose "who is the better parent." The family law assumption is quantitatively focused on the status of the relationships, their creation or dissolution, and their rights, not the quality of the relationships per se. The preference for co-parenting ("two parents are better than one") and generous visitation equates into a perspective that requires a large dose of one-sided physical violence before abuse is taken into account.⁵⁰

EXAMPLE #2: A custody court judge is reluctant to abridge or condition an abusive parent's right to access his children, even though a judge in an earlier, related protection order hearing found credible threats of physical violence directed at the other parent by the abusive parent.

Domestic Violence Law Assumption: Safety is more critical than access in custody and visitation arrangements. Granting custody or visitation to the abuser can place both the domestic violence survivor and child in danger.

Family Law Assumption: Parental influences and access are most important, so it is better to allow contact rather than deny visitation. Evidence of emotional abuse or violence toward intimate partners may be irrelevant to the issue of someone's fitness as a parent.

Prioritizing safety over access is the key feature of this domestic violence assumption.⁵¹ Safety, as noted *supra*, is defined broadly and includes freedom of movement and liberty from an artificially fettered life of oppression. Restricting the batterer's access to the survivor and her children, in the domestic violence law context, is more important than ongoing exposure of the children to the abuser.⁵² Opportunities by the batterer to utilize the child(ren) as pawns and to engage in separation assault must be contained.⁵³ The

commonly held belief that mere physical separation from a batterer increases a battered woman's safety is challenged by the significant research showing that separation is potentially the most dangerous time for battered women and their children.⁵⁴ Finally, safety, not access, is the primary focus because domestic violence law recognizes that harm to a parent can also constitute harm to children.⁵⁵

The family law assumption, on the other hand, prioritizes both parents' access to the children over safety concerns. Facilitating contact with the non-custodial parent, generous visitation, and co-parenting characterize this approach.⁵⁶ The belief or paradigm is that children are better off with two parents, that parental influences are critical to the child, and that safety can be discounted as the abuse is either not severe enough, or can be assuaged. This standpoint is buttressed by the jurisprudential underpinnings of family law previously discussed—that the law is meant to protect fundamental parental interests and regulation of relationships.

EXAMPLE #3: A battered woman petitions the court for custody of her children, and when the court orders her to undergo mediation with her abusive husband, she resists. The court then questions her ability as the children's caretaker on the grounds that she models conflictive, rather than cooperative, behavior.

Domestic Violence Law Assumption: Obtain structured agreements and schedules through the court process to avoid contact or negotiation for the abused party; do not mediate.

Family Law Assumption: Both parties have equal responsibility for working together to come up with a mutual agreement regarding everything; any party who won't work with another party is "unfriendly"—and less deserving of support.

This domestic violence law assumption is based upon experiential knowledge of the history of the abuser's tactics of threats, coercion, and resource deprivation designed to assure primacy and dominion in the relationship.⁵⁷ Obtaining detailed agreements and schedules for property, support, and child caretaking is a method of setting limits on the batterer and respond-

ing to his strategies.⁵⁸ Court orders and process are critical because they are public and enforceable. On the other hand, private processes such as mediation, while useful in non-domestic violence cases, can create enormous dangers and inequities for battered women because they are forced to make choices and agreements under threat of violence and coercion.⁵⁹

While the domestic violence assumption seeks to buffer the survivor of domestic violence from the ongoing coercive controls and harm of the abuser, the family law assumption governing this scenario facilitates contact. General divorce literature on the impact of divorce on children views “conflict” as a negative influence on children and co-parenting as a positive influence.⁶⁰ This research, combined with the family law value of parental autonomy and judicial reluctance to make qualitative choices about parenting, puts the pressure onto the parties to resolve their differences without excessive court involvement or process. Alternative dispute resolution, primarily mediation, is believed to be most conducive to building cooperative parenting arrangements. This private resolution also removes the court from primary decision-making.

This family law assumption promotes on-going contact between parents and parent/child as a primary goal, with any parent critical of such arrangements painted as “unfriendly” and not child-centered. This precept places survivors of domestic violence in the “unfriendly parent” catch-22. If a survivor seeks custody and visitation arrangements that limit contact, then they are not “fostering relationships with the other parent” and are less deserving of custody. Yet, if they do not take action to protect their child, they are held responsible for failure to protect. Moreover, certain actions taken by the survivor to enhance safety and self-determination, such as relocation or restrictions on access, may be viewed in the false light of “animus” or “unfriendliness” toward the other parent, or as instability on the part of the protecting parent.⁶¹

EXAMPLE #4: In the course of a protection order hearing, a mother asks the court not to award either custody or visitation to the abusive father. The court denies the request and orders supervised visitation. Later, in a custody proceeding, the father asks for unsuper-

vised visitation and the mother asks that the abusive father have only telephonic or video cam communications with the child, because she wants to relocate to an undisclosed location for the safety of herself and her child.

Domestic Violence Law Assumption: Creativity and persistence are important to outcomes that will not further opportunities for control, harassment, or abuse.

Family Law Assumption: Denying an abusive parent custody/contact is an inappropriate attempt to punish him.

In this scenario, the domestic violence assumptions supporting the parent’s requests point to the domestic violence survivor’s pursuit of safety and location in a supportive environment (restoration). The remedies sought by the protecting parent may be creative—indeed, even unique—but they may well be grounded in good safety planning that assesses indicators that an abuser’s violence is life-threatening. Seeking structured court relief, in combination with inventive remedies that will forestall the batterer’s attempts to maintain dominance, are the hallmark of good domestic violence representation practice. To a domestic violence victim seeking safety and a supportive environment to raise the children, the relocation and access requests are reasonable, prudent, and necessary—not extraordinary.

