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2021

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Recommended Citation

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

*Joan S. Meier**
*Vivek Sankaran***

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 in part, but only in part. For instance, as described in Part I below, 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 child placements in cases involving domestic violence and child maltreatment are regularly decided by family courts adjudicating private custody litigation. Moreover, the often unfavorable reception given to mothers making such allegations, and not infrequent 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, 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.

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. OF SOC. WORK, 837 (2011).

² *Id.*

Our collaboration has identified 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 sidestep foster care when it is possible for a safe parent to seek child custody in civil court. The hope has been that this would protect children from the problems with foster care and keep them safe with one of their parents. However, as detailed below, qualitative and quantitative research indicate that relying on family courts to assure a child's safety from an unsafe parent is actually quite risky. 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, we believe 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 wrongly 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' responses to mothers' allegations of family violence, including frequent custody reversals or awards to alleged (and adjudicated) abusers. 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, we note a parallel skepticism from even these agencies toward custody litigants' claims of child abuse. Moreover, well-intended reformers have advocated that, where there is one safe parent, child welfare agencies replace over-reliance on foster care with reliance on family court custody adjudications. These reform efforts, however, have developed with limited awareness of the dynamics in custody litigation which actually render family courts poor settings in which to seek the protection of children from an unsafe parent.

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

In response to these dynamics and problems, we propose three specific reforms, including cross-training and education aimed at changing both systems' ideologies, assumptions and practices. Central to these reforms is recruitment of child welfare agencies themselves to advocate for children's safety *within the private custody case between the parents*. Such 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.

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 family 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. However, these initiatives did not include civil courts adjudicating child custody.⁵ And, while child custody law has incorporated domestic violence reforms, these changes have not explicitly addressed 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

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

⁵ [SUSAN SCHECTER & 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.

abuse have long been addressed entirely separately.⁷ This continues today, despite the now widespread understanding that a substantial number of 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

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 created a governmental child protective program, and by the 1960s most states had converted these 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 children were being victimized by the father.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 emerged.¹⁴ Instead, child maltreatment as a field has become identified with maternal failures, and fathers' abuse of children has been shadowy at best.¹⁵

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

⁸ LUNDY BANCROFT, JAY G. SILVERMAN & DANIEL RITCHIE, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2ed. 2012).

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 (2008).

¹¹ LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON, 1880-1960* 253 (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 A.M.S. Slep & S.G. O'Leary, *Examining Partner and Child Abuse: Are We Ready for a More Integrated Approach to Family Violence*, 4 CLINICAL CHILD AND 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.

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

J. 119, 125 (2019).

¹⁶ Kiersten Stewart, *Evolving Federal Policies and Their Implications for Greenbook Interventions*, 70 JUV. & FAM. CT. J. 37 (2019).

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. OF GENDER L. & POL'Y 205 (2015).

¹⁹ [SUSAN SCHECTER & JEFFREY EDLESON](#), IN THE BEST INTEREST OF WOMEN AND CHILDREN: A CALL FOR COLLABORATION BETWEEN CHILD WELFARE AND DOMESTIC VIOLENCE CONSTITUENCIES (1994).

²⁰ SCHECTER & EDLESON, *supra* note 5.

separate pilot projects around the country, and varying degrees of improvements in practices of the three collaborating groups were reported.²¹ For instance, screening for domestic violence was adopted by many agencies, 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 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 batterer impacts the whole family, including the children.²⁵ While the organization's mission has focused on child welfare agencies, its work is primed for potential application in the civil family courts; initial explorations have occurred.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

²¹ THE GREENBOOK NATIONAL EVALUATION TEAM, THE GREENBOOK INITIATIVE FINAL EVALUATION REPORT, GREENBOOK EVAL REPORT ii-xi (2011).

²² *Id.*

²³ Stewart, *supra* note 16.

²⁴ Safe and Together Institute, Promoting the Best Outcomes for Children in Domestic and Family Violence Cases, National Family Law Pathways Network 2020 Webinar Series, YOUTUBE (Jun. 9, 2020), https://www.youtube.com/watch?v=xYjQOnJTB5U&feature=emb_err_woyt (emphasis added).

²⁵ Mandel & Wright, *supra* note 15.