To the traditional family law practitioner or judge, the mother’s request may look like a deliberate attempt to trigger a conflict, a maladaptive strategy pursued solely to punish the other parent. This construct sows the seeds for retaining and utilizing the scientifically defunct and legally unjustifiable theory of parental alienation syndrome (PAS) in custody cases.⁶² A flawed and discredited theorem, PAS has a “dandelion” resilience for a number of courts and custody evaluators precisely because it draws upon family law values of access and cooperation/friendliness. Moreover, the PAS phenomenon tends to shift attention away from the dangerous behavior of the batterer to the protecting parent’s behavior.⁶³

EXAMPLE #5: An immigrant woman seeks a protection order on the grounds that her U.S.

citizen husband beat her two years ago and has since threatened her and controlled her by draining the family bank accounts, forcing her to hand over her paycheck, and providing her and her children with so little money that at times they go hungry or without appropriate clothing or medication. The woman not only asks the protection order court to make her husband vacate the family home, and stay away from her and the children, but also asks that the court order him to assist her in petitioning for legal permanent residency status, and to temporarily pay for the mortgage, child support, health and life insurance, and the costs of private tuition and medication for their learning disabled son.

Domestic Violence Law Assumption: Weave many forms of relief together to prevent an abuser from using financial, property, or decision-making power to harm the survivor and the children.

Family Law Assumption: Evidence of other, non-family law proceedings regarding abuse are unrelated matters; at worst, utilizing more than one remedy is viewed as strategic litigiousness.

The constellation of batterer tactics involving resource deprivation is addressed by this domestic violence law assumption. In this scenario, the facts suggest that the physical harm is “old” and unserious. Domestic violence law, however, views the abuser’s tactics in this case as strategically designed to fall “below the radar” of the family court system, but no less damaging to the victim or her children. Domestic violence law considers that the economic or material resource deprivations contained here should be addressed in the protection order cause of action, even though the physical violence is remote in time. Access to material resources, housing, living wage jobs, health care, child care, educational opportunities, and support have a critical impact on the effect of domestic violence on a survivor.⁶⁴ Domestic violence may be the cause of homelessness for 50% of homeless women.⁶⁵ Economic barriers and viability are the greatest challenges for battered women who separate from their batterers.⁶⁶ Relocation is not without cost.⁶⁷ Obtaining court orders and seeking custody relief takes the resources of time and economic subsidy.

It also may involve compromising support awards for custody of the children.⁶⁸

This restorative domestic violence assumption involving comprehensive relief leads to a court strategy seeking all possible remedies, often in multiple forums. The maximum use of system remedies is sometimes necessary and proper to respond to domestic violence.

From a family law viewpoint, however, this strategy is considered extreme gamesmanship meant to get “a leg up” in a later divorce or custody case or to circumvent existing rulings from other proceedings. Yet, when it comes to domestic abuse, it is more likely that battered women are failing to assert their needs, rather than exaggerating incidents to manipulate courts.⁶⁹ Moreover, a common tactic batterers use in litigation, ironically, is exactly the full court press of multiple hearings, motions, and modification requests.⁷⁰

EXAMPLE #6: A mother obtains a protection order against the father of her child that gives him visitation with the child only on alternate Saturdays. The child’s birthday falls on a day not scheduled for visitation, and the father makes multiple phone calls to the mother demanding time to see the child on the child’s birthday. Even though the mother refuses, citing the visitation schedule in the protection order, the father shows up at her home on the child’s birthday and “crashes” the child’s celebration with the mother and other relatives. The father cries openly when the child’s grandfather tells him to leave, and he says he is only there because he didn’t want the child to think he’d forget a special day like a birthday.

Domestic Violence Law Assumption: Hold abuser accountable; enforce orders and respond to violations quickly and consistently.

Family Law Assumption: The victimized party has the responsibility for making the order and the relationship work.

Domestic violence law assumes that the court will take an aggressive approach to an abuser’s propensity to eke out deviations from rules or orders restoring balance in a relationship. This vigilance is necessary to prevent the abuser’s subtle attempts to resume power and

Domestic Violence Law Assumptions	Family Law Assumptions
Take ANY physical threat or harm seriously, including emotional and financial abuse.	Physical harm must constitute serious bodily injury and threats must involve imminent physicality.
Safety is more critical than access.	Parental influences and access are of primary importance.
Obtain structured agreements and schedules through the adversary system to avoid contact and negotiation for the abused party; avoid mediation.	Parties share equal responsibility to work together to arrive at mutual agreement; parties should be friendly and cooperative toward one another.
Creativity and persistence are important to outcomes that will not further opportunities for control, harassment, or abuse.	Denying on-going contact or access to children for a parent is an inappropriate attempt to punish that person.
Weave many forms of relief together to prevent the abuser from using financial, property, or decision-making power to harm the abused party.	Non-family law proceedings are unrelated matters and use of other proceedings are viewed with skepticism regarding party intent; litigants want to get “a leg up.”
Hold abuser accountable; enforce orders and respond to violations quickly and consistently.	The parties are mutually and primarily responsible for making the order and post-separation relationship work.

control.⁷¹ Moreover, domestic violence law assumes that courts will issue orders that are detailed, readily enforceable, and comprehensive—anticipating the problems likely to arise based upon the perpetrator’s patterns and threats.⁷²

Violations also require ramifications if they are to be meaningful to recalcitrant parties. When the public, here the courts, becomes involved in enforcing orders, then the public takes a stand that gradually removes it from complicity with an abuser’s acts of domestic violence. Sanctions for violations send a message that the underlying legal proceeding is a serious undertaking, and that the court will neither countenance disrespect toward its

authority nor overlook actions that suggest that the abuser will continue to try to threaten or control.

The family law assumption, of course, differs. A judge adhering to the norms of family law might assume that certain violations of a protection order or custody provisions are better left unaddressed because they are “minor” infractions or “simple misunderstandings” that do not impair the basic goals of communication and cooperative decision making. When lawyers argue or courts apply these values to facts like those outlined above, they are assuming it is better for the parties to resolve their differences privately, because conflict is an inherent part of a post-separation family system and

children need problem-solving parents who are mutually inclined in their best interest. Additionally, lawyers and judges may see this as a simple resource and case management issue: that the court cannot be the ubiquitous super-enforcer for the family, but rather, is there to partition and assist with the stabilization of the new relationship, made necessary by divorce or disunion. There is a zone of leeway placed upon party behavior that belies the *de jure* orders of the court—not because the court intends to encourage defiance, but because it hopes to build party-based mutual reliance.

This family law assumption becomes extremely problematic in domestic violence cases and has the unintended consequence of undermining judicial process as parties realize that orders of the court do not matter. Worse, it removes the legal remedies that should be available as of right, and it perpetuates the notion of a law on the books versus the law in action.

The Domestic Violence Distinction Makes a Difference

At the heart of these juxtaposed domestic violence and family law assumptions are four dichotomous principles that guide the practice parameters for courts and representation.

1. Domestic Violence vs. Conflict

The foundational dichotomy of domestic violence law and family law is domestic violence vs. conflict. As discussed *supra*, the core features of domestic violence are the strategic, instrumental tactics and behaviors asserted by the batterer directed at or upon his intimate partner, designed to induce fear and maintain power and control in the relationship. This is gender-based violence.⁷³ It is more than physical assault. It is the induction of fear and threats to harm one's intimate partner. The batterer views his authority in the relationship as a right and privilege to be acknowledged and maintained.

Interventions flow from this acknowledgment of domestic violence, as courts and representatives ask themselves: What do battered women need to be safe? What types of orders and process will allow survivors to regain measures of control over their lives? What sort of relief or restitution will assist with safety and replacing

loss? The range of answers to these questions becomes focused upon those things that will address the unremitting instrumental and strategic use of violence. For example:

- Resources to allow survivors to relocate or live in their homes without the batterer;
- Custody and visitation provisions that increase the ability of the protecting caretaker to maintain healthy parent/child relationships;
- Support provisions that are immediate and automatically withheld from income;
- Confidentiality of records and location information;
- Access to courts and remedies via representation; and
- Acknowledgment of the value of the advocacy community that brings survivors' voices into the courtroom and that assists her with the services that further a battered woman's ability to employ options.

Vital, comprehensive resources and enforcement become key.

The alternative approach is conflict-based. Conflict connotes mutual responsibility for disagreements, problems, or antagonism. Conflict can be frequent and/or "severe" and may be referred to by levels—"high" or "low." The tendency is to consider conflict a result of stress, health problems, or alcohol and drug use. It may be situational—such as a response to divorce or separation, job loss, or adultery.

Interventions developed through a conflict paradigm focus on solving the problem through individual conflict-resolution education, e.g., classes that teach the negative aspects of unhealthy conflict; development of skills to problem-solve disagreements positively; and drug and alcohol treatment. The psychological underpinnings of conflict may be diagnosed through treatment and addressed through counseling. Thus, court interventions based upon this conflict approach tend toward: 1) divorce education and parenting classes; 2) marital and individual counseling; 3) mediation; 4) mutual restraining orders; and 5) sanctions for those parties that "flame" the conflict, e.g., are not friendly or that "alienate" the other parent.

2. Safety vs. Access

Intervention also differs depending upon how one values safety and access, which is directly related to whether a domestic violence approach or family law approach is predominant. If one acknowledges the lethality, harm, and fundamentally compromised parenting by batterers, then the comprehensive remedies outlined *supra* will seem necessary and proper. On the other hand, if the analysis of the court is that the parties are enjoined in a mutually antagonistic relationship characterized as “low level,” “not enough violence,” “past or remote violence,” or a lack of “ongoing violence,” then the rubric of “sharing” the parenting, liberal visitation, and ongoing contact between the parties becomes the prevailing practice, and domestic violence survivors are asked to “get along” in the best interests of their children.

3. Public vs. Private Legal Process

The domestic violence assumptions and family law assumptions also break down by whether or not the practice interventions arising from each tend toward the use of public court process or private alternative dispute mechanisms.

Public court process, judicial decision-making, and meaningful review are the interventions encouraged by the domestic violence law assumptions. Civil procedures and court rules level the playing field for all litigants, but especially for a battered woman subject to her batterer’s coerced rule matrix.⁷⁴ Hearings, motions, and trials provide both parties the opportunity to present their issues and get their day in court; for battered women this allows their voices to be heard. Evidentiary rules set the parameters for engagement and standards for what can be considered. For battered women this translates into protective provisions for confidentiality and standards for expert testimony (see PAS discussion *supra*). Stipulations and agreements through the court process are, in fact, the norm. Judicial review and enforcement of structured agreements is a positive by-product of the public system that provides the backdrop for attorney-negotiated settlements.

Affordable and informed representation for battered women in civil proceedings is critical. The system

is adversary-based, with courts making factual decisions based upon competing presentations by the parties who test, through cross-examination, each other’s case. A well-trained lawyer’s use of case precedent, civil procedure, rules, motions, trials, and appeals becomes the means to broker the rights and remedies afforded by domestic violence law. A survivor attempting to navigate the legal system on her own is not likely to know either her rights or court procedure. If she goes forward *pro se*, she may not receive the remedies and protections the individual situations demand. If she goes forward *pro se*, the court’s neutrality is threatened, as the judge is forced to help the survivor elicit the testimony and evidence she needs to make her case. An unrepresented battered woman is more likely to face great physical danger at the hands of an abusive partner while waiting alone at the courthouse; she is also more likely to be subjected to threats or actual harm if she must engage in negotiation with an abuser. *Pro se* litigants in domestic violence cases are not the system’s mainstream “free standing adversaries.”⁷⁵ It is a fundamental necessity for all battered women to have opportunities to consult with, and be represented by, an attorney when facing their batterer.

Alternatively, family law assumptions direct the use of nonadversarial-based private dispute resolution. The emphasis on mediation and therapeutic justice is logically sound if: these tools are used with non-domestic violence families who will do better without litigation; based on the facts of the case, parental influences are so important that they trump safety risks; the family’s only need is to have the judge approve agreements they arrive at; the only issue before the court is which parent is the best decision-maker regarding the parenting of their children; and the court offers processes that facilitate and educate parties to develop problem-solving skills so that ongoing future decisions can be made without court interference.