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.

develop.²⁹ The civil protection order, which allowed abused women to seek an equitable injunction against abuse, was first utilized in the District of Columbia in 1970.³⁰ Over the following two decades, comparable equitable protection order remedies were adopted across the country.³¹

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

a. 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, the reality is likely that family courts are the *primary* system responding to both types of

²⁹ *Id.*

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

³² Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213 (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 (2019). AMY NEUSTEIN & MICHAEL LESHER, *FROM MADNESS TO MUTINY: WHY MOTHERS ARE RUNNING FROM THE FAMILY COURTS – AND WHAT CAN BE DONE ABOUT IT* (2005). Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57 (2003). Stephanie J. Dallam & Joyanna L. Silberg, *Six Myths that Place Children at Risk in Custody Disputes*, 7 FAM. & INTIMATE PARTNER VIOLENCE Q. 65 (2014).

³⁴ The Greenbook National Evaluation Team, *supra* note 21, at ii.

allegations. Unfortunately, this capacious view is not widely shared by civil courts themselves: 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.

Thus, 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) describe 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 handled by the first author and a law student many years ago, when the student started to detail the father’s hurling of a child across a room, the highly-regarded and domestic-violence-trained judge exploded and started berating our client (the mother) and ourselves. These volatile responses may have been triggered both by a discomfort with the information and possibly also with reactivity to such traumatic material.³⁶ But the fact that there is a separate state agency designed to address child maltreatment provides an easy structural argument for why family court judges are not required to address child maltreatment.

Family courts’ resistance to hearing about child abuse has 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 Another 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, 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 below strongly underlines many family courts’ negative attitudes toward child

³⁵ The first author was representing the mother who was testifying, advocating for a protection order for both herself and her children. She explained to the judge that DCFS had interviewed the children, expressed empathy and concern, and done nothing. The judge was not very receptive. *Sessions v. Harris* (2018) (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 (2020). Joan Meier, *Ending the Denial of Family Violence: An Empirical Analysis and Path Forward for Family Law*, 110 GEO. L. J. (forthcoming).

³⁷ Electronic Communication from Mikaela Deming to ABACDSV List-serv (July 20, 2020). Electronic Communication from Danielle Pollock to Joan Meier (July 27, 2020).

³⁸ Electronic Communication from Anonymous to first author (May 18, 2020).

maltreatment allegations. Indeed, a similar attitude has been voiced by child welfare agencies as well. 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'.³⁹

How is it that not only domestic relations but even *domestic violence* civil courts perceive child abuse as outside their mandate? We submit 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 domestic violence 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 raised and advocated the issue of child maltreatment, whether co-occurring with domestic violence or not. Responsibility for this oversight resides not just with the legal system but with reform advocates as well. Indeed, the battered women's movement's gender-focus may have helped to fuel the legal system's tendency to see battering as a crime of men against women, rather than against the entire family.⁴²

b. Lack of Intersectional Professional Education

This siloing begins to some degree in the professional schools. Law schools

³⁹ Electronic Communication from Danielle Pollock to Joan Meier, *supra* note 37.

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 Thanks to David Mandel of the Safe and Together Institute for pointing out these fundamental philosophical frameworks as contributing to the siloing problem.

may have domestic violence classes or clinics, and those courses may address child protection agency practices and laws, or the overlap of domestic violence and child abuse, but almost never child abuse itself; 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 abuse and domestic violence. Among mental health professions, while this may no longer be universally the case, 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 3-hour trainings are unlikely to engender critical or deep thinking about an attendee's relatively un-educated beliefs about families and child custody.⁴⁶

Finally, despite the ubiquity of neutral court-appointed child custody evaluators, only three states (Montana, California and Texas) require *any* training for them, and of those three only California and Texas require training on domestic violence.⁴⁷ Given that roughly 75% of contested custody cases in court involve allegations of some kind of family abuse⁴⁸, often involving both child and adult victims,⁴⁹ the lack of basic professional

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

⁴⁴ INST. OF MED., *CONFRONTING CHRONIC NEGLECT: THE EDUCATION AND TRAINING OF HEALTH PROFESSIONALS ON FAMILY VIOLENCE* 40-42 (Nat'l Academies Press 2002). Pamela D. Connor et al., *Overcoming Barriers in Intimate Partner Violence Education and Training of Graduate Social Work Students*, 32 J. OF 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).

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. OF TRAUMA & DISSOCIATION 489 (2019).