Unfortunately, from a batterer’s perspective, this private process approach is exactly the ticket—as the abuser prefers to keep things hidden or silent or away from the court’s eye. Methods or processes that do not intercede in the established relationship are undoubtedly advantageous to the one who has greater power.

4. Ending Violence vs. Stabilizing Family Relationships

Family law assumptions and values are, at their core, about the establishment, preservation, and stabilization of individual families. Family law and attendant assumptions are about the creation and disunion of these relationships, intra-family responsibilities, and appropriate regulation and management of the family by the state. Parental autonomy and privacy are core values.

Domestic violence law assumptions and values go beyond family relationships, as the goal is to end violence against women. Perhaps most critical to reaching this goal is the comprehension and application of a seemingly simple truth—that not all battered women are similarly situated.⁷⁶ Differences have an impact on the resources available to a particular battered woman and the barriers that she may face in responding to the violence used against her.⁷⁷

Poor women, for example, are more vulnerable to becoming homeless due to domestic violence and the lack of affordable housing.⁷⁸ Intermittent or nonexistent child support payments, including bureaucratic delays, have a negatively disparate effect upon women living in poverty.⁷⁹ Reliable transportation, decent child care, and time off from work—all necessities for court access—may not be available to poor women. Representation in civil courts is not a constitutional right for the indigent.⁸⁰ Separation violence may also be more frequent or severe for poor women.⁸¹

Race and ethnicity also have an impact on each battered woman's experience. For example, batterers often sabotage current and prospective employment of battered women through harassment at the workplace. Survivors also may have extraordinary job absenteeism due to caring for injuries, court, and social service appointments, and transportation made unreliable by the batterer. While all these things assuredly affect all battered women across race and class, it is also the case that African-American and Hispanic women face compounding educational and employment discrimination unlike white women.⁸²

Another difference is that for some women, state control over one's life and the harm generated by the state is a more complicated matter than for other women. This context cannot be ignored if one seeks interventions that assist, rather than do additional or

substitute harm. Calling the police, for example, or using the criminal justice system present unique challenges for many women of color. For example, the disproportionate rates of incarceration for African-American men, including the risk of police brutality and lethal encounters, can make police response a less viable option for black women than for white women.⁸³ African-American women are quite likely disproportionately affected by inappropriate dual-arrest in domestic violence cases, just as African-American children are disproportionately represented in the CPS system. Immigration status concerns and language barriers create different burdens for battered Latinas and other immigrants.

The intersection of poverty and race is also important. Deportation of a batterer for a poor, undocumented Latina may force economic deprivation.⁸⁴ Poor African-American women in urban areas are more likely to live in neighborhoods that have a higher rate of poverty than poor urban white women resulting in less access to social services.⁸⁵ Services, moreover, may fail to meet the needs of women of color.⁸⁶ Non-English speakers are seriously disadvantaged in courts, legal services, advocacy programs, and social services.

Domestic violence assumptions and values require that we recognize battered women as individuals with unique capabilities, strengths, burdens, and barriers who, despite compromised options, are able to evaluate the strategies needed to respond to the violence that are in their own best interest. While safety is the overarching goal, it cannot be implemented without regard to a battered woman's agency and the context in which she lives her life, e.g., poverty. Domestic violence survivors are more than "battered." Understanding and *then responding* to that fact is no small feat. Interventions often are "universal" due to ease of administration, bureaucratic inertia, funding restraints, and professional burnout. At the same time, universal interventions may also be widely applauded by the advocacy community, fundable, and actually successful for many battered women. Mandatory arrest is a classic example of the latter.⁸⁷ "One size fits all" family service plans in child protection cases are a prime example of the former. Yet, there is no one universal battered woman. Legal system practices that are based upon generic assumptions about battered women without regard to the diverse

circumstances in which they live their lives are destined to be irrelevant, potentially detrimental, and unsafe.

Transforming Judicial and Legal Practice to End Violence Against Women

“[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

— Justice Kennedy in *Lawrence v. Texas* (2003).⁸⁸

“[T]he obligation of the court is to implement the purpose of the law, which is to do justice, and not to mechanically apply established principles of law, even when they compel an absurd result.”

— Judge Imbriani in *D’Arc v. D’Arc* (1978).⁸⁹

Addressing a domestic violence case under a family law construct is problematic at best, dangerous at worst. Batterers must be held responsible for their terror, harm, and lethal violence; concomitantly, court and representational practices and intervention should not be unwitting allies or silent partners of subjugation, bias, and burden. Practical, transformative practices are needed and should:

1. Improve Competency

Domestic violence is a complex substantive field. The harm that can come to parties by inappropriate or “wrong” judicial judgments and orders is daunting and, appropriately, concerns many courts. Some judges, however, respond to the burden of decision-making by abdicating their authority to rule. Others may resort to rote decisions because that is how they have always done things. Neither response is adequate.⁹⁰ Ongoing training and education is critical. It is not, however, the cure-all. Knowledge gained through training must be actualized into practice changes for it to mean anything.⁹¹ Justice-making courts are those that continually strive to improve their domestic violence competency through critical reflection and action.

Concrete Suggestions to Improve Competency:

- Regularly attend local and state domestic violence training
- Attend national domestic violence trainings
- Develop indices reviewing domestic violence law and cases
- Utilize technical assistance resources available in your state or nationally through the Domestic Violence Resource Network⁹²
- Share resource information with local attorneys and other judges
- Encourage attorneys to fully brief the court on factual and legal issues
- Develop a domestic violence library⁹³
- Recruit colleagues to join in the work to improve competency
- Take action to reduce bias (see below)

2. Reduce Bias

The goal is to end the violence directed at women as a group and across race, ethnicity, immigrant status, class, and other differences. Failure to critically examine and respond to bias and how it renders unequal justice leaves the root causes of domestic violence unaddressed. For example, an assumption that “a history of domestic violence” for custody purposes requires police reporting of incidents seems logical on its face. However, it simultaneously ignores battered women who are not safer when they call police, or who will not call the police because it leads to elevated harm to themselves or their partner. Sometimes courts assume that custody relief should not be ordered in a protection order proceeding, but should await a divorce or separate custody action. Waiting, in and of itself, is a class privilege, as those with greater resources can afford necessary representation, additional days off of work, requisite child care, reliable transportation, and alternative safe places to stay.