⁴⁷ CAL. FAM. CODE §§ 1816, 3110.5 (West 2020). TEX. FAM. CODE ANN. § 107.104 (West 2015).

⁴⁸ Jaffe et al., *supra* note 33.

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

education 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.

c. 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. Child abuse is thus assumed to be handled “over there” in the agency cases; and while it’s not entirely logical, this feeds the unstated belief that child abuse does not belong – or exist - in other civil dockets.

A parallel type of siloing can be seen 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 multiple 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.⁵⁰ But twenty-six years later, despite an original commitment to including custody cases in the Domestic Violence Unit, these continue to be heard in the separate Domestic Relations Unit. 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.

Invariably, when child abuse or domestic violence is handled by a separate court, 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 DV or CAN Unit, it’s *not a case of domestic violence* or *child abuse*, respectively. Whether or not this type of bureaucratic siloing is an independent cause, it surely reinforces family court professionals’ assumption that family violence - especially child maltreatment – is not something that should be part of a custody adjudication.

II. FAMILY COURTS’ RETICENCE TOWARD PROTECTING CHILDREN

The siloing of child maltreatment and domestic violence and the separation

CUSTODY OUTCOMES IN CASES INVOLVING PARENTAL ALIENATION AND ABUSE ALLEGATIONS 20 (The Geo. Wash. Univ. L. Sch. 2019).

⁵⁰ Epstein, *supra* note 18.

of child welfare agencies and family courts would not necessarily be a problem if both agencies fulfilled their mandates effectively and at-risk children were adequately protected. However, a vast literature, and a growing body of empirical data, describes 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 internationally⁵¹ 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 victims⁵², and often fail to understand the implications of domestic violence for children and parenting,⁵³ resulting in awards of unfettered access or custody to abusive fathers.⁵⁴ 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.⁵⁵ These drastic responses to

⁵¹ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System*, Report No. 135 (2019). MINISTRY OF JUSTICE, ASSESSING RISK OF HARM TO CHILDREN AND PARENTS IN PRIVATE LAW CHILDREN CASES, PROGRESS UPDATE, 2019 (UK).

⁵² ROSEMARY HUNTER, R. ET AL., MINISTRY OF JUSTICE, ASSESSING RISK OF HARM TO CHILDREN AND PARENTS IN PRIVATE LAW CHILDREN CASES, FINAL REPORT, 2020 (UK). Jaffe et al., *supra* note 33. Dallam & Silberg, *supra* note 33.

⁵³ Evan Stark, *Rethinking Custody Evaluations in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287 (2009). Clare Dalton, Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11 (2003).

⁵⁴ BANCROFT, SILVERMAN & RITCHIE, *supra* note 8. Fernandes, *supra* note 3. Sally Goldfarb, U.N. Div. for the Advancement of Women, *The Legal Response to Violence Against Women in the United States of America: Recent Reforms and Continuing Challenge*, U.N. Doc. EGM/GPLVAW/2008/EP.06 (2008). Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM.U. J. GENDER, SOC. POL. & L. 657 (2003).

⁵⁵ Nancy Stuebner, Linda Krajewski & Geraldine Stahly, Poster Presentation at the Int'l Violence and Trauma Conf. (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

mothers' abuse allegations appear to be strongest in cases of alleged child sexual abuse.⁵⁶

B. Empirical Data

These substantive critiques have been supported by a small number of empirical studies of custody courts' handling of adult domestic violence, which also indicate that adult domestic violence is often ignored or minimized by custody courts.⁵⁷ A recent Colorado study found that half of all custody courts failed to mention domestic violence even when the perpetrator had been criminally convicted.⁵⁸ And another 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 protected the child. Consistent with extensive anecdotal reports in the literature and social media, they 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."⁵⁹

The above scholarship has shed light on family court trends, but none of these empirical studies looked at a national picture nor addressed child abuse, as distinct from or in conjunction with domestic violence. But recently a first-ever empirical study of family court outcomes nationwide 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.⁶⁰ The

cases in which U.S. family courts both suppressed evidence of adult and child abuse and awarded custody to abusers).

⁵⁶ Kathleen Coulborn Faller and Ellen DeVoe, *Allegations of Sexual Abuse in Divorce*, 4 J. CHILD SEXUAL ABUSE 1 (1995). NEUSTEIN & LESHNER, *supra* note 33. S. R. Lowenstein, *Child Sexual Abuse in Custody and Visitation Litigation: Representation for the Benefit of Victims*, 60 UMKC L. REV. 227 (1991). L. Bancroft & M. Miller, *Chapter 4, The Batterer as Incest Perpetrator*, in *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2ed. 2012). Madelyn Milchman, *Misogyny in New York Custody Decisions with Parental Alienation and Child Sexual Abuse Allegations*, 14 J. CHILD CUSTODY 234 (2017).

⁵⁷ Joan Zorza & Leora Rosen, *Guest Editor's 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).

⁵⁸ 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>.

⁵⁹ Joyanna Silberg & Stephanie Dallam, *Abusers Gaining Custody in Family Courts: A Case Series of Over Turned Decisions*, 16 J. CHILD CUSTODY 140 (2019).

⁶⁰ Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and*

Study of all relevant custody opinions within a 10-year period powerfully confirms the qualitative critiques in the literature, and in addition, to the authors' knowledge, this study provides the only existing credible data on family courts' responses to child abuse allegations.⁶¹

In brief, courts only rejected mothers' allegations of any type of family abuse, on average, approximately 2/3 of the time. Eighty-nine percent of child physical abuse claims and 81% of child sexual abuse allegations were rejected. When an allegedly abusive father cross-accused the mother of parental alienation, rejection rates further increased. Only *one* child sexual abuse claim out of 51 (2%) was accepted by a court in that circumstance.⁶²

Courts' rejections of mothers' allegations had severe consequences. Approximately one-third of mothers alleging child abuse lost custody to the alleged abuser. When they alleged *both* types of child abuse, the penalties skyrocketed: 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. As is discussed in the Study, these patterns do not appear to operate when genders are reversed.⁶³

While the Study did not and could not know whether trial courts' factual findings and rejections of abuse allegations were wrong or right, 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 98% 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.⁶⁴

Overall, the Study's new data powerfully reinforce the extensive critiques in the literature and social media (*e.g.*, The Court Said; Women's Coalition International) of mothers who report having disclosed true abuse and losing custody to the abuser.⁶⁵ It should now be clear that family courts set an

Abuse Allegations: What do the Data Show?, 42 J. SOC. WELFARE & FAM. L. 92 (2020). MEIER ET AL., *supra* note 49.

⁶¹ 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 (Meier et al, 2021, Commentary; Meier et al, Response, forthcoming).

⁶² *Id.* at 14.

⁶³ *Id.* at 23.

⁶⁴ Meier, *supra* note 36, at 15-16 (citations omitted).

⁶⁵ Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project*,

extremely high bar for proof of child physical – and particularly child sexual – abuse allegations against fathers. The data as well as the 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 own, we 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,” leading to a skeptical and critical response when such allegations arise where they “don’t belong.” In reality, child abuse allegations often arise in family court first, 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.⁶⁶ Nonetheless, courts have been known to reject child abuse allegations on the ground that they were raised for the first time in custody court.⁶⁷

More generally, some scholars have posited that courts’ skepticism toward mothers’ abuse allegations stem from a lack of knowledge of how domestic violence and trauma affect families, and implicit or explicit gender bias.⁶⁸ Another hypothesis turns on the natural human inclination to avoid psychological and emotionally traumatic material such as, particularly, 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.⁶⁹

While these phenomena likely play a role, the fact that courts’ negative

Women’s Narratives, and Court Reform, 37 ARIZ. STATE L. J. 709 (2007).

⁶⁶ 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, SILVERMAN & RITCHIE, *supra* note 8.

⁶⁷ NEILSON, *supra* note 67, at Sec. 6.5.3.2 n. 271, *citing* Cox v. Brady, 2002 NFCA 27.

⁶⁸ Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399 (2019). Goodmark, *supra* note 66. Milchman, *supra* note 56.