Justice-making courts are those that work to overcome their own privilege and bias. The crux of justice-making for courts is the critical analysis of one’s own biases and the effects that these have on decision-making, and then working to eradicate them through both individual case disposition as well as through the overall administration of the court.

Concrete Suggestions to Reduce Bias:

- Take action steps to improve competency (see above)
- Support Continuing Legal Education Programs on Elimination of Bias⁹⁴
- Make quality court interpretation a priority
- Implement recommendations of State Gender Bias Task Forces⁹⁵
- Ensure accessibility of the courthouse
- Include diversity material in your domestic violence library
- Learn about “living wage” and the cost of basic necessities in your local community such as housing, food, child care, and health care⁹⁶
- Invite and encourage “Courtwatch” activities, including citizen review panels

3. Afford Equal Access to Justice and Ensure Due Process

For a battered woman, representation is a fundamental necessity required to employ legal options. A fair hearing, an opportunity to have one’s cause of action heard or defended, is basic to providing justice and assuring excellence in judicial practice. Court process and judicial demeanor, in this regard, greatly impact survivors of domestic violence.⁹⁷ Courts must be willing to scrutinize their own performance and to modify decisions when appropriate.⁹⁸ Justice-making courts are those that actualize the law for the most vulnerable so that everyone can utilize its protections and remedies.

Concrete Suggestions to Afford Equal Access to Justice and Ensure Due Process:

- Take action steps to improve competency and reduce bias (see above)
- Seek feedback from litigants, local domestic violence advocates, attorneys, and others regarding your courtroom demeanor
- Make timely decisions based upon facts and law
- Ensure that proceedings occur “on the record” only
- Work with your local bar association, Legal Services program, and Domestic Violence program to increase funding for representation for indigent litigants

- Consider attorney fee awards to allow parties to hire counsel or pay for existing counsel
- Utilize *in forma pauperis* statutes to afford litigation expenses for parties
- Schedule sufficient court time for cases, including eliminating delays between hearings
- Develop protocols and procedures to improve outcomes for *pro se* litigants

4. Be Resource-Enhancing in Court Relief and Process

Interventions that amplify resources for battered women are the most promising because they assist with removing barriers to separation from the batterer and they help women and children to live decently. In a recent national study, women reported that domestic violence and sexual assault, equal pay, health care, and child care are their top priority issues.⁹⁹ We know that legal strategies collapse amidst economic need.¹⁰⁰ There is a cost to safety. While material resources are crucial, social and informational resources are also important.¹⁰¹ Justice-making courts approach resource-based relief and process as necessities, not luxuries, to ending violence.

Concrete Suggestions to Be Resource-Enhancing in Relief and Process:

- Take action steps to improve competency, reduce bias, and afford equal access to justice and ensure due process (see above)
- Provide non-mandatory referrals to local domestic violence programs and other community agencies
- Provide quality child care for litigants
- Establish and enforce adequate and immediate support awards and insurance coverage in protection order cases¹⁰²
- Award and enforce relief that will enable survivors to establish or continue their employment, e.g., return of vehicles, no-contact provisions at the workplace
- Provide reimbursement for wage loss or loss of job training due to court proceedings
- Provide relief that will enable battered women to live in safe housing

Conclusion

The promise of the legal system is that it can offer redress and resources to survivors of domestic violence. Law, however, is an imperfect tool.¹⁰³ It is not self-enforcing.¹⁰⁴ The considerations, exemptions, and presumptions of domestic violence, embedded within the family law jurisprudence and values, are promising tools—but they are not accessible to all battered

women. Freedom from domestic violence is a human right that should be enjoyed by all. Professionals have a moral responsibility to offer this central human right guaranteed by the principles of the law to all battered women. Through the work of the courts and lawyers who rise to the challenge of actualizing justice, a collective transformation is underway.

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AUTHORS' NOTE: The authors wish to thank Maureen Sheeran, Sharon López, Loretta Frederick, and Billie Lee Dunford-Jackson for their contributions to the development of this article.