⁶⁹ Ordway et al., *supra* note 36. Meier, *supra* note 54. Meier, *supra* note 36.

responses are aimed more at mothers than fathers compels a gender-specific explanation. Even putting aside overt or implicit bias, there is another implicitly gendered norm which drives family courts: the emphasis on shared parenting and fathers' involvement with their children, often termed "contact" or "access."⁷⁰ Although equal shared parenting may not be court-ordered as often as it is touted,⁷¹ most courts consider it the pre-eminent value in custody decisions, and tend to judge parents by their stance on it.⁷² Given that most primary caregivers are mothers, they naturally oppose shared parenting more than fathers do; they are accordingly disadvantaged in court.⁷³ Moreover, courts and systems tend to expect relatively little of men as parents before deeming them worthy of custody, in contrast to expectations of mothers, another source of implicit gender bias in these decisions.⁷⁴

Mothers' generalized disadvantage in custody court is compounded when they allege that a father is dangerous. As the 2020 United Kingdom government-instigated study of family courts' responses to mothers alleging abuse 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."⁷⁵ 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.⁷⁶ 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.⁷⁷ While the parental alienation concept theoretically also applies in non-abuse cases and to any gender, the Study found it to be more powerful when utilized against

⁷⁰ HUNTER, R. ET AL., *supra* note 52. Meier, *supra* note 54.

⁷¹ 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).

⁷² Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

⁷³ *Id.* HUNTER, R. ET AL., *supra* note 52, at 64.

⁷⁴ Mandel & Wright, *supra* note 15, at 127.

⁷⁵ HUNTER, R. ET AL., *supra* note 52, at 4.

⁷⁶ 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, R. ET AL., *supra* note 52.

⁷⁷ JOAN S. MEIER, PARENTAL ALIENATION SYNDROME AND PARENTAL ALIENATION: A RESEARCH REVIEW (VAWnet 2013).

mothers accusing fathers of abuse.⁷⁸ 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.⁷⁹

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. And courts' resistance to mothers' claims of child abuse is also powerfully fueled by their priority to shared parenting and fathers' rights – reinforced by theories like parental alienation.

Unfortunately, despite the fairly extensive literature describing these trends and dynamics, awareness of the negative reception which awaits mothers alleging family violence by fathers 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 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 – perhaps assuming that they will “sort out” the truth.⁸⁰ At the same time, agencies share courts' deep skepticism toward allegations of child abuse that arise in 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,

⁷⁸ MEIER ET AL., *supra* note 49. HUNTER, R. ET AL., *supra* note 52.

⁷⁹ Milchman, *supra* note 56.

⁸⁰ Silberg & Dallam, *supra* note 59.

as “custody night.”⁸¹ Others are advised – or believe - that the presence of custody litigation is grounds for serious skepticism of a child abuse report.⁸² 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 here, but are discussed elsewhere.⁸³

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.⁸⁴

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.⁸⁵ 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 only fail to protect children from – but even force them into the care of - a dangerous or abusive parent.

⁸¹ [Safe and Together Institute, *supra* note 24.](#)

⁸² BANCROFT, SILVERMAN & RITCHIE, *supra* note 8.

⁸³ NEILSON, *supra* note 67; Brittany E. Hayes, *Indirect Abuse Involving Children During the Separation Process*, 32 J. INTERPERS. VIOLENCE 2975 (2015); BANCROFT, SILVERMAN & RITCHIE, *supra* note 8.

⁸⁴ 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, *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 100 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. <https://centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/>.

⁸⁵ Diana J. English, Jeffrey L. Edleson & Mary E. Herrick, *Domestic Violence in One State’s Child Protective Caseload: A Study of Differential Case Dispositions and Outcomes*, 27 CHILD. & YOUTH SERVS. REV. 1183 (2005).

1. Harms of Foster Care

While foster care is presumably used to protect children from an abusive or neglectful parent, it is not infrequent that children are removed from both parents, even when one is non-offending and safe.⁸⁶ 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.⁸⁷ The harm that can occur as a result of removal results in a “monsoon of stress hormones . . . flooding the brain and body.”⁸⁸ 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.”⁸⁹

Such harms can be exacerbated when the removal is abrupt. Children are sometimes removed suddenly and without warning, intensifying the

⁸⁶ 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*, 495 Mich 394; 852 N.W.2d 524 (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).

⁸⁷ 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-11e8-805c-4b67019fcfe4_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 ATTACH. & HUM. DEV. 5 (2009).

⁸⁸ Eck, *supra* note 88.