END NOTES

- 1 See, e.g., Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1086 (1995) (“[F]reedom from domestic violence is a central human right that should be enjoyed by poor people as well as by others.”).
- 2 See Sylvia Law, *Access to Justice: The Social Responsibility of Lawyers: Families and Federalism*, 4 WASH. U. J.L. & POL’Y 175, 177-78 (2000).
- 3 See *Troxel v. Granville*, 120 S. Ct. 2054 (2000); Herma Hill Kay, *Symposium on the Law in the Twentieth Century: From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2047 (2000).
- 4 *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977).
- 5 See *Loving v. Virginia*, 388 U.S. 1 (1967); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lawrence v. Texas*, 539 U.S., 123 S. Ct. 2472 (2003).
- 6 See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 202-08 (2d ed. 1985). Both the civil ceremony and common law marriage were sanctioned forms of creating a husband and wife union in Colonial America. Friedman argues that common law marriage materialized due to social context—the philosophical distaste for ecclesiastical prerogatives, necessity based upon the shortage of available clergy, and a sparse farm-based population that had an economic need for clarity. Common law marriage is best characterized as a “verbal contract” or agreement between a man and a woman to consider themselves husband and wife. *Id.* As of 1999, 11 states and the District of Columbia continued to recognize common law marriage. See Kay, *supra* note 3, at 2037-38.
- 7 The Court, having identified the freedom to marry as “one of the vital personal rights essential to the orderly pursuit of happiness by free men,” struck down state laws covering filing fees for divorce that prevented poor people from marrying, child support requirements interfering with marriage license acquisition, and prohibitions against marriage of state prisoners. *Loving v. Virginia*, 388 U.S. at 12. See also; *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987). Herma Hill Kay notes how the rise of state miscegenation laws coincided with the post-Emancipation period and was clearly a public policy statement meant to assure white supremacy. In the 1920s, 29 states had enacted such laws and federal constitutional law allowed for such racist schemata under *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Kay, *supra* note 3, at 2036. Contemporary debate continues as to who can marry whom with federal enactment of the Defense of Marriage Act in 1996 meant to counter action in Hawaii involving same-sex marriage.
- 8 See, e.g., Kay, *supra* note 3, at 2047 (“On the one hand, there was a genuine demand for divorce—a demand for ways to regularize legal status inside the family, and thus ensure rights of property, inheritance and the smooth operation of the land market... [t]here were also competing demands for strict divorce laws, to protect family structure, to strengthen the home, and to prevent immortality and sin.”).
- 9 In 1951, the American Bar Association sponsored a national Interprofessional Commission on Marriage and Divorce to address and recommend marriage and divorce law reform. The Commission selected three assumptions to study: “basing divorce on guilt and punishment has proven harmful to family stability,” “the use of adversary procedures on divorce cases should be displaced” and “the approach to the subject of divorce should be therapeutic with the interest of the family as the motivating factor.” See Kay, *supra* note 3, at 2043-44.
- 10 See Susan Frelich Appleton, *From the Lemma Barkeloo and Phoebe Couzins Era to the New Millennium: 130 Years of Family Law*, 6 WASH. U. J.L. & POL’Y 189, 191 (2001) (citing I WILLIAM BLACKSTONE, *442). Acknowledgment of women as separate human beings from the men they marry is a relatively recent phenomenon. For thousands of years the law viewed women’s property rights as either nonexistent or dependent on the rights of their husbands, fathers, or other male kin. Only in the 19th century did economic independence for married women begin to creep into substantive law. As late as the 1950s, 1960s, and 1970s, states viewed women as economically dependent on their husbands. Wives in California, for example, only obtained the legal right to control their earnings in 1951, and most states continued until the late 1980s to view married women as dependents of their husbands, absent presenting contrary evidence. See Valente et al., *The Violence Against Women Act of 1994: The Federal Commitment to Ending Domestic Violence, Sexual Assault, Stalking, and Gender-Based Crimes of Violence*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN (Jeffrey L. Edleson, Claire E. Renzetti, & Raquel Kennedy Bergen eds. 2001)[hereinafter Valente]. The husband was the owner of the “one flesh” that resulted from the merger of women’s identities with that of their husbands. See FRIEDMAN, *supra* note 6, at 208.
- 11 See FRIEDMAN, *supra* note 6, at 208.
- 12 Mississippi passed the first version of such property reform acts in 1839. Ownership and disposal of slaves by married women consumed four of five sections of the law. See FRIEDMAN, *supra* note 6, at 210. Friedman notes

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that these reforms involved primarily the *external* relations with creditors and not *internal* litigation between spouses. See FRIEDMAN, *supra* note 6, at 211. See also Kay, *supra* note 3, at 2021-22 (describing the development of Married Women's Property Acts and the unsuccessful demand for joint property rights in household labor). Additionally, "earnings statutes" allowed married women ownership of their labor outside the home. See Kay, *supra* note 3, at 2021-22. The modern era of property division law is best characterized by a progression from title to equitable division in the majority of jurisdictions, with a community property minority. See James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. REV. 923, 946 (2001). Today, most states outline a list of factors for court consideration that includes spousal non-monetary contributions and economic misconduct. See Linda D. Elrod & Robert Spector, *A Review of the Year in Family Law: State Courts React to Troxel*, 35 FAM. L.Q. 577 (2002) 5 at Chart 5.

13 See DiFonzo, *supra* note 12, at 946.

14 *Id.*

15 With regard to the first question, the traditional rule recognized natural birth or adoption as the sole means to establish a parent/child relationship. Modern interpretations, while deferring to the biological or adoptive parent, also consider unavailability and/or unfitness of the legal parents and may allow for "third parties" to seek custody of a child. See DiFonzo, *supra* note 12, at 928-29. Further, there is a growing trend toward granting legal recognition to "functional" parents. *Id.* at 936. Note that the ALI Principles of the Law of Family Dissolution Analysis and Recommendations (2002) set out three categories of "parents" for custodial purposes: legal parents, parents by estoppel, and *de facto* parents.

16 See Valente, *supra* note 10, at 281.

17 Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations*, in National Electronic Network on Violence Against Women Applied Research Forum (1998) at <http://www.vawnet.org>.

18 See Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 VIOLENCE AGAINST WOMEN 597 (2002); Stephen Doyne *et al.*, *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority* 50 JUV. FAM. CT. J. 1, 1-12 (1999); Saunders, *supra* note 17, at 1.

19 See Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System* 37 FAM. & CONCILIATION CTS. REV. 273, 277 (1999). The notion that children need both parents

became reflected in permissive joint custody provisions in nearly every state, with approximately 13 states having presumptions, some mandatory, favoring joint custody. See Katherine T. Bartlett, *Improving the Law Relating to Postdivorce Arrangements for Children*, in THE POSTDIVORCE FAMILY: CHILDREN, PARENTING, AND SOCIETY (ROSS A. THOMPSON & PAUL R. AMATO, eds. 1999).

20 In 1995, 10 states codified such public policy statements in their custody statutes. See Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 2, 197-227 (1995). Today, approximately 22 states have "cooperative parent" custody criteria. See ABA Family Law Section—Law in the 50 States (2003) at <http://www.abanet.org/family/familylaw/tables.html>.

21 See Hardesty, *supra* note 18, at 603-04. Nine states utilize parenting plans, usually as a condition of joint custody. *Id.*

22 See Dalton, *supra* note 19.

23 See Bartlett, *supra* note 19, at 79.

24 *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The principle of a natural parent's fundamental liberty interest in the caretaking of their child is central to both earlier and later Court decisions involving parental prerogative over public education, evidentiary standards in termination of parental rights proceedings, and state court awards of non-parent visitation without consideration of parental wishes. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982); and *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

25 See Sandra Day O'Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573, 574 (2001) ("[F]amily law matters more often than not raise fact-specific problems regarding the equities of the particular case and the best interests of the parties involved.").