⁸⁹ Wan, *supra* note 88.

psychological trauma of a separation.⁹⁰ 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.⁹¹

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.⁹² 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.⁹³ 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.⁹⁴ Children who “age out” of foster care experience high rates of homelessness, incarceration, unemployment and other negative outcomes.⁹⁵ Given these poor outcomes, it is unsurprising that *every state* has failed to meet federal standards to ensure the well-being of children in foster care, which has contributed to many states’ systems being put under federal oversight pursuant to consent decrees.⁹⁶

In short, research suggests that foster care can be a toxic intervention for

⁹⁰ 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).

⁹¹ *Id.*

⁹² 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-eea2-11e9-9c6d-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 & ADOLESC. PSYCHOPHARMACOL 97 (2005).

⁹³ Joseph Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AMERICAN ECONOMIC REV. 1583 (2007); Joseph Doyle, *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 JOURNAL OF POLITICAL ECONOMY 746 (2008); Joseph Doyle, *Causal Effects of Foster Care: An Instrumental Variables Approach*, 7 CHILDREN AND YOUTH SERVICES REV. 1143 (2013)

⁹⁴ 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).

⁹⁵ PETER J. PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDING FROM NORTHWEST FOSTER CARE ALUMNI STUDY (Casey Family Programs, 2005).

⁹⁶ U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD AND FAMILY SERVICES REVIEWS AGGREGATE SCREENING REPORT, ROUND 3, 2015-2018 (2020).

children. Given that it is often used when moderate/severe domestic violence is present,⁹⁷ it is especially concerning that the domestic violence context renders it even more traumatic for children to be removed from their safe parent.⁹⁸ 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.⁹⁹

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.¹⁰⁰ 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.” Its policy manual requires caseworkers to be “coordinating” with family court, though it does not define what that entails.¹⁰¹ 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.¹⁰² 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.”¹⁰³ Before dismissing juvenile court jurisdiction, courts must inquire whether the non-offending parent is keeping the child safe, which may require obtaining a custody (or protective) order in court.¹⁰⁴

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

⁹⁷ English, Edleson & Herrick, *supra* note 86.

⁹⁸ *Nicholson v. Williams*, 203 F. Supp. 2d 153 (2002).

⁹⁹ *PECORA ET AL.*, *supra* note 96.

¹⁰⁰ State Plan for Foster Care and Adoption Assistance, 42 U.S.C. § 671.

¹⁰¹ MICH. DEP’T OF HEALTH & HUM. SERVS., CHILDREN’S PROTECTIVE SERVICES MANUAL (2020).

¹⁰² *In re M.L.*, 757 A.2d 849 (Pa. 2000). *In re Russell G.*, 672 A.2d 109 (Md. Ct. Spec. App. 1996).

¹⁰³ *In re Russell G.*, 672 A.2d 109 (Md. Ct. Spec. App. 1996).

¹⁰⁴ *In re M.L.*, 757 A.2d 849 (Pa. 2000).

Detroit Center for Family Advocacy, co-founded by the second author – provided parents with the assistance of a lawyer, social worker and parent mentor, to resolve any safety concerns identified by the child welfare agency.¹⁰⁵ 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 handled by the Center 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.¹⁰⁶

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, of course, are purely *pro se*.¹⁰⁷ And while many child welfare investigators instruct the non-offending parent that she must get a custody order in 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 for child welfare investigators to appear in a custody proceeding to support the non-offending parent.¹⁰⁸ Additionally, to complicate matters, as described earlier, 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, this inaction can be seen by the custody judge as a signal that the abuse claims are false, even though “un-substantiation” usually means only that an allegation’s validity is unknown.¹⁰⁹

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

¹⁰⁵ U. MICH. L. SCH., DETROIT CENTER FOR FAMILY ADVOCACY PILOT EVALUATION REPORT (2013).

¹⁰⁶ See <https://www.casey.org/preventive-legal-support/> for more information about the spread of pre-petition legal representation models across the country.

¹⁰⁷ Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L. J. 1389 (2016).

¹⁰⁸ Meier, *supra* note 54.

¹⁰⁹ CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS. CHILD.’S BUREAU, MAKING AND SCREENING REPORTS OF CHILD ABUSE AND NEGLECT (2017).

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.¹¹⁰ 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,¹¹¹ 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.

We 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 our proposed systemic reforms to address these important concerns. We believe each of these reforms is firmly within reach, with the right investment of expert support, training, and policy advocacy.

IV. THREE PRACTICABLE SYSTEM REFORMS

There are three over-arching mechanisms that could help to correct the systemic failures leading to such troubling outcomes for children: (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

¹¹⁰ MEIER ET AL., *supra* note 49. The Court Said USA (@thecourtsaidusa), FACEBOOK, <https://www.facebook.com/thecourtsaidusa/> (last visited July 12, 2021).

¹¹¹ Hester, *supra* note 1.

allegations, as described above. (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.) 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.¹¹² 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 may still be 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 should not constrain the court, or even because it was believed that the custody judge would sort them out.¹¹³

The idea of child welfare agencies supporting protective mothers in custody litigation was first proposed as a "thought experiment" by the first author in 2003.¹¹⁴ While agencies working with Safe and Together sometimes have been known to engage in this way,¹¹⁵ we must move further to systematize such supportive interventions by child welfare agencies. We 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 their workers 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

¹¹² Meier, *supra* note 54.

¹¹³ Both co-authors have seen child welfare agencies abdicate for these reasons and have seen family courts 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.

¹¹⁴ Meier, *supra* note 54.

¹¹⁵ We are informed of Safe and Together's work with agencies to intervene in family court and obtain safe parenting orders.

vulnerable to family courts' disbelief of their allegations of child abuse. They may not know what evidence to present to support the allegations - or how to testify about the allegations - or how to question opposing witnesses. Lawyers can make a difference.¹¹⁶

Thanks to action by the federal Children's Bureau in 2018, foster care expenditures under Title IV-E of the Social Security Act may now be used to support lawyers to represent parents involved with child welfare, including lawyers seeking to help prevent "candidates for foster care" from entering care.¹¹⁷ Federal foster care funds can thus now be used to support programs like the Detroit Center for Family Advocacy, 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. 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. This policy can and should be encouraged by not only advocates and reformers but by formal state policies. 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, consistent with the philosophy of the Greenbook and Safe and Together Institute's reform efforts.¹¹⁸

C. Policy Reforms and Substantive Trainings

There are three areas in which policy development and education/training can help un-do misconceptions which are leading to courts' and agencies' failures to keep children safe even though there is one non-offending, safe protective 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.¹¹⁹ On the contrary, there are multiple reasons why custody litigation *should be expected* when one parent abuses others in the family.¹²⁰ Such a prohibition could draw on precedent from early

¹¹⁶ Mansfield, *supra* note 107.

¹¹⁷ *Federal Funding*, FAM. JUST. INITIATIVE, <https://familyjusticeinitiative.org/iv-e-funding/> (2020).

¹¹⁸ Mandel & Wright, *supra* note 15.

¹¹⁹ 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.

¹²⁰ BANCROFT, SILVERMAN & RITCHIE, *supra* note 8. NEILSON, *supra* note 67.

domestic violence reforms involving arrest policies: For instance, the 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.¹²¹ Similarly here, policies and statutes should state that the fact that the parents are litigating custody may not be grounds for rejecting 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 a bit harder to reject some genuinely false allegations, we believe that on balance more children would benefit from such a policy than not.

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 danger 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 a lack of substantiation did not reflect a finding that abuse did not happen. 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, agencies should work with the non-offending parent to keep the child safe, as discussed above.

Unlike agencies, courts *must* issue parenting orders. In indeterminate cases therefore, they 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 like to produce greater clarity about the truth over time, leading to both better protection for children *and* greater potential for healing negative parent-child relationships.¹²²

Finally, substantial, systematic expert trainings on child maltreatment and system practices should be mandated for both family courts and child welfare agencies. 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

¹²¹ 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 (1992).

¹²² Meier, *supra* note 36.

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, including 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 take aim at the deep-rooted 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, and on implicit gender biases which may fuel undue and inappropriate skepticism and hostility toward mothers alleging abuse.¹²³ 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 our collaboration on this article, we both learned a great deal from each other about family court and child welfare system practices and potential reforms. We believe that the same will be true for child welfare, child custody, and domestic violence professionals who come together to address the profound lacunae in the legal system's responses to child maltreatment which intersects with custody litigation. We are not the first to point out the gulfs between civil courts, child welfare, and domestic violence systems.¹²⁴ But we believe our 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

¹²³ Epstein & Goodman, *supra* note 69.

¹²⁴ Hester, *supra* note 1.

– 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, make us optimistic that real change can be accomplished. It must.