26 Appleton, *supra* note 10, at 191 (citing I WILLIAM BLACKSTONE at 444).

27 NEIL WEBSDALE, *RURAL WOMAN BATTERING AND THE JUSTICE SYSTEM: AN ETHNOGRAPHY* at 84-85 (1998).

28 ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000).

29 *Id.* Excessive and permanent injury is discussed in the 1864 case of *State v. Black*, 60 N.C. 262, 263, 86 Am. Dec. 436 (1864). Necessity to enforce subjugation is outlined in the 1871 Massachusetts case, *Commonwealth v. McAfee*, 108 Mass. 458, 11 Am. Rep 383 (1871). Although the Blackstone and English common law regarding the male right to beat became the dominant theme in the

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- development of American common law, there were some exceptions to this precept, notably the Puritans. This early colonial history, however, is an example of the law on the books in contrast with the law in practice, as courts were not anxious to insert themselves into the private sphere of the marital relationship and enforce the law. See E. SCHNEIDER, *supra* note 28.
- 30 See SCHNEIDER, *supra* note 28, at 16-20.
- 31 *Id.* at 18.
- 32 *Id.* at 20.
- 33 SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 17 (1982)(emphasis added).
- 34 Barbara Hart, *Rule Making and Enforcement/Rule Compliance and Resistance* 253-263 in I AM NOT YOUR VICTIM: ANATOMY OF DOMESTIC VIOLENCE (B. Sipe and E. Hall, eds. 1996).
- 35 See I. SCOTT, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE (2002).
- 36 Barbara Hart, The Legal Road to Freedom (1991)(unpublished manuscript, on file with the Legal Department of the Pennsylvania Coalition Against Domestic Violence).
- 37 See Ellen Pence, *Advocacy on Behalf of Battered Women*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 10, at 333.
- 38 See, e.g., Chris M. Sullivan *et al.*, *Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women are Nurturing Parents*, 2 J. EMOTIONAL ABUSE 51 (2000)(noting that mother's experience of physical and emotional abuse had no direct impact on their parenting stress or discipline).
- 39 See Hart, *supra* note 34; see also JILL M. DAVIES, ELEANOR LYON, & DIANE MONTI-CATANIA, SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES (1998)(analyzing risks posed to battered women by their particular batterer as well as by "life," e.g., poverty).
- 40 See Pence, *supra* note 37, at 329.
- 41 See Barbara Hart, *Safety and Accountability: The Underpinnings of a Just Justice System* (1998)(unpublished manuscript on file with the Legal Department of the Pennsylvania Coalition Against Domestic Violence); Pence, *supra* note 37; Perilla, *Domestic Violence as a Human Rights Issue: The Case of Immigrant Latinos*, 21 HISPANIC J. BEHAVIORAL SCIENCES 107 (1999); DAVIES, LYON, & MONTI-CATANIA *supra* note 39.
- 42 Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).
- 43 See Donna Coker, *Piercing Webs of Power: Identity, Resistance, and Hope in Latcrit Theory and Praxis: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000).
- 44 See SCHECHTER, *supra* note 33, at 253.
- 45 See Pence, *supra* note 37.
- 46 See Coker, *supra* note 43.
- 47 See Doyne, *supra* note 18; Hart, *supra* note 34.
- 48 At least 157 people were killed in Pennsylvania in 2002 due to domestic violence. This number is derived from newspaper reports and is likely underreported. See Pennsylvania Coalition Against Domestic Violence, *Domestic Violence Homicide Report (2002)* at <http://www.pcadv.org>.
- 49 See Hardesty, *supra* note 18.
- 50 *Id.* See also Dalton, *supra* note 19.
- 51 See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE §402 (National Council of Juvenile and Family Court Judges 1994).
- 52 For a thorough review of the parenting by batterers, including the broader perspective regarding batterers' poor role modeling and influence regarding stability and emotional health see LUNDY BANCROFT & JAY SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).
- 53 See PETER JAFFE, NANCY LEMON, & SAMANTHA POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY (2002); See also Hardesty, *supra* note 18; Doyne, *supra* note 18.
- 54 See Coker, *supra* notes 42 and 43; Hart, *supra* note 36; Hardesty, *supra* note 18.
- 55 See Doyne, *supra* note 18; Hart, *supra* note 36.
- 56 See Dalton, *supra* note 19; Hardesty, *supra* note 18.
- 57 See Hardesty, *supra* note 18.
- 58 See Caitlin Glass, Tamara Kuennen, & Sharon López, *Custody and Visitation: Considerations for Every Attorney Retained by a Survivor of Domestic Violence*, 36 CLEARINGHOUSE REV. 529-543 (2003)[hereinafter Glass].

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- 59 See Hardesty, *supra* note 18. See also Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990). Perpetrators of domestic violence, because they can more readily utilize subtle coercion and threats in the less formal process, are situated to eagerly agree to mediation.
- 60 See Doyne, *supra* note 18.
- 61 See Dalton, *supra* note 19; See also *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996)(indicating that the behavior of a protective parent may be misinterpreted as a sign of instability).
- 62 See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 530-34 (2001)(discussing the flaws in PAS theory).
- 63 See *id.* at 537-541 (noting the prevalence of PAS as an issue in custody cases through an appellate search and that, while many courts have reviewed the admissibility issues regarding PAS, many, disturbingly, have not inquired into the scientific validity). See also Doyne, *supra* note 18, at 7 (discussing a 1996 survey of custody evaluation practices and noting that more than 75% of evaluators recommended denial of sole or joint custody to parents who alienated children from the other parent).
- 64 See Margulies, *supra* note 1, at 1076.
- 65 *Id.* at 1076 (citing numerous references at footnote 27).
- 66 See Hart, *supra* note 36, at 4 (“The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him.”).
- 67 *Id.* at 4 (reporting a minimum of \$5,000 per relocation); See also Coker, *supra* note 42, at 836 (discussing separation costs such as first and last month’s rent plus deposit, new child care arrangements, school enrollment, a new job, and transportation).
- 68 See Hardesty, *supra* note 18, at 606 (“Research indicates that a climate of fear during custody proceedings leads a substantial number of women to compromise their rights....[A] significant inverse relationship exists between fear during child support negotiations and awards of child support.”).
- 69 See Doyne, *supra* note 18, at 5 (noting that battered women may not be believed when they report violence as it is viewed as exaggerating incidents to manipulate courts).
- 70 See Jaffe, *supra* note 53, at 61(discussing how batterers fight for custody and visitation for purposes of continuing the abuse, control, and compliance over their partner). See also Hardesty, *supra* note 18, at 610 (reviewing a study showing that women forgo support for fear of violence and that visitation requests by fathers center around control issues rather than relationships with the children).
- 71 See Loretta M. Frederick, *Effective Advocacy on Behalf of Battered Women* (1997) (at <http://www.bwjp.org>).
- 72 See Hart, *supra* note 41. Representatives should keep in mind that safety planning and strategies for enforcement of court orders go hand in hand. See Glass, *supra* note 58, at 542.
- 73 See SCHECHTER, *supra* note 33, at 210 (framing the domestic violence inquiry as to why individual men batterer is misplaced; the question is why men as a group direct their violence against women).
- 74 See Hart, *supra* note 34.
- 75 See WEBSDALE, *supra* note 27, at 127.
- 76 Battered women differ in age, race, class, and ethnicity. Battered women also differ by health conditions and abilities. The community where a battered woman lives may be rural, suburban, or urban. It may be a college or university town. A battered woman may be a tribal member. A battered woman may or may not have children with the batterer, may or may not speak English, and may or may not be a citizen of the United States. Every woman is unique.
- 77 See DAVIES, LYON, & MONTI-CATANIA, *supra* note 39. This is to say that not every woman (and man) is impacted the same way as another. Poor battered women may face many similar barriers, but not all poor women will be impacted exactly the same.
- 78 See Margulies, *supra* note 1, at 1076; see also WEBSDALE, *supra* note 27; Coker, *supra* note 43, at 1020-21 (noting that “inadequate material resources render women more vulnerable to battering” and that battering behaviors contribute to job loss, homelessness, health and disability impairments, and estrangement from family and friends).
- 79 See Hardesty, *supra* note 18, at 607.
- 80 See Coker, *supra* note 42, at 804-805 (noting that without legal representation, “women are unable to benefit from much of domestic violence law reform” and that “there are too few free lawyers for the number of domestic violence cases.”); See also Brennan Center for Justice: *Struggling to Meet the Need: Communities Confront Gaps in Federal Legal Aid* (2003) at <http://www.brennan>

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- center.org/resources/atj/index.html (noting that 45 million low-income Americans meet the financial qualifications for LSC-funded representation, and that LSC-funded programs provide services to about 1.4 million). The right to counsel in criminal cases was established in the United States in 1963 in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Gideon* overturned the 1942 ruling of *Betts v. Brady*, 316 U.S. 455 (1942). In 1981 in *Lassiter v. Dep't of Social Serv.* 452 U.S. 18 (1981), the Court ruled 5-4 against an absolute federal right to counsel in termination of parental rights proceedings for the indigent.
- 81 See Hardesty, *supra* note 18, at 607.
- 82 *Id.* at 606.
- 83 Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM L. Q. 461, 467 (1999).
- 84 See Coker, *supra* note 43, at 1029-1032.
- 85 See Coker, *supra* note 43, at 1026-27.
- 86 *Id.*
- 87 See Coker, *supra* note 43 (discussing how mandatory arrest policies negatively affect undocumented battered Latinas).
- 88 *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).
- 89 *D'Arc v. D'Arc*, 164 N.J. Super. 226 (1978).
- 90 For repudiation of doing things the same way just because that is how one has always done them, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have not better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").
- 91 See, e.g. Dalton, *supra* note 19, at 275 ("Without real change in the attitudes and practice of professionals, formal change can be a largely empty promise.").
- 92 The Domestic Violence Resource Network (DVRN) is a national network of domestic violence resource centers that provide information on a wide array of domestic violence topics, from criminal and civil legal system response, health, child protection and custody, and economic justice. Each center has a toll free number. Contact information for the various centers can be obtained by contacting the National Resource Center on Domestic Violence (NRC DV) at 1-800-537-2238. Information on the various centers can be found on the NRC DV Web site at <http://www.nrcdv.org>.
- 93 An excellent book to begin or add to a domestic violence library is JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* (1999).
- 94 Minnesota, for example, has a mandatory elimination of bias component as part of its continuing legal education requirements.
- 95 As of 2000, 21 states had investigated and reported on gender bias in their court systems. See *United States v. Morrison* 529, U.S. 598 (2000) (Souter, J., dissenting).
- 96 In Pennsylvania, for example, the Women's Association for Women's Alternatives, Inc. has put together county by county cost information on housing rents, food, child care, transportation, and other costs to establish family economic self-sufficiency. The Pennsylvania 2001 self-sufficiency report can be found at <http://www.womensassoc.org/programs/tools.html>.
- 97 See PTACEK, *supra* note 93.
- 98 See Dalton, *supra* note 19.
- 99 See Center for the Advancement of Women, Press Release (June 24, 2003) at <http://www.advancewomen.org>.
- 100 See Hart, *supra* note 36 ("Legal strategies collapse if the consciousness of the community is not aligned against violence, if emergency services and housing are not available to battered women and children, if human service institutions are not cognizant of domestic violence and are not employing strategies to safeguard victims and hold batterers accountable, and if the family and friends of the battered woman and the batterer do not reject violence as an option in intimate relationships and offer support for safety and change.").
- 101 See Coker, *supra* note 43, at 1051 (noting battered women's positive reaction to police behavior that provides information regarding services and legal rights).
- 102 Domestic violence law reform may be necessary to implement this suggestion in certain jurisdictions.
- 103 See Hart, *supra* note 36.
- 104 *Id.*